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COMMENTS ON THE ICJ ADVISORY OPINION ON OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE ON 23 JULY 2025

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Abstract: On 23 June 2025, the International Court of Justice (ICJ) issued an advisory opinion on the obligations of states in respect of climate change. The opinion was adopted at the request of the UN General Assembly (UNGA), which, in resolution 77/276, asked what the obligations of States under international law are to ensure the protection of the climate system and what the legal consequences of these obligations are for states where their acts and omissions cause significant harm to the climate system and other parts of the environment, with respect to other states, in particular Small Island Developing States (SIDS), peoples and individuals. For the first time in history, the International Court of Justice issued an advisory opinion unanimously. However, this influenced its content. The opinion is somewhat conservative, and the ICJ does not venture to further address the issues of: SIDS statehood, state liability for GHG emissions, division between States responsible for climate change-related damages and States affected by them, obligations towards indigenous peoples, or the customary nature of international climate change rules.

Keywords: climate change, advisory opinion, obligations, international law, responsibility

1. Introduction

Mother Earth, humanity, and the international community undoubtedly face an unprecedented challenge posed by global warming. The above statement should be considered valid and indisputable for these comments on the International Court of Justice (ICJ) advisory opinion.

The author of the comments, as well as the judges of the ICJ and the vast majority of the scientific community dealing with global warming and its effects, accept this assumption as irrefutable and scientifically proven. Therefore, it is necessary to reject any position held by some politicians, e.g., 'this climate change is the greatest con job ever perpetrated on the world' (US President Donald Trump's speech at the UN General Assembly on 23 September 2025).[1] This position, unfortunately, leads to the rejection of climate agreements and the formal withdrawal of the United States from the Paris Agreement.[2]

It should be acknowledged that the ICJ's advisory opinion on the obligations of States with respect to climate change undoubtedly concerns a global phenomenon that directly impacts the life of every creature on Earth—humans, animals, and plants—as well as the existence of the entire planet, which we can call our Mother. Only the ICJ's advisory opinion on nuclear weapons is comparable in terms of subject matter and significance, as it allowed the ICJ to rule on a matter of importance to all humanity, the international community, and Mother Earth. Unfortunately, the ICJ in this opinion did not answer the question posed by the WHO regarding whether the use of nuclear weapons violates states' obligations to protect the environment. It is worth quoting Judge Koroma's dissenting opinion here:

> with regard to the protection and safeguarding of the natural environment, the Court reached the conclusion that existing international law does not prohibit the use of nuclear weapons, but that important environmental factors are to be taken into account in the context of the implementation of the principles and rules of law applicable in armed conflict; the Court also found that relevant treaties in relation to the protection of the natural environment could not have intended to deprive a State of the exercise of its right to self-defence under international law; (…) what is at issue is not whether a State might be denied its right to self-defence under the relevant treaties intended for the protection of the natural

[1] Trump tells UN that climate change is 'greatest con job' globally, https://www.reuters.com/sustainability/cop/trump-tells-un-that-climate-change-is-con-job-2025-09-23/; he also added as follows: 'All of these predictions made by the United Nations and many others, often for bad reasons, were wrong; (…) they were made by stupid people that have cost their country's fortunes and given those same countries no chance for success'.

[2] *Paris Agreement*, UNTS vol. 3156, 79, entered into force 4 November 2016.

> environment, but rather that, given the known qualities of nuclear weapons when exploded as well as their radioactive effects which not only contaminate human beings but the natural environment as well including agriculture, food, drinking water and the marine ecosystem over a wide area, it follows that the use of such weapons would not only cause severe and widespread damage to the natural environment, but would deprive human beings of drinking water and others resources needed for survival.[3]

Judge Weeramantry also commented in a similar tone:

> the multifarious international instruments relating to the environment, to which reference has been made, build up the rising tide of international acceptance which creates in its totality a universal acceptance of State obligation which in turn translates itself into law; all of the areas they deal with are areas affected by the nuclear weapon to an extent which is impermissible under these instruments, had the damage been caused by any other agency; the areas named are a small sample of the areas of State obligations under international law which are affected by the nuclear weapon.[4]

Thirty years ago, the ICJ did not seize the opportunity to invoke environmental and climate protection issues in the opinion on the legality of nuclear weapons. It approached the questions posed by the UNGA and WHO from a strictly state-centric perspective, ignoring the environmental issues raised above by Judges Koroma and Weeramantry. Nearly thirty years after this opinion, the ICJ had the opportunity to recognize ecological and climate issues as key to resolving international problems and fostering cooperation between states. It can already be said that the ICJ has seized its second chance in the face of environmental and climate change.

Contrary to the 1996 advisory opinion, it responded unanimously to the questions posed by the UNGA, leaving no doubt about the voting pattern. The unanimity of the ICJ judges is certainly one of the positive

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[3] *Dissenting opinion of Judge Koroma*, 578; https://www.icj-cij.org/sites/default/files/case-related/95/095-19960708-ADV-01-13-EN.pdf.

[4] *Dissenting opinion of Judge Weeramantry*, 143; https://www.icj-cij.org/sites/default/files/case-related/93/093-19960708-ADV-01-05-EN.pdf.

features of the commented advisory opinion. It undoubtedly provides a significant counterweight to the populist and dangerous tendencies that deny the problem of global warming in the international arena. However, has not the ICJ once again approached another global problem too conservatively? Compared to the 1996 opinion, the current opinion is indeed progressive. Is it sufficiently progressive and forward-looking in the face of climate catastrophe? Indeed, like the 1996 opinion, it resolves international problems within the framework of the existing international legal order and relies on applicable and current legal norms rather than the presumption of the existence of a law that seems desirable.[5] However, as I will show below, the commented opinion lacks more robust analyses, statements, and conclusions. The history of the 1996 opinion has demonstrated that it is worthwhile to address global problems more boldly and with a forward-looking approach, because for 30 years it will be too late.

First, I will present the most important facts regarding climate change based on the IPCC reports (assuming that they are indisputable). Next, I will briefly discuss the circumstances surrounding the adoption and content of UNGA resolution 77/276. I will then critically analyse the main assumptions of the advisory opinion under review.

2. Climate Change and its Impacts (Key Facts)

The ICJ agrees that the best available scientific source on climate change and its impacts is the IPCC reports. The participants in the advisory opinion proceedings expressed the same position. Documents from UNEP, WMO, WHO, and IMO are supporting sources.

The IPCC defines climate change as

> a change in the state of the climate that [. . .] may be due to natural internal processes or external forcings such as modulations of the solar cycles, volcanic eruptions, and persistent anthropogenic changes in the composition of the atmosphere or in land use.[6]

[5] *Southwest Africa*, Second Phase, Judgment, I.C.J. Reports 1966, 6, para. 50.

[6] IPCC, 2023, *Climate Change 2023: Synthesis Report, Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Annex I, Glossary*, https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_FullVolume.pdf, 122.

