

# CLIMATE JUSTICE: ADVISORY OPINION OF THE INTERNATIONAL COURT OF JUSTICE AND THE IMPACT OF YOUTH ADVOCACY

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*The International Court of Justice (ICJ) has dealt with environment-related issues in the past, however, it has not yet dealt specifically with climate change and its direct impacts on human rights. World's Youth for Climate Justice (WYCJ) is campaigning to obtain an Advisory Opinion from the ICJ on the links between climate change law and human rights law. This paper provides an in-depth analysis of the legal justification for and potential outcomes of such an Advisory Opinion.*

*Si la Cour internationale de justice (CIJ) a déjà eu à connaître de problématiques liées à la protection de l'environnement, elle n'a cependant pas encore eu l'occasion de se prononcer de manière exhaustive sur la question des effets du changement climatique sur la jouissance des droits de l'homme. World's Youth for Climate Justice (WYCJ) fait aujourd'hui campagne afin que la Cour Internationale de Justice rende un avis consultatif sur cette question. Cet article fournit une analyse détaillée de la pertinence juridique d'une telle démarche ainsi que des potentiels résultats attendus d'un tel avis consultatif.*

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## **I INTRODUCTION**

Humanity thrives on natural resources, from land to the atmosphere, to forests and oceans. The rise in the world population and the changes in lifestyles, in both developed and developing countries, brought about by economic growth and

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technological development have greatly increased demands on resources. This has led to the accelerated loss and degradation of life-sustaining resources and has pushed planetary boundaries beyond sustainable limits. According to the WHO, 24% of global deaths each year are linked to modifiable environmental factors such as air pollution and chemical exposure.<sup>1</sup> The 2021 IPCC report<sup>2</sup> stated it is "code red for humanity".<sup>3</sup> Indeed, scientists have observed the impacts of human-induced climate change across the whole of Earth's ecosystem.<sup>4</sup> Many of these changes are unprecedented and are already 'irreversible' for centuries or millennia.<sup>5</sup> It is thus evident and incontestable that climate change, biodiversity loss, and changes in sea levels directly impact human rights.

International environmental governance has attempted to address this situation. It has come a long way since the United Nations Stockholm Conference in 1972, the Rio Declaration in 1991, and the Kyoto Protocol in 1997. The momentum to develop international environmental law since has been monumental in streamlining international cooperation and governance of the global commons. Adopting the Paris Agreement at COP21, completing the Paris Rule Book at COP26, UNHRC recognising the "right to live in a safe, healthy, and sustainable environment as a human right",<sup>6</sup> and the UNCRC recognising that "failure to take measures to mitigate the harm caused by climate change, could constitute a violation of States' human rights obligations"<sup>7</sup> are some among many milestones that have shaped and will continue shaping international environmental law. It, therefore, is not unreasonable

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- 1 A Prüss-Üstün, et al 'Preventing disease through healthy environments: a global assessment of the burden of disease from environmental risks, (2018) WHO.
  - 2 Intergovernmental Panel on Climate Change, *Climate Change 2021, The Physical Science Basis* (IPCC AR6 WGI, 2021).
  - 3 United Nations Secretary-General "Secretary-General's statement on the IPCC Working Group I Report on the Physical Science Basis of the Sixth Assessment" (9 August 2021) United Nations <<https://www.un.org/sg/en/content/secretary-generals-statement-the-ipcc-working-group-1-report-the-physical-science-basis-of-the-sixth-assessment>>.
  - 4 IPCC "Climate change widespread, rapid, and intensifying – IPCC" (August 9, 2021) <<https://www.ipcc.ch/2021/08/09/ar6-wg1-20210809-pr/>>.
  - 5 UN, UN News Global Perspectives on Human stories "IPCC report: 'Code red' for human driven global heating, warns UN chief" (9 August 2021) Law and environment <<https://news.un.org/en/story/2021/08/1097362>>.
  - 6 United Nations General Assembly, UNHRC Resolution 48/13 A/HRC/RES/48/13 (8 October 2021).
  - 7 UN Committee Decision on the Rights of the Child CRC/C/88/D/105/2019 (22 September 2021), <[https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/BRA/CRC\\_C\\_88\\_D\\_105\\_2019\\_33021\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/BRA/CRC_C_88_D_105_2019_33021_E.pdf)>.

to state that global environmental governance is correlated to other disciplines of international law such as trade, security, and peace.

