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The International Court of Justice Facing the Existential Threat of Climate Change

What Legal Questions and for Whom?

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19.1 Introduction

The data speak for themselves: to limit the increase in global average temperature (well) below 2°C, carbon dioxide (CO_2) emissions need to decline by about 25% with respect to 2010 levels by 2030, and reach net zero around 2070. Deep reductions are required for non-CO_2 emissions as well.[1] Contrary to what would be necessary, the projected total greenhouse gas emissions level in 2030 is expected to be some 16% higher than in 2010.[2]

As summarised in a report issued by the Secretariat of the Conference of the Parties (COP) serving as meeting of the Parties to the Paris Agreement in September 2021, reported data urgently demand a significant increase in the level of ambition of nationally determined contributions (NDCs) thus far adopted by the State parties by 2030 in order to attain the emission levels suggested by the Intergovernmental Panel on Climate Change (IPCC) for keeping the increase in the global average temperature well below 2°C, and possibly limiting it to 1.5°C.[3] Indeed, even if all States fully implemented their current NDCs, the trend would continue well above the 1.5–2°C target. The future does not bring good news – as the United Nations (UN) Environment Programme's Emission Gap Report 2021 shows that, despite the pledge that COVID-19 recovery spending would prioritise a transformation towards a low-carbon economy, recovery funds have been insufficiently supporting clean energy and natural capital investments.[4]

Given this state of affairs, it does not come as a surprise that in the last few years many civil society movements have wisely started strategic lawsuits against governments[5] in the national tribunals of several States,[6] as well as in international human rights courts and treaty bodies, to complain about insufficient efforts to cut greenhouse gas emissions. The aim of such legal actions is putting pressure on States to accelerate efforts and adopt

[1] UNFCCC, Nationally Determined Contributions under the Paris Agreement. Synthesis Report by the Secretariat, UN Doc. FCCC/PA/CMA/2021/8, 17 September 2021, paragraph 140. The Report synthesises information from the 164 available NDCs, representing all the Parties to the Paris Agreement, recorded in the interim NDCs registry on 30 July 2021 and covering 93.1% of total global emissions in 2019. For the text of the NDCs submitted to the States Parties, see https://unfccc.int/NDCREG.

[2] Ibid. [3] Ibid. at para. 15. See also UNEP, Emission Gap Report 2021. www.unep.org/resources/emissions-gap-report-2021.

[4] Ibid. at para. 38.

[5] For an interesting analysis of this phenomenon and its financing, see L. Gradoni, M. Mantovani, 'No kidding! mapping youth-led climate change litigation across the north–south divide. Verfassungsblog (24 March 2022). https://verfassungsblog.de/no-kidding.

[6] For an updated list of cases, see the database of the Sabin Center for Climate Change Law (Columbia Law School), https://climate.law.columbia.edu.

effective mitigation and adaptation measures to address a phenomenon that does not leave more time to act. For this reason – as is well known – plaintiffs usually do not ask national tribunals to condemn governments to seek reparations for injuries caused by State inaction to prevent climate change, but only demand to order the improvement of efforts to mitigate climate change and bring emissions in line with the obligations stemming from the United Nation Framework Convention on Climate Change (UNFCCC) and the Paris Agreement.

An identical rationale is in the drawback of the debate on the utility of a judgment or an advisory opinion of the International Court of Justice (ICJ) on States' obligations and responsibility as regards climate change. Many studies have also highlighted the positive implications of an ICJ advisory opinion or judgment for strategic ligation in national and international tribunals and treaty bodies, sometimes confusing it with the contribution an ICJ judgment or advisory opinion may give to resolving disputes between States in this same field. The purpose of this study is first to distinguish these different playgrounds and second to elaborate on how a prospective ICJ stance on the existence and content of some rules of international law may effectively help national tribunals and international tribunals and treaty bodies to overcome the legal arguments usually governments oppose to contest jurisdiction, or otherwise rebut the plaintiffs' claims. While several studies have already dealt with this topic,[7] these have not clearly taken into account the nature of the appeals brought before national and international tribunals and treaty bodies, as civil rather than constitutional or other complaints, as well as the rationale underpinning such strategic litigation. This has resulted in a missing link between, on the one hand, questions that it is suggested the ICJ should properly deal with in a prospective judgment or advisory opinion, and on the other hand clarifications on the existence and scope of international rules that national and international tribunals as well as treaty bodies apply to resolve disputes.

