

22 August 2026

Volume 15, Issue 2

“In a general manner”: Reflections on the Climate Change Advisory Opinion a year later

Dr Matina Papadaki

Lecturer in International Law, University of Glasgow, School of Law
matina.papadaki@glasgow.ac.uk

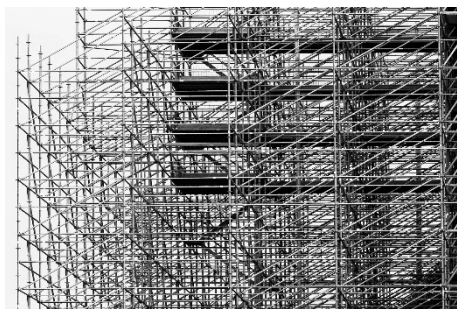


Image credit: The image is provided by a Pixabay contributor and is used in accordance with the Pixabay Content License.(www.pixabay.com).

Just over a year ago the International Court of Justice (ICJ) issued its *Climate Change* advisory opinion ('*Climate Change* AO' or 'AO'). Since then, there has been significant practice relevant to the Opinion, and a great deal of commentary. While much of this extensive commentary has been both excellent and wide-ranging, this short reflection aims to bring together some lesser-explored aspects concerning the interpretation of the question asked of the Court, and the scope of the answers it provided. In doing so, the main aim of this contribution is to serve as a jumping-off point for further reflection connecting the level of analysis in the AO and its impact on scaffolding and substantiating normative claims.

In particular, I would like to make two broad and impressionistic observations. The first (A) will focus on how the Court's interpretation of the questions asked of it determined the level of analysis that the Court engaged in this particular opinion. The second (B) relates to how, despite its broad interpretation of the questions asked of it, the Court nevertheless managed to deliver an advisory opinion that provides legal scaffolding for the interpretation and development of international law relating to climate change in the future. This is illustrated by two categories of examples: I) intra-AO and II) extra-AO. The first will talk about the ICJ's findings relating to the sources of law, and standing, while the second will look into the "uptake" and effect of the AO in the framing of two new topics before the International Law Commission (ILC).

A. Interpretation of the questions: Avoiding the Scylla of false hopes and the Charybdis of theoretical analysis

The framing of the issue and thus the kind of answers that the Court gives to any AO request is tightly bound up with the interpretation and/or reformulation of the question(s) put to it, according to its established jurisprudence.¹ Here I want to showcase how this uncontentious observation played out in the course of these particular advisory proceedings and how it framed the final result, dictating the level and objects of analysis.

The Court in this specific AO found that it did not need to *reformulate* the questions asked of it. However, due to the fact divergent interpretations of their scope had emerged during the proceedings, there was a need to *interpret* the questions.²

In order to interpret the scope of the questions, the Court had to "frame" the material, territorial, and temporal scope of its inquiry.³ As such, it is important to highlight how the way in which the Court interpreted the questions asked of it was determinative of the eventual analysis provided in the AO. By this I mean to say that the Court's broad interpretation of the material, territorial and temporal scope subtly determined the scope of the Court's inquiry, moving it away from the responsibility of particular categories of states for climate change, to more general and conceptual dicta. To recall, the questions asked of the Court were:

- 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?"

With regard to the material scope of these questions, the Court offered a broad interpretation that included the examination of both acts and omissions of state and non-state actors under the jurisdiction or effective control of states that result in adverse effects to the climate system and the environment by anthropogenic greenhouse gases (GHG). The Court highlighted that this broad interpretation was “apt” for a problem like climate change due to its “magnitude” and it being a “common concern of mankind” causing an “unprecedented challenge of civilizational proportions”.⁴ Exhibiting the same broad approach, the territorial scope was identified as being unlimited territorially.

The determination of the temporal scope was interpreted in the same manner. The Court did not determine a particular temporal scope from the outset of the opinion, because it said that doing so would be connected to *concreto* assessments of state responsibility, whereas the Court noted that it had been tasked with identifying the “legal obligations of *all States* under question (a) and identif[ying] the relevant legal régime applicable to legal consequences arising under those legal obligations in reply to question (b).”⁵

The Court then analysed the consequences for states that, in the words of question b, have harmed the climate system. The Court found that “the application of the rules on State responsibility under customary international law does not differ depending on the category or status of an injured State. Thus, ‘specially affected’ States or States that are ‘particularly vulnerable’ are in principle entitled to the same remedies as other injured State”.⁶ The ICJ did not deny that such states face a higher level of threats due to climate change, in particular with respect to maritime entitlements and existential threats to States due to sea level rise. Rather, it noted that this is an issue of primary rules of international law, and in particular “these matters do not fall within the scope of question (b)...they are governed by the relevant primary rules of international law”.⁷