Yet international governance has largely failed to address the threat of climate change: climate change remains the "21st century's largest global threat to the planet and human rights".<sup>8</sup> The scope and degree of the threat varies according to the people impacted. For instance, people living in small island developing states and those under the age of 24 "are among the most heavily affected".<sup>9</sup> Young people are less responsible for climate change than the generations born before them. As such, the need for action, fair representation, and legal protection of the young ones is essential for climate justice and human rights protection. Indeed, as defined by the Human Rights Council, climate change is the "most significant intergenerational injustice of our time",<sup>10</sup> pushing youth to make use of multiple methods of activism both in the legal and political spheres. Youth strive to organise themselves in the hope of creating movements that have an impact on decisions made by decision-making bodies and governments. One among many such movements is the campaign that seeks an Advisory Opinion from the International Court of Justice (ICJ) on matters relating to human rights and climate change law. This global campaign is led by a youth-led organisation called World's Youth for Climate Justice (WY CJ).

The purpose of this article is to evaluate WY CJ's campaign for an Advisory Opinion (AO) in the context of international environmental law and human rights law. The article begins by briefly highlighting the roots of the campaign and its legal justification. The next part discusses the advisory jurisdiction of the ICJ. That is followed by a consideration of the legal effects such an advisory opinion may have on the climate change law regime. There is an analysis of the rights-based approach on which the campaign is based, and finally, there is a statement of the importance of youth representation in high-level governance and of the socio-legal impacts the campaign will have in achieving climate justice.

## **II WORLD'S YOUTH FOR CLIMATE JUSTICE**

World's Youth for Climate Justice (WY CJ)<sup>11</sup> is a youth-led NGO that campaigns to seek an advisory opinion from the ICJ to obtain clarification of principles of

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8 G Gasparri et al "Children, Adolescents, and Youth Pioneering a Human Rights-Based Approach to Climate Change" (2021) 23 Health and Human Rights Journal 96.

9 N Watts, M Amann, N Arnell et al "The 2019 report of The Lancet Countdown on health and climate change: Ensuring that the health of a child born today is not defined by a changing climate" (2019) *Lancet* 394, 1840// Intergovernmental Panel on Climate Change, "Summary for policymakers" in Special report: Global warming of 1.5°C (Cambridge University Press, 2018) 9.

10 G Gasparri et al, above n 8, 96.

11 World's Youth Fighting for Climate Justice <<https://www.wy4cj.org/>>.

international and human rights law on the matter of climate change and its impacts on the environment and people. The campaign focuses on the operation of the principle of intergenerational equity within the international legal sphere to achieve climate justice. The campaign revolves around the idea that such an initiative represents an opportunity to assess the impacts of climate change on youth's human rights and clarify the applicable norms of international law.

The roots of this campaign can be traced to the Pacific, where a few students from the University of South Pacific, were inspired by Palau's effort in 2011-2012 to persuade the United Nations General Assembly (UNGA) to request an advisory opinion from the ICJ on state responsibility for climate change. Ergo, in 2019, these students established a movement called Pacific Island Students fighting for Climate Change (PISFCC).<sup>12</sup> Students from the island states of Vanuatu, Fiji, Solomon Islands and Tonga were the main founders of this movement.<sup>13</sup> PISFCC's aim was to persuade the leaders of the Pacific Islands Forum to take the issue of climate change and human rights to the International Court of Justice.

Later, recognising the global aspects of the campaign, the campaign grew beyond the Pacific. From the idea that climate change impacts the human rights of youth all over the world, in 2020 the youth organised themselves as World's Youth for Climate Justice (WYCJ). WYCJ now operates as an umbrella organisation to lead the AO campaign. More importantly, they are "turning to the courts and relying on rights-based legal theories to bring claims for current and future generations".<sup>14</sup> The campaign for an advisory opinion from the ICJ proceeds on the ground that the protection of youth's human rights against climate change is an efficient path to enhance youth representation at the high level of governance in environmental law and more generally to move the international law framework towards climate justice.

The campaign attempts to lay a strong foundation for developing the principle of intergenerational equity and protecting the rights of future generations under international law. Thus, the question WYCJ suggests be submitted to the ICJ is, "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>15</sup> This question asks the Court to consider substantive issues of international environmental

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12 Pacific Islands Student Fighting for Climate Change <<https://www.pisfcc.org/>>.

13 Above n 12.

14 Above n 2, 2.

15 World's Youth for Climate Justice "Human rights in the face of the climate crisis: a youth-led initiative to bring climate justice to the International Court of Justice" published by WYCJ in collaboration with Normandy Chair for Peace, July 2021, 29.

law (specifically climate law), and international human rights law since these two areas of international law currently operate independently. "By integrating them, the Court would play a useful role in developing and clarifying international law and the obligations arising for States (the traditional subjects of international law)."<sup>16</sup> The two main aspects of the law that WYJC hopes will be clarified are: firstly, "the language of 'obligations to protect' on which the Court could potentially express its opinion on the full range of human rights obligations arising in the environmental context [...]" and secondly, "the emphasis on the rights of present and future generations"<sup>17</sup> on which the Court could potentially elaborate on the intergenerational nature of climate change. The Court could thus not only provide legal clarification but also contribute to a change of consciousness. These developments can, in turn, catalyse new actions.<sup>18</sup> Additionally, the question offers the opportunity for the Court to cement consensus on the scientific evidence of climate change. The Advisory Opinion would, therefore, provide:<sup>19</sup>

[an] excellent forum to endorse the best scientific findings on anthropogenic climate change, including but not limited to the Special Report of the Intergovernmental Panel on Climate Change on Global Warming of 1.5 °C, thus providing an impetus and guidance for domestic, regional, and international adjudication.

