

Great Expectations

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I. Introduction

General media as well as experts' assessment seem to be unanimous that the 23 July 2025 Advisory Opinion of the International Court of Justice ('ICJ' or 'Court') on Obligations of States in respect of Climate Change¹ is a historic, 'land-mark opinion'². Indeed, expectations were high before its delivery and remain so in its aftermath. However, a glance at the Court's own *jurisprudence constante* seems to pour cold water on any expected relevant impact of this, as in fact any, advisory opinion. Since 1950, the Court consistently underlines that 'as such, [an advisory opinion] has no binding force'³. Accordingly, when the Special Chamber of the International Tribunal for the Law of the Sea ('ITLOS') in *Mauritius v. Maldives* recently sought to grant the ICJ's *Chagos* opinion⁴ *de facto res judicata* effect,⁵ this received wide-spread criticism.⁶

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ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025.
 - 2 'Nations who fail to curb fossil fuels could be ordered to pay reparations, top UN court rules', The Guardian, 23 July 2025, available at <https://www.theguardian.com/environment/2025/jul/23/healthy-environment-is-a-human-right-top-un-court-rules>, last accessed 20 September 2025.
 - 3 ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950, ICJ Rep. 65, 71.
 - 4 ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, ICJ Rep. 95.
 - 5 ITLOS (Special Chamber), *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives)*, Judgement of 28 January 2021, paras. 202–205.
 - 6 E.g. Fabian Simon Eichberger, 'The Legal Effect of ICJ Advisory Opinions Redefined? The Mauritius/Maldives Delimitation Case – Judgment on Preliminary Objections', MJIL 22 (2021), 383, 398–399 (noting also that the ICJ rejected a similar argument introduced by Portugal in *East Timor (Portugal v. Australia)*, Judgement of 30 June 1995, ICJ Rep. 90, 103–104, paras. 30–31).

Yet, when invoking prior ‘case-law’ as persuasive international precedent, the Court and other international judicial bodies refer to advisory opinions and decisions in contentious proceedings in an indiscriminate fashion, as the International Law Commission (‘ILC’) recently noted.⁷ So, where does such legal impact come from and how should we assess the impact of this ‘landmark’ opinion? I submit that the lasting legal impact and influence of the Advisory Opinion of 23 July – like that of any of the Court’s opinions – depends to a considerable degree on how well the Court succeeds in managing and responding to expectations held prior to its delivery. This harkens back, and pertains to, the World Court’s judicial function, no less.⁸

II. Expectations

In a recent article, I argue that stakeholders pursue advisory opinions before the ICJ with one or several of a total of six different expectations in mind, ranging from ‘advice as advice’ to ‘advice as miracle’.⁹ Their ‘persuasiveness’¹⁰ and thus their relevance and impact regarding future case law depends to a considerable degree on how well the Court succeeds in managing these expectations in its Opinion.¹¹ With respect to the Climate Change Advisory Opinion, two of these expectations are of particular interest.

7 International Law Commission, First report on subsidiary means for the determination of rules of international law, 74th session, Geneva, 24 April–2 June and 3 July–4 August 2023, by Charles Chernor Jalloh, Special Rapporteur, p. 93, para. 278, available at <https://digitallibrary.un.org/record/4010690?v=pdf>, last accessed 20 September 2025.

8 See on the latter, seminally, Gleider I. Hernández, *The International Court of Justice and the Judicial Function* (Oxford University Press 2014).

9 Andreas Kulick, ‘Between Advice and Miracle: Expectations and Persuasiveness of ICJ Advisory Opinions’ ICLR 27 (2025), 33, 37–51.

10 I distinguish this term both from ‘authority’, which is content-independent (see e.g. Frederick Schauer, ‘Authority and Authorities’, Va. L. Rev. 94 (2008), 1931, 1940–1944; Ingo Venzke, *How Interpretation Makes International Law* (Oxford University Press 2012), 63; Ingo Venzke, ‘Between Power and Persuasion: On International Institutions’ Authority in Making Law’, TLT 4 (2013), 354, 370) and from persuasion, which is content-dependent (e.g. Frederick Schauer, ‘Authority and Authorities’, Va. L. Rev. 94 (2008), 1931 (1940). ‘Persuasiveness’ inheres both content-independent and content-dependent elements, see Kulick (n. 9), 56–60.

11 See Kulick (n. 9), 56–60.

- (1) Stakeholders may seek an advisory opinion to have the Court ascertain and develop the law on abstract and general legal questions. It was expected that the ICJ would provide ‘advice as law-development’ pertaining to a whole panoply of complex doctrinal issues, including: the relationship of the United Nations Framework Convention on Climate Change (‘UNFCCC’) and the Paris Agreement (‘PA’) as well as of climate change treaties and customary international law; the elements and scope of due diligence standards; the potential existence of a human right to a clean and healthy environment; as well as various matters of state responsibility, causation and compensation among them.
- (2) In addition, advice may be sought from the Court to resolve a grand societal debate: ‘Advice as miracle’. Arguably, some expectations attached to the present Opinion concerned its potential to single-handedly transform worldwide climate policy. I submit that only once before has the Court been confronted with expectations of a similar magnitude – and fared rather badly in handling them: In its *Nuclear Weapons* Advisory Opinion¹² it had no clear answer to the fundamental societal question whether nuclear weapons and their use were to be banned by international law *tout court*.

