WORLD CONSERVATION CONGRESS MOOT COURT WORKSHOP

Written Memorial

Submitted by the ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT

to the INTERNATIONAL COURT OF JUSTICE

on the question of

The Responsibility Under International Law of States to Address the Global Climate Crisis for
the Benefit of Present and Future Generations of Mankind

Seoul National University
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I. The OECD submits that it is in the power of the Court to issue an advisory opinion under Art. 65(1) of the ICJ Statute, in the event that the GA requests it under Art. 96(a) of the UN Charter.

   A. Article 96(a) of the UN Charter provides that “The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.” 1

   B. Art. 65(1) of the ICJ Statute states that “[t]he Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such requests.” 2

   C. The request for an advisory opinion on the question of the responsibility under international law of States to address the global climate crisis for the benefit of present and future generations of humankind, is clearly a request for an opinion on a “legal question,” since it is a question on the content, if any, of international responsibility of a State under international law. 2

II. The OECD submits that although it is in the discretion of the Court to decline to issue an advisory opinion, the Court should comply with the UNGA’s request for an advisory opinion.

   A. The ICJ itself, while giving emphasis to its ability to use discretion in giving advisory opinion, has taken the position that the ICJ should not, in principle, decline UNGA requests for legal counsel unless it has a compelling reason to do so. 4
B. Therefore, the ICJ should, in the OECD’s view, provide a substantive answer regarding the legal responsibilities of States to address the Global Climate Crisis.

III. The OECD submits that the political nature of the question does not exclude the jurisdiction or admissibility of the case.

A. The Court has stated before that even in cases of political importance, or perhaps even more so in these cases, there is a need for a judicial authority to state its opinion on the matter in question.

B. The OECD submits that the political nature of this problem is unrelated to determining whether the Court has jurisdiction over this issue.

C. The OECD submits that political concerns may be addressed together with the merits issues.

IV. The OECD submits that States have an obligation under the UNFCCC, SDGs, and other treaty commitments, to address and combat the global climate crisis.

A. States have common but differentiated responsibilities

B. Developed Countries have an obligation under the principle of equity to take the lead in combating climate change.

C. SDGs create obligations for States to immediately and urgently address climate change and its effects

V. The OECD submits that the ICJ, as a matter of appropriate judicial role and prudence, should refrain from imposing immediate and specific obligations on States.

A. The Global Climate Crisis and Sustainable Development is a controversial and complex issue that must be approached carefully.

1. The OECD believes that policy-based tools based on international consensus encourage creative and peer-monitored problem-solving strategies, instead of legally binding methods.

B. Cost-Benefit Analysis weighing the benefits of concrete legal precedent against the costs of potential litigation against States implies that recognizing a legally binding responsibility under international law will incur more costs than benefits.

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1. Awards by courts and tribunals
   
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   *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, I.C.J. Reports 2010, p. 403


   *Conditions of Admission of a State in Membership of the United Nations (Article 4 of the Charter)*, Advisory Opinion, 1948, I.C.J. Reports 1947-1948

   *Gabčíkovo-Nagymaros Project (Hungary/Slovakia) 2006 ICJ (ICJ Reports 2006)*


   *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the Unesco*, I.C.J. Reports 1956


   *Legality of the threat or use of nuclear weapons* (Advisory opinion) 1996 ICJ (ICJ Reports 1996)
Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996

I.C.J.


1.2. PCIJ


1.3. Awards by other international tribunals (ICC etc.)

Kyrtatos v Greece (2005) 40 EHRR 16, para. 53


Athanassoglou v Switzerland (2001) 31 EHRR 13, para. 52

1.4. Municipal courts


1.5. Domestic Legislation

2. UN Documents

Charter of the United Nations, 1945

Convention on the Elimination of All Forms of Discrimination Against Women, 1979

Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 1992

Convention on the Rights of the Child, 1989


Declaration on the Right to Development, 1986

Paris Agreement, 2016

Rio Declaration on Environment and Development, 1992
Transforming our World: The 2030 Agenda for Sustainable Development, 2015
United Nations Framework Convention on Climate Change, 1992
Universal Declaration of Human Rights, 1948