The ICJ notes that the above definition is consistent with Article 2(2) of the UN Framework Convention on Climate Change:[7] 'a climate change attributed directly or indirectly to human activity that alters the composition of the global atmosphere, and which is, in addition to natural climate variability, observed over comparable time periods.'

Climate change is a naturally occurring phenomenon throughout Earth's history, but in recent decades it has reached an unprecedented scale due to the rapidity of processes related to global warming. The phenomenon is caused by greenhouse gases (GHGs), whose atmospheric concentrations during industrialization are the result not only of natural processes but primarily of human activity. The IPCC defines GHGs as being 'gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and emit radiation at specific wavelengths within the spectrum of radiation emitted by the Earth's surface, by the atmosphere itself, and by clouds; this property causes the greenhouse effect'.[8] According to the Panel, water vapour (H_2O), CO_2, N_2O, CH_4, and ozone (O_3) are the primary GHGs in the Earth's atmosphere. GHGs generated exclusively by human activities include sulphur hexafluoride (SF_6), hydrofluorocarbons (HFCs), chlorofluorocarbons (CFCs), and perfluorocarbons (PFCs). Several of these are also ozone-depleting. Different combinations of gases are emitted from other activities. The IPCC adds that the largest source of CO_2 is the combustion of fossil fuels in energy conversion systems, such as boilers in electric power plants, engines in aircraft and automobiles, and cooking and heating in homes and businesses (approximately 64% of emissions). It further notes that fossil fuels are a significant source of CH_4, the second-largest contributor to global warming. Finally, the Panel states that, while most GHGs come from fossil fuel combustion, about a quarter comes from land-related activities such as agriculture (mainly CH_4 and N_2O) and deforestation (primarily CO_2), with additional emissions from industrial processes (mostly CO_2, N_2O, and fluorinated gases), and municipal waste and wastewater (mostly CH_4).[9]

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7 *United Nations Framework Convention on Climate Change*, New York 9 May 1992, UNTS vol. 1771, 107, entered into force 21 March 1994 (UNFCCC).

8 IPCC, 2023, *Climate Change 2023: Synthesis Report, Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Annex I, Glossary*, 124.

9 IPCC, 2022, *Climate Change 2022: Mitigation of Climate Change, Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, https://www.ipcc.ch/

The ICJ pointed out, by quoting IPCC documents,[10] that 'historical contributions of GHG emissions vary substantially across regions, and that differences remain today, with the least developed countries and small island developing States having much lower per capita emissions of GHGs than the global average'. It quoted also the position of Working Group III of the IPCC: 'the three developing regions together contributed 28% to cumulative CO2 FFI emissions between 1850 and 2019, whereas developed countries contributed 57% and least-developed countries contributed 0.4%'.[11] The section on states' share of greenhouse gas emissions seems conservative and overly simplified. The ICJ should explicitly identify particular states and their specific share in greenhouse gas emissions. The ICJ states that climate change is 'inherently a consequence of activities undertaken within the jurisdiction or control of all States, although individual States' historical and current contributions differ significantly; it is the sum of all activities that contribute to anthropogenic GHG emissions over time, not any specific emitting activity that produces the risk of significant harm to the climate system'.[12] Such a statement is unfair to least developed countries. For example, as Judge Yusuf points out in a separate opinion:

> (Burkina Faso) emissions remained nearly flat until the 1960s and did not exceed 1 Mt CO_2 annually until after 2000; from 1850 to 2023, its cumulative emissions represent virtually 0 per cent of global CO_2 emissions to date; similarly, Tuvalu, a small island developing State which may soon lose large swathes of its territory due to sea level rise, contributed essentially no emissions between 1850 and 1960; since 1998, its emissions have plateaued at the extremely low level of approximately 0.01 Mt CO_2 per year. Tuvalu's total cumulative CO_2 emissions from 1850 to 2023 also

report/ar6/wg3/, 194; *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025, https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-00-en.pdf, para. 81.

10 IPCC, 2023, *Summary for Policymakers, Climate Change 2023: Synthesis Report, Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf, 4-5.

11 IPCC, 2022, *Climate Change 2022: Mitigation of Climate Change, Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, 218; Advisory Opinion (opinion note 9), para. 80).

12 *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025 (opinion note 9), para. 277.

> amount to a vanishingly small fraction — effectively 0% — of the global total; on the other hand, Germany, as a developed country and one of the top ten historical emitters, saw a gradual increase in CO_2 emissions from 1850 to 1910; by 1880, its emissions had reached approximately 135 Mt CO_2, rising further to around 581 Mt CO_2 by 1913; over the entire period from 1850 to 2023, Germany's cumulative CO_2 emissions are estimated at approximately 90 to 100 Gt CO_2 (90,000 to 100,000 Mt CO_2), accounting for about 4% to 5% of total global CO_2 emissions since 1850.[13]

The ICJ, which recognized that all States have contributed to global warming, avoided a clear distinction between States that have significantly contributed to global warming and those that have been injured, particularly Small Island Developing States (SIDS).

The direct effect of GHG concentration in the Earth's atmosphere is global warming. According to IPCC estimates, the average temperature of the Earth's atmosphere will increase by 1.5°C by 2040 (as a result of GHGs already accumulated in the atmosphere due to human activity; a more optimistic scenario is improbable even with very low GHG emissions). The IPCC predicts the following scenarios for the second half of the 21st century:

1. very low GHG emissions, with emissions rapidly declining to zero by mid-century, followed by large-scale removal of CO_2 from the atmosphere;
2. low GHG emissions, but with a slower decline in emissions, a later achievement of net zero emissions, and a lower level of CO_2 removal from the atmosphere;
3. average GHG emissions, with GHG emissions remaining at levels close to current levels until the second half of the century, then gradually declining, but not below zero by the end of the 21st century (the state most closely aligned with the Paris Agreement);
4. high GHG emissions, with emissions increasing, doubling from current levels by the end of the century;
5. very high GHG emissions, with emissions rising rapidly, doubling from current levels by mid-century (countries abandoning climate

[13] *Separate Opinion of Judge Yusuf*, https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-03-en.pdf, para. 15.

protection policies; a position represented by the administration of US President Donald Trump).[14]

The increase in the average temperature of the Earth's atmosphere by 2100 will be seen in the following scenarios: 1. up to 1.4°C, 2. up to 2°C, 3. up to 3°C, 4. up to 3.5°C, and 5. up to 4.4 °C.

It should be noted that the above scenarios are presented more precisely than those in the ICJ's commented advisory opinion. The ICJ only briefly notes: 'The IPCC explains that global warming is more likely than not to reach 1.5°C before 2040 even under a very low GHG emissions scenario; the best estimate for global warming by 2081-2100 ranges from 1.4°C for a very low GHG emissions scenario to 4.4°C for a very high GHG emissions scenario'.[15]

It should be emphasized that none of the above scenarios is safe for people and ecosystems, and any increase in average temperature will intensify the negative consequences.[16] The ICJ, based on IPCC data, listed the negative consequences of global warming (for people and ecosystems) as: rising sea levels, heatwaves, heavy precipitation, droughts, and tropical cyclones, as well as the loss of species and biodiversity. The ICJ emphasized that:

> The IPCC has determined that approximately 3.3 to 3.6 billion people are highly vulnerable to climate change; it has concluded with high to very high confidence that, in all regions, increases in extreme heat events have resulted in human mortality and morbidity, and that there is an increased incidence of climate-related diseases; moreover, increasing weather and climate extreme events have exposed millions of people to acute food insecurity and reduced water security; individuals' livelihoods have been affected through the destruction of homes and infrastructure, and the loss of property, income, and human health.[17]

[14] IPCC, 2021, *Summary for Policymakers, Climate Change 2021: The Physical Science Basis, Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM_final.pdf.