In September 2021, the Government of Vanuatu announced its support for this campaign and confirmed that it will route the request for an advisory opinion through the UNGA.

### ***III ICJ'S ADVISORY JURISDICTION AND THE ADVISORY OPINION***

The ICJ has two primary adjudicative functions. One is to resolve international law disputes between sovereign states.<sup>20</sup> The other is to issue advisory opinions on "outstanding legal questions at the request of whichever body authorised by or is in accordance with the Charter of the United Nations".<sup>21</sup> Only states are entitled to

16 Above n 15, 30.

17 Above n 15, 30.

18 Philippe Sands "Climate Change and the Rule of Law: Adjudicating the Future in International Law" Public Lecture at the Supreme Court of the United Kingdom (17 September 2015); <<https://www.supremecourt.uk/docs/professor-sands-lecture-on-climate-change-and-the-rule-of-law.pdf>>.

19 World's Youth for Climate Justice *Human rights in the face of the climate crisis: a youth-led initiative to bring climate justice to the International Court of Justice* (WYJC in collaboration with Normandy Chair for Peace, July 2021) 30.

20 International Court of Justice <<https://www.icj-cij.org/en/how-the-court-works>>.

21 Article 65.1, Part IV of the ICJ Statute; and art 96.1 of the UN Charter.

appear before the Court – not international organisations – but a special procedure is open ie advisory proceedings are open to five organs of the United Nations and to its fifteen specialised agencies.<sup>22</sup> The United Nations General Assembly (UNGA) and the Security Council may request an advisory opinion on "any legal question",<sup>23</sup> while the other United Nations organs and specialised agencies can only do so concerning "legal questions arising within the scope of their activities".<sup>24</sup> In addition, art 10 of the UN Charter deals with the competencies of the UNGA which may (i) "discuss any matter within the scope of the charter"; (ii) "make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters".<sup>25</sup> Here, the scope of the Charter can be derived from arts 1 and 2 which extend from international peace and security to international cooperation in solving international problems. Making recommendations entails "initiating studies to promote international political cooperation, the development, and codification of international law ...",<sup>26</sup> and tabling resolutions before the Assembly to request an Advisory Opinion from the ICJ. It is indisputable that climate change qualifies as an international problem and therefore falls within the ambit of the ICJ's advisory jurisdiction. It is also essential that the question is in line with the practices of the UNGA. The Court has also observed that "'any legal questions' as mentioned in the ICJ Statute or the UN Charter should not be interpreted restrictively".<sup>27</sup> The UNGA also has a long history of putting climate change and its human rights implications on its agenda. This foundation was laid by its resolutions on the "Protection of Global Climate for Present and Future Generations" as early as 1988, which can be seen as the conceptual origin of the matter. Thus, the question that WY CJ suggests would be considered a "legal question" as per ICJ statute and UN Charter.

The broad competency of the UNGA means that the advisory jurisdiction of the ICJ can be used to gain answers to an array of legal questions. To illustrate, the ICJ has issued advisory opinions on the legality of the threat or use of nuclear weapons; on reparations for injuries suffered in the service of the United Nations; on the legal consequences of the construction of a wall in the occupied Palestinian territory; on

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22 <<https://www.icj-cij.org/en/advisory-jurisdiction>>.

23 Article 65.1 ICJ Statute.

24 Article 65.2 ICJ Statute <<https://www.icj-cij.org/en/how-the-court-works>>.

25 United Nations, Charter of the United Nations (26 June 1945) art 10.

26 United Nations, "About the General Assembly" <<https://www.un.org/en/ga/about/background.shtml>>.

27 *Western Sahara Advisory Opinion* (1975) 20; <<https://www.icj-cij.org/public/files/case-related/61/061-19751016-ADV-01-00-EN.pdf>>.

reservations to the Convention on genocide; and on the self-determination of the people of Western Sahara.<sup>28</sup>

Advisory opinions are not legally binding on states and the Court has no enforcement power. Nevertheless, such an opinion holds strong moral authority and thus helps interpret established laws that may be relied on in subsequent cases, and even in legal education.<sup>29</sup> To emphasise, the ICJ has not yet dealt with any climate change case. If the Court is engaged based on this AO campaign, it would be the most authoritative decision on climate change and the obligation of states under international/human rights law to mitigate the climate crisis.