This study is even more necessary in the light of the fact that in March 2023 the UN General Assembly adopted a resolution concerning the respect for an Advisory Opinion of the International Court of Justice on the Obligations of States in respect of Climate Change, upon a diplomatic initiative by Vanuatu.[8] The UN General Assembly asked the Court to provide an opinion on the following:

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

[7] A. Strauss, Climate change litigation: opening the door to the International Court of Justice', in W. C. G. Burns, H. M. Osofsky (eds.), *Adjudicating Climate Change: State, National, and International Approaches* (Cambridge University Press, 2009), p. 334; P. Sands, Climate change and the rule of law: adjudicating the future in international law. *Journal of Environmental Law* 2016, 28(1): 19–35; D. Bodansky, The role of the International Court of Justice in addressing climate change: some preliminary reflections. *Arizona State Law Journal* 2017, 49: 689–712; A. Savaresi, Inter-State climate change litigation: 'neither a chimera nor a panacea', in I. Alogna, C. Bakker, J.-P. Gauci (eds.), *Climate Change Litigation* (Nijhoff, 2021), p. 366; A. Mile, Emerging legal doctrines in climate change law: seeking an advisory opinion from the International Court of Justice. *Texas International Law Journal* 2021, 56: 59–94; M. Wewerinke-Singh, J. Aguon, J. Hunter, Bringing climate change before the International Court of Justice: prospects for contentious cases and advisory opinions, in Alogna et al. (eds.), *Climate Change Litigation: Comparative and International Perspectives*, p. 395.

[8] See www.vanuatuicj.com. The World's Youth for Climate Justice (WYCJ) supported the initiative with legal advice: WYCJ, Human rights in the face of the climate crisis: a youth-led initiative to bring climate justice to the International Court of Justice.

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 injured or specially 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?[9]

Our study will thus seek to understand how some of the questions the Court has been requested to answer may impact pending and prospective cases before national and international tribunals and treaty bodies.

19.2 The International Court of Justice's Contribution to Inter-State Disputes on the Violation of the No-Harm Principle

It is not disputed that the ICJ will not be, in the near future, called upon to resolve disputes concerning the violation of the obligation to adopt mitigation measures as they stem from conventional rules (UNFCCC and Paris Agreement). Indeed, at the time of their ratification no States Parties, except for the Netherlands,[10] have adopted a written instrument that, in respect of any dispute concerning the interpretation or application of climate change agreements, recognises the jurisdiction of the ICJ as compulsory, in relation to any party accepting the same obligation.[11]

By contrast, an inter-State dispute based on the violation of the customary no-harm rule, imposing upon any State the obligation not to allow activities under its jurisdiction or control that impair the territory and environment of other States, may be brought before the ICJ on the basis of those declarations that recognise the jurisdiction of the Court as compulsory (Article 36(2) of the ICJ Statute).[12] The ICJ has iterated the existence of such a rule on several occasions, and in the *Pulp Mills on the River Uruguay* case held that this was an obligation of due diligence, as '[a] State is . . . obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State'.[13] This provides the Court with the opportunity to take a clear stance on interesting questions concerning the application of the principle to climate change.

[9] UN Doc. A/RES/77/276/, 29 March 2023.

[10] Declaration relating to the UNFCC: https://unfccc.int/process-and-meetings/the-convention/status-of-ratification/declarations-by-partie; Declaration relating to the Paris Agreement: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-d&chapter=27&clang=_en.

[11] See article 14 (2) of the UNFCCC, article 19 of the Kyoto Protocol and article 24 of the Paris Agreement.

[12] D. A. Kysar, Climate change and the International Court of Justice. Yale Law School, Public Law Research Paper, 2013, pp. 16–18. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2309943.

[13] ICJ, *Corfù Channel Case (United Kingdom v. Albania)*, Judgment of 9 April 1949, *ICJ Reports 1949*, p. 4 ff., at p. 22; *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion of 8 July 1996, *ICJ Reports 1996*, p. 226 ff., at p. 241, para. 41; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, *ICJ Reports 2010*, p. 14 ff., at p. 55 ff., para. 110.

First, the Court could clarify whether the no-harm rule is applicable to harm deriving from lawful activities that cause the emission of greenhouse gases. In particular, the Court should clarify whether in the case of harm arising from climate change a sufficient causal nexus can be considered to exist between the alleged and ineffective defendant State's conduct and the injury suffered by the complaining State, triggering the international responsibility of the defendant State. Second, in the case of a positive answer, the Court should consider the applicable standard of due diligence.[14] Third, in a contentious case the Court could be called to clarify the consequences of the violation of the no-harm rule.[15]