[15] *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025 (opinion note 9), para. 85.

[16] *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025, para. 83.

[17] *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025, para. 78.

3. UNGA Resolution 77/276

Issues concerning the environment and climate change have been present in the work of the UNGA since 1968, when, in resolution 2398, the UNGA recognized 'the continuing and accelerating impairment of the quality of the human environment caused by factors such as air and water pollution, erosion and other forms of soil deterioration, waste, noise, and the secondary effects of biocides', and expressed concern about 'the consequent effects on the condition of man, his physical, mental, and social well-being, his dignity, and his enjoyment of basic human rights'.[18] The UNGA, in resolution 43/53 of 1988, explicitly stated that emerging evidence indicated that continued growth in atmospheric concentrations of GHGs could lead to global warming. The UNGA recognized that 'climate change is a common concern of mankind, since climate is an essential condition which sustains life on Earth', adding that climate change 'affects humanity as a whole and should be confronted within a global framework to take into account the vital interests of all mankind'.[19] In resolution 63/281 of 2009, the UNGA expressed concern that 'the adverse impacts of climate change, including sea-level rise, could have possible security implications'.[20]

The SIDS, threatened by sea-level rise, lobbied the UN for effective action to mitigate the adverse effects of climate change. The initiatives of SIDS, especially Vanuatu, led to the adoption of UNGA resolution 77/276 on March 29, 2023. It is worth emphasizing that the resolution was adopted by consensus by 132 UN Member States. This is the first UNGA resolution of this type (containing a question or questions to the ICJ) adopted by consensus. The previous resolutions were adopted by non-unanimous votes.

In resolution 77/276, the UNGA decided to render an advisory opinion on the following questions:

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[18] Resolution adopted by the UN General Assembly 2398(XXIII) – *Problems of the human environment,* 3 December 1968, https://digitallibrary.un.org/record/202554?v=pdf.

[19] Resolution adopted by the UN General Assembly 43/53 – *Protection of global climate for present and future generations of mankind,* 6 December 1988, https://digitallibrary.un.org/record/54234?v=pdf.

[20] Resolution adopted by the UN General Assembly 63/281 – *Climate change and its possible implications,* 6 June 2009, https://digitallibrary.un.org/record/656156?v=pdf.

> Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment,
> (a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations?
> (b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:
> (i) States, including, in particular, small island developing States, which, due to their geographical circumstances and level of development, are adjudicated or particularly affected by or are particularly vulnerable to the adverse effects of climate change?
> (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?

4. Obligations of States in Relation to Climate Change (Question A)

First, in response to question (a), the ICJ considered applicable law as 'the most directly relevant applicable law governing the question[s] of which it [has been] seized'.[21] It included in applicable law:

- the UN Charter, i.a., articles 1 and 2;
- climate change treaties (United Nations Framework Convention on Climate Change, the Kyoto Protocol,[22] and the Paris Agreement);

[21] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996 (I), https://www.icj-cij.org/sites/default/files/case-related/95/095-19960708-ADV-01-00-EN.pdf, 243, para. 34.

[22] *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, Kyoto 11 December 1997, UNTS vol. 2303, 162; entered into force 16 February 2005.

- the United Nations Convention on the Law of the Sea;[23]
- other environmental treaties (Ozone Layer Convention,[24] the Montreal Protocol,[25] Biodiversity Convention,[26] the Desertification Convention[27]);
- customary international law;
- international human rights law (International Covenant on Economic, Social and Cultural Rights,[28] the International Covenant on Civil and Political Rights,[29] and the human rights recognized under customary international law);
- other principles (principles of sustainable development, common but differentiated responsibilities and respective capabilities, equity, intergenerational equity, the precautionary approach or principle, and the 'polluter pays' principle).

The above list of applicable law contains the sources of public international law in relation to states' obligations regarding climate change. The ICJ found that such sources include international agreements and international customs. It also considered another source of public international law, binding and law-making resolutions of international organizations. However, finding the relevant text in the opinion is difficult because it is not included in the section devoted to applicable law. In paragraph 184, it indicated that

> in interpreting their obligations under the climate change treaties, States also need to have recourse to the relevant decisions of the governing bodies of these treaties, which are the COP of the UNFCCC; the Court

[23] *United Nations Convention on the Law of the Sea*, Montego Bay, 10 December 1982, UNTS vol. 1833, 3; entered into force 16 November 1994 (UNCLOS).

[24] *Vienna Convention for the Protection of the Ozone Layer*, Vienna 22 March 1985, UNTS vol. 1513, 293; entered into force 22 September 1988.

[25] *Montreal Protocol on Substances that Deplete the Ozone Layer*, Montreal 16 September 1987, UNTS vol. 1522, 3; entered into force 1 January 1989.

[26] *Convention on Biological Diversity*, Rio de Janeiro 5 June 1992, UNTS vol. 1760, 79; entered into force 29 December 1993.

[27] *UN Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*, Paris 14 October 1994, UNTS vol. 1954, 3; entered into force 26 December 1996.

[28] *International Covenant on Economic, Social and Cultural Rights*, New York 16 December 1966, UNTS vol. 993, 3; entered into force 3 January 1976.

[29] *International Covenant on Civil and Political Rights*, New York 16 December 1966, UNTS vol. 993, 171; entered into force 23 March 1976.

> observes that in certain circumstances the decisions of these bodies have certain legal effects; first, when the treaty so provides, the decisions of COPs may create legally binding obligations for the parties; second, the decisions of these bodies may constitute subsequent agreements under Article 31, paragraph 3 (a), of the Vienna Convention on the Law of Treaties, in so far as such decisions express agreement in substance between the parties regarding the interpretation of the relevant treaty, and thus are to be taken into account as means of interpreting the climate change treaties.