However, it is questionable whether the Court’s move in interpreting the material breadth of the question follows the wording and intent of question asked by the UNGA. Judge Yusuf takes up this point in his Separate Opinion, arguing that the Court was not just interpreting the scope of the questions asked of it, but in fact reformulating them.⁸ This was due to the fact the UNGA had indeed intended to ask specifically about the results of breaches of obligations by certain states causing harm to other, more vulnerable and least developed states. This claim is supported by the question as drafted but also by the origin of the request and associated concerns.⁹

At the same time, for the purposes of this enquiry, it is instructive to mention the framing and addressees of question b, where the ICJ makes a significant move by identifying five specific units of meaning within the UNGA’s question and analysing them as it “considers that the meaning and scope of the question **rests** on the(ir) interpretation”.¹⁰ These are the following terms, in bold, and numbered in order of reference by the Court:

(b) What are **the legal consequences(2) under these obligations(1) for States(3)** 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”(4)** 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?”(5)¹¹

The above presentation of the choices aims to show which units of meaning were **not** considered as ones that the scope of the decision rests on. One example is that of future generations, where the Court refers to “legal consequences with respect to peoples and individuals”, without mentioning future generations as one of the key terms to interpret.

The main takeaway from this framing exercise is that it set the tone for the rest of the Opinion. The Court went on to make broad and far-reaching pronouncements, mapping extant obligations in a broad manner, but did not zoom in to examine specific groups of states, or go beyond its interstate function to look at the legal consequences of violations of human rights. It also prejudices the depth into which the Court went with respect to the non-highlighted terms.

The Court’s approach to interpretation of the questions asked of it was criticised as one of “extreme formalism”, for turning the opinion into a “scholarly dissertation”¹² as well as for not being clear enough about the difficulties of litigating climate change related disputes, thus potentially giving “false hopes”.¹³

However, the Court seems to have, for the most part, avoided the Scylla of ‘merely’ being academic as well as the Charybdis of overprescribing. The important thing to note here is that the Court clarified important issues regarding the sources of obligations related to climate change as well as potential issues of state responsibility. Further examples of the useful contribution of the Opinion relate to its scaffolding for the development of international law, to which we now turn.

B. I (a) Regardless of generality: Scaffolding for the development of international law

Substantively, the Court clarified the sources of law applicable to the question that are “most directly relevant”,¹⁴ again with a general and not exhaustive focus. The Court in this analysis took the important step of clarifying relationships between the sources of law —with various degrees of specificity and utility. Most importantly, it underscored the unity and non-conflictual relationship between general law and climate change law, rejecting the claims of *lex specialis* and the existence of unconnected legal islands. The Court also made multiple references to the advisory opinions and judgments by the International Tribunal for the Law of the Sea, as well as the Inter-American Court of Human Rights, as well as the most relevant European Court of Human Rights cases, to affirm and supplement its findings.¹⁵

This is very important not only because it evidences efforts from the Court to guarantee the unity (both formal and material) of international law, but also because the Court affirmed the existence of obligations and related consequences for all states.

Apart from *lex specialis*, the Court specifically dealt with the relationship between treaties and customary law, affirming their parallel and complementary existence.¹⁶ Its reading of the sources allowed the Court to close the protective gap between parties and non-parties to climate change agreements. Additionally, and conversely, the Opinion when read as a whole affirmed that treaty and customary obligations run in parallel and that treaty obligations do not exhaust the ambit of customary obligations. This means that because customary law obligations are broader, compliance with treaty law does not *ipso facto* mean compliance with relevant customary international law.¹⁷ This in turns results in the creation of a tight yet wide net of mutually reinforcing obligations by the Court.

I (b) Vehicles, rarely parked: Erga omnes obligations

Brownlie famously stated that *jus cogens*, though part of *lex lata*, was a vehicle that rarely left the garage.¹⁸ Equally, writing in 1990, with respect to *erga omnes* obligations, Hugh Thirlway had described them as possibly an “empty gesture” which, genocide aside, is “of purely theoretical interest” since the “a right of protection conferred by a multilateral treaty derives its validity from the treaty, not from a principle that ‘in view of the importance of the rights involved’ all States have ‘a legal interest in their protection’”.¹⁹

The situation has changed markedly and cases brought on the basis of *erga omnes partes* obligations have become common for the Court (not only in cases involving the Genocide Convention, but also e.g. the Convention against Torture in the case brought by Canada and Netherlands v. Syria in 2023²⁰) and are clearly linked to the content and not the source of the obligation.