Furthermore, any ICJ judgment would have to deal with the complex questions of the division of responsibility among States and the content of the obligation to provide reparation for injury caused by climate change.[16] This entails explaining whether and how, in the case of wrongful conduct based on raising global temperatures, involving a plurality of States, article 47 of the 2001 International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) is applicable,[17] or rather other customary rules have developed, superseding article 47, as some scholars argue.[18] As is well known, article 47 provides that, where there is a plurality of responsible States for the same wrongful act, each State is in principle separately responsible for attributable conduct.[19]

Moreover, the Court will have to assess what the content of the obligation to provide reparation for injury is; namely, whether there is an obligation to make *full* reparation, as established in customary international law codified in the ARSIWA, or whether this duty is superseded in climate cases by a new rule establishing an obligation to provide alternative forms of reparation, but not necessarily *full* reparation.[20]

[14] See the ILC's Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (Yearbook of the International Law Commission, 2001, vol. II, Part Two), especially article 3 and the related paragraphs 13 and 17 of the Commentary).

[15] The Court would be called on to clarify whether the no-harm rule creates an objective regime of State responsibility, arising only because it pertains to activities carried out under a State jurisdiction or *vis-à-vis* injury to the environment of other States. The Court would also have to consider article 8 of the Paris Agreement, which recognises the importance of averting, minimising, and addressing losses and damages associated with the adverse effects of climate change, and would have to consider whether this provision, as interpreted via Decision 1/21 adopted at COP21, is *lex specialis* as regard the customary obligation of the responsible State to make full reparation to the injured State (see UN Doc. FCCC/CP/2015/10/Add.1, 26 January 2016, para. 51 and M. J. Mace, R. Verheyen, Loss, damage and responsibility after COP21: all options open for the Paris Agreement. *Review of European, Comparative & International Environmental Law* 2016, 25: 197–214).

[16] C. Voigt, State responsibility for climate change damages. *Nordic Journal of International Law* 2008, 77(1–2): 1–22.

[17] ILC, *Articles on Responsibility of States for International Wrongful Acts with Commentary*, in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two.

[18] According to the Guiding Principles on Shared Responsibility in International Law (*European Journal of International Law* 2020, 31: 15), any international person is under an obligation to make full reparation for the indivisible injury caused by a single or multiple internationally wrongful acts (principle 10). Moreover, according to principle 12(1), an international person who makes full reparation for indivisible injury has a right of recourse against all other international persons that share responsibility for that injury. The commentary to principle 12 only recalls a couple of cases in State practice where the Principles have been applied and some legal means (mandate; *negotiorum gestio*; unjust enrichment) that entitle a legal person making full reparation to the right to recourse against other subjects that share responsibility for injury. This practice is not sufficient to codify an existing rule of customary law, or to develop a new one. Moreover, while some form of joint responsibility exists in different legal systems, it is not clear whether this is sufficient to establish a general principle of law (see the Commentary to Article 47 of the ARSIWA, parag. 3 and J. Peel, Climate change in A. Nollkaemper, I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2016), p. 1009.

[19] Commentary to Article 47 of the ARSIWA, para. 3.

[20] B. Mayer, The relevance of the no-harm principle to climate change law and politics. *Asia Pacific Journal of Environmental Law* 2016, 19: 79–104.

19.3 Strategic Litigation before National and International Jurisdictions and Treaty Bodies

Although an ICJ judgment on an inter-State controversy concerning climate change would be challenging and interesting for international scholars and the development of international law, this remains a theoretical exercise rather than a concrete possibility, at least in the near future. According to some scholars, it wouldn't even be desirable to enter such a dispute, as no complaint could be brought against the main greenhouse gas emitters, namely the United States – which withdrew its acceptance of the ICJ's jurisdiction after judgment was handed down in 'Military and Paramilitary Activities in and Against Nicaragua' – the People's Republic of China (PRC), and Russia, which have never accepted the compulsory jurisdiction of the Court.[21]

Be they convincing or not, these reasons make it preferable to set aside the hypothesis of an inter-State dispute and to focus on the impact that an ICJ advisory opinion may actually have on noteworthy strategic litigation currently ongoing in national and international tribunals and treaty bodies. An impressive number of claims have indeed been brought before national tribunals against governments. Some cases have recently been decided by human rights treaty bodies and others are pending in international tribunals. Thus, it is more likely that an ICJ advisory opinion concerning the interpretation of well-selected rules of international law actually support national and international tribunals that are confronted with the new challenge of climate change.