Since the ICJ referred to the COP resolutions, including potential (future) ones, it could have mentioned the possible competencies of the UN Security Council (UNSC) in combating climate change. The UN Security Council, in paragraph 26 of resolution 2349 (2017), recognized climate change as one of the threats to stability. The UNSC began to broaden the concept of threats to peace under Article 39 of the UN Charter, and to include, in addition to strictly military, epidemiological, or humanitarian threats, those resulting from climate change. Another group of instruments at the Security Council's disposal are hard measures, namely sanctions. While non-military sanctions, referred to in Article 41 of the UN Charter, are easy to imagine, imposing military sanctions (Article 42) can be problematic, because their implementation can lead to environmental degradation.[30] Sanctions can be imposed primarily on a state that fails to comply with its climate protection commitments. The Security Council's instruments can include embargoes, suspension of scientific and technical cooperation, blocking of financial operations, commitments to ratify international agreements on combating climate change, and commitments to implement appropriate national legislation. The Security Council may take such actions against both states and companies.[31] Sanctions under Article 41 of the UN Charter should be considered a last resort, when treaty measures, such as those provided for in the Kyoto Protocol, prove ineffective or take too long to implement. Furthermore, the establishment of a UN peacekeeping mandate

[30] Knight, "Global environmental threats. Can the Security Council protect our Earth?", 156.

[31] Voight, "Security in a <warming world>. Competences of the UN Security Council for preventing dangerous climate change", 298, 307.

on climate change cannot be ruled out, for example, to counter rising sea levels (e.g., by building a dam).[32]

The ICJ stated that the UNFCCC, the Kyoto Protocol, and the Paris Agreement complement each other: 'they are mutually supportive, with the Kyoto Protocol and Paris Agreement providing greater specification to the general obligations contained in the UNFCCC'.[33] The UNFCCC establishes the ultimate objective as well as the basic principles and general obligations of States in respect of climate change. In contrast, the Kyoto Protocol and the Paris Agreement, respectively, implement these basic principles and general obligations into more specific, interrelated obligations. The ICJ emphasized that the UNFCCC is a 'foundational treaty to address climate change'.[34] The Kyoto Protocol and the Paris Agreement are therefore agreements that 'operationalize obligations under the Framework Convention.[35]

The significance of the UN Convention on the Law of the Sea (UNCLOS) in the climate change context was considered by the International Tribunal for the Law of the Sea (ITLOS) in its advisory opinion on climate change and international law.[36] The ICJ, as ITLOS, held that many provisions of UNCLOS constitute obligations of States in respect of climate change. The Court also considered that the ozone layer treaties, the Biodiversity Convention, and the Desertification Convention constitute the most directly relevant law.

The Court stated that many other treaties also address the global problem of climate change. However, the Court confined itself to examining 'the most directly relevant applicable law' regarding climate change.

The ICJ found that climate change treaties do not constitute *lex specialis* in relation to other international obligations arising from 'general customary international law or other treaty rules on the protection

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[32] Srogosz, "Kompetencje Rady Bezpieczeństwa ONZ w sprawach klimatycznych".

[33] *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025 (opinion note 9), para. 195.

[34] *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025, para. 191.

[35] *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025, para. 192.

[36] Request for Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, ITLOS Reports 2024; https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/.

of the environment'. According to the ICJ, 'the object and purpose of the climate change treaties does not contradict other rules or principles of international law or suggest that these treaties are generally intended to replace such other rules or principles'.[37] Therefore, there is a complementary relationship between climate change rules and other norms of international law. Treaty and customary norms complement each other. The judges Charlesworth, Brant Cleveland and Aurescu rightly write that:

> in the context of States' obligations under climate change law, customary rules apply more broadly than the climate change treaties; these treaties do not aim to codify customary rules or indeed to alter them, but constitute a gradual attempt to develop specific rules on climate change mitigation, adaptation and climate change law generally; in other words, a State's compliance with its obligations under the climate change treaties does not automatically imply or presume compliance with its customary obligations in relation to climate change mitigation and vice versa; (…) under both general international law and climate change law, treaty rules and customary rules retain a separate existence and maintain their own separate scope of application; these bodies of law are independent but mutually reinforcing, and States' compliance with each of them must be assessed separately; in our view, the Opinion, when read as a whole, confirms that it is not enough to assess a State's compliance with customary rules simply by reference to their compliance with the climate change treaties; in short, the treaties are not proxies for assessing compliance with the rules of customary international law.[38]

Judge Nolte put this issue as follows:

> the climate change treaties and their implementation are examples of where the <present content> of a customary rule is <confirmed and influenced> by a treaty; they are an appropriate means of fulfilling a general customary obligation and they guide the determination of the content and the application of that obligation in specific situations; obligations

[37] *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025 (opinion note 9), para. 169.

[38] *Joint Declaration of Judges Charlesworth, Brant Cleveland and Aurescu*, par. 10-13; https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-09-en.pdf.

> arising from climate change treaties give substance to general customary obligations.[39]

The ICJ also considered the application of the following customary rules in the context of climate change:

- the duty to prevent significant harm to the environment,
- the duty to cooperate for the protection of the environment.

The ICJ did not doubt that the duty to prevent significant harm to the environment is a rule of customary law. It referred to the unanimous positions of the states that participated in the proceedings before the ICJ. However, there are doubts whether this duty is limited only to direct neighbouring damage or whether it can also apply to damage resulting from a global process, such as climate change. The ICJ used a few words from its advisory opinion in the case on the legality of the threat or use of nuclear weapons. It finally found that

> the duty to prevent significant harm to the environment is not confined to instances of direct cross-border harm and that it applies to global environmental concerns; therefore, the customary duty to prevent significant harm to the environment also applies with respect to the climate system and other parts of the environment.[40]

The ICJ no longer relied on the consent of the parties to the proceedings concerning the duty of States to cooperate for the protection of the environment, but in relation to this customary rule, it referred to 'related practice of States'.[41] It also cited the ITLOS advisory opinion on climate change and the ITLOS order on interim measures (*Ireland v. United Kingdom*).[42] There is no doubt that the ICJ plays a significant role in the formation of customary rules. Unfortunately, there is a tendency in ICJ case law to define customary rules authoritatively, which is not supported by any argument relating to the constitutive elements

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[39] *Declaration of Judge Nolte*, para. 8; https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-07-en.pdf.

[40] *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025 (opinion note 9), para. 134-135.

[41] *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025, para. 140.

[42] *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, 110, para. 82; https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/published/C10-O-3_dec_01.pdf.

of custom (*usus* and *opinio iuris*). While in the case of the duty to cooperate for the protection of the environment, the ICJ referred to the 'related practice of States', with respect to the duty to prevent significant harm to the environment, it based its assertion of customary nature on the positions of the parties to the proceedings, not the practice of States. It also noted that these positions are not uniform and differ on whether the obligation applies only to cross-border harm or to climate change in general. Defining the normative status of the duty to prevent significant harm to the environment is an essential element on which the ICJ advisory opinion is based. Therefore, the ICJ should thoroughly analyse the components of custom, especially given the UN International Law Commission's (ILC) conclusions on the identification of customary international law, which present a traditional understanding of custom. They also recognize that 'decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are subsidiary means for the determination of such rules'.[43] The ILC's authoritative definition of a customary rule and its content, unfortunately, weakens the significance of an advisory opinion and leaves room for criticism and denial of the opinion's assumptions. States may simply question the existence of a customary rule concerning a significant harm to the environment in the context of climate change and consider that custom applies only to cross-border harms (pollutions). They have grounds for doing so, because the literature and case law refer to 'the obligation to prevent transboundary harm by means of pollution'.[44] Citing a short excerpt from the 1996 ICJ advisory opinion, which is unrelated to the context of climate change, is likely insufficient to demonstrate the customary nature of the duty to prevent significant harm to the environment in the climate change context. The author of the comments does not *a priori* deny the significance of the ICJ's conclusions regarding the customary rule on

[43] Resolution 73/203 adopted by General Assembly on 20 December 2018 - *Identification of customary international law*, https://digitallibrary.un.org/record/1660343?v=pdf.

