

BRIEFING DOCUMENT

# AN INTERNATIONAL COURT OF JUSTICE ADVISORY OPINION ON CLIMATE CHANGE

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**WE ARE TAKING THE WORLD'S  
BIGGEST PROBLEM  
TO THE WORLD'S  
HIGHEST COURT!**

**ENDORSE  
THE AO**

**SIGN OUR  
PETITION**

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**AO  
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**SIGN OUR  
PETITION**

**OUR  
SURVIVAL**

**One People  
One Ocean  
One Journey**  
#ENDORSETHEAO

**CLIMATE JUSTICE**

## PURPOSE

To make the case for all United Nations Member States to support, with their vote at the UN General Assembly, the proposal of the Republic of Vanuatu for an International Court of Justice advisory opinion on climate change.

## CONTEXT

In September 2021 the Republic of Vanuatu announced it would seek an advisory opinion from the International Court of Justice to “set out with clarity the obligations of States under international law to protect the rights of present and future generations against the adverse effects of climate change”.<sup>1</sup>

<sup>1</sup> <https://www.vanuatuicj.com>



## 01 . BACKGROUND

### WHAT IS AN INTERNATIONAL COURT OF JUSTICE ADVISORY OPINION?

Pursuant to Article 96 of the Charter of the United Nations (UN Charter) and Article 65(1) of the Statute of the International Court of Justice (ICJ Statute), UN organs and UN specialised agencies are eligible to request an advisory opinion from the ICJ. The General Assembly and the Security Council may request an advisory opinion in respect of “any legal question” while other UN organs and agencies may request an advisory opinion on “legal questions arising within their scope of activities”. States cannot request an advisory opinion from the ICJ directly.

Unlike judgments of the ICJ in contentious proceedings, advisory opinions are not binding as such, although the law they state is binding. Moreover, due to the status of the ICJ as the principal judicial organ of the United Nations they “carry great legal weight and moral authority. They are often an instrument of preventive diplomacy and help to keep the peace. Advisory opinions also contribute to the clarification and development of international law and thereby to the strengthening of peaceful relations between States.”<sup>2</sup> In particular, advisory opinions requested by the UN General Assembly are “extremely powerful in terms of authority; that authority comes from legitimacy, and the legitimacy comes from universal state participation.”<sup>3</sup>

For example, the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory advisory opinion confirmed the continued applicability of international human rights law during times of war. The Reservations to the Convention on Genocide advisory opinion clarified the use and effect of reservations to treaties and was subsequently incorporated in Articles 19-21 of the 1969 Vienna Convention on the Law of Treaties. The Threat or Use of Nuclear Weapons advisory opinion consolidated the principle that states are required to act to prevent significant transboundary harm where such harm is caused by a disposition over their territory.

Most recently, the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius opinion confirmed that the United Kingdom is obligated to end its administration of the Chagos Archipelago “as rapidly as possible” and reaffirmed the principle that “[a]ll peoples have the right to self-determination”.<sup>4</sup>

The Court has received 28 requests for advisory opinions: 17 from the General Assembly, one from the Security Council and ten from other UN bodies. It has declined to consider only one request based on the consideration that the question asked exceeded the sphere of competence of the requesting body.

### PAST PROPOSALS

In 2011 President Johnson Toribiong announced that the Republic of Palau would ask the UN General Assembly to seek an ICJ advisory opinion: “It is time we determine what the international rule of law means in the context of climate change.” The Marshall Islands and Bangladesh have also, at various points in time, expressed interest in pursuing an ICJ advisory opinion on climate change. These initiatives remained embryonic, for a variety of contextual reasons.

However, in the last decade, the context has dramatically changed, with the consequences of climate wreaking havoc all around the world and giving a renewed impetus for bold action now. It is also critical that Vanuatu’s current proposal gives voice to the ‘grass-roots’ of youth activism in places already experiencing extreme climate vulnerability, themselves supported by a global coalition comprising over a thousand civil society organisations from the four corners of the world.

### WHAT LEGAL QUESTION SHOULD BE ASKED ON CLIMATE CHANGE?

The question proposed by Palau in 2011 was: “What are the obligations under international law of a State for ensuring that activities under its jurisdiction or control that emit greenhouse gases do not cause, or substantially contribute to, serious damage to another State or States?” That question is explained and justified in the report Climate Change and the International Court of Justice.<sup>5</sup>

We advocate a different approach. While the question ultimately presented to the UN General Assembly by the Republic of Vanuatu is currently the subject of extensive negotiation, we believe that a better question would seek the Court’s opinion upon all aspects of international law relevant to climate change with a focus on customary international law, the protection of human rights, and intergenerational equity. To illustrate, such a question might ask: “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?”