Appeals lodged before national tribunals usually concern the civil liability of governments towards individuals or private legal persons, particularly non-governmental organisations (NGOs), because of their ineffective policies to counter climate change or the unconstitutionality of laws implementing the State international obligation to limit greenhouse gas emissions, which are considered too vague, and thus not in conformity with constitutional obligations (where applicable) to protect individuals as well as the natural environment or the constitutional individual right to a healthy environment. Before appeals, national tribunals must frequently face similar legal obstacles. Governments usually contest the *locus standi* of the claimants, especially their victims' status, the competence of the tribunal to deal with the complaints – mainly by invoking the political question doctrine[22] – as well as the impossibility of establishing the State contribution to climate change or its irrelevance, given that global warming involves several States. However, while several claims have been unsuccessful, national tribunals have sometimes overcome defensive arguments, duly adopting historical judgments.

Positively, the Netherlands' *Hoge Raad* (Supreme Court) compelled the Dutch Government in its *Urgenda* ruling to cut al least of 25% of its greenhouse gas emissions a result of a duty of care construed from the European Convention on Human Rights (ECHR).[23] The German *Bundesverfassungsgericht* (Federal Constitutional Court) held the provisions of the *Bundes-Klimaschutzgesetz* (Federal Climate Protection Act),

[21] Savaresi, Inter-State climate change litigation, p. 374.
[22] See Chapter 17 by I. Alogna, N. Arnould, A. Holzhausen in this volume.
[23] *The State of The Netherlands (Ministry of Economic Affairs and Climate Policy) v. Urgenda*, Supreme Court of the Netherlands, Case 19/00135, Cassation Judgment of 20 December 2019, para. 64.

governing national climate targets and annual emission amounts allowed until 2030, incompatible with the basic constitutional rights of the plaintiffs to the extent that they lack sufficient specifications for further emission reductions from 2031 onwards, making reductions after 2030 necessary to avoid infringing practically every individual constitutional freedom.[24] The French *Conseil d'État* set aside the implicit refusal of the French Government to take appropriate measures to curb greenhouse gas emissions produced in France and ordered the Government to adopt all necessary measures to bring greenhouse gas emissions into conformity with reduction objectives set forth in the *Code de l'énergie* ('Energy Code', Law 100–4) and in annex I to EU Regulation 2018/842 before 31 March 2022.[25] The Supreme Court of the Republic of Ireland quashed the Government's National Mitigation Plan as inconsistent with the Climate Action and Low Carbon Development Act 2015,[26] as this law failed to specify the way to achieve the 'transition to a low carbon, climate resilient, and environmentally sustainable economy' by 2050. The Court held the Plan 'excessively vague or aspirational'.[27]

Negatively, the Swiss *Bundesgericht* (Federal Court) dismissed the appeal of the 'association of climate-seniors of Switzerland' and four elderly plaintiffs because it denied their status of victims. The Court there found that the plaintiffs were not sufficiently affected in terms of individual rights as protected under the ECHR, especially the right to life and the right to respect for private and family life, in order to assert an interest worthy of protection within the meaning of the *Bundesgesetz über das Verwaltungsverfahren* (Federal Law on Administrative Procedure).[28]

The Norwegian *Høyesterett* (Supreme Court) applied the political question doctrine to limit the judicial review of laws and governmental legislative acts concerning environmental protection and established a very high threshold for review. Indeed, the Court found that article 112 of the *Grundlov* (Constitution), which embeds the right to a healthy environment, can be invoked directly before national tribunals in cases concerning the alleged unconstitutionality of legislative acts, but limited judicial review to cases where the claimants allege that the Parliament grossly neglects its duties under article 112. On the basis of such a restrictive interpretation, the Supreme Court upheld the validity of a royal decree awarding petroleum production licences concerning the Norwegian continental shelf in the Barents Sea.[29]

The lawsuits lodged with international tribunals and treaty bodies are all concerned with the alleged violation of individual rights, including the rights to life, private and

[24] BVerfG, Order of the First Senate, 24 March 2021, 1 BvR 2656/18. www.bverfg.de/e/rs20210324_1bvr265618en.html.
[25] Conseil d'Etat, Decision of 1st July 2021, No. 427301. www.conseil-etat.fr/actualites/emissions-de-gaz-a-effet-de-serre-le-conseil-d-etat-enjoint-au-gouvernement-de-prendre-des-mesures-supplementaires-avant-le-31-mars-2022.
[26] (Act No. 46/2015) (Ir). www.irishstatutebook.ie/eli/2015/act/46/enacted/en/html.
[27] Supreme Court of Ireland, *Friends of the Irish Environment v .the Government of Ireland and Others*, Judgment of 31 July 2020, para. 6.43. www.courts.ie/view/judgments/681b8633-3f57-41b5-9362-8cbc8e7d9215/981c098a-462b-4a9a-9941-5d601903c9af/2020_IESC_49.pdf/pdf-.
[28] Federal Supreme Court of Switzerland, *Verein KlimaSeniorinnen Schweiz et al. v. Federal Department of the Environment, Transport, Energy and Communications*, Judgment of 5 May 2020 No. 1C_37/2019. https://klimaseniorinnen.ch/wp-content/uploads/2020/06/Judgment-FSC-2020-05-05-KlimaSeniorinnen-English.pdf.
[29] Supreme Court of Norway, *Nature and Youth Norway and Others v. The State of Norway*, Judgment of 22 December 2020. www.domstol.no/no/hoyesterett/avgjorelser/2020/hoyesterett-sivil/hr-2020-2472-p.