In the case of the *Climate Change* AO, the Court clarified that due to the nature of climate change, it considers that “all States have a common interest in the protection of global environmental commons like the atmosphere and the high seas” and thus related customary obligations and treaty obligations create obligations *erga omnes* and *erga omnes partes* respectively.²¹ This means that, provided there is consent through valid and reciprocal titles of jurisdiction, states can bring a case against other states. The Court also made clear that non-injured states can invoke the responsibility of other states, but not seek reparations.²²

The affirmation of *erga omnes* (*partes*) obligations related to climate change might not be a novelty but it is an important signal that future litigation can at least be attempted and injury need not be proved.

II. ILC uptake

Another measure of the AO’s scaffolding success is its uptake in the current work of the International Law Commission (ILC).

In particular, looking at the newly introduced topics of reparations²³ and due diligence,²⁴ the ICJ Climate AO has frequently been referred to not only to confirm but also to guide findings by the Special Rapporteurs.

The references to the AO in Paparinskis' report were also prompted by several States who had mentioned the relevance of the topic with respect to climate change.²⁵ The AO was used, inter alia, to confirm the material scope of the ILC's work by referring to the distinction between harm arising from internationally wrongful and non-wrongful acts,²⁶ as well as to affirm that reparations are not owed only to States but can also be vindicated by private persons, depending on the international primary rule violated.²⁷

One notable passage related to the plurality of injured and responsible actors:

80. Finally, in the advisory opinion on Obligations of States in respect of Climate Change, the Court addressed the plurality of injured and responsible actors and causality in the climate change context, and *appeared* to suggest, with a *nod* to the discussion of global sums and equitable considerations in the contentious cases summarized above, that these tools were particularly appropriate for this context.²⁸

Here, as is clear by the careful and tentative nature of the SR's conclusion, the level of generality of the AO findings was capable of bearing normative fruit.

In the context of due diligence important reliance on the ICJ (and ITLOS) advisory opinions was had because both AOs as well as participant's pleadings shed light in the concept.²⁹ In concluding on this point, however, the Report does not directly cite the AO but relies on academic commentary:

175. ... Due diligence, as interpreted by the International Court of Justice, does not become "all things to all people", an inherently variable and flexible concept, highly contextual and fact-specific, which could end up diluting rather than reinforcing States' compliance with their international obligations.³⁰ The advisory opinions have given clarity as to the factors that should be taken into account in assessing whether the required due diligence has been met. Recourse to these factors will assist in making the required objective determination of compliance with a due diligence obligation. It has been suggested that the identification and categorization of these factors "constitutes a significant hardening and concretization of international climate law and circumscribes the conduct to be exercised in the compliance with international legal obligations."³¹

In doing so the passage above speaks to the difficulty identified in this post regarding the operability of judicial findings in connection to their generality, but probably, for the moment, fails to clearly establish or point to the "factors that should be taken into account".

These are not the only issues that the ICJ Climate AO has influenced. The AO has in fact featured in the ongoing work of all topics of the ILC's current programme. In particular, the AO was also taken up in the finalised work of the ILC regarding general principles of law in its recently concluded session,³² at crucial parts of the commentary, most notably in Draft Conclusion 2 which provides that general principles of law must be recognised by the community of nations. In doing so, the commentary uses the AO as part of the proxies of community recognition their confirmation by judicial decisions,³³ as well as pleadings of States and IGOs.³⁴ In so far as the AO itself is concerned, the commentary points to sustainable development (para 147 of the AO) and "the generally recognised principle" of harmonious

interpretation drawn from, in a sort of circular manner, the ILC's own work on the Fragmentation of international law (para 165 of the AO). The AO also features, in Draft Conclusion 7 regarding principles formed within the international legal system,³⁵ in particular with respect to common but differentiated responsibilities and respective capabilities (CBDRC-RC) and intergenerational equity,³⁶ as specific manifestations of equity with respect to the environment. The commentary notes:

There are also subject-specific general principles of law formed within the international legal system that may be found, for example, in international environmental law. Some of them have been associated with the principle of equity as referred to in the Obligations of States in respect of Climate Change Advisory Opinion and regulate the international climate change regime.... Similarly, the principle of intergenerational equity has been acknowledged by the International Court of Justice as a manifestation of equity, identified by reference to article 3 of the United Nations Framework Convention on Climate Change, the preamble to the Paris Agreement and the Court's previous jurisprudence in the Legality of the Threat or Use of Nuclear Weapons Advisory Opinion.³⁷