3. Books

4. Articles


5. Other documents


(d) Statement of Relevant Facts

Efforts to establish a legally binding instrument imposing obligations and responsibilities on States to address the global climate crisis are coming to fruition. Support for international law obligations to mitigate climate-related harms is found in prior GA resolutions, as well as broader support in international and domestic legal instruments for sustainable development. One of the GA Resolutions most directly representing the international community’s interest in this issue is Resolution 69/292, where the GA decided to “develop an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.”

Though not recognized as posing concrete legal obligations, pursuing sustainable development has widely been acknowledged at least as a moral duty imposed on States. The beneficiaries whose interests or rights are implicated by this duty are most often presented as “present and future generations.” For example, The Convention on the Protection and Use of Transboundary Watercourses and International Lakes provides: “Water resources shall be managed so that the needs of the present generation are met without compromising the ability of future generations to meet their own needs.” The Rio Declaration on Environment and Development, adopted by about 178 countries at the 1992 Earth Summit, declares: “The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.” The UN Framework Convention on Climate Change provides: “The Parties should protect the climate system for the benefit of present and future generations of humankind, on the

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1 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Art. 2.5(c)
2 Rio Declaration on Environment and Development, Principle 3
basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities."

The GA resolution requests the Court to provide legal counsel on the legal responsibility, under international law, of States to address the global climate crisis. Customary international law, recognized as a source of international law that applies generally to States, is considered to be established through the existence of State practice and *opinio juris*. Therefore we shall look into individual State practice and perception dealing with environmental interests of present and future generations. It can be verified that multiple Constitutions adopt the view that there is an obligation of the State to protect present and future generations’ environmental rights. For example, Article IX, § 1(1) of the Montana Constitution states that “The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.” Article XI, § 1 of the Hawaii Constitution states: “For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii’s natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.” Article 110(b) (1814, as amended 2007) of the Constitution of the Kingdom of Norway stipulates: “Every person has a right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources should be managed on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well. In order to safeguard their right in accordance with the foregoing paragraph,

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3 *UN Framework Convention on Climate Change*, Preamble
citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out. The authorities of the State shall issue specific provisions for the implementation of these principles.”

Several scholars also suggest constituting environmental interests of future generations as concrete legal interests. For example, professor Edith Brown Weiss argues that while limitations on the present generation should be applied very narrowly, long-term environmental damage is a good place to begin⁴.

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(e) Issues

WHETHER IT IS WITHIN THE POWER OF THE COURT TO GIVE AN ADVISORY OPINION ON THE ISSUE IN QUESTION

1. Does the UNGA have the power to request the ICJ for an advisory opinion on this issue?
2. Is the question a legal one?

WHETHER THE COURT SHOULD EXERCISE ITS DISCRETION ON THE ISSUE IN QUESTION

1. What is the Court’s position on the exercise of its discretion to decline UNGA requests for advisory opinions?
2. Has the Court declined a UNGA or UN Body request for advisory opinion?
3. Should the Court exercise its discretion on the issue in question?

WHETHER THE COURT MAY GIVE AN ADVISORY OPINION EVEN IN CASES OF POLITICAL IMPORTANCE

1. What is the Court’s position on giving advisory opinions on politically charged cases?
2. Should the ICJ provide a substantive answer to the UNGA’s request?