family life, cultural identity and the right not to be discriminated protected under human rights treaties.[30] These have encountered common procedural and substantial obstacles. Frequently, the plaintiffs have not exhausted domestic remedies before acting in international fora, justifying the omission on the basis of various claims. In fact, first, because the claimants act simultaneously against several States, exhausting domestic remedies would allegedly require too much time and money. Second, as global warming is rapidly increasing, no time would be left to resort to domestic litigation. Another recurrent difficulty is that several plaintiffs are not under the territorial jurisdiction or control of the States they sue in international human rights tribunals or treaty bodies. To date, only two cases have been decided, that is, *Sacchi et al. v. Argentina et al.* in the UN Committee on the Right of the Child (UNCRC),[31] and *Daniel Billy et al. v. Australia* in the UN Human Rights Committee (UNHRC). Although the UNCRC dismissed the claim based on non-exhaustion of domestic remedies,[32] it adopted a very forward-looking interpretation of the notion of 'jurisdiction' under article 2 of the Convention on the Rights of the Child, leaving the door open to future climate complaints.[33] The UNHRC considered that by failing to discharge its positive duty to implement adequate adaptation measures and protect the plaintiffs' home, private life and family, Australia violated their rights under article 17 of the International Covenant on Civil and Political Rights. Likewise, the UNHRC found that Australia's failure to adopt timely adequate adaptation measures to protect the plaintiffs' collective ability to maintain their traditional way of life and to transmit to future generations their culture, traditions, and use of land and sea resources discloses a violation of the State positive obligation to protect the right to enjoy a minority culture (article 27). The UNHRC duly recommended that Australia not only provide the plaintiffs with adequate compensation for the harm suffered, but also that it engage in meaningful consultations with their communities to conduct need assessments and uphold and effectively improve measures to secure the safe existence of communities in their islands, including measures to prevent similar violations in the future.

[30] See, in particular, Inuit, *Petition to the Inter-American Commission on Human Rights, Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States* (7 December 2005). See also *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, ECtHR, Application No. 53600/20, communicated on 26 November 2020 and submitted to the Grand Chamber on 26 April 2022; *Duarte Agostinho and Others v. Portugal and Other 32 States*, ECtHR Application No. 39371/20, communicated on 7 September 2020 and submitted to the Grand Chamber on 29 June 2022; *Carême v. France*, ECtHR Application No. 7189/21, communicated on 28 January 2021 and submitted to the Grand Chamber on 31 May 2022. These cases concern alleged violations of the ECHR, particularly articles 2 and 8, by the respondent States for failure to comply with their undertakings, in the context of the Paris Agreement, to hold the increase in the global average temperature well below 2°C above pre-industrial levels and to pursue efforts to limit temperature increase to 1.5°C above the same levels. Instead, Application No. 34068/21 – *Greenpeace Nordic and Others v. Norway* – was only communicated to the court on 16 December 2021 and concerns the alleged violation by Norway of the ECtHR, particularly articles 2, 8, 13, and 14, because of the decision of the Norwegian authorities to issue petroleum production licences on the Norwegian continental shelf in the Barents Sea.

[31] Committee on the Rights of the Child, *Chiara Sacchi and Others v. Argentine, Brazil, France, Germany and Turkey*, Decisions Adopted by the Committee on the Rights of the Child (UNCRC) under the Optional Protocol to the CRC in respect of Communications Nos. 104/2019, 105/2019 106/2019, 107/2019, 108/2019, 22 September 2021, available at https://juris.ohchr.org/search/results.

[32] Human Rights Committee, *Daniel Billy et al. v. Australia*, Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 3624/2019, CCPR/C/135/D/3624/2019, 22 September 2022.

[33] See discussion below.

19.4 Issues the International Court of Justice Should Deal With

19.4.1 General International Law and Future Generations

Various studies have identified rules whose existence and content an ICJ advisory opinion should clarify. These span the general principles of international (environmental) law – such as intergenerational equity,[34] the no-harm rule,[35] international co-operation, public participation in climate decision-making, and common but differentiated responsibility – and conventional rules establishing the obligation for States to reduce polluting emissions and to provide financial support, technology transfer, and capacity building to developing States.[36] However, on a closer analysis, taking into account the aim of strategic litigation as well as the nature of legal actions brought before national and international tribunals and treaty bodies, the Court should take into consideration only a few rules to advance national and international proceedings.