<sup>2</sup> International Court of Justice: <https://www.icj-cij.org/en/advisory-jurisdiction>

<sup>3</sup> Jorge Viñuales, presentation to the Symposium Navigating Pacific Climate Justice to the UNGA 2 June 2022, University of the South Pacific, Suva, Fiji.

<sup>4</sup> Separation of the Chagos Archipelago from Mauritius in 1965 Advisory Opinion, para. 153.

<sup>5</sup> Yale University Center for Environmental Law and Policy, Climate Change and the International Court of Justice: Seeking an Advisory Opinion on Transboundary Harm from the Court, 2013 pp8 - 17.





## 02 . BENEFITS

An ICJ advisory opinion on a broad legal question of climate change could make a substantial contribution to climate negotiations, bolder action as well as intra- and inter-generational equity. Some of the main benefits are summarised in the four categories below:

### CEMENTING CONSENSUS ON THE SCIENTIFIC EVIDENCE OF CLIMATE CHANGE

The ICJ is the preeminent legal forum to connect the current scientific consensus on anthropogenic climate change with its legal consequences. The ICJ has already demonstrated a willingness and ability to engage with complex and competing scientific claims.<sup>6</sup> Very importantly, ICJ findings of fact on climate change “would be of great authority in proceedings before other international courts and tribunals, and before national courts”.<sup>7</sup>

### COMPLEMENTING THE PARIS AGREEMENT BY INTEGRATING AREAS OF INTERNATIONAL LAW THAT ARE CURRENTLY DEVELOPING IN SEPARATE TRACKS, SUCH AS THE LAW OF THE SEA, HUMAN RIGHTS AND ENVIRONMENTAL PRINCIPLES

International law develops in an incremental and piecemeal fashion, leading to a differentiation between different areas of law. International climate change law arose from an environmental treaty process, but the climate negotiations that provide the backbone of such process have not addressed, or only marginally addressed, many important legal questions arising from climate change.

A key role of ICJ advisory opinions is developing and clarifying international law. The ICJ is the only global judicial body that can hear evidence of law and fact on the great range of critically important legal issues that are impacted by climate change and ultimately provide an opinion integrating consideration of them all. This would in turn enhance the effectiveness of the international legal system in tackling climate change, for example by bolstering the authority of human rights bodies to address climate change under their respective mandates, and by operationalising the principle of intergenerational equity.

Better integrating customary international law principles into the Paris Agreement is another significant benefit. In the words of Professor Lavanya Rajamani of Oxford University “the Paris

Agreement has gaps in ambition, accountability and fairness” and the ICJ can “interpret [its] provisions, in particular Articles 4.2 and 4.3 in the light of customary international law principles such as harm prevention and the duty of due diligence that attaches to it”.<sup>8</sup>

### PROVIDING IMPETUS FOR MORE AMBITIOUS ACTION UNDER THE PARIS AGREEMENT

The nature of the Paris Agreement is one in which States voluntarily commit to emissions reductions. The pledges made to date are utterly insufficient and, despite hope after COP26 that the level of ambition would increase, the current geopolitical crisis has called into question such expectations, with States now reconsidering their energy pathways. Yet, increasing ambition has never been as pressing as it is today, in the second year of the 2020-2030 critical decade, when the future of humanity is genuinely at stake. An ICJ advisory opinion on climate change is a powerful method through which parties to the Paris Agreement may be further encouraged to commit to a level of emissions reductions that are scientifically in line with the ultimate objective of the international climate change regime: preventing anthropogenic interference with the climate system.

In this we agree with Professors Jorge Viñuales and Phillippe Sands: “I think that [an ICJ advisory opinion] would be extremely supportive of climate negotiations. It would be ‘life support’ for the climate negotiations as they are unfolding right now.” “A clear statement by a body such as the ICJ - as to what is or is not required by the law, or as to what the scientific evidence does or does not require - may itself contribute to change in attitudes and behaviour.”<sup>9</sup>

### PROVIDING IMPETUS AND GUIDANCE FOR DOMESTIC, REGIONAL AND INTERNATIONAL ADJUDICATIONS

ICJ findings on the implications of climate change from an international law perspective will be of great authority in any relevant future proceedings before international courts and tribunals. While each domestic legal system adopts its own approach to international authorities and precedents, such findings would also be influential on domestic climate litigation, encouraging claimants to bring matters before national courts and guiding the latter in their ultimate determinations. An advisory opinion will therefore develop the law and guide how it might be applied in subsequent judicial proceedings, which in turn will lead to faster and more equitable private and state action in avoiding and responding to climate change.