[44] McIntyre, "The Role of Customary Rules and Principles in the Environmental Protection of Shared International Freshwater Resources", 169 and the literature and case law cited therein; it was published in 2006, however, in order to confirm the customary rule of the duty to prevent significant harm to the environment in the climate change context, the ICJ referred to an earlier advisory opinion, finding that the custom in this respect was already in force in 1996; however, it did not cite any other evidence of the existence of the custom in the form of state practice and *opinio iuris* by the date of the opinion.

the duty to prevent significant harm to the environment in the climate change context, but the ICJ should demonstrate in more detail the custom with reference to its elements.

The ICJ also recognized the International Covenant on Economic, Social, and Cultural Rights, the International Covenant on Civil and Political Rights, and customary human rights among the rules applicable to climate change. It stated that

> the human right to a clean, healthy and sustainable environment is therefore inherent in the enjoyment of other human rights; the Court thus concludes that, under international law, the human right to a clean, healthy and sustainable environment is essential for the enjoyment of other human rights.[45]

However, the ICJ did not directly comment on the customary nature of the right to a clean, healthy, and sustainable environment. A customary character of this right can be indirectly inferred from the opinion, since the ICJ considers 'human rights recognized under customary international law'. The ICJ could have explicitly indicated the customary character of this right, especially since it is a right that is fundamental to the realization of other rights in the context of climate change (the right to life, the right to health, and the right to an adequate standard of living, including access to water, food, and housing). It had no more difficult task than in the case of the duty to prevent significant harm to the environment in the climate change context, since the UNGA, in Resolution 76/300,[46] 'recognizes the right to a clean, healthy, and sustainable environment as a human right' and 'existing [in] international law'. Resolution 76/300 serves as an essential indication of *opinio juris*.[47] The ICJ avoids clear and explicit statements about the development of customary rules. It either assumes their legal nature *a priori* or implicitly states that a given right or obligation stems from a customary rule. Such an approach probably resulted from a far-reaching

[45] *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025 (opinion note 9), para. 393.

[46] General Assembly resolution 76/300 - *The human right to a clean, healthy and sustainable environment*, 28 July 2022 (UN doc. A/RES/76/300).

[47] *Declaration of Judge Tladi*, para. 31, https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-12-enc.pdf.

compromise among all judges, who wanted to reach a unanimous decision. Nevertheless, this approach to customary rules leaves room for challenge by states. It is not necessary to derive custom from *usus* and *opinio iuris* in great detail. An ICJ judgment or advisory opinion does not function as a lecture for students. As Talmon rightly points out

> there are situations where the inductive and deductive methods will not allow the Court to fulfil its normal judicial function of determining the applicable rules of customary international law because induction is virtually impossible or because there are no relevant general rules or principles from which to deduce the applicable law; judicial assertion is the price states have to pay for the Court not to declare an epistemological non-liquet.

However, he further emphasizes that '[The ICJ] must be careful, however, not to overstep the limits of the method of assertion; if the Court's assertions do not convince its clients, States may simply stay away from the Court'.[48] The ICJ would speak more firmly and clearly about the existence of customary rules. The ICJ's arguments regarding the customary nature of the duty to prevent significant harm to the environment in the climate change context and the right to a clean, healthy, and sustainable environment may not convince states.

The ICJ also included 'other principles' among 'relevant applicable law' in the context of climate change: sustainable development, common but differentiated responsibilities and respective capabilities, equity, intergenerational equity, the precautionary approach or principle, and the 'polluter pays' principle. It emphasized that most of them were indicated in the preamble and Article 3 of the UNFCCC. It stated that these principles 'are applicable as guiding principles for the interpretation and application of the most directly relevant legal rules'.[49] The ICJ does not consider them sources of international law on climate change, but rather principles for interpreting or implementing international treaties or customary rules. However, general principles of law may be

[48] Talmon, "Determining Customary International Law: the ICJ's Methodology Between Induction, Deduction and Assertion", 442.

[49] *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025 (opinion note 9), para. 161.

customary rules.[50] However, an analysis of the content of the ICJ advisory opinion does not allow for the conclusion that 'other principles' have a normative, customary character in the context of climate change because they are presented by the ICJ separately from treaty and customary rules. The ICJ emphasized that 'these principles do not constitute standalone obligations within the climate change treaty framework; they guide the interpretation of the treaty obligations'. Climate change treaties implement both these principles and the customary rule of the duty to cooperate for the protection of the environment, which should be treated not only as an 'obligation under customary international law' but also as a 'guiding principle'.[51] Thus, it is an example of a general principle of law that has acquired the character of a customary rule, serving both as a source of legal obligation and as a rule of interpretation.

The ICJ devoted a significant part of the advisory opinion to reconstructing and repeating the obligations resulting from: international treaties on climate change (UNFCCC, Kyoto Protocol, and Paris Agreement) (par. 196-270), other environmental treaties (par. 316-335), and the UNCLOS (par. 339-368). The advisory opinion in many parts constitutes a commentary on the provisions of these treaties and, in this respect, does not require a critical approach. Regrettably, the ICJ focused on a 'school-like' and formalistic description of treaty obligations, which resulted in a too brief and general treatment of the answer to question (b) contained in resolution 77/276. Judge Yusuf rightly writes

> The General Assembly did not ask for a scholarly dissertation on the obligations of States in relation to climate change and the legal consequences that may theoretically arise from a breach of such obligations; its questions deserved more concrete and tangible replies capable of engaging with their material scope, the context in which they were posed, and the objectives underlying the request for an advisory opinion.[52]

These critical words cannot be applied to the ICJ's description regarding customary obligations, in which the ICJ explained in detail

[50] Compare: Czapliński and Wyrozumska, „Prawo międzynarodowe publiczne", 98.

[51] *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025 (opinion note 9), para. 178, 183

[52] *Separate opinion of Judge Yusuf* (supra note 13), para. 2.

the content and scope of the duty to prevent significant harm to the environment (par. 272-300) and the duty to cooperate (par. 301-315).