Fundamentally, as provided in the Request for an Advisory Opinion on the Obligations of States in respect of Climate Change, States should request the ICJ to clarify the nature and scope of their obligations to protect the rights of present and future generations against the adverse effects of climate change. The Court should thus shed light on the question whether the principle of intergenerational equity has only a moral value or if it has also become a general principle of international law.[37] The Court might further consider whether this is at least a general principle common to several domestic legal systems under article 38(1)(c) of the ICJ Statute, given that an increasing number of national constitutions provide for the public authorities' duty to protect future generations.[38]

In its Advisory Opinion on the 'Legality of the Threat or Use of Nuclear Weapons', the Court observed that 'the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, *including generations unborn*'.[39] As the destructive power of nuclear weapons cannot be contained in either space or time,[40] the Court held that, although treaties relating to the protection of the environment have not deprived a State of the exercise of its right to self-defence under international law nor have prohibited the use of nuclear weapons, they have nonetheless limited the lawfulness of military action, as the obligations stemming from environmental treaties have to be taken into account when assessing whether the use of armed force is consistent with the principle of necessity and proportionality.[41] Without excluding the lawfulness of the threat or use of nuclear weapons in an extreme circumstance of self-defence, where the very survival of a State is at stake,[42] the Court held that States believing they can exercise

[34] Wewerinke-Singh et al., Bringing climate change before the International Court of Justice, p. 411; Mile, Emerging legal doctrines in climate change law, p. 82.
[35] See Kysar, *Climate Change and the International Court of Justice*, p. 1 ff.
[36] Wewerinke-Singh et al., Bringing climate change before the International Court of Justice, p. 411; Mile, Emerging legal doctrines in climate change law, p. 66.
[37] A very accurate list of national and international decisions and treaties referring to the principle of intergenerational equity is provided in a document submitted by the Centre for International Environmental Law to the UN Special Rapporteur on Human Rights and the Environment on 31 October 2017, available at www.ohchr.org/sites/default/files/Documents/Issues/Environment/SREnvironment/Child/CIEL.pdf.
[38] For a list of national constitutions that include the principle of intergenerational equity, see www.ohchr.org/sites/default/files/Documents/Issues/Environment/SREnvironment/Child/CIEL.pdf.
[39] ICJ, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, p. 241, para. 29. Emphasis added.
[40] Ibid. at paras. 35 and 36. [41] Ibid. at paras. 30 and 33. [42] Ibid. at para. E of the Court's findings.

nuclear self-defence have to remember the catastrophic effects of such arms on present and future generations in order to make a proportionate use.[43]

In its Gabčíkovo-Nagymaros Project ruling, the ICJ recognised that the protection of the natural environment is an essential interest of the State within the meaning of article 25 of the ARSIWA.[44] Indeed, the Court endorsed the concept of 'sustainable development' and upheld the existence of an obligation to interpret and apply treaties taking into account norms and standards set forth in several environmental conventions and soft law documents.[45] The ICJ also observed that these norms and standards are the result of new scientific insights and of a growing awareness about the risks caused to present and future generations by decades of anthropogenic interference with nature.[46]

The Court has, therefore, taken into account the interest in the protection of future generations on two occasions, stopping short of clarifying whether this only reflects an ethical stance or represents a binding rule under international law. Nor did the Court consider what obligations a binding norm on the rights of future generations would entail for States other than that of interpreting international law in conformity with environmental treaties.[47]

Furthermore, in its advisory opinion the Court should clarify whether a new customary rule laying down the right to a clean, healthy and sustainable environment as an individual human right has come into existence. In July 2022, the UN General Assembly adopted a historical resolution affirming the individual human right to a sustainable environment.[48] The Court's endorsement of this important resolution would be a step further in the consolidation of a customary rule.

19.4.2 Obligations Stemming from the Paris Agreement

The ICJ advisory opinion should also shed light on the Paris Agreement's obligations to hold the increase in global average temperature well below 2°C, and possibly 1.5°C, above pre-industrial levels under article 2 of the Paris Agreement,[49] and to consequently adopt consistent NDCs.

