

Not Quite at the Core of the Core Group Advocating an ICJ Advisory Opinion on Climate Change

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2023-04-04T14:21:30

Published: 4. April 2023 Author: Stefan Talmon

In September 2021, Vanuatu announced his intention to build a coalition of States to seek an advisory opinion on climate change from the International Court of Justice (ICJ). On 24 October 2022, Vanuatu announced that it was working closely with a core group of eleven other States, including Germany – the ICJAO4Climate Core Group – focussed on seeking an advisory opinion of the ICJ clarifying the rights and obligations of States under international law as it pertains to the adverse effects of climate change. Three days later Vanuatu's Permanent Representative to the United Nations and Special Envoy for Climate Change, Ambassador Odo Tevi, made a statement to the General Assembly, which read in part:

I make this statement on behalf of a group of States that includes Antigua and Barbuda, Bangladesh, Costa Rica, the Federated States of Micronesia, Morocco, Mozambique, New Zealand, Portugal, Samoa, Sierra Leone, Singapore, Uganda, Vanuatu and Viet Nam. As a group of States that comprises, but is not limited to, the States I just mentioned, we are pleased to announce that we will submit a draft resolution to the General Assembly requesting an advisory opinion from the International Court of Justice on climate change as it specifically affects small island developing States (SIDS) and other developing countries that are particularly exposed to the adverse effects of climate change. ...

The zero draft of the draft resolution will be finalized by the core group over the next few weeks, and informal consultations will be held before it is submitted for discussion and action.

At the time, sixteen States were members of the ICJAO4Climate Core Group. However, the Permanent Representative of Vanuatu expressly only spoke on behalf of fourteen States – Germany and Liechtenstein being noticeable absentees. Unlike other members of the core group, Germany also did not mention the request for an advisory opinion in its interventions in the General Assembly.

On 29 November 2022, Vanuatu presented a draft resolution to the UN membership on behalf of sixteen of the by-now eighteen-member ICJAO4Climate Core Group. Again, Germany and Liechtenstein were not part of the sixteen. However, Vanuatu thanked the members of the group, including Germany, for working tirelessly over the past few months on the text of the draft resolution, the questions that will go

to the court, and building support the request for an advisory opinion amongst UN Member States.

On 16 February 2023, Germany was present when the eighteen members of the ICJAO4Climate Core Group celebrated the endorsement of the draft UN General Assembly resolution seeking an advisory opinion from the ICJ on climate change. However, when the final draft resolution entitled 'Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change' was formally uploaded as an L-document on the United Nation's e-deleGATE portal on 20 February 2023, Germany and Liechtenstein were missing from the official list of initial sponsors of the resolution. On the Vanuatu Government's dedicated website for the resolution campaign – www.vanuatuicj.com/ – Germany's flag was shown as one of the 18 members of the core group, but its flag (together with that of Liechtenstein) was missing on the site for the resolution itself, indicating that it was not one of the '16 ICJ Champions Nations'.

It was only on 1 March 2023 that Germany, together with 104 other States, appeared on the draft resolution as a co-sponsor of the resolution. At that time, both the Director-General for Legal Affairs at the Federal Foreign Office, and the Director General for Asia and the Pacific at the Federal Foreign Office announced Germany's co-sponsorship on Twitter.

By the time the draft resolution was finally adopted by the General Assembly without a vote on 29 March 2023, it was co-sponsored by 133 States. In the relevant part the resolution provided:

The General Assembly, ...

Decides, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to render an advisory opinion on the following question:

'Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment,

(a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations;

(b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:

(i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change ?

(ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?’

Upon the adoption of the resolution, Germany's Permanent Representative to the United Nations stated:

Germany is a proud member of the Core Group leading the initiative to seek an advisory opinion from the International Court of Justice to clarify the rights and obligations of states under international law in relation to the adverse effects of climate change. We trust that seeking an advisory opinion is a constructive route to addressing the climate crisis and to shape state conduct as it pertains to dealing with climate change. This trust is based on the firm belief in the crucial contribution that the Court, when asked to give its Advisory Opinion, can make to clarify the extent and status of relevant obligations under international law with regard to all States. ...

[W]e share Vanuatu's intention to 'provide legal motivation for all nations, including emerging and high emitting developing countries, to build greater ambition into their Paris Agreement Nationally Determined Contributions, and take meaningful action to curb emissions and protect human rights'. ...

Germany's goal was a formulation of the operative paragraphs and the questions submitted to the Court that is *future-oriented* and clearly addresses *current obligations* of all states on the basis of the current state of the law *with regard to the future development of climate change*. Whilst the Resolution does not limit the Court in its analysis, especially with regard to the time horizon, we believe that the Core Group could have gone further in this respect in order to make the initiative even stronger in its *potential to promote climate action*. At the same time, we recognize the enormous success reflected in the number of co-sponsors and reiterate our trust in the Court's deliberations.

The next day, the Legal Adviser to the Federal Foreign Office also welcomed the adoption of the resolution, writing on Twitter that it 'was a pleasure to work closely with ... [Vanuatu UN] in the ICJAO4Climate Core Group to make this UNGA resolution possible.'

While Germany publicly identified itself with the successful initiative for an ICJ advisory opinion on the obligations of States in respect of climate change, one

cannot help but get the impression that it jumped on a moving train at the last moment – a train that had already left the station and could no longer be stopped.

Germany, the only high emitting State among the members of the ICJAO4Climate Core Group, worked closely with Vanuatu and the other core group members on developing the text of the draft resolution but was ultimately unsuccessful in shaping the outcome in its favour. As becomes clear from the above statement by the German Permanent Representative, Germany's approach was 'future-oriented'. It wanted the ICJ to authoritatively determine the 'current obligations of all states ... with regard to the future development of climate change.' Its focus was thus on the primary obligation to mitigate climate change; that is the obligation to reduce emissions, rather than on climate reparations for past emissions. While Germany was prepared to discuss loss and damage resulting from past greenhouse gas emissions in a political setting, it seems wary of having emitting States' secondary legal obligations to make reparation for loss and damage resulting from the adverse effect of climate change authoritatively determined by the ICJ. However, operative paragraph (b) of the resolution allows just this.

None of the legal instruments listed in the chapeau of the request for an advisory opinion deals with the legal consequences of violations of 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. While the Paris Agreement recognises the importance of 'addressing loss and damage associated with the adverse effects of climate change', Decision 1/CP.21 of the conference of the parties to the Paris Agreement expressly makes clear that this 'does not involve or provide a basis for any liability or compensation'. However, this caveat does not preclude the ICJ from ruling on climate reparations on the basis of the general international law on State responsibility. Any violation of an obligation under the treaties and principles listed in the chapeau of the request for an advisory opinion gives rise to a secondary obligation to make full reparation for the injury caused. The ICJ could thus rule, in principle, on the existence and scope of a secondary obligation of high emitting States such as Germany to make climate reparations. There is little danger in this for Germany. It is highly unlikely that in its non-binding advisory opinion, the ICJ will deal with individual States. It will, at best, address the existence of a general obligation to make climate reparations and clarify the intractable issues of attribution, causation, and quantum. Considering the Court's standing as the principal judicial organ of the United Nations, its findings may however inform and spur climate lawsuits before regional human rights courts and domestic courts.

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