WHETHER THERE EXISTS DIFFERENTIATED OBLIGATIONS FOR STATES TO ADDRESS THE GLOBAL CLIMATE CRISIS UNDER THE UNFCCC AND IN ACCORDANCE WITH SDGS

1. What is the common but differentiated responsibility of States under international law?
2. Is there an obligation for developed States to take the initiative in combating the climate crisis?
3. What is the specific obligation for developed States in accordance with the SDGs?
Whether the Court should impose immediate and binding legal obligations and duties on states

1. Is there a broad international consensus on the problem of the Global Climate Crisis?
2. Is it within the role of the Court to impose specific binding regulation on States?
3. Is the Court able to enforce the implementation of specific and immediate legal obligations on States?
4. Does the benefits of legal precedent outweigh potential litigation costs for States?
5. Under Customary International Law, can the Present Generation be considered as a Legal Entity and as such possess Legal Rights?
6. Under Customary International Law, can Future Generations be considered as a Legal Entity and as such possess Legal Rights?
7. Are Environmental Rights subject to legal protection under Domestic Laws?
8. Are Environmental Rights subject to legal protection in the context of Customary International Law?
9. Can Persons base Litigations on Environmental Rights?

Whether the Court should provide a general legal guideline for the benefit of States and interstate negotiation
(f) Summary of Arguments

The OECD submits that this Court has the power to issue an advisory opinion under Art. 65(1) of the ICJ Statute, as the UNGA request is a request for an advisory opinion on a “legal question,” despite the political contentiousness involved in the question of the responsibility of States to address the global climate crisis. Precedents provide that although it is in the discretion of this Court to issue an advisory opinion, it should not use this discretionary power to decline a request for an advisory opinion, since this part of the Court’s judicial role goes to its very participation in the United Nations.

However, under customary international law, there is no evidence to support the existence of a specific legal obligation of States to respect the Environmental Rights of Present or Future Generations. There is no customary international law on specific legal obligations of States toward Generations as a Legal Entity, nor is there customary international law conferring public environmental rights as concrete rights on which individuals can base their litigations. Rather, State practice and precedents of International Courts show that so long as there is explicit statutory or treaty language recognizing a public environmental right as a legal basis for litigation, it is usual to confer such rights only when an action of a State injures him or her privately, on the premise that the requirements under tort law are met.

In conclusion, although the OECD recognizes that this Court has the jurisdiction to issue an advisory opinion, the ICJ, as a matter of appropriate judicial role and prudence, should refrain from imposing immediate and specific obligations on States, due to the non-existence of customary international law that supports the existence of a specific legal obligation of States to respect the Environmental Rights of Present or Future Generations, and the living political
contentiousness as well. The OECD submits that the ICJ should provide a general legal framework as guidance for the international community in addressing the Global Climate Crisis.
(g) Jurisdiction of the Court

Art. 96 (a) states that the General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question. Art. 65(1) of the ICJ Statute provides that “[t]he Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such requests.”
(h) Arguments

I. The OECD submits that it is in the power of the Court to issue an advisory opinion under Art. 65(1) of the ICJ Statute, in the event that the GA requests it under Art. 96(a) of the UN Charter.

A. Article 96(a) of the UN Charter provides that “The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.” The International Court of Justice is the principal judicial organ of the United Nations. The Court, accordingly, performs two roles: in contentious cases, to judge disputes between Member States; in advisory ones, to give legal counsel to the UNGA or to the relevant UN body. Unlike judgments, advisory opinions are non-binding; but, they carry “great legal weight and moral authority.”

In this case the UNGA has requested the ICJ to give an advisory opinion on the question, “What is the responsibility under international law of States to address the global climate crisis for the benefit of present and future generations of humankind?” As long as this question can be regarded as a legal one, the UNGA may request legal counsel from the ICJ on matters it deems significant.

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5 UN Charter Art. 92.

6 C. G. Weeramantrty, Good Faith Negotiations Leading to the Total Elimination of Nuclear Weapons: Request for an Advisory Opinion from the International Court of Justice. (IALANA, 2009), 5.


8 General Assembly resolution A/RES/70/xxx, Request for an advisory opinion of the International Court of Justice on the responsibility under international law of States to address the global climate crisis for the benefit of present and future generations of humankind, A/RES/70/xxx (15 January 2016), available from undocs.org/A/RES/70/xxx.
B. Art. 65(1) of the ICJ Statute states that “[t]he Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such requests.”