The ICJ raised statements regarding treaty and customary obligations in the context of the importance of climate protection for all humanity. The ICJ rightly noted that the climate system is a global common good, and that all states have a common interest in protecting environmental goods. Thus, treaty and customary obligations are *erga omnes* obligations, including obligations arising from climate treaties, which are *erga omnes partes* obligations.[53]

A formalistic interpretation of international treaties can be well illustrated by the example of the issue of 'Obligations of States in relation to sea level rise and related issues' (par. 355-365). The ICJ devotes considerable attention and analysis to 'charts or lists of geographical coordinates that show the baselines and outer limit lines of their maritime zones' and recognizes that UNCLOS 'does not require States parties, in the context of physical changes resulting from climate-change-related sea level rise to update' them.[54] The key issue of statehood in the international legal order, namely, a significant threat to territorial integrity and, thus, the very statehood of SDIS resulting from sea level rise, was considered by the ICJ very shortly. The ICJ merely stated a priori that

> in the event of the complete loss of a State's territory and the displacement of its population, a strong presumption in favour of continued statehood should apply; in the Court's view, once a State is established, the disappearance of one of its constituent elements would not necessarily entail the loss of its statehood.[55]

The ICJ included this statement within its comments on 'Obligations of States in relation to sea level rise and related issues', and derived the continuation of statehood from the customary obligation to cooperate in the climate change context.[56] The issue of statehood in international law should be the subject of considerations on the constitutive elements of a state and international legal subjectivity, and it should

[53] *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025 (opinion note 9), par. 440.
[54] *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025, par. 362.
[55] *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025, par. 363.
[56] *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025, par. 364.

not be based on the customary obligation to cooperate. The existence and continuation of a state in international law does not stem from such an obligation, but from the elements constituting a state and the right to self-determination.[57] Therefore, including the statement about continued statehood in the advisory opinion is problematic. This issue is not the subject of either question a) or b), because, according to the ICJ, question b) relates to the 'application of the secondary rules of international law concerning the responsibility of States for internationally wrongful acts'.[58] The ICJ nevertheless wished to address such a crucial issue for international law. However, if it had decided to address question (a), it should have further developed its considerations in light of the criteria for statehood.[59] This is too important an issue to be treated in a few words, and in the context of an obligation that has nothing to do with statehood. It was better not to comment on this issue, which could have been left for later, for example, within the UNSC's competence. The ICJ's acceptance of the possibility of a non-territorial subject of international law composed of a population and a government actually carries grave consequences for international law. It opens the way to the international subjectivity of indigenous peoples, dispossessed of their land during colonization.[60] Taking the above into account, the ICJ should have approached the issue more seriously if it had already decided to establish the existence of States deprived of one of their constitutive elements: their territory.

5. Legal Consequences Arising from State Acts and Omissions that Cause Significant Harm to the Climate System and Other Parts of the Environment (Question B)

First, it is essential to identify the scope of question (b) contained in resolution 77/276 of the UNGA. The ICJ indicated that 'the legal consequences to be determined by the Court are those arising from the various obligations under international law which the Court is called upon to identify

[57] Compare: Crawford, "The Creation of States in International Law".

[58] Although an issue of statehood in the context of climate change can be considered as legal consequences for States, e.g. in a framework of compensation for SIDS.

[59] *Declaration of Judge Tomka*, https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-02-en.pdf .

[60] Compare e.g. Watson (ed.), "Indigenous Peoples as Subjects of International Law".

under question (a)'.[61] The ICJ defined legal consequences through 'the application of the secondary rules of international law concerning the responsibility of States for internationally wrongful acts'.[62] According to the ICJ, 'nothing in the question indicates that the General Assembly intended to request the Court to opine on the legal consequences, if any, for injuries arising out of acts not prohibited by international law'. Therefore, 'legal consequences arising under States' obligations must (…) be understood to pertain to legal consequences arising from a breach of States' obligations identified under question (a)'.[63] The problem is that there is no scientific or practical way to distinguish the amount of greenhouse gas emissions into the atmosphere produced by activities constituting a breach of the obligations from those produced by activities consistent with the law. Science can only determine the total amount of emissions produced by individual states since the beginning of industrialization. It is impossible to determine the amount of emissions resulting from internationally wrongful acts for two reasons. First, it is challenging to distinguish illegal from legal emissions. Second, it is difficult to determine the amount of emissions produced after the entry into force of climate treaties and after the emergence of appropriate customary rules.[64] The ICJ indicates that the possible responsibility of specific states for internationally wrongful acts in the climate change context can be considered only on a case-by-case basis. However, in reality, the above comments regarding the impossibility of determining the amount of GHG emitted as a result of internationally wrongful acts and lawful activities lead to the conclusion that such responsibility cannot be attributed. It locates developed countries in a better position in the proceedings. Furthermore, there is no doubt that the damage caused by climate change is primarily the result of GHG emissions generated by industry before the development of appropriate international law norms to combat climate change. This significantly reduces the scope of state responsibility and worsens the situation of the states most affected by the damages, including the small island States.

61 *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025 (opinion note 9), para. 103.

62 *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025, para. 104.

63 *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025, para. 105.

64 *Compare Declaration of Judge Nolte* (supra note 39), para. 20.

Considering the above, it is surprising that the ICJ did not assume liability for acts not prohibited by international law. State liability can arise not only from international agreements but also from general principles of international law. The principle of good neighbourliness, which prohibits States from using their territory in a way that could cause harm to other States, has acquired particular significance in state practice. Abuse of the right to use one's territory can become a basis for liability in cases concerning gas emissions that cause damage in the territory of a neighbouring state (Trail Smelter case). The ICJ cited this case in an advisory opinion when it discussed the customary norm of 'duty to prevent significant harm to the environment'.[65] The ICJ did not wholly reject state liability for lawful GHG emissions. It merely limited the interpretation of the General Assembly's question to internationally wrongful acts. The ICJ did this completely unnecessarily. As mentioned earlier, most GHG have been emitted since the beginning of industrialization as a result of lawful, yet abusive, activities. Unfortunately, there is a presumption that the ICJ used the concept of legal consequences to avoid broadening the scope of developed countries' liability for damage caused to developing countries, including small island states. It did this in one sentence, where it quotes the ILC Articles on State Responsibility: 'the Court observes that, in general, legal consequences are identified and addressed through the application of the secondary rules of international law concerning the responsibility of States for internationally wrongful acts (see paragraph 3 of the general commentary, ILC Articles on State Responsibility, p. 31)'.[66] However, ILC Articles on State Responsibility use the term legal consequences in Article 28 which does not exclude state liability. In the ILC's work on state liability the term legal consequences did not appear, but rather 'transboundary consequences','physical consequences', 'consequences of the activity", serious consequences', and injurious consequences'.[67] Therefore, is such a strict interpretation of resolution 77/276 that is based on the word legal consequences correct? Judge Yusuf says,

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[65] *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025 (opinion note 9), para. 272.

[66] *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025, para. 104.

[67] Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, with commentaries, https://legal.un.org/ilc/texts/instruments/english/commentaries/9_10_2006.pdf.