The nature of the obligation to contain temperature increase within sustainable levels is unclear *vis-à-vis* whether it is a best effort obligation or one of collective result, to be achieved via proportionate co-operation between all States. Scholars usually qualify the duty as a due diligence obligation,[50] while judicial practice in at least a couple of States

[43] Ibid. at para. 42.
[44] ICJ, *Case Concerning the Gabcíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 September 1997, *ICJ Reports 1997*, para. 53.
[45] Ibid. at para. 140. [46] Ibid.
[47] In a hypothetical future inter-State dispute, the general principle of intergenerational equity might be used to consider whether the claimant State has made a prima facie case of damage to its interests sufficient to bring the case before the ICJ (see *Nuclear Test* (*New Zealand v. France*), *ICJ Reports* 1974, p. 457; *Dissenting Opinion of the Judge Weeramantry*, p. 341).
[48] With the support of 161 States, and eight abstaining (the People's Republic of China, Russian Federation, Belarus, Cambodia, Iran, Syria, Kyrgyzstan, and Ethiopia).
[49] By a decision adopted at the end of the COP held in Glasgow in November 2021, the State Parties to the Paris Agreement further 'resolve[d] to pursue efforts to limit the temperature increase to 1.5°C': see para. 16 of the decision: https://unfccc.int/sites/default/files/resource/cop26_auv_2f_cover_decision.pdf.
[50] C. Voigt, The Paris Agreement: what is the standard of conduct for parties? *Questions of International Law* 2016, 26: 17–28, at pp. 18-20.

seems to support the idea of an obligation of result to be achieved collectively. Indeed, both the Dutch *Hoge Raad* and German *Bundesverfassungsgericht* have rebutted the defensive thesis that taking national mitigation measures in conformity with governmental international obligations would be useless if other States do not act seemingly, or that a State contribution to climate change is limited and therefore no responsibility could stem from it. Both courts held that what matters is that each State does its part, and that the global nature of climate change does not affect a State obligation to take climate action.[51] While, at first, this seems to be a merely political reply, nevertheless it may also be seen as reading an interpretation of the nature of the duty stemming from article 2 of the Paris Agreement as an obligation of result to be achieved collectively.

As concerns the related obligation to adopt consistent NDCs, the ICJ should address the question whether this is only a procedural duty, simply requiring the adoption of mitigation plans, irrespective of their content, or whether it is a duty that also implies the adoption of mitigation plans that contribute substantially to achieving the general objective of keeping the increase in global average temperature well below 2°C, and possibly 1.5°C, above pre-industrial levels, under article 2 of the Paris Agreement. In order to satisfy such a request, the Court should explain whether in interpreting the obligation to adopt NDCs, as laid down in article 4(2) of the Paris Agreement, subsection 3 of the same provision – governing the obligation to adopt NDCs that reflect State parties' highest ambitions – may limit State freedom to draft NDCs. In this respect, it is also important to clarify whether the employment of the *effet utile* principle, positing a presumption of usefulness in interpreting legal norms, may be relied upon to justify a reading of article 4(2) that warrants satisfaction of the Paris Agreement's main purpose under article 2.

19.4.3 The Notion of 'Jurisdiction' under Human Rights Treaties

Litigation pending in international human rights tribunals and at least one already decided by the UNCRC has been commenced not only by individuals under the jurisdiction and control of the defendant State, but also by individuals outside the State of location, residence, or nationality and its control. Thus, the question arises whether such claimants can be considered under the jurisdiction of the defendant State for the purpose of human rights treaties, and it requires clarification by the ICJ.

While some human rights tribunals are not in favour of an excessive enlargement of the notion of 'jurisdiction', others have already endorsed a reading of this notion that includes individuals who are not within the territory or under the control of the defendant State, but claim to be injured by its ineffective activities against climate change and environmental degradation. Particularly, the Inter-American Court of Human Rights (IACtHR) and the UNCRC have supported an extensive interpretation of the notion of jurisdiction.

The IACtHR has held that, for the purposes of the American Convention on Human Rights,[52] when transboundary damage occurs that affects treaty-based rights, the persons

[51] Supreme Court of the Netherlands, *The State of the Netherlands v. Urgenda Foundation*, paras. 5.7.1–5.7.9 and BVerfG, Order, para. 197.

[52] Opened for signature 22 November 1969, entered into force 18 July 1978.

whose rights are violated are under the jurisdiction of the State of origin if there is a causal link between the act that originates within its territory and human rights infringements outside its territory.[53] In the opinion of the Court, in the case of transboundary damages, the exercise of jurisdiction by a State is grounded in the understanding that the State where the activities are carried out has effective control over them and is in a position to prevent transboundary harm.[54]

The UNCRC has endorsed the position of the IACtHR, adding that, for the scope of the notion of jurisdiction, the alleged harm victims suffer must be reasonably foreseeable by a State party at the time when wrongful conduct takes place.[55]

19.5 How an International Court of Justice Advisory Opinion May Support National and International Tribunals

Once introduced in the domestic legal systems of States that do not yet recognise them at the constitutional level, the general principle of international law on intergenerational equity and the customary rule on the individual human right to a clean, healthy and sustainable environment might be relied upon by national tribunals to interpret domestic law in conformity with them, where general international law ranks higher than national legislation. Moreover, constitutional courts might declare national legislation unconstitutional when not in conformity with such international norms.