In accordance with Art. 96(a) of the UN Charter, the ICJ Statute also provides that it is within the power of the Court to provide an advisory opinion on legal issues on which the UNGA, or any other UN body that is authorized by the UN Charter to make such a request, seeks legal guidance. In doing so the ICJ fulfills its obligation as the judicial branch of the UN to provide legal guidance to the UN and its Member States.

In some cases, the ICJ may decline to fulfill such a request on the basis of inadmissibility, for example, where it dismissed a WHO request for an advisory opinion on the Legality of the Use of Nuclear Weapons in Armed Conflict. UN Bodies other than the GA may only request advisory opinions from the Court “on legal questions arising within the scope of their activities”. The Court held that the legality of Nuclear Weapons was not within the scope of WHO activities, nor did it influence its activities in any way.

However, the request in question being one of the UNGA and not of a UN body, the scope of its questions is limited only by the range UN activities; determining the legal responsibility of States to address Climate issues is well within this range.

C. The request for an advisory opinion on the question of the responsibility under international law of States to address the global climate crisis for the benefit of present and future generations

\[9\] Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 82-84.

\[10\] UN Charter Art. 96(b)
of humankind, is clearly a request for an opinion on a “legal question,” since it is a question on the content, if any, of international responsibility of a State under international law.

As we will submit further, the question posed is both political and exceptionally vague in nature, which makes specific findings on legal obligations and remedies unsuitable, as a practical matter and in keeping with the Court's judicial role.

Notwithstanding these uncertainties, the request clearly constitutes a “legal question”, concerned with the responsibility of States under international law. The formulation of the UNGA request itself already concerns a legal matter: whether there exists a responsibility under international law, and if it does exist, what the responsibility of States is. The question already having touched on a legal matter, there may be no more uncertainty on whether the issue is a legal one or not.

Although the OECD pleads that the ICJ give a more sweeping definition, rather than a narrow one, of aforementioned responsibility, it is within the scope defined by both the UN Charter and the ICJ Statute for the ICJ to give an advisory opinion on this matter. The ICJ, by helping to formulate a coherent legal framework for international responsibility in matters concerning the Global Climate Crisis and Sustainable Development, will be able to provide a beacon for the international community and its member states to follow in setting their respective domestic policies and problem-solving strategies.

II. The OECD submits that although it is in the discretion of the Court to decline to issue an advisory opinion, the Court should comply with the UNGA’s request for an advisory opinion.
A. The ICJ itself, while giving emphasis to its ability to use discretion in giving advisory opinion, has taken the position that the ICJ should not, in principle, decline UNGA requests for legal counsel unless it has a compelling reason to do so.

Settled jurisprudence of this Court emphasizes its discretion: "Article 65 of the Statute is permissive. It gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request."\(^\text{11}\) It may also be noted that the ICJ, like its predecessor the PCIJ, “cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court”\(^\text{12}\), and therefore must decline to comment on matters that are not of a legal nature\(^\text{13}\).

The Court, however, has also taken the position that, in principle, it should not use this discretionary power to decline a request for an advisory opinion, since this part of its judicial role goes to its very participation in the United Nations\(^\text{14}\). Furthermore, the Court has specified that only when “compelling reasons” exist should the Court decline to give an opinion\(^\text{15}\). There have indeed been cases where the Court has declined a UN Body request for an advisory opinion;


\(^{12}\) P.C.I.J., Series B, No. 5, p. 29


\(^{14}\) Interpretation of Peace Treaties, 71.

However, the Court has never refused to deliver an opinion in the absence of specific and compelling reasons to abstain from rendering an opinion\textsuperscript{16}. No such reasons exist in this case.

B. Therefore, the ICJ should, in the OECD’s view, provide a substantive answer regarding the legal responsibilities of States to address the Global Climate Crisis.

The ICJ has unfailingly responded to the UNGA’s, and the relevant Bodies’, requests for advisory opinions with substantive answers, providing the necessary legal guidance in matters of international significance.