In 2011, a similar attempt was made by the island state of Palau along with the Marshall Islands. They set out to call for an advisory opinion from the ICJ regarding states' obligations on emitting GHGs that cause harm to other states.<sup>30</sup> The island states also attempted to take the diplomatic route, but were unsuccessful at the UNGA.<sup>31</sup> Learning from Palau's case, for this campaign to succeed it is critical to ask the "right" question. Asking the wrong question could result in an unhelpful answer from the Court. Even asking the right question does not guarantee a particular outcome; the ICJ has the power to interpret the question as it sees fit.<sup>32</sup> Nonetheless, assuming that Palau's resolution succeeded at the UNGA and the ICJ accepted jurisdiction over the question;<sup>33</sup> the Court would have looked to customary international law, treaties, general principles of law, precedents, and scholarly writings to determine states' duties. Perhaps it might have also investigated the duty to prevent transboundary harm, the precautionary principle, and the UNFCCC.<sup>34</sup> It would, however, not elaborate on the legality of a human rights-based approach that

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28 M B Gerrard "Taking Climate Change to the World Court" *Environment & Energy*, 25 October 2021.

29 Professor A Tzanakopoulos "British Institute of International and Comparative Law "Rising Sea Levels: A Matter for the ICJ?" (11 March 2021); <<https://www.biiicl.org/events/11468/webinar-series-rising-sea-levels-promoting-climate-justice-through-international-law?cookieset=1&ts=1645281829>>.

30 The question Palau intended to ask 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?"

31 "Questions of state responsibility for transboundary harm raise the issue of causation, and how to establish that. The consequence of such a question is that the Court is afforded a leeway to address these legal issues on its own interpretation", above n 29, Prof A Tzanakopoulos.

32 Above n 29.

33 Above n 29.

34 J C Glickenhau "Potential ICJ Advisory Opinion: Duties to Prevent Transboundary Harm from GHG Emissions" (2015) 22 *NYU Environmental Law Journal* 123.

could mould international environmental law. Unfortunately, Palau's resolution at the General Assembly was unsuccessful and the ICJ could not be moved to seek an advisory opinion at the time; this certainly does not mean that further such attempts would meet a similar fate. Given the high stakes and adversities of climate change, the leaders from the Pacific to the United Nations have recognised the threat it poses to livelihoods, security, and well-being of the most vulnerable groups.<sup>35</sup>

As noted above, the government of Vanuatu announced in September 2021 that it would campaign to seek an advisory opinion from the ICJ, with a view "to clarify the legal obligations of all countries to prevent and redress the adverse effects of climate change".<sup>36</sup> It stated that it would "route the initiative through the United Nations General Assembly".<sup>37</sup> It further stated, that the "objective of the initiative is to establish clear standards for climate action and 'climate justice benchmarks', which may be used in contentious adjudication".<sup>38</sup> Pursuing the UNGA route requires support from the majority of UN members present and voting.<sup>39</sup> Considering the political interests of states and navigating the bureaucracy, passing a resolution at the UNGA with a majority is a difficult task. This has been an engaging topic of discussion amongst legal professionals as well as academics<sup>40</sup> who are concerned that the need to ensure that Vanuatu's request is "broadly supported and perceived as legitimate".<sup>41</sup> In light of this concern, the CARICOM alliance in 2022 announced its support for Vanuatu's initiative seeking the advisory opinion.<sup>42</sup>

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35 Above n 11.

36 Reuters "Vanuatu to push international court for climate change opinion" (25 September 2021) <<https://www.reuters.com/world/asia-pacific/vanuatu-push-international-court-climate-change-opinion-2021-09-25/>>.

37 Above n 36.

38 A Savaresi et al "Beyond COP26: Time for an Advisory Opinion on Climate Change?" EJIL: Talk!, December 2021; <<https://www.ejiltalk.org/beyond-cop26-time-for-an-advisory-opinion-on-climate-change/>>.

39 M B Gerrard n 28, 2; Also see GA/11924 (Seventy-first Session) 22 June 2017 where the UNGA recorded a vote of 94 in favour to 15 against, with 65 abstentions, the Assembly adopted the text contained in document A/71/L.73 on the matter of separation of the Chagos Archipelago from Mauritius.

40 Law and Governance Initiative, COP26 (5 November 2021) <<https://www.youtube.com/watch?v=JUU-0pEly3M>>.

41 A Savaresi, above n 38.

42 CARICOM Caribbean Communique "Thirty-Third Inter-sessional Meeting of CARICOM Heads of Government" (3 March 2022) <<https://caricom.org/communique-thirty-third-inter-sessional-meeting-of-caricom-heads-of-government/>>.