An ICJ advisory opinion interpreting the obligation to adopt NDCs so as to impose on States effective mitigation policies might allow constitutional courts in States where treaties have some constitutional bearing to declare vague domestic laws adopted to implement ineffective NDCs not in conformity with constitutional law. Furthermore, it would be important for the ICJ to endorse a reading of the obligation to adopt NDCs that really contributes to achieving the UNFCCC and Paris Agreement's main aims of stabilising greenhouse gas emissions at sustainable levels. To this end, the Court might argue that reduction targets recommended by the IPCC manifest the consensus of the Members States,[56] as the Supreme Court of the Netherland stated in *Urgenda*.[57] This would provide national tribunals with a powerful tool to rebut the argument States have frequently put forward against the competence of national judges, namely the political question doctrine. The ICJ would in doing so neither overstep its role nor intrude in the law-making process and would compel States to acknowledge their responsibility.

Lastly, an ICJ pronunciation on the extraterritorial application of human rights treaties as those adopted by the IACtHR and the UNCRC would suggest to international tribunals and treaty bodies a uniform path to follow when they are asked to interpret the notion of

[53] Inter-American Court of Human Rights, *The Environment and Human Rights*, Advisory Opinion, OC-23/17, 15 November 2017. www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf, para. 101.
[54] Ibid. at para. 102. [55] *Decision in respect of Argentina*, paras. 10.5 and 10.7.
[56] The IPCC's Assessment Reports are regularly submitted to the Governments of the States Member of the Organisation and approved by the responsible Working Group, with the IPCC government representatives coming together in a Plenary Session of the Working Group: see IPCC, *Factsheet*: *How Does the IPCC Approve Reports?* www.ipcc.ch/site/assets/uploads/2021/07/AR6_FS_approve.pdf.
[57] *The State of The Netherlands (Ministry of Economic Affairs and Climate Policy) v. Stichting Urgenda*, Supreme Court of the Netherlands, Case 19/00135, Cassation Judgment of 20 December 2019, para. 8.3.4.

jurisdiction in the case of harm caused by global warming. If the Court favoured an extensive interpretation of the notion of jurisdiction, it would encourage cautious tribunals, such as the European Court of Human Rights (ECtHR), to support an extensive view without, at the same time, fully embracing the so called 'functional' approach to the notion of jurisdiction. The ECtHR has indeed adopted a case-by-case interpretation of extraterritoriality, shaping it along the lines of the specific features of the dispute. On the other hand, the fear that such a reading may open the door to an excessive number of lawsuits before international tribunals and treaty bodies might convince the ICJ not to support it. However, there are remedies to this side effect. Notably, the ECtHR can rely on the pilot judgment procedure to contain the multiplier effect of lawsuits addressing human rights violations stemming from global warming. If the applicants were to complain about the existence in a State of a systemic policy deficiency to reduce greenhouse gas emissions, according to its Rules of Procedure,[58] the Court could – even *ex officio* – postpone the examination of all actions arising from the same plea against the same State pending the adoption of remedial measures by that responsible State. This would help the Court to manage the claims and limit the submission of further lawsuits at least against the same State, in line with the rationale that underpins strategic litigation in national courts. In fact, if the Court found a violation of the ECHR, it should then indicate the type of reparatory measures (both individual and general) that a defendant State must adopt to bring a dysfunction in line with that Convention.

19.6 Conclusion

This contribution has provided an attempt to identify what international law rules the ICJ should necessarily take into account, among the many it was asked to consider in the Request for an Advisory Opinion on the Obligations of States in respect of Climate Change, to make a real contribution to strategic climate litigation in national and international fora. In particular, it would be urgent for the Court to provide an advisory stance on the nature of the duty to curb carbon emissions via NDCs, its extraterritorial effects and implications for future generations. In all likelihood, not all States would be ready to submit to an opinion of the ICJ on essential climate issues. This is particularly the case for the conventional rule obliging States to adopt NDCs, and the notion of jurisdiction under human rights treaties. States might prefer keeping the content of rules on NDCs and extraterritoriality undefined to be free and adopt softer mitigation measures that are less demanding on private (energy) companies operating within their jurisdiction, as well as for individuals living there.

[58] ECHR, Rules of the Court, 16 September 2022. www.echr.coe.int/documents/rules_court_eng.pdf.