<sup>6</sup> For example, in Whaling in the Antarctic (Australia v. Japan: New Zealand intervening, 2014)

<sup>7</sup> Phillippe Sands, Public Lecture at the Supreme Court of the United Kingdom, 17 September 2015, 15.

<sup>8</sup> Lavanya Rajamani, Presentation to COP 26 Side Event Advancing Climate Justice through the World’s Highest Court, 5 November 2021, University of Glasgow, United Kingdom.

<sup>9</sup> Jorge Viñuales, presentation to the Symposium Navigating Pacific Climate Justice to the UNGA 2 June 2022, University of the South Pacific, Suva, Fiji.



Potential risks of seeking an ICJ advisory opinion are summarised below:

#### LACK OF INTERNATIONAL SUPPORT

The most apparent risk is that this proposal will be put to the international community only to encounter opposition preventing passage of the UN General Assembly resolution. This is a risk, but it is also a necessity. Climate change is the foremost challenge humanity faces today. It must therefore be considered by the most representative world assembly, the UN General Assembly, where all viewpoints, aspirations and political stances will find expression. At present, a wide coalition of Pacific Island, Caribbean, and other climate-vulnerable and like-minded states is emerging with the power to overcome predictable opposition.

Furthermore, in May 2022 a global coalition of more than 1500 civil society organisations supporting Vanuatu's proposal was formalised in Suva, Fiji. Member organisations of this coalition are all now working to ensure that there is continuing and growing public support for a favourable outcome when the UN General Assembly resolution is voted upon during the seventy-seventh session

#### IT MAY INHIBIT OR COMPLICATE OTHER INTERNATIONAL PROCESSES

It can be expected that certain states will oppose consideration of the international legal implications of climate change by the ICJ using reasons similar to those they have raised in opposition to other issues of great importance being subject to the Court's advisory procedure. The following is an excerpt from the written statements of the United States for the Legality of the Threat or Use of Nuclear Weapons in Armed Conflict opinion.<sup>10</sup>

*The question presented is vague and abstract, addressing complex issues that are the subject of consideration among interested States and within other bodies of the United Nations that have an express mandate to address these matters. An Opinion by the ICJ concerning the question presented would provide no practical assistance to the General Assembly in carrying out its functions under the UN Charter. Such an Opinion has the potential of undermining progress already made or being made on this sensitive subject and, therefore, is contrary to the interests of the United Nations Organization.*<sup>11</sup>

This risk must be acknowledged but it can be managed and greatly reduced through careful formulation of the question. Moreover, we note that it is considerably more likely that the weight of scientific and legal evidence on climate change will lead the Court to acknowledge its own responsibility to courageously speak law to special interests, and truth to power.

Arguments similar to these will likely be restated in terms specific to climate change when the Republic of Vanuatu places the resolution for an ICJ advisory opinion on the UN General Assembly agenda. We note that the General Assembly and the Court has in the past not found them persuasive.

Specifically, regarding the current proposal, this risk shall be eliminated by framing a question encouraging an opinion that complements the Paris Agreement by carefully drawing on international law in a way that addresses the gaps and ambiguities in the UNFCCC and Paris Agreement, without competing with or undermining them.

#### THE COURT MAY RENDER AN OPINION THAT IS UNHELPFUL TO PROGRESSIVE INTERNATIONAL ACTION ON CLIMATE CHANGE

This risk must be acknowledged. In response we note that it is considerably more likely that the weight of scientific and legal evidence on climate change overwhelmingly supports the Republic of Vanuatu's position that states should be obligated to take much stronger action to prevent and respond to all aspects of climate change.



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OUR  
SURVIVAL  
IS OUR  
HUMAN  
RIGHT!



## 04. TIMING

### NOW IS THE IDEAL TIME TO SEEK AN ICJ ADVISORY OPINION, FOR A NUMBER OF REASONS.

Firstly, since Palau first raised it, expert legal opinion has shifted away from questioning the value of an ICJ advisory opinion on climate change, towards strong support for it. Statements of eminent Professors of Law from the Universities of Cambridge, Oxford, Columbia, Harvard, Stanford and Leiden provide notable examples. In 2022 we are assured that the expert legal community welcomes the ICJ considering climate change. Indeed, several have commented that a remarkable aspect of climate law is the absence of an ICJ opinion.