#### **IV ADVISORY OPINION AND THE CLIMATE CHANGE LAW REGIME**

There have been many lawsuits concerning climate impacts. Plaintiffs have sought compensation for climate-related losses but have not seen enough success.<sup>43</sup> One among many reasons is the lack of admissible evidence that links anthropogenic climate change and its impacts.<sup>44</sup> Therefore, it is important that this advisory opinion links international law and climate science and justifies WYJC's effort to strengthen the current climate change law regime.

It has been observed that "an ICJ advisory opinion could bring legal clarity to and progress in international diplomatic endeavours [...]".<sup>45</sup> WYJC bases its campaign in support of this argument.<sup>46</sup> This opinion could set the terms of the discussion, provide evaluative standards and establish a framework of principles to develop more specific norms, and, ultimately, "shape public consciousness and define normative expectations for a broad variety of actors as on its direct influence on States".<sup>47</sup> Furthermore, as it aims to elucidate the law, an advisory opinion seems preferable, less controversial, and more likely achievable than a "contentious case, for example concerning state responsibility for harms associated with the impacts of climate change".<sup>48</sup> Over and above this, the ICJ has "the most general subject matter jurisdiction of any international tribunal and hence could address climate change more comprehensively than other forums".<sup>49</sup> It could (depending on what exactly is asked and the Court's interpretation of the question) also have the potential to clarify certain vague principles of environmental law such as the "common but differentiated responsibilities and respective capabilities" (CBDRRC).<sup>50</sup>

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43 R F Stuart-Smith, F E L Otto, A I Saad et al "Filling the Evidentiary Gap in Climate Litigation" (2021) 11 *Nature Climate Change* 651–655.

44 Climate Home News "IPCC Report a 'call to arms' for climate science in courts legal experts say" (12<sup>th</sup> August 2021) <<https://www.climatechangenews.com/2021/08/12/ipcc-report-call-arms-climate-science-courts-legal-experts-say/>>.

45 D Bodansky "The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections" (2021) 49 *Arizona State Law Journal* 689-712.

46 Legal report, above n 15, 39.

47 D Bodansky, above n 45, 706.

48 A Savaresi "Inter-State Climate Change Litigation: Neither a Chimera nor a Panacea" in I Alogna et al (eds) *Climate Change Litigation: Global Perspectives* (Brill Publications, 2021) 366–392 at 385; Palau's case above n 23.

49 D Bodansky, above n 45, 701.

50 Article 3.1 United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107 [hereinafter UNFCCC]; for CBDRRC see generally L Rajamani *Differential Treatment in International Environmental Law* (2006); But this could also make it a contentious issue, therefore

Another potential benefit of such an advisory opinion is to affirm the casual links between climate science and law before judicial bodies. There is a paucity of jurisprudence regarding the legal interpretation of climate science dealing with climate change cases. Despite the wide acceptance of the IPCC assessment reports, their admissibility as evidence in some national courts dealing with climate change cases has been contentious. The competency of judges and their credibility to rule on climate change-related cases has often been questioned.<sup>51</sup> While the ICJ understands its limitations, it has not avoided dealing with scientific claims. This has been illustrated in the contentious *Whaling in the Antarctic* case<sup>52</sup> where the Court defined "[...] purposes of scientific research" thus rendering a legal meaning to both "science" and "research".<sup>53</sup> Pursuant to these circumstances, such an advisory opinion offers an opportunity to "depoliticize" the IPCC reports and admit them as technical evidence on climate change. This could perhaps encourage national courts to do the same, in turn laying a foundation of precedents relating to climate mitigation and adaptation. The ICJ, through an advisory opinion, could contribute to the legal understanding of the scientific findings. Discussing the Court's role in examining and interpreting such evidence on establishing responsibility for environmental damage is beyond the scope of this article. However, cases such as the *Pulp Mills* case<sup>54</sup> show that the Court would consider concepts drawn from international environmental law. Such an opinion would perhaps provide guidance to national and regional courts when they deal with scientific evidence on climate change.<sup>55</sup> Therefore, at the cost of reiteration, if this campaign has to see success and mobilise this tool of adjudication, it is important to emphasise the need for not only meticulously forming a question but also backing it with sufficient legal and scientific materials to legitimise the need for the ICJ's advisory opinion.

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it would perhaps be bold to ask a question that could implicate clarifying this principle - D Bodansky, above n 45, 708; however, this shows the extent to which the court could possibly enlarge its advisory jurisdiction.