The above assertion is not entirely uncomplicated; it does not *necessarily* follow from the ICJ's treatment of the CBDRC-RC and intergenerational equity that these are principles formed within the international system, as in the AO itself, they are anchored in the principle of equity "in the general sense",³⁸ and supported through the ICJ's own case law.³⁹

Additionally, the AO has also been referred to in the ILC's work on subsidiary means,⁴⁰ with regards to Draft Conclusion 12 concerning resolutions of international organisations, as other means generally used for the determination of international law beyond article 38 (1)(d) ICJ Statute.⁴¹ In this instance, the commentary refers to the AO and the utilisation by the ICJ of the United Nations General Assembly Resolution 76/300 of 28 July 2022 on the right to a clean and healthy environment as "**evidence of acceptance** of this right"⁴² and not as a constituent element of customary international law as is most commonly viewed.⁴³ As the commentary puts it "the resolution contributed to the Court's reasoning rather than serving as the source of the right",⁴⁴ thus providing support to the role of resolutions as a law determining agency.

In this context, the ILC's swift utilisation of the Climate AO shows its normative potential despite, or more likely because of, its level of specificity: general in its addressees and content, but malleable enough to be used to substantiate and shore up codification or progressive development efforts.

C. Conclusion: Delphic Dicta?

The framing and level of analysis of the Court is neither neutral in design (as shown by the fact the actors behind the drafting of the AO question are also adamant about its carefully calculated purpose⁴⁵) nor outcomes. It is notable that both Judges Tomka and Nolte refer to the Advisory Opinion as handed down by the ancient Greek oracle at Delphi. Tomka, who devotes his Declaration to the Court's finding on para 363 laments the pronouncement on the continuity of statehood without analysis. He opines that '[t]he reader is left to ponder [the Court's] Delphic pronouncement, unaided by any reasoning whatsoever... Oracular pronouncements may, by virtue of their conciseness, have helped the Court reach a

unanimous Opinion, but this comes at a cost. The authority of the Court is enhanced not by mystique but by reasoned analysis — particularly in matters that may reshape the law's very foundations.' Nolte for his part, speaks more about future litigation, stating that the Opinion '[a]s it is written [...] sometimes brings to mind the Delphic Oracle' and he argues that it remains to be seen whether it will be falsely taken as encouraging litigation to compensate for lack of political will or whether it will be deemed as complementary to political initiatives.⁴⁶

The issue is not however one of prophecy, and the Opinion is neither deciding nor prejudging the future. In this case, the role of the Court can be seen as striving to provide scaffolding for a future where the legal avenues for combatting climate change are still open, where occasional blurriness, laconic reasoning, or lack of complete clarity can be seen as fecund ground for development of international law on a case-by-case basis.

In conclusion, the Advisory Opinion as framed gives at least “modest hope” in the words of Judge Tladi⁴⁷ that states and people have international legal tools at their disposal to fight this urgent fight. One year on we see that opinion is legally operational and not only by being taken up in domestic practice, specific projects, and human rights,⁴⁸ but also in the context of codification and progressive development of international law.

¹ *Obligations of States in Respect of Climate Change*, Advisory Opinion, 25 July 2025, ('*Climate Change AO*') para 89.

² Ibid, paras 88-92, but note that the boundaries between interpretation and reformulation appear inconsistent, see Panos Merkouris, 'Interpreting Requests for ICJ Advisory Opinions: Saying What You Mean or Meaning What You Say?' *Hague Yearbook of International Law* (2014) 27, 93 examining the practice of both the PCIJ and ICJ.

³ *Climate Change AO*, para 93.

⁴ Ibid, para 95.

⁵ Emphasis added, ibid, para 97.

⁶ Ibid, para 109.

⁷ Ibid, para 110.

⁸ Ibid, Separate Opinion of Judge Yusuf, para 6.

⁹ Ibid, para 9.

¹⁰ *Climate Change AO*, para 101 [emphasis added].

¹¹ Ibid [emphasis added].

¹² *Climate Change AO*, Separate Opinion of Judge Yusuf, para 2.

¹³ Ibid, Declaration of Judge Nolte, para 31.

¹⁴ *Climate Change AO*, para 114.

¹⁵ Ibid, paras 144 and 385.

¹⁶ Ibid, paras 309-315, see also Julian Arato and Justina Uriburu, 'Treaty and Custom in the ICJ's Climate Change Opinion', *EJIL: Talk!* 27 July 2025, for analysis.