\textbf{III. The OECD submits that the political nature of the question does not exclude the jurisdiction or admissibility of the case.}

A. The Court has stated before that even in cases of political importance, or perhaps even more so in these cases, there is a need for a judicial authority to state its opinion on the matter in question.

The Court affirmed this position in 1980, maintaining that “in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an Advisory Opinion from the Court as to the legal principles applicable with respect to the matter under debate.”\textsuperscript{17} Again, in the \textit{Kosovo Advisory Opinion}, the Court confirmed that “whatever its political aspects, it cannot refuse to respond to the legal elements of a question which invites it to discharge an essentially judicial task, namely, an assessment of an act by reference to international law.”


\textsuperscript{17} \textit{Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt}, Advisory Opinion, 1980 I.C.J. 73.
B. The OECD submits that the political nature of this problem is unrelated to determining whether the Court has jurisdiction over this issue.

The Court, in its jurisprudence, confirmed that “in determining the jurisdictional issue of whether it is confronted with a legal question, it is not concerned with the political nature of the motives which may have inspired the request or the political implications which its opinion might have”.

C. The OECD submits that political concerns may be addressed together with the merits issues.

The OECD submits that since the issue is clearly a legal one, as we have argued, and neither is the Court constrained by political questions in determining jurisdiction, there is no further question on whether the ICJ has the prerogative to give an advisory opinion on this question.

However, the OECD does not deny the complexity of the issue at hand: the Global Climate Crisis is and has been a problem with many entangled State interests, and discussion in the international sphere on addressing this problem is often skewed in favor of certain parties. The OECD submits that instead of ignoring the political aspect of the problem, the ICJ should address it from a merits perspective.

IV. The OECD submits that States have an obligation under the UNFCCC, SDGs, and other treaty commitments, to address and combat the global climate crisis.

A. States have common but differentiated responsibilities

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Article 3(1) of the UNFCCC stipulates that States parties to the convention should protect the climate “on the basis of equity and in accordance with their common but differentiated responsibility and respective capabilities.”

While all Member States of the UNFCCC are obligated, in their own way, to contribute to the collective effort in combating the global climate crisis, there is a difference on how each State shall participate in this effort. In making this distinction, the UNFCCC provides the principle of equity, along with the concept of “common but differentiated responsibilities”\(^\text{19}\).

Common but differentiated responsibilities (CDR), under international law, is becoming a widely accepted concept, especially in the field of international environmental law.\(^\text{20}\) “Common” refers, of course, to the nature of the Global Climate Crisis in that its effect and repercussions inevitably apply to all States. States have a common responsibility to cooperate “in a spirit of global partnership”\(^\text{21}\) in order to address the climate crisis.

“Differentiated”, however, is more complex, and begs a more elaborate definition. Although the term CDR is a recent one, the concept of differentiated responsibilities that take into account the different situation of each State has existed for a long time, for example the Treaty of Versailles and the General Agreement on Tariff and Trade (GATT)\(^\text{22}\). The concept was gradually incorporated into environmental law through the Stockholm Declaration and many subsequent

\(^{19}\) Article 3, paragraph 1, United Nations Framework Convention on Climate Change (UNFCCC).


\(^{22}\) Stone 278.
Multilateral environment agreements (MEAs), until theUNFCCC officially used the phrasing of CDR.

Differentiation may occur on the basis of many different axes, such as need, culpability, and technological capabilities. There exists no consensus on what the ideal model of CDR is, under international law; rather, the rule has been uniform application rather than CDR, which is an exceptional provision. Nonetheless, the UNFCCC puts a differentiated burden on States, which is what we must rely on and examine further to define the obligation.

B. Developed Countries have an obligation under the principle of equity to take the lead in combating climate change.

In differentiating each State’s responsibility, the UNFCCC provides a lead: that “the developed country Parties should take the lead in combating climate change and the adverse effects thereof.”