III. Expectation Management and the Court’s Judicial Function

When discussing admissibility, the Court underlined its ‘judicial function’, citing *Nuclear Weapons*¹³ to stress that, when issuing an advisory opinion, it ‘states the existing law and does not legislate’¹⁴. It echoes a similar point later, quoting from *Fisheries Jurisdiction* that ‘the Court, as a court of law, cannot render judgments *sub specie legis ferendae*.’¹⁵ This pertains to both expectations at play regarding the Opinion of 23 July 2025.

12 See ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Rep. 226, para. 105.

13 ICJ, *Legality of the Threat or Use of Nuclear Weapons* (n. 12), para. 18.

14 ICJ, *Legality of the Threat or Use of Nuclear Weapons* (n. 12), para. 48.

15 ICJ, *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Judgement of 25 July 1974, ICJ Rep. 3, para. 53.

With respect to the ‘advice as miracle’ expectation, the Opinion and the Judges’ separate opinions and declarations¹⁶ evince unequivocally how much the Court and its Members were aware of the high hopes attached to these proceedings and their outcome. This much becomes apparent not only in the frequent references to the Court’s judicial function.¹⁷ The ICJ, further, felt compelled to add a very last paragraph before the *dispositif*. Here, it addresses the enormity of the challenges posed by climate change thus implicitly accounting for the enormous expectations held *vis-à-vis* the Court’s Advisory Opinion: ‘[T]he questions posed ... represent more than a legal question: they concern an existential problem of planetary proportions.’¹⁸ The Court, so it underlines, can only make a modest contribution to the solution: ‘The Court, as a court of law, can do no more than address the questions put to it’ with respect to ‘international law’, which ‘has an important but ultimately limited role in resolving this problem.’¹⁹ Here, the spectre of *Nuclear Weapons* seems to loom.²⁰

Focusing in the following on expectations pertaining to ‘advice as law-development’, among the almost infinite number and variety of legal issues potentially to be addressed and clarified regarding States’ obligations in respect of climate change, the Court arguably did not shy away from tackling many of the most pertinent matters. Some of the most important contributions to the development of international climate change law are doubtless to be found in its analysis of the climate change treaties as well as their interrelationship and their interaction with customary international law. The Court emphasizes that the PA is neither *lex specialis* regarding the UNFCCC nor are the climate treaties *leges speciales vis-à-vis* customary standards such as the principles of prevention or co-operation.²¹ Similarly, the ICJ clarifies that ‘discretion’ regarding the PA Contracting Parties’ ND-Cs under Art. 4(2) is not unlimited but rather guided by a requirement

16 E.g. Declaration of Judge Nolte, *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025, para. 1.

17 E.g. ICJ, *Obligations of States in respect of Climate Change* (n. 1), paras. 45, 48, 100, 338 and 456.

18 ICJ, *Obligations of States in respect of Climate Change* (n. 1), para. 456.

19 ICJ, *Obligations of States in respect of Climate Change* (n. 1), para. 456. See also the Declaration of Judge Tladi, *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025, para. 38.

20 Note the frequent references to the 1996 opinion in the text: ICJ, *Obligations of States in respect of Climate Change* (n. 1), paras. 48, 98, 114, 134, 141, 155, 272, 373.

21 ICJ, *Obligations of States in respect of Climate Change* (n. 1), paras. 162–171, 187–195 and 309–315.

of progression and the obligation of a 1.5° Celsius threshold,²² the latter deriving from the interpretation of Art. 2(1) PA.²³ Moreover, it engages in a detailed and differentiated discussion of the contours and conditions of the due diligence standards in both the PA²⁴ and especially under the customary prevention principle.²⁵ Overall, these sections, as most parts of the Advisory Opinion, are exceptionally well-reasoned, displaying an impressive attention to doctrinal precision and detail.²⁶

Nonetheless, as is almost inevitable in such a long opinion addressing a wide range of matters, there are some passages less convincingly argued than others. Among those, the Court's identification of a 'human right to a clear, healthy and sustainable environment' stands out as probably most wanting: it remains rather opaque whether the Court regards it as a self-standing right or rather accessory to other treaty provisions and it is equally unclear whether the opinion asserts this right as a rule of custom²⁷ or rather derives it from necessary implication²⁸ or functionality.²⁹

Similarly, the distinction between customary principles³⁰ and 'other principles'³¹ merely 'guiding ... the interpretation and application of the most directly relevant legal rules'³² will probably raise more questions than it answers: Are they 'general principles of law' or rather 'general principles of law formed within the international legal system', in the parlance of the ILC³³ – or are they rather interpretative maxims similar to *effet utile* or *contra proferentem*, but special to the climate law regime (exclusively or also

22 ICJ, *Obligations of States in respect of Climate Change* (n. 1), paras. 237 et seq.

23 ICJ, *Obligations of States in respect of Climate Change* (n. 1), paras. 222 et seq.

24 E.g. ICJ, *Obligations of States in respect of Climate Change* (n. 1), paras. 246, 258.

25 ICJ, *Obligations of States in respect of Climate Change* (n. 1), paras. 280–300.

26 See also, with similar assessment, Julian Arato and Justina Uriburu, 'Treaty and Custom in the ICJ's Climate Change Opinion', EJIL Talk!, 24 July 2025.