> that question (b) in the resolution encompasses both the legal consequences of internationally wrongful acts and the legal consequences of injuries arising out of conduct not prohibited by international law; thus, both kinds of injuries or harm, i.e., harm due to acts considered unlawful under international law as well as harm due to acts not necessarily prohibited by international law, should have been addressed by the Court.[68]

Similarly, Judge Nolte stated: 'legal consequences from lawful actions or omissions could ensue if conduct leading to GHG emissions were a hazardous activity giving rise to strict liability'.[69] While the ICJ did not address state liability in the case of lawful actions or omissions related to GHG emissions, it did not expressly rule out such a possibility. Moreover, it indirectly referred to state liability in the context of climate change, citing the Trail Smelter case in its discussion of the duty to prevent significant harm to the environment. Moreover, taking into account this customary norm, which encompasses 'risks which current activities might pose in the future, including in the long term', the ICJ should also consider the legal consequences of lawful actions and omissions. In its commentary on the duty to prevent significant harm to the environment, the ICJ did not limit itself to actions or omissions of States constituting only internationally wrongful acts, but indicated that such actions or omissions may involve 'the cumulative effect of various acts undertaken by various States and by private actors subject to their respective jurisdiction or control, even if it is difficult in such situations to identify a specific share of responsibility of any particular State'.[70]

The limited scope of legal consequences used by the ICJ will undoubtedly hinder the implementation of liability, particularly in future cases. First, it limits responsibility to actions and omissions that occurred after the emergence of the relevant customary norms (it is difficult to determine the moment of emergence of the customary norm, especially the duty to prevent significant harm to the environment) and after the entry into force of the relevant international agreements. The ICJ did not resolve the issue of temporality, finding that 'the issue of the temporal scope of the obligations, and the related issue of breach

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68 *Separate opinion of Judge Yusuf* (supra note 13), para. 42.

69 *Declaration of Judge Nolte* (supra note 39), para. 16.

70 *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025 (opinion note 9), para. 276.

of those obligations, comprise elements of an in-concrete assessment for the determination of State responsibility, which is beyond the scope of this Advisory Opinion'.[71] Secondly, an internationally wrongful act, especially with respect to the customary norm of the duty to prevent significant harm to the environment, occurs in cases of actions or omissions inconsistent with due diligence, which, according to the ICJ, should be assessed on a case-by-case basis. The unclear issue of temporality and the difficulty of proving due diligence in the performance of obligation to prevent significant harm to the environment mean that States that suffer the most from climate change (especially small island States) and that have not contributed to climate change are placed in a difficult position in the future in relation to developed States that have significantly contributed to climate change.

The ICJ confirmed that responsibility for breaches of obligations under the climate change treaties is to be determined by applying the well-established rules on State responsibility under customary international law. Therefore, the procedural mechanisms contained in the Paris Agreement (which relate to loss and damage and compliance) and in Article 14 of the UNFCCC do not exclude the general rules on State responsibility.[72] These rules are intended to apply to specific cases of attribution of actions and omissions of States, as well as to instances of causation. GHG emissions alone do not constitute an internationally wrongful act. Conduct attributable to States includes the adoption of laws, policies, and programs, including decisions that promote fossil fuel production and consumption, and failure to adequately regulate the GHG emissions under the State's jurisdiction or control.[73] The internationally wrongful act is not the emission of GHGs per se, but the breach of treaty and customary obligations identified under question (a).[74] According to the ICJ, the obligations concerning climate change include States' commitment to regulate the activities of private actors. Therefore, attribution in this context involves attaching to a State its own actions or omissions that constitute a failure to exercise regulatory due

71 *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025, para. 423.
72 *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025, para. 410-420.
73 *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025, para. 426.
74 *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025, para. 427.

diligence. In such circumstances, the question of attributing the conduct of private actors to a State does not arise.[75]

Once it is known what constitutes an internationally wrongful act and how to attribute actions and omissions to States, the question arises of how to determine the scope of a specific State's responsibility for damages resulting from climate change caused by these actions and omissions. In this regard, the ICJ notes the difficulty: 'the wrongful conduct is cumulative in nature, involving different States over a period of time, and involving a plurality of States that cause injury to a plurality of injured States'.[76] The advisory opinion indicates that the only conceivable basis for such attribution is the amount of GHG emissions resulting from internationally wrongful acts. The ICJ states that 'while climate change is caused by cumulative GHG emissions, it is scientifically possible to determine each State's total contribution to global emissions, taking into account both historical and current emissions'.[77] It also cites the obligation to report GHG emissions under the UNFCCC and scientific studies, including those by the IPCC.[78] Unfortunately, state reports prepared under the UNFCCC show residual GHG emissions compared with those since the beginning of industrialization. Furthermore, scientific studies do not distinguish between emissions resulting from internationally wrongful acts and those resulting from lawful conduct.[79] It is questionable whether such a division can be applied to GHG emissions. International reports discuss overall GHG emissions by region and country since 1990.[80] However, it is also possible to scientifically determine states' shares in GHG emissions since the beginning of the industrial era.[81] The ICJ attempts to resolve the above problem of defining the scope of state responsibility (related to the factual impossibility of determining

[75] *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025, para. 428.
[76] *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025, para. 429.
[77] *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025.
[78] *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025.
[79] See e.g. IPCC, 2023, *Climate Change 2023: Synthesis Report, Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Annex I, Glossary*.
[80] European Commission, *Joint Research Centre Science for Policy Report, CO2 Emissions of all World Countries*, 2022; IPCC, 2023, *Climate Change 2023: Synthesis Report, Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Annex I, Glossary*, 45.
[81] IPCC, 2022, *Climate Change 2022: Mitigation of Climate Change, Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, 221-231.

the amount of GHG emissions resulting from internationally wrongful acts) by confirming the possibility that 'the rules on State responsibility under customary international law are capable of addressing a situation in which there exists a plurality of injured or responsible States'. The ICJ referred to its Judgment concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, where it observed that 'in certain situations in which multiple causes attributable to two or more actors have resulted in injury . . . responsibility for part of such injury should [be] allocated among [the] actors'.[82] The ICJ concludes

> therefore, in the climate change context, the Court considers that each injured State may separately invoke the responsibility of every State which has committed an internationally wrongful act resulting in damage to the climate system and other parts of the environment; and where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.[83]

At the same time, the ICJ notes that 'factual questions arising in the context of attribution and apportionment of responsibility are to be resolved on a case-by-case basis'.[84] The ICJ notes the same with regard to causation, although it states that

> the causal link between the wrongful actions or omissions of a State and the harm arising from climate change is more tenuous than in the case of local sources of pollution; this does not mean that the identification of a causal link is impossible in the climate change context.

The above ICJ statements on attribution and causation do not improve the situation of developing countries affected by climate change, including small island States. The ICJ did not take a firm stance regarding the responsibility of developed countries whose conduct led to the emission of climate-damaging amounts of GHG. It did not provide specific, practical solutions that could serve as a basis for future state claims for

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82 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, I.C.J. Reports 2022 (I), para. 98.

83 *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025 (opinion note 9), para. 431.