¹⁷ *Climate Change AO*, Joint Declaration of Judges, Charlesworth, Brant, Cleveland, and Aurescu, in particular paras 12-13.

¹⁸ Ian Brownlie, "Chapter II Voluntarism *versus* Majority Rule" II. Discussion in Antonio Casesse et al (eds), *Change and Stability in International Law Making* (De Gruyter 1988) 108-110 at 110.

¹⁹ Hugh Thirlway, 'The Law and Procedure of the International Court of Justice 1960-1989: Part One' *British Yearbook of International Law* 60 (1989) 1, 100, 102.

²⁰ Joint Application Instituting Proceedings Concerning a Dispute Under the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Canada and the Kingdom of The Netherlands v. the Syrian Arab Republic, available: <https://www.icj-cij.org/sites/default/files/case-related/188/188-20230608-APP-01-00-EN.pdf>.

²¹ *Climate Change AO*, para 440.

²² Ibid, paras 442 and 443; for an analysis of state responsibility in the AO see Federica Paddeu, 'State Responsibility in the ICJ's Advisory Opinion on Climate Change' *EJIL: Talk!* 25 July 2025, and Federica Paddeu and Miles Jackson, *Erga omnes and erga omnes partes* obligations in the International Court of Justice's Climate Change Advisory Opinion, *Journal of Environmental Law*, 2026, eqag007.

²³ First report on compensation for the damage caused by internationally wrongful acts by Mārtiņš Paparinskis, Special Rapporteur, 10 March 2026, A/CN.4/793.

²⁴ First report on due diligence in international law by Penelope Ridings, Special Rapporteur, 4 March 2026, A/CN.4/792.

²⁵ See Paparinskis (n 20), para 11.

²⁶ Ibid, para 42.

²⁷ Ibid, para 54, citing para 111 of the *Climate Change AO*.

²⁸ Emphasis added, citing paras 430, 434-438 and 452-454 of the *Climate Change AO*.

²⁹ See Ridings (n 21), para 35.

- ³⁰ Citing Vladislav Lanovoy, 'Due Diligence in International Law: A Useful Renaissance or "All Things to All People"? (2024) European Journal of International Law 34(4).
- ³¹ Citing Christina Voigt, "'Doing the Utmost': Due Diligence as the Standard of Conduct in International Climate Law', in Maria Antonia Tigre (et al) *The ICJ's Advisory Opinion on Climate Change* (Verfassungsbooks 2025) 61.
- ³² A/81/10 Report of the International Law Commission Seventy-seventh session (27 April–5 June and 29 June–30 July 2026) (unofficial copy of 7 August) [ILC 2026 Advance Report], see the summary of the ILC's work at the current session 5, para 14.
- ³³ Ibid, 113, footnote 275.
- ³⁴ Ibid, 114, footnote 280.
- ³⁵ A draft conclusion which has been the subject of disagreement and debates between ILC commissioners and States, as it is evident in the commentary itself, *ibid*, 126-7 para 5 [The word "may" has been included in draft conclusions 3, paragraph (b), and 7 to note that the formation of general principles of law within the international legal system is sometimes debated.]
- ³⁶ Ibid, 133.
- ³⁷ Ibid, paras 15 and 16 [footnotes omitted, emphasis added].
- ³⁸ *Climate Change* AO, para 157.
- ³⁹ Ibid, para 153.
- ⁴⁰ For a summary of the ILC's work on this topic during this session see ILC 2026 Advance Report, 5 para 15.
- ⁴¹ Ibid, 224-225.
- ⁴² *Climate Change* AO, para 392.
- ⁴³ ILC 2026 Advance Report 221: "Thus, by adopting the present draft conclusion, the Commission confirms that resolutions are **primarily** used in **the law formation process** but that, under certain circumstances, may also serve as subsidiary means" [emphasis added]
- ⁴⁴ ILC 2026 Advance Report, 225, para 19.
- ⁴⁵ See Margaretha Wewerinke-Singh and Jorge Viñuales, 'Bracing for Impact: the ICJ Advisory Opinion on climate change and the activation of legal tipping points' (2026) *Journal of Environmental Law*, eqag014.
- ⁴⁶ *Climate Change* AO, Declaration of Judge Nolte, para 34.
- ⁴⁷ Ibid, Declaration of Judge Tladi, para 39.
- ⁴⁸ For a thorough mapping and analysis of influence see Wewerinke-Singh and Viñuales (n 45).