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SYMPOSIUM ON THE CONTOURS AND LIMITS OF ADVISORY OPINIONS

THE ROLE OF ADVOCATES IN THE CONCEPTION OF ADVISORY OPINION REQUESTS

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Law, like medicine, is a practiced discipline, and the practice of international law is no exception. There are different contexts in which that practice unfolds. Here, our focus is on: (1) a specific form of practice, that of "advocates," understood widely to include counsel advising or representing a party in legal proceedings, diplomats supporting a policy directive, and civil society activists advocating for legal causes; (2) engaging in different forms of legal advocacy, which can be organized analytically under three headings: legal advice and representation, diplomacy, and campaigning; and (3) in a specific context, that of advisory opinions and, more specifically, in the conception of requests for advisory opinions. Such requests are subject to different requirements according to the institutional setting through which they are channeled, but the most prominent and complex setting is that of requests for advisory opinions by the UN General Assembly to the International Court of Justice (ICJ). This is the setting we will refer to in our essay.

Climate Advocacy and Legal Change

The quintessential role of advocates in the conception of requests for advisory opinions is *to prepare the ground for legal change*. To some extent, this is what advocates do most of the time. In contentious cases addressing a dispute between two or more parties, legal change may transpire through advocates' efforts to frame the dispute and identify applicable rules and interpret them, or through the formal decision of an adjudicatory body that changes the legal position of the parties. Yet, this is not the legal change that is the primary target of requests for advisory opinions. Such requests specifically aim to move the boundary of what is settled law, not only for the parties to a dispute but for all states bound by the law mobilized in the opinion. Moreover, advisory opinion requests entail a distinct phase of legal engagement that precedes formal legal proceedings. Seen from this vantage point, the role of advocates in the conception of advisory opinion requests mirrors the act of adjusting the headsails to optimally harness the winds of change. Yet, to understand the nuance of this role, we need to move from metaphor to description.

The process leading to an advisory opinion request is ridden with legal and political complexity. It involves navigating a maze of jurisdictional hurdles, strategic objectives, negotiations, as well as a panoply of divergent interests.

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The manifestation of this process is eventually reduced to and recorded in textual form, i.e., the request itself. But the process has transformational implications well beyond this text. Navigating this complex process requires a wide range of skills and forms of advocacy. Technical expertise on both substance and process-related matters is critical, but it must be deployed in a broader context in which diplomacy (including consensus building, negotiation, and understanding the political context) and campaigning (with an emphasis on communication of a clear purpose) are crucial. The initiative to seek an ICJ advisory opinion on climate change offers a good case study to explore the role of advocates—and of different forms of advocacy—in such a process.

The Campaign for an ICJ Advisory Opinion on Climate Change

The inception of this initiative is a remarkable story. It all began on the Vanuatu campus of the University of the South Pacific, where students from twelve Pacific Island countries (Cook Islands, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu, and Vanuatu) were tasked with identifying legal strategies for addressing climate change. This group acted as the initial advocates. They conceived the ambitious idea of seeking an advisory opinion from the ICJ on climate change and human rights. They formed an organization, the Pacific Islands Students Fighting Climate Change, and embarked on a campaign to rally support for the idea, emphasizing "the obligations of States to protect the rights of present and future generations from the adverse effects of climate change."[1]

A second track of advocacy emerged when the government of Vanuatu decided to embrace the students' idea and launched a diplomatic campaign toward its realization.[2] In navigating the legal complexities of the diplomatic process, Vanuatu sought the counsel of Blue Ocean Law, a boutique international law firm from Guam known for its grassroots orientation and commitment to advancing the rights of Indigenous peoples.

Guided by the vision of the Pacific Island youth and Vanuatu leaders, the diverse team at Blue Ocean Law—comprised of both in-house and external counsel—added a third track of advocacy, crafting a legal strategy aimed at generating the legal change that could begin to deliver on the hitherto elusive promise of climate justice for the peoples of the Pacific and the world at large.

While these tracks of advocacy were distinct, the various advocates involved made efforts to ensure that they were mutually reinforcing. The government of Vanuatu and its legal team liaised with the youth leaders to turn their demands into a carefully crafted legal strategy capable of securing the necessary support of UN members while retaining the integrity of the legal question being asked of the ICJ. Dozens of public events featuring youth leaders, Vanuatu officials and members of the legal team, along with other speakers, were held to communicate the various dimensions of the initiative to different audiences.