51 University of Aberdeen, J Schnakenberg, B Watt and A Fleming "The potential for the World Court to address climate justice: COP26 as an opportunity to raise the ICJ Advisory Opinion with World Leaders" (9 December 2021) <[https://www.abdn.ac.uk/law/blog/the-potential-for-the-world-court-to-address-climate-justice-cop26-as-an-opportunity-to-raise-the-iej-advisory-opinion-with-world-leaders/?fbclid=IwAR3J2t-rVcu99nOljDjFeHGyLn5k85Ejw1\\_Fe1Cd6ZD9VBrdwAVhLa6qDs](https://www.abdn.ac.uk/law/blog/the-potential-for-the-world-court-to-address-climate-justice-cop26-as-an-opportunity-to-raise-the-iej-advisory-opinion-with-world-leaders/?fbclid=IwAR3J2t-rVcu99nOljDjFeHGyLn5k85Ejw1_Fe1Cd6ZD9VBrdwAVhLa6qDs)>.

52 *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* [2014] ICJ Report 16R. Caddell "Science Friction: Antarctic Research Whaling and the International Court of Justice" (2014) 26 *Journal of Environmental Law*.

53 Above n 52.

54 *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2006] ICJ Rep 113.

55 Above n 45 at 704, 711.

Acknowledging and factoring in multiple issues surrounding climate change adjudication, this advisory opinion from the ICJ would highlight the role the Court could play in climate law and policy while negotiations mainly remain a political process. If Vanuatu's initiative succeeds at the UNGA, the question to be asked to the ICJ should be meticulously formulated,<sup>56</sup> since it would be the first time that the "principal judicial organ of the United Nations" would provide strong legal precedent on the issue of integration of human rights and international environmental jurisprudence.

Besides ICJ's advisory jurisdiction, the International Tribunal on the Law of the Sea (ITLOS) also offers a route<sup>57</sup> to interpret climate change law. For instance, the island states of Antigua, Barbuda and Tuvalu envision seeking an advisory opinion from the ITLOS to clarify international legal issues of climate mitigation and adaptation.<sup>58</sup> This avenue would specifically deal with loss and damage<sup>59</sup> which is an urgent concern for SIDS. This path would, however, be less likely to address the links between climate change law, intergenerational equity, and human rights.

## ***V THE ADVISORY OPINION AND HUMAN RIGHTS-BASED APPROACH***

To justify the use of human rights in WYCI's ICJ AO campaign, the links between climate change and human rights need to be highlighted. Since climate change is one of the biggest environmental threats currently faced by humans, "its negative impacts on the Earth's ecosystem have acknowledged consequences for the enjoyment of human rights".<sup>60</sup> More precisely, "human rights such as the rights to health, food, water, housing, self-determination and even the right to life are threatened by climate change".<sup>61</sup> On this basis, courts and other institutions have recognised that states have the obligation to take reasonable and appropriate measures to mitigate climate change and protect their inhabitants' human rights. These various courts and

56 Above n 45, 712.

57 Article 138 of the ITLOS Rules of Procedure, the tribunal may give an advisory opinion "if an international agreement related to the purposes of the [UNCLOS] specifically provides for the submission to the Tribunal of a request for such an opinion".

58 Loop Caribbean News "Antigua and Tuvalu join forces to seek climate justice" (31 October 2021) <<https://caribbean.loopnews.com/content/antigua-and-tuvalu-join-forces-seek-climate-justice>>.

59 Press Conference held at COP26, 1 November 2021; <<https://unfcccop26.streamworld.de/webcast/antigua-barbuda-tuvalu>>.

60 *Kyrtatos v Greece* [2003] ECHR 41666/98 (ECtHR, 22 August 2003).

61 Bridget Lewis *Environmental Human Rights and Climate Change, Current Status and Future Prospects, Introduction to Environmental Human Rights and Climate Change* (Springer Nature, Singapore, 2018) 1-14.

institutions include national courts,<sup>62</sup> numerous UN Human Rights Treaty Bodies,<sup>63</sup> and human rights courts.<sup>64</sup> When human rights to a healthy environment are clearly recognised by law, the threat of climate change to human rights is then directly and unequivocally established by courts.<sup>65</sup> Additionally, the Paris Agreement in its preamble explicitly refers to the link between climate change and human rights. Indeed, it acknowledges that "climate change is a common concern of humankind",<sup>66</sup> and requires "action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development".<sup>67</sup> From this, it is relevant for rights holders to utilise human rights to legally interpret climate change law and its consequences.

A human rights-based approach is defined as a "conceptual framework that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights".<sup>68</sup> More precisely, it aims "to analyse obligations, inequalities, and vulnerabilities and to redress discriminatory practices and unjust distributions of power that impede progress and undercut human rights".<sup>69</sup> Consequently, this approach not only applies to litigation but can be implemented at every legal and regulatory stage – for instance, during the policymaking process, the review process, or when private entities make decisions

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62 See, among others, *State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda* (2019) ECLI:NL:HR:2019:2007 (official translation) (Supreme Court of the Netherlands, Civil Division) [5.5.2-5.3.2, 5.6.2]. *Friends of the Irish Environment CLG v The Government of Ireland (Irish Climate Case)* [2020] Supreme Court of Ireland Appeal No. 2015/19 [3.6].