“As the world’s highest court and the principal judicial organ of the United Nations, it is strange that the ICJ has not yet been called upon to pronounce its views on climate change. All the other principal bodies of the United Nations have discussed climate change at length, so it is extremely odd that the ICJ has not yet been given this opportunity”.<sup>12</sup> We also note that opinions of other international courts, such as the Inter-American Court on Human Rights<sup>13</sup>, are opening pathways in international law to overcome previous jurisprudential roadblocks<sup>14</sup>.

Secondly, in 2022, destructive climate change is a reality for people everywhere. Accordingly, public concern on climate change across the world has quickly risen. Widespread public concern about climate change is being demonstrated in many ways, such as global coordinated youth strikes across dozens of countries. Governments choosing to stand in solidarity with young people, who hope only for effective global action on climate change, are on the right side of history. We seek only to hear what the world’s highest court has to say about the world’s biggest problem.

Thirdly, we have now entered what is “perhaps the single most important decade in the history and prehistory of homo sapiens sapiens”.<sup>15</sup> This decade is our last chance to avert a climate catastrophe that may end human society as we have known it, resulting in unprecedented suffering and decline for all economies, all peoples, and all societies. We can delay no longer; we must leave no stone unturned and no legal avenue unpursued.

## 05. PROGRESS SO FAR

Substantial progress has already been made towards this goal:

- In March 2022 Caribbean Countries at the 33rd Inter-Sessional Meeting of CARICOM Heads of Government indicated their support for Vanuatu’s proposal.<sup>16</sup>
- In June 2022 the Organisation of African, Caribbean and Pacific States at the 114th session of the Council of Ministers endorsed Vanuatu’s proposal.
- In July 2022 the 51st Meeting of Pacific Island Forum Leaders called on the UNGA for a resolution requesting the International Court of Justice to provide an advisory opinion on the obligations of states under international law to protect the rights of present and future generations against the adverse impacts of climate change.<sup>17</sup>

## 06. RECOMMENDATION

All UN member states adopt a national policy decision supporting the resolution to be presented by the Republic of Vanuatu to the seventy-seventh session of the General Assembly seeking an advisory opinion on climate change from the ICJ.



### OUR STORY

PISFCC began in March 2019 when 27 USP Law students from 8 Pacific Island countries decided to join together to begin a campaign to persuade the leaders of the Pacific Island Forum to take the issue of climate change and human rights to the International Court of Justice. We now have members in every Pacific island country and from all levels of education, from primary and high schools to postgraduate university students. Our core campaign remains convincing the governments of the world to seek an Advisory Opinion from the International Court of Justice answering a question that will develop new international law integrating legal obligations around environmental treaties and basic human rights. We are also committed to educating and activating all Pacific island youth to become aware and take action to help prevent and fight against climate change.

### OUR MISSION

Climate change now threatens to destroy our homeland and cultures, but we will not lie down and accept that fate. Instead, we choose to use our passion and knowledge to fight against climate change at every level - from the grassroots of our communities to the highest levels of national and international government.

VISIT OUR WEBSITE: →

[pisfcc.org](https://pisfcc.org)



SIGN THE PETITION: →

[pisfcc.org/petition](https://pisfcc.org/petition)



MORE ABOUT THE RESOLUTION: →

[vanuatuicj.com/resolution](https://vanuatuicj.com/resolution)



<sup>12</sup> Jorge Vinales, presentation to the Symposium Navigating Pacific Climate Justice to the UNGA 2 June 2022, University of the South Pacific, Suva, Fiji

<sup>13</sup> Advisory Opinion OC-23/18, Inter-Am. Ct. H.R., (ser. A) No. 23 (Nov. 15, 2017).

<sup>14</sup> Christopher Campbell & Sumudu Atapattu “The Inter-American Court’s Environment and Human Rights Advisory Opinion: Implications for International Climate Law” 8 Climate Law, 2018

<sup>15</sup> Jorge Vinales, presentation to the Symposium Navigating Pacific Climate Justice to the UNGA 2 June 2022, University of the South Pacific, Suva, Fiji.

<sup>16</sup> <https://caricom.org/communique-thirty-third-inter-sessional-meeting-of-caricom-heads-of-government/>

<sup>17</sup> <https://www.forumsec.org/wp-content/uploads/2022/07/FINAL-51st-Pacific-Islands-Forum-Communique-2022.pdf>



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