The OECD is comprised of nations that have reached a certain level of economic development. They may be reasonably classified as developed nations. The OECD submits that its member States accordingly have a responsibility to lead the cooperation of States in addressing the Global Climate Crisis.

The Preamble to the UNFCCC additionally notes that developed countries have contributed the largest share of Global emissions. However, this is outdated information, and more recent research shows that more than half of the world’s greenhouse emissions were issued by developing countries, and that that figure is estimated to grow up to 70 percent.

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23 Stone 279.
Therefore, the OEDC notes that the responsibility of the OECD to lead the Global Climate Crisis is not based on any measure of culpability, but rather of capability. Furthermore, Art. 3(5) of the UNFCCC encourages cooperation of States that would lead to economic development, thus enabling States to address Climate problems in a more effective manner. The OECD recognizes that an environment that supports economic development is in line with its goals.

C. SDGs create obligations for States to immediately and urgently address climate change and its effects

SDGs are a UN-spearheaded development agenda, succeeding the Millennium Development Goals (MDGs). It is based on UNGA Resolution A/RES/66/288—also known as “The Future We Want”. Among the 17 goals, many have an environmental focus, with consideration of intergenerational equity as well as intragenerational equity. For example, Goal 13 urges states to “take urgent action” to address the Global Climate Crisis, and Goal 14 promotes conservation of the Oceans’ resources for sustainable development.

Since SDGs are widely recognized and committed to by the global community, it has a measure of binding force in the sphere of international law. As such, States have a legal obligation to comply with these obligations in light of both vertical and horizontal equity.

V. The OECD submits that the ICJ, as a matter of appropriate judicial role and prudence, should refrain from imposing immediate and specific obligations on States.

A. The Global Climate Crisis and Sustainable Development is a controversial and complex issue that must be approached carefully.

1. The OECD believes that policy-based tools based on international consensus encourage creative and peer-monitored problem-solving strategies, instead of legally binding methods.
We have consistently supported a focus on public policy instead of the resort to legally binding tools, and progress is instead promoted through mechanisms that encourage peer learning and accountability. The OECD recognizes there is a grey area between legally binding and non-binding strategies for global problem-solving; some agreements, in their genesis meant to be binding, nevertheless lose their authority through non-compliance; on the other hand, many non-binding resolutions are extremely powerful in their enforcement.

B. Cost-Benefit Analysis weighing the benefits of concrete legal precedent against the costs of potential litigation against States implies that recognizing a legally binding responsibility under international law will incur more costs than benefits.

Nearly everyone agrees that a treaty system would be better than litigation, allowing for the development of a system for the most efficient reduction of greenhouse gases while at the same time taking into account regional differences in economic development. Alternatively, due to the unwillingness, even resistance, of governments to negotiate treaty-based solutions, litigations, with the backing of an international legal precedent, may seem at first glance an attractive solution. Individuals could then litigate against States in domestic courts or international tribunals for their failure to regulate greenhouse gas emissions.

Despite these possibilities, this would not be a functional solution to the Climate problem. Since the enforcement of international law depends largely on the extent of voluntary compliance of


26 Posner, 2.
States, non-compliance and free-riding would likely create significant costs that would outweigh any real or perceived benefits of legal judgments rendered against States.

C. A blanket statement imposing wholesale legal obligations on States may be difficult to enforce; Consequently the ICJ may risk losing legal authority and credibility

The Court, in the Nuclear Weapons Advisory Opinion, forcefully stated that “There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control”. In the Wall Advisory Opinion, The Court issued an advisory opinion instead of a Judgment, in the absence of Israel’s consent and the non-recognition of Palestine as a State in the International Theater. However, despite the Court’s sometimes forceful words, in international law enforcement largely depends on the voluntary compliance of States. In the Wall Advisory Opinion, the US and Israel publicly avowed not to comply with the ruling.