63 For instance, Joint Statement of Five UN Human Rights Treaty Bodies on Human Rights and Climate Change (online, 16 September 2019) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E>>.

64 See eg the Inter-American Court of Human Rights *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights) (Advisory Opinion) OC-23/18* (2017) (ser A) No 23 Inter-Am Court Hum Rights (IACtHR) [47, 54].

65 Above n 64.

66 Preamble, Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015. See also Glasgow Climate Pact, Decision 1/CP.26 and Decision 1/CMA.3, preambular para. 6.

67 Above n 66.

68 UN Human rights, Applying a human right-based approach to climate change negotiations, policies and measures (OHCHR, 2010) 1.

69 Above n 61.

that impact on human rights. At the national level, the application of a rights-based approach builds upon the statement that "States are obliged to protect their inhabitants from foreseeable threats related to climate change".<sup>70</sup> Therefore, a human rights-based approach should be considered by any decision-making body, as well as at every stage of adjudication before courts. When citizens take legal action against private or public bodies, the implementation of a rights-based approach serves as a powerful instrument for rights holders to highlight climate change impact claims. Human rights-based climate litigation has already gained impetus before various adjudicating authorities.

The application of this approach in climate change litigation can be illustrated by the two following cases. Firstly, the Dutch Supreme Court in the *Urgenda* case in 2019<sup>71</sup> held that "the Netherlands' inadequate climate policies is a violation of articles 2 and 8 of the European Convention on Human Rights (ECHR)" and established "there was a legal duty on a government to prevent dangerous climate change".<sup>72</sup> Secondly, in *Leghari v Federation of Pakistan*,<sup>73</sup> the High Court held that "the right to life, right to human dignity, right to property, and right to information under Articles 9, 14, 23, and 19A of the Constitution must now be extended to cover climate change".<sup>74</sup> These cases have inspired a surge in the use of the rights-based approach and may have changed the general perception of climate cases.<sup>75</sup> In the case of WYCJ's campaign, these cases offer strong legal precedents and a basis for pursuing this advisory opinion. Moreover, in the light of the cross-fertilisation phenomenon, under which courts and tribunals consider and draw upon each other's jurisprudence,<sup>76</sup> these cases could offer a basis for the ICJ. Indeed, the legal reasoning employed in them could offer a basis for interpretation. Furthermore, the

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70 F Knur "The United Nations Human Rights-Based Approach to Climate Change –Introducing a Human Dimension to International Climate Law" *from The United Nations Human Rights-Based Approach to Climate Change – Introducing a Human Dimension to International Climate Law* Dresden Papers on Law and Policy of the United Nations, 2014, 7.

71 *Urgenda Foundation v State of the Netherlands* [2019] High Court Netherlands 19/00135.

72 Above n 8, 100.

73 *Leghari v Federation of Pakistan* (2015), Lahore High Court, WP No 25501/2015.

74 Above n 8, 97.

75 Peel and Osofsky (n 5) 61, 63-4; however, rights-based cases remain the lesser part of the total, see United Nations Environmental Programme and Sabin Center for Climate Change Law, 'Global Climate Litigation Report: 2020 Status Review' (UNEP 2020) 41-2.

76 Ulf Linderfalk "Cross-Fertilisation in International Law" (2015) 84 *Nordic Journal of International Law* 429-430.

advisory opinion would assist other courts and other bodies when confronted with climate change and human rights-based cases.

Consequently, the already recognised relationship between climate change and the enjoyment of human rights and the increasing trend of using a human rights-based approach as a legal basis in climate litigation are essential tenets of the ICJ AO campaign. WY CJ then aims to utilise these legal mechanisms to stipulate States' obligations under international law to protect the rights of present and future generations against the adverse effects of climate change.

## **VI YOUTH ADVOCACY AND CLIMATE ADJUDICATION**

The youth that leads WY CJ's campaign recognise the urgent need for a rights-based approach to environmental governance. More precisely, WY CJ emphasises the need to protect one's human rights. It also highlights the particular attention that must be given to the rights of present and future generations when facing climate change. Indeed, "young people are playing a fundamental role in driving climate change accountability in both formal and informal settings".<sup>77</sup>

With the recent development and the mobilisation of the youth across the world, climate justice movements and other initiatives are proof of their rising concerns and worries regarding the future and human rights.<sup>78</sup> Additionally, the presence and representation of youth within international environmental discourse is extremely restricted, especially in the institutional and policy-making process – "in the hubbub of UNFCCC negotiations, where decision-makers have limited time and capacity, policy-makers and governments are unlikely to attend youth events or to seek their advocacy messages".<sup>79</sup> This has been the experience of YOUNGO. Consequently, the lack of representation and power of the younger generation is the foundation for challenging the current legal and political framework through litigation, more precisely litigation based on human rights. As trends show, "before 2015, there were only a handful of rights-based climate cases but since 2015, 40 cases have been brought in 22 countries and before three international bodies".<sup>80</sup> The involvement of

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77 Above n 8, 100.