The youth leaders themselves campaigned with vigor and sophistication, as illustrated by the "climate justice flotilla" sailing past UN headquarters in September 2022. The *vaka*, or traditional canoe, symbolized the journey from the Pacific to the United Nations, its arrival coinciding with Vanuatu's first official announcement of the initiative at the General Assembly. Banners with "Our Survival Is Our Human Right," "Vote Yes for Climate Justice," and "AO Let's Go" bolstered the visibility and appeal of the campaign at this critical juncture.

Shaping the Legal Strategy and Overcoming Opposition

The design of the legal strategy was based on the notion of "concentric circles," where the innermost circle was comprised of Pacific Island countries and successive circles from climate vulnerable nations to a range of other

[1] *See* Pacific Island Students Fighting Climate Change.

[2] Naveena Sadasivam, *How a Small Island Nation Is Taking Climate Change to the World's Highest Court*, GRIST (June 27, 2023).

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constituencies. This strategy was used to focus the initial efforts on climate justice and build a solid political basis to expand them. Once the Pacific was fully on board, a cross-regional "core group" was formed to provide wide representativeness to the initiative and, thereby, to help secure buy-in from across different geographic regions.[3]

For the General Assembly to request an advisory opinion, the UN Charter as well as state practice require the adoption of a resolution by a simple majority of the members present and voting. Given that absent and non-voting states are not counted to compute this majority, a number of votes lower than ninety-seven (a simple majority of all 193 UN members) may be—and has been in practice—sufficient to make a request. Yet, securing the requisite number of votes remains a high bar to clear.

At the initial stages of Vanuatu's diplomatic campaign, some legal practitioners advised interested states to pursue alternative routes, most notably shifting the focus from the ICJ to the International Tribunal for the Law of the Sea or certain regional bodies. Making such a shift at that time would have had significant implications, including with respect to the scope of the law to be addressed, participation in the drafting of the question to be put to the relevant body, and the geographical relevance of the legal change sought. The insistence of grassroots advocacy in taking the largest challenge ever faced by humanity, climate change, to the "World Court," was a key factor in staying course despite strong headwinds.

The journey required an exceedingly collaborative approach. It entailed extensive and sustained diplomatic outreach in New York, capitals, and elsewhere, with campaigners, politicians, diplomats, and counsel all harnessing personal connections and establishing new ones to build support for the initiative. It involved grappling with procedural strategy considerations, which—despite appearances—were of great importance.

One of them was how to bring the matter to the General Assembly, bearing in mind the complex procedure that must be followed to introduce and allocate items in the agenda of a regular session, and its legal and political implications. Continuous dialogue between different types of advocates was needed to ensure that political, strategic, and legal considerations were carefully weighed. The decision to introduce the request under an already existing item on the agenda of the General Assembly, rather than requesting that a new one be introduced (as had been done in other recent cases), resulted from a discussion with a wide range of stakeholders, with counsel supporting each step of the way.

Another was how to signal to a wide range of states, both "swing" voters and opponents, that the resolution would ultimately prevail at the General Assembly. That entailed showcasing support in different rounds, from resolutions of international organizations with a large membership endorsing the initiative to the co-sponsoring of the draft General Assembly resolution. For swing voters, siding with a large majority reduced the political cost of taking a position that may otherwise expose them to economic or political retaliation. For opponents, showcasing a majority was a way of defusing their diplomatic efforts to "turn" other states as well as, eventually, to persuade them not to vote against. The draft resolution was uploaded to the UN e-delegate portal on February 20, 2023 for co-sponsorship. By March 1, 2023, when the L-document was issued, the text had 105 co-sponsors, i.e., well above the 97 votes required (even if all states were present and voting) for adoption of the resolution. By the time it was submitted to a vote, the text had 132 co-sponsors.

The climate justice demands of the grassroots movement also informed the complex process of drafting and negotiating the legal question. It was clear from the outset that the question to be put to the ICJ needed to be capable of addressing "loss and damage" from climate change, as well as forging more ambitious and equitable action to prevent and minimize future harm. Initial drafts of the question produced by the legal team therefore sought to encompass a broad temporal focus. The essence of the language to this effect was preserved in the

[3] The core group of states led by Vanuatu included Angola, Antigua and Barbuda, Bangladesh, Costa Rica, Germany, Liechtenstein, the Federated States of Micronesia, Morocco, Mozambique, New Zealand, Portugal, Romania, Samoa, Sierra Leone, Singapore, Uganda, and Vietnam.