An Advisory Opinion of the International Court of Justice, though not strictly having a res judicata effect, remains “an authoritative statement of the law” and carries weight as a precedent. However, this authority depends on the ability of the Court to maintain its neutrality as the judicial arm of the UN. If the ICJ cannot maintain that neutrality and instead begins to

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27 Nuclear Weapons Advisory Opinion, 267.


issue opinions as a way of advocating for certain agendas that the Court itself has no way to enforce, there will be a slow decline in the credibility of their judgments and opinions.

D. There is no customary international law specifically addressing Generations as a Legal Entity

1. Regarding the Rights of the Present Generation

What is a generation? The dictionary definition may provide a tentative answer: “All of the people born and living at about the same time, regarded collectively\textsuperscript{32}”. However, a generation is not a term defined beyond its colloquial usage, which has multiple meanings; poorly defined even in the sociological sphere\textsuperscript{33}, a legal definition of generation is nonexistent. A generation, in the context of contemporary international law, is not a legal entity and thus does not have rights or duties\textsuperscript{34}. A generation may be considered to have collective rights and duties in many social contexts, but caution must be advised regarding a legal framework that emphasizes the collective benefit as opposed to individual rights.

2. Regarding the Rights of Future Generations

It is difficult to find specific legal authorities acknowledging future generations as a legal entity, even under domestic law. While future generations are envisaged in multiple constitutions as an entity of rights, legislations that specify obligations and rights do not recognize the acquisition of legal capacity of future generations or even future individuals. Indeed, it is settled practice of


\textsuperscript{34} Saki Bailey, Gilda Farrell, and Ugo Mattei, Protecting future generations through commons, Council of Europe, 2014.
States to follow the principle that legal capacity attaches exclusively to persons, and is acquired at birth\textsuperscript{35}.

As in domestic practice, International Law does not recognize future generations as being a legal entity. It may be worth noting that, if future generations were found to have protectible legal rights, it would be very difficult (and from an international consensus perspective, perhaps impossible) to define the scope of those rights and the extent to which they restrict the actions of present day people and states. This could go far beyond climate change law and even international law.

Even the most progressive comments on future generations as a subject of international law admit that, despite the possibility that they may well acquire such recognition in the future, that currently “future generations cannot presently be \textit{stricto sensu} a subject of international law.”\textsuperscript{36}

E. No customary international law exists to confer environmental rights as concrete and specific rights on which individuals can base their litigations.

Though many national and regional constitutions, in addition to the multinational treaty frameworks, confirm the existence of an environment right and obligation, environmental obligations, in multiple States, are regarded as abstract constitutional obligations that do not impose concrete responsibilities on those States toward individual litigations.

Environmental rights are also regarded as abstract ones that individuals can base their litigation on only under limited conditions. While it is true that recently the People’s Republic of China

\textsuperscript{35} Guido Alpa, Vincenzo Zeno-Zencovich, Italian Private Law, 30; Art. 3 of Japan Civil Law; Art. 3 of South Korean Civil Law.

\textsuperscript{36} Emmanuel Agius, Salvino Busuttil, Future Generations and International Law, 45.
amended their Civil Procedure Law in 2012 to include Environmental Civil Litigation, the provision is evaluated to be unclear\textsuperscript{37}.

While common law recognizes that individuals could also sue corporations, for example, for emitting greenhouse gases under existing tort law if causation and harm can be shown\textsuperscript{38}, proving causation is so difficult that the request for relief is likely to be denied. Eric A. Posner, in his assessment of the plaintiff’s argumentation in the EPA case, that major emitters of greenhouse gases have violated rights to life and health by contributing to environmental and health injuries associated with global warming, stated that if the American courts adopt that submission in Alien Tort Statute litigation, it would be a mistake, since, first of all, causation problems are hard to be resolved, and secondly and more importantly, such litigation cannot address a global problem\textsuperscript{39}.

In short, public environmental rights are usually not construed as rights that individuals can base their litigation on; one can request relief only when an action infringes him or her privately, on the premise that the requirements under tort law are met, as far as there is no explicit provision recognizing the public environmental right as a legal basis for litigation.