84 *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025, para. 432.

damages resulting from climate change. The ICJ's considerations actually complicate the pursuit of these claims, making them very difficult, if not impossible. The specific nature of these claims stems from the fact that obligations concerning climate change are *erga omnes* obligations, including treaty obligations: *erga omnes partes*. Therefore, as pointed out by the ICJ

> responsibility for breaches of such obligations, such as climate change mitigation obligations, may be invoked by any State when such obligations arise under customary international law; when such obligations arise under the climate change treaties, all parties to the treaty may invoke such responsibility; there is, however, a difference between the position of injured States or specially affected States on the one hand, and that of non-injured States on the other, as concerns the availability of remedies; while a non-injured State may pursue a claim against a State in breach of a collective obligation, it may not claim reparation for itself; rather, it may only claim cessation of the wrongful act and assurances and guarantees of non-repetition, as well as for the performance of the obligation of reparation in the interest of the injured State or of the beneficiaries of the obligation breached.[85]

The ICJ also indicates possible legal consequences for breaches of obligations under the climate change regime. These include the duty of cessation and the guarantees of non-repetition, as well as the duty to make reparation, restitution, compensation, and satisfaction. While it generally does not require proof of causation, in the case of reparation, it states that 'causation must be established between the wrongful act of a State—or group of States—and the particular damage suffered by the injured State, or, in the case of human rights law, by the injured individuals'.[86]

Considering the above, the question arises: how should potential claims by states for the effects of climate change be pursued in the future? The questions posed by the UNGA and the ICJ Advisory Opinion addressing these questions should open the door to pursuing such claims. In reality, however, they do not fully open the door; instead, they only slightly open it. The Advisory Opinion lays the foundation for potential

[85] *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025, para. 442.
[86] *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025, para. 449.

future disputes. However, it will be possible to establish the responsibility (liability) of specific states only on a case-by-case basis. However, will it be possible to determine the scope of state responsibility (liability) in particular cases? Such a possibility would exist if the nature of global warming were related to cumulative GHG emissions since the beginning of industrialization and scientific research, covering the period before the emergence of appropriate customary norms and legal emissions. If such a solution of a dispute were based on a presumption of slice of legal and illegal emissions or emissions before and past 1990, the possibility of attribution and responsibility (liability) of State(s) would be somewhat doubtful.

6. Conclusions

The ICJ advisory opinion, beyond providing practical guidance in future contentious cases before the ICJ, should also play another vital role, as the ICJ noted: 'to inform and guide social and political action to address the ongoing climate crisis'.[87] It should also be agreed that 'international law has an important but ultimately limited role in resolving this problem'.[88] Despite this 'ultimately limited role' of international law, the ICJ failed to optimally utilize the opportunity to address the impact of climate change on the international community, the Earth, and the future of humanity. Such an opportunity will likely not come again. Of course, the ICJ's conservative and balanced stance, grounded in the need to conduct deliberations within the framework of General Assembly questions, stems from the requirement of unanimity, which undoubtedly entailed concessions and compromises among judges. Unanimity is certainly a success for the ICJ and a sign to the international community that the time has come to act.

The ICJ was, as it itself noted, limited by the framework of the international normative order. However, the ICJ, which operated within this framework, did not do enough. First and foremost, it misinterpreted question (b) in the UNGA resolution, and, finally, significantly limited the substantive scope of the opinion to responsibility for internationally wrongful acts. Secondly, it misinterpreted the principle of common

[87] *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025, para. 456.
[88] *Advisory Opinion on Obligations of States in Respect of Climate Change*, 23 June 2025.

but differentiated responsibilities and respective capabilities in the context of the UNGA's question (b). The question did not concern only internationally wrongful acts. It also clearly divided the international community into states that committed acts and omissions and states that, due to their geographical circumstances and level of development, are injured or specially affected by, or are particularly vulnerable to, the adverse effects of climate change (particularly small developing States). If the ICJ had covered state liability in the case of lawful actions or omissions related to GHG emissions and had highlighted the above-mentioned division between States, the opinion would have been more significant for developing countries not only in potential proceedings before the ICJ but also in international negotiations and initiatives, including at the UN. Meanwhile, the ICJ's interpretation of the principle of common but differentiated responsibilities and respective capabilities weakens the position of these states vis-à-vis developed countries.[89]

Furthermore, the ICJ focused on state responsibility and addressed responsibility towards individuals of the present generation, leaving unanswered the question of responsibility towards future generations. Harm continues to be inflicted on indigenous peoples in the case of climate change. First, they suffered harm under colonialism and neocolonialism, which involved the direct exploitation and seizure of indigenous lands. Second, they suffer damage as a result of the industrial policies of developed countries, including former colonial states, related to GHG emissions. Ecosystems and territories that initially belonged to indigenous peoples and are currently subject to indigenous claims are being degraded by climate change factors. The existence of these peoples depends on the existence of ecosystems with which they are existentially and culturally closely linked. These peoples can be considered 'peoples' within the meaning of resolution 77/276, and their claims to realize the right to self-determination are now closely linked to the effects of climate change.

The UNGA also included in question (b) the legal consequences in respect of future generations. In this respect, the ICJ could have gone beyond the framework of existing international law, taking into account its future evolution. It could have proposed potential solutions to protect

[89] *Separate Opinion of Vice-President Sebutinde*, https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-01-en.pdf.

future generations. The threats associated with climate change concern the present and persist into the future. This fact was taken into account by the UNGA in resolution 77/276. These legal solutions could have addressed legal consequences, the list of which is presented in the advisory opinion, appears insufficient from the point of view of the interests of future generations. Legal specific implications related to liability for the effects of climate change that may be considered include the restitution of lost lands and territories by state nations and indigenous peoples in the form of: rebuilding damaged or destroyed infrastructure; restoring terrestrial and marine habitats; rehabilitating ecosystems and biodiversity; and, where feasible, returning lost territory or property.[90]

Finally, it is worth noting that the ICJ issued its advisory opinion within the limits of the current state-centric international legal order. This legal order is not prepared for the threats posed by climate change. The ICJ emphasized that

> a complete solution to this daunting, and self-inflicted, problem requires the contribution of all fields of human knowledge, whether law, science, economics or any other; above all, a lasting and satisfactory solution requires human will and wisdom — at the individual, social and political levels — to change our habits, comforts and current way of life to secure a future for ourselves and those who are yet to come; through this Opinion, the Court participates in the activities of the United Nations and the international community represented in that body, with the hope that its conclusions will allow the law to inform and guide social and political action to address the ongoing climate crisis.[91]

Unfortunately, the outlook is not optimistic when we consider the current approach of politicians in some developed countries and the increasing involvement of States in armed conflicts. Therefore, it is worth writing and discussing innovative solutions rather than waiting for the goodwill of politicians, states, and individuals. Mother Earth and

[90] *Separate Opinion of Judge Bhandari,* para. 6; https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-05-en.pdf.

[91] *Advisory Opinion on Obligations of States in Respect of Climate Change,* 23 June 2025 (opinion note 9), para. 456.

humanity simply cannot wait. Such creative solutions include considering the rights of Nature and its legal subjectivity.[92]

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[92] Jones, "Posthuman International Law and the Rights of Nature", 76–101; Gear, "Anthropocene, Capitalocene, Chthulucene. Re-encountering Environmental Law and Its Subject with Haraway and New Materialism", 94.

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