27 Separate Opinion of Judge Aurescu, *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025, paras. 28 et seq.; and Declaration of Judge Tladi (n.19), par. 29 et seq.

28 ICJ, *Obligations of States in respect of Climate Change* (n. 1), para. 393: 'precondition', 'inherent'.

29 ICJ, *Obligations of States in respect of Climate Change* (n. 1), paras. 391 and 393: 'importance', 'essential'.

30 ICJ, *Obligations of States in respect of Climate Change* (n. 1), paras. 131–142.

31 ICJ, *Obligations of States in respect of Climate Change* (n. 1), paras. 146–161.

32 ICJ, *Obligations of States in respect of Climate Change* (n. 1), para. 161.

33 See International Law Commission, Fourth report on general principles of law, Seventy-sixth session, Geneva, 14 April–30 May and 30 June–31 July 2025, by Marcelo Vázquez-Bermúdez, Special Rapporteur, pp. 26 et seq.

beyond? Only regarding treaty interpretation or custom interpretation as well?)? I could go on).

Finally, the Court is most curt where the highest potential for litigation lies: While the discussion of Question (b) contains many important doctrinal pronouncements, I agree with Judge Nolte³⁴ in his assessment that the comparatively short statements on reparation, especially compensation,³⁵ leave a lot of room for interpretation and thus will likely entail³⁶ considerable contentious litigation – whereas I do not share his opinion that such litigation may necessarily be ‘counterproductive’.³⁷

IV. Conclusions

The lasting effect of this Advisory Opinion will remain in its response to the expectation of and thereby its contribution to law-development. The proof is in the pudding of the ‘persuasiveness’³⁸ of the Court’s argumentation regarding the individual legal pronouncements. While the Court and the individual Judges, for good political reasons, need to emphasize that the ICJ can only state, analyse and apply, but never create the law, the Court undoubtedly attains a law-developing function – however, within the confines of thorough legal argumentation.

Through what arguably falls squarely within its judicial function, the Opinion of 23 July 2025 has indeed made an important contribution to the climate change debate, not least because it relied for the most part on robust legal reasoning. Even most of the more progressive and innovative findings are thoroughly reasoned and backed up by doctrine, especially by extensive references to case law. It is of note here that this Court, which usually is rather sparse in citing other international courts and other adjudicatory bodies, in this Opinion summons an impressive amount of other judicial authorities – from ITLOS to regional human rights courts or the

34 Declaration of Judge Nolte (n. 16), , paras. 18 et seq.

35 ICJ, *Obligations of States in respect of Climate Change* (n. 1), paras. 449–455.

36 See ‘Australia warned it could face legal action over ‘wrongful’ fossil fuel actions after landmark climate ruling from world’s top court’, *The Guardian* of 24 July 2025, available at <https://www.theguardian.com/environment/2025/jul/24/australia-warned-it-could-face-legal-action-over-fossil-fuels-after-icj-landmark-climate-ruling>, last accessed 20 September 2025.

37 Declaration of Judge Nolte (n. 16), para. 34.

38 Kulick (n. 9), 56 et seq.

Human Rights Committee – to corroborate its legal analysis. ITLOS alone is cited no less than 28 times in the Opinion.

The potentially high relevance of the Court's pronouncements on central legal questions pertaining to States' obligations in respect of climate change, finally, results from its careful expectation management. The ICJ emphasises its important but limited role in a debate that eventually can only find resolution through 'human will and wisdom'³⁹; law-development: yes; miracle-working: no. This is not at all to say that litigation and arbitration based on many of the Court's doctrinal pronouncements could not and should not be pursued by claimants. Especially the findings on Art. 2(1) and 4(2) PA as well as the customary requirements of the prevention principle and its due diligence standards, particularly *vis-à-vis* fossil fuel exploration, production and consumption,⁴⁰ provide avenues for contentious proceedings before the ICJ and beyond. The Court exercised its judicial function precisely with the view to future law application, including through adjudication. Nonetheless, it makes clear that eventually, it is the political process that needs to find the final responses to the grand societal debate on, as the Court puts it, this 'existential problem of planetary proportions'.⁴¹ In Judge Tladi's words: 'It requires those in decision-making positions to make the right choices for the sake of the future of our planet.'⁴² Hopefully, they will be guided by the legal requirements, standards and guidelines so aptly clarified in this 'landmark opinion' – and maybe also by future case law inspired by and building upon it.

39 ICJ, *Obligations of States in respect of Climate Change* (n. 1), para. 456.

40 See ICJ, *Obligations of States in respect of Climate Change* (n. 1), para. 427.

41 ICJ, *Obligations of States in respect of Climate Change* (n. 1), para. 456.

42 Declaration of Judge Tladi (19), para. para. 38.