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question eventually agreed upon by the aforementioned core group, notably with respect to the "legal consequences" arising for states that have displayed a certain conduct, namely states which, "by their acts and omissions, have caused significant harm to the climate system and other parts of the environment" with respect to a carefully defined category of states as well as to "peoples and individuals from the present and future generations."[4] The drafts were refined and endorsed in discussions with states from the Pacific, the Caribbean, Africa, Latin America, and Asia. This wording was at the center of countless discussions and negotiations.

Throughout the process, the strategies of a range of other stakeholders became increasingly clear. For example, some states responsible for significant historical emissions sought to exclude or narrow the scope for climate justice using a discursive strategy, namely emphasizing that the question had to be "forward-looking" with respect to both conduct and impacts. Amongst these states, some went as far as arguing explicitly that a question about "legal consequences" had no place in the resolution, despite its importance for Vanuatu and other stakeholders, including grassroots movements. In other cases, proposals to focus on a "forward-looking" question were presented as the only way to secure buy-in from certain other states, which would find a milder question more palatable. As a compromise, it was ultimately agreed to have two questions, one "forward-looking" and one concerning "legal consequences," with the possible expectation in some quarters that the latter question would eventually be dropped at the eleventh hour as a concession to secure the requisite number of votes.

The legal team's advice about dealing with such proposals had to consider these and other negotiating tactics. Such advice was constantly grounded on the understanding of the high expectations of civil society campaigners and UN member states which strongly supported the initiative. Some stakeholders stressed that the risk of alienating genuine political support among the climate vulnerable outweighed the gain of certain swing or skeptical voters. By meticulously setting out the legal, strategic, and political implications of each language proposal and providing a suite of textual options in response to concerns, the legal team identified pathways that could potentially lead a critical mass of UN members to the desired destination. The work was also highly technical, as it involved collecting a daunting number of constantly evolving wording proposals in spreadsheets, explaining their implications, suggesting counterproposals, and recalling red lines, all on sometimes very tight deadlines and in the context of politically charged discussions.

Interestingly, this complex textual negotiation was shaped not only by a range of different interests but also by varying understandings of the same terms, or, conversely, divergence on the use of terms to refer to the same legal rule. For example, the expression "general international law" was deemed confusing by some who engaged in the negotiations. At issue was the adjective "general." Although the ICJ uses the term as synonymous with customary international law, which is mostly of "general" application, some found it synonymous with "loose" or unspecific. Another example of terminological divergence concerned the "principle of prevention" of significant environmental harm, to use the recent terminology of the Court. Some participants preferred to use the term "no harm rule," a formulation that, in the view of those who had proposed the inclusion of "principle of prevention," refers to an older and narrower understanding of the rule. Rather than reflecting a covert negotiation tactic, these understandings appeared to signal that some of the terms referred to in the draft resolution were not entirely settled and needed explaining and backing.

Ultimately, however, the need to draft a question with a focus on climate justice—seen with equal clarity by counsel, diplomats, and campaigners—illuminated the textual pathways. Side-tracks and dead ends disguised as minor or editorial tweaks were identified as such, with explanations enabling skilled diplomats to consolidate support for the preferable options. Extensive diplomatic outreach and campaigning around these options, carefully designed procedural strategy, as well as some compromises, swayed initially reluctant actors toward support.

[4] GA Res. 77/276 (Mar. 29, 2023) (operative part).

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As noted earlier, the level of support, signaled in the number of co-sponsors, led to a point in which being part of a small number of states voting against the resolution became politically more costly for reluctant states and outright opponents of the initiative than fighting back in the context of the more technical advisory proceedings. This culminated in the adoption of Resolution 77/276 on March 29, 2023 by consensus, i.e., without a vote singling out the position of each state (although some positions were aired in post-adoption remarks). Such an outcome is unprecedented in the contemporary practice of advisory opinions requested by the General Assembly.[5]

Conclusion: A Diverse Craft

This essay has highlighted the different types of advocacy that must be combined in the context of a request for an ICJ advisory opinion by the General Assembly. This blend of advocates and forms of advocacy serve to build and maintain political momentum, channel grassroots demands to senior diplomatic circles, and ensure that the integrity of the legal question is preserved throughout negotiations. The auspicious adoption of Resolution 77/276 illustrates how different forms of advocacy, when skillfully combined, can achieve results that initially appeared out of reach.

[5] The only other precedent of a General Assembly resolution requesting an ICJ advisory opinion adopted by consensus is Resolution 258 (III), which requested the *Reparation for Injuries Suffered in the Service of the United Nations* opinion. However, the UN had only fifty-eight members at that time.

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