78 Since 2018 and 2019, youth-led movements and climate actions have shown that "young people support their peers and other social groups to promote common goals and values and to bring about the social change they desire – ... that there are possibilities for leadership and agency among young people ..." in H Han and S W Ahn "Youth Mobilization to Stop Global Climate Change: Narratives and Impact" (2020) *Sustainability* 12 4127 at 17.

79 H Thew "Youth participation and agency in the United Nations Framework Convention on Climate Change" (2018) 18 *Int Environ Agreements* 387.

80 Chatham House *Climate change and human rights-based strategic litigation* (Briefing paper International Law Programme Environment and Society Programme November 2021) 2.

youth in climate litigation has drastically increased in recent years – "with support from non-governmental organizations (NGOs) and law firms around the world, they have brought climate change cases against federal and state governments in over 15 countries".<sup>81</sup> For instance, young plaintiffs, many of them children, have filed lawsuits against governments in Australia, Canada, Colombia, India, Mexico, Pakistan and South Korea. Some have also filed complaints against Argentina, Brazil, France, Germany and Turkey through the UN Committee on the Rights of the Child for their failure to reduce carbon emissions and their violation of children's rights to life, health, and a healthy environment.<sup>82</sup>

Youth is an active part of the political process when it comes to climate action and challenging both governments and private stakeholders in the name of intergenerational equity and climate justice. Therefore, WY CJ's campaign is not only necessary considering the environmental urgency but also endorses the strengthening will of younger generations to claim their right to climate justice. Youth from all over the world are thus coming together to hold their governments accountable for their promises before domestic and regional courts. The campaign hopes to close the protection gap between the UNFCCC framework and human rights treaty bodies. It further aims to enhance the recognition of youth in the international legal sphere. Similarly, the impact of the Advisory Opinion on the legality or threat of nuclear weapons<sup>83</sup> emerged from decades of campaigning before the World Health Organisation and at the UNGA. It, therefore, makes sense to involve the highest judicial body to take a position on this urgent matter.

However, it is necessary to remain realistic given the fact that according to the ICJ Statute a Youth Organisation does not have the *locus standi* to present the case before the Court. The legal question and issues that are to be submitted to the ICJ must be accepted by a majority of states for a resolution to be successful at the UNGA. It is the responsibility of states to uphold the interest of the youth as it is their obligation to assure the protection of their population and their human rights. Therefore, it is even more important for states to understand the gravity of this responsibility in supporting the youth, because ultimately it is the duty of states to commit to the principle of intergenerational equity in the public interest.

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81 C Cameron and R Weyman "Recent Youth-Led and Rights-Based Climate Change Litigation in Canada: Reconciling Justiciability, Charter Claims and Procedural Choices" (2021) *Journal of Environmental Law* 2.

82 Above n 71.

83 ICJ AO on the legality or threat of nuclear weapons 1996 ICJ 266.

## VII CONCLUSION

Millions of young people have reached the consensus that climate change is a humanitarian crisis. However, measuring the impact of social movements is an elusive task. In other words, it could be stated that youth campaigns generally are set in motion with three basic tenets: first, putting pressure on those in power (since the deciding power lies in the hands of states) to do more to mitigate climate change; second, showcasing the voices of people who are directly and most affected by the climate crises; and third, raising awareness and motivating others to take climate action.

Since the government of Vanuatu announced its intention to seek an advisory opinion in support of the campaign, WY CJ has focused on mobilising youth, like-minded NGOs and CSOs, and local governing bodies in not only the most affected countries but also the less vulnerable countries alike. The campaign strives to bring solidarity and unity amongst civil society in as many countries as possible. In the hope of meeting the necessary requisites at the UNGA, the campaign endeavours to build momentum to ensure cooperation among states to support the tabling of the resolution. The campaign also endorses the efficacy of multilateralism in addressing a global crisis. This campaign stands on the shoulders of its pioneers from the Pacific,<sup>84</sup> but it hopes to gain support and be the first youth movement in history that successfully affects high-level governance and utilises the tool of international adjudication to influence and amalgamate two international legal regimes. In the words of M B Gerrard, "if countries don't act, people will turn to courts".<sup>85</sup>

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84 Above n 15, 70.

85 Above n 28, 1.

[Ed. See also <<https://www.theguardian.com/world/2022/jun/20/vanuatu-calls-on-australia-to-back-its-un-bid-to-recognise-climate-change-harm>>.]