International Courts have also been hesitant to recognize the merits of public interest litigation concerning environmental rights. In \textit{Athanassoglou v Switzerland} and \textit{Balmer-Schafroth v Switzerland} concerning government licences to operate Swiss nuclear power plants, where the

\footnotesize{\textsuperscript{37} It does not specify which organs and tissues in compliance with the requirements of the provision, and there is no explicit provisions on environmental public interest litigation in civil procedure. For more information, see Zhifang Liu, “Analysis of Environmental Civil Litigation System,” \textit{SSRG International Journal of Humanities and Social Science}. volume 2 Issue4 July to Aug 2015.}

\footnotesize{\textsuperscript{38} David A. Grossman, “Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation,” \textit{Colum. J. Envtl. L.} 1 (2003); the requirements are similar under civil law systems, for example, Section 823 of the German Civil Code and Article 709 of the Japan Civil Code.}

applicants argued the application of Article 6 § 1 of the ECHR, the ECtHR held that it is essential for the parties to show that they are personally exposed to a danger that is “not only serious but also specific and, above all, imminent”. In stating that they were alleging not so much a specific and imminent danger in their personal regard as a general danger in relation to all nuclear power plants and relying *inter alia* on mere environmental grounds, the applicants failed to show the necessary link between the operating conditions of the power plant and the right to protection of their physical integrity. Comments on theses cases provide: “[c]onsidering the severe dangers presented to the environment and the population by nuclear power plants not meeting the safety standards, the judgment of the Court shows that it leaves no room for litigation which is merely in the public interest as long as the victims are not yet determinable”. In *Kyrtatos v Greece* where the applicants challenged an illegal act of urban planning and its consequences, which destroyed a swamp protected under the Greek Constitution, the ECHR found that the applicants were not able to show that the damage to the birds and other protected species needing the swamp as their habitat was of such a nature as to trigger a violation of Convention rights. The Court expressly did not accept that the interference with the conditions of animal life “constituted an attack on the private or family life of the applicants”.

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41 *Athanassoglou v Switzerland* (2001) 31 EHRR 13, para. 52.

42 *Balmer-Schafroth*, para. 40


VI. The OECD submits that the ICJ should provide a general legal framework as guidance for the international community in addressing the Global Climate Crisis

A. The ICJ should provide a general guideline to facilitate interstate negotiations for addressing and solving the Global Climate Crisis

While in the Nuclear case this Court rejected the argument of the US that “[u]nlike other requests for advisory opinions, the present request does not present a dispute or situation upon which specific legal advice can usefully be given,” the stance should apply in the present case on global environmental crisis, since the actor causing the environmental crisis, unlike the use or threat of nuclear weapons, is much more difficult to identify, and causation problems plague both the assessment of harms and the determination of efficient solutions. The request presents a very general and vague question that would necessarily involve complex legal, technical, political and practical considerations.

In addition to this problem, law, unlike policy, is not very well-equipped to devise complex economic and social reform systems for bringing about "low carbon, green growth," "sustainable development," or any other paradigm that can be an effective response to climate change. It is not clear what compelled action by states can mitigate the harms, even if the ICJ were able to compel the States to take immediate action.

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(i) Submissions

The OECD submits that the ICJ, as the principal judicial arm of the United Nations, should help the UN and its Member States in addressing the current Global Climate Crisis by providing legal guidance, as per the request of the General Assembly.

However the OECD submits that since there is no concrete legal concept of a generation, and therefore no concrete rights to confer upon them, consequently there exists no corresponding legal obligation on States. Notwithstanding this lack of concrete legal standing, the ICJ may help provide a legal basis for States in the fight against climate change.

The OECD submits that instead of immediate and binding legal resolutions, which are unlikely to attract much compliance from States, the ICJ should declare that States have a general obligation in good faith to work together in interstate cooperation to inhibit the emission of greenhouse gases and protect the environment for present and future generations of humanity, and should take steps to implement policies and laws to combat climate change within their respective domestic legislations as well.