

# CLI RECOMMENDATION NO. 16

## Give the International Court of Justice Compulsory Advisory Jurisdiction on Matters Concerning Climate Change and the Needs and Interests of Future Generations\*

### A. Introduction: The Under Utilization of the International Court of Justice

The World Trade Organization's dispute settlement mechanism, now in its second decade, stands as one of the crowning achievements of the international legal system. That mechanism, which includes binding dispute resolution that no member can opt out of, allows trade conflicts to be resolved peacefully and authoritatively. Disputing parties are no longer left to make their own line calls without the benefit of a referee.

Now that we have significant evidence that the WTO system succeeds in settling the law, and encouraging compliance, the time is right to consider extending the model to conflicts over global warming and other matters of international contention, particularly when the issues are large enough to implicate the needs and interests of future generations. One way this can be done is by expanding the jurisdiction of the International Court of Justice. As the only tribunal designed to hear disputes generally, in terms of status and hold on the public imagination it is the closest institution we have to a high court of the world.<sup>1</sup> Presently, the power of the Court to exercise compulsory jurisdiction, which requires states to submit to the authority of the Court, is optional,<sup>2</sup> and many states, in particular some of the most powerful, have not been willing to cede the Court such power.<sup>3</sup> In the absence of compulsory jurisdiction, the Court is foreclosed from presiding over a contentious case unless all of the states agree ad hoc to give the Court jurisdiction<sup>4</sup> or a treaty that governs a dispute happens to contain a "compromisory clause" allowing for dispute resolution by the Court.<sup>5</sup>

Practically speaking, because of the Court's limited ability to exercise jurisdiction in contentious cases, the great majority of disputes cannot be adjudicated. In the area of climate change specifically, developing a plausible theory for the Court to exercise jurisdiction over countries that do not accept the Court's compulsory jurisdiction is extremely difficult, and this difficulty has no doubt contributed to the absence of climate change cases.<sup>6</sup> Without cases, the Court

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<sup>1</sup> See generally Nagendra Singh, *The Role And Record Of The International Court Of Justice* (1989) (discussing the influence of the International Court of Justice); see also Robert Y. Jennings, *The United Nations at Fifty: The International Court of Justice After Fifty Years*, 89 A.J.I.L. 493 (1995).

<sup>2</sup> See Statute of the International Court of Justice, art. 36 (2), Oct. 24, 1945, 59 Stat. 1031, 1060, T.S. No. 993 [hereinafter ICJ Statute], reprinted in 1 INTERNATIONAL LAW AND WORLD ORDER: BASIC DOCUMENTS I.A.2 (Burns H. Weston & Jonathan C. Carlson eds., 1994-) [hereinafter Weston & Carlson].

<sup>3</sup> Of the five permanent members of the United Nations Security Council, for example, Russia never accepted the compulsory jurisdiction of the Court. The acceptance by the Chinese nationalist government was later repudiated by the Communist regime and the United States and France withdrew their acceptance of compulsory jurisdiction. Only the United Kingdom currently accepts the compulsory jurisdiction of the Court subject to certain reservations. See International Court of Justice, *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3> (last visited Feb. 27, 2008).

<sup>4</sup> See ICJ Statute, *supra* note 2, art. 36(1).

<sup>5</sup> *Id.*

has been deprived of the opportunity to apply the rules of customary international law dealing with state responsibility for harming the environment. Because there is no other tribunal within the international system capable of rendering an authoritative decision on the matter, the law of climate change remains underdeveloped.

This underdevelopment has significant implications for future generations. Some of the more extreme but still credible scenarios suggest a global climate that could make civilization as it has developed over the past five thousand years unsustainable.<sup>7</sup> Even less dramatic scenarios that have been predicted by climate scientists with much higher degrees of certainty will dramatically alter the natural environment with significant implications for future generations.<sup>8</sup> While the effort to deal seriously with the climate problem will involve far more than application of law, international law is clearly necessary for both constraining and coordinating state action. Climate change—and the contours of intergenerational justice in relation to it—is only one of the more pressing examples of global problems whose amelioration could be furthered through involvement of the International Court of Justice. If jurisdictional barriers could be overcome, the Court could play a significantly enhanced role in both settling international law generally and resolving individual disputes, particularly those of large ecological import with implications across time as well as across space.

## B. A Legal Strategy to Expand the Role of the Court

Unfortunately, securing the necessary political support for amending the Court's treaty, the Statute of the International Court of Justice, to provide universal binding jurisdiction in contentious cases is most likely not politically viable now or in the foreseeable future. Article 69 of the Court's Statute incorporates by reference the formidable barriers to amendment contained in Articles 108 and 109 of the United Nations Charter.<sup>9</sup> Article 108 requires that an amendment be approved by two-thirds of the United Nations General Assembly and subsequently ratified by two-thirds of the members of the United Nations including all of the permanent members of the Security Council.<sup>10</sup> Getting each and every of the permanent members of the Security Council to go along is particularly unlikely as these permanent members are presently (except for Great Britain) declining to accept the compulsory jurisdiction of the Court.<sup>11</sup>

Under Article 109 of the Charter, a Charter review conference can be called into session by a two-thirds vote of the General Assembly and an affirmative vote of any nine members of the fifteen member Security Council with no provision for permanent member veto.<sup>12</sup> Any alteration of the Charter coming out of the review conference, however, must be approved by two-thirds of the conference and ratified by two thirds of the United Nations membership, again including all of the permanent members of the Security Council.<sup>13</sup>

<sup>6</sup> For a discussion of possible jurisdictional theories upon which a global warming case might be presently brought before the Court, see generally Andrew Strauss, *Climate Change Litigation: Opening the Door to the International Court of Justice*, in *Adjudicating The Climate: International And National Causes Of Action On Climate Change* (William C.G. Burns & Hari Osofsky eds., Cambridge University Press 2008) (forthcoming 2008).

<sup>7</sup> See e.g., Peter Schwartz & Doug Randall, *An Abrupt Climate Change Scenario And Its Implications For United States National Security* (2003) (suggesting that a climate change induced slowing of the ocean's thermohaline conveyor could cause changes in global weather patterns significantly reducing food supplies and the carrying capacity of the earth's environment.)

<sup>8</sup> See Intergovernmental Panel on Climate Change (IPCC), Working Group II, *Climate Change 2007: Impacts, Adaptation and Vulnerability, Summary For Policymakers*, 1–3 (2007).

<sup>9</sup> ICJ Statute, *supra* note 2, art. 69.

<sup>10</sup> Charter of the United Nations, art 108. June 26, 1945, 1976 Y.B.U.N. 1043, 59 Stat. 1031, T.S. 993, S. Ex. F/79-1 [hereinafter UN Charter], *reprinted in* 1 Weston & Carlson I.A.1.

<sup>11</sup> See *supra* note 3.

<sup>12</sup> See UN Charter, *supra* note 10, art. 109, para. 1.

<sup>13</sup> *Id.* art. 109, para. 1.

Though the current prospects for universalizing the Court's compulsory jurisdiction by way of amendment are bleak, there is a practical solution that would allow the Court to render advisory opinions on conflicts between states without the requirement of state consent. In addition to exercising binding jurisdiction over contentious cases, the Court's statute empowers it to render advisory decisions of a nonbinding nature. Thus far, in accordance with the original scheme of the Court's Statute and the United Nations Charter, such opinions have only been given in response to requests by either the Security Council, the General Assembly or other international organizations. A creative use by the General Assembly of its powers under the Charter, however, would allow it to establish a mechanism for states to request advisory opinions.

Pursuant to Article 65 of the Court's Statute, the Court is empowered "to 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 a request."<sup>14</sup> Article 96 of the United Nations Charter provides that in addition to the General Assembly and the Security Council other organs of the United Nations and specialized agencies, may request advisory opinions of the Court on any legal question so long as they arise within the scope of their activities and they are authorized to make such requests by the General Assembly.<sup>15</sup> If the General Assembly, therefore, had the legal authority to establish a "Judicial Organ" and empower it to request advisory opinions from the Court upon the application of states, then under the terms of Article 96 such requests would be within the scope of the organ's activities and authorized by the General Assembly.

The General Assembly, it so happens, does have this authority under Article 22 of the United Nations Charter which empowers the General Assembly to establish such subsidiary organs as it deems necessary to perform its functions.<sup>16</sup> The Judicial Organ could be structurally independent, and any state that wanted to pursue a legal complaint against another state could petition the Judicial Organ, and upon certain criteria of justiciability, or no criteria, it could refer the case to the Court for an advisory opinion.<sup>17</sup> Though probably not necessary for consistency with the requirements of the United Nations Charter or the Statute of the Court, the Security Council as a matter of policy should have the ability to defer the referral. Under the Charter, the Security Council has primary responsibility for international peace and security, and if the Council believes that the Court might interfere with, rather than further, the political resolution of a conflict, it should be able to secure the suspension of a case. A similar deferral scheme has been adopted as a way of coherently institutionalizing the relationship between the International Criminal Court and the

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<sup>14</sup> ICJ Statute, *supra* note 2, art. 65.

<sup>15</sup> UN Charter, *supra* note 10, art. 96 ("1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question; 2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.")

<sup>16</sup> *Id.* art. 22 ("The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.")

<sup>17</sup> In the mid 1970's the late Paul Szasz proposed a *specialized tribunal* similar to what I have dubbed the Judicial Organ. Although he did not comprehensively work out the basis for the tribunal's legality, he did elaborate upon its composition:

For [the task of transmitting requests for advisory opinions to the Court] the General Assembly might establish a specialized tribunal whose sole function would be the evaluation of proposals for the submission of questions to the ICJ, against criteria established by the General Assembly, and perhaps the Court itself, for such submissions. Similar to other international tribunals, its members would be politically/geographically distributed but chosen on the basis of individual qualifications for relatively long terms to ensure maximum independence; they would not necessarily function full-time in that capacity, though they would have to avoid inconsistent employment.

Paul C. Szasz, *Enhancing the Advisory Competence of the World Court*, in LEO GROSS, *THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE* 499, 527 (1976).

Security Council.<sup>18</sup> Perhaps a similar power should also be granted to the General Assembly which enjoys a subsidiary responsibility for the maintenance of international peace and security under the Charter.<sup>19</sup>

Of course, in theory there is nothing to stop a state now from petitioning the General Assembly to request an advisory opinion regarding that state's legal dispute with another state, and this has been done on rare occasion.<sup>20</sup> In practice, however, the process of getting the General Assembly to request an advisory opinion has been slow and politically cumbersome. In addition, while the General Assembly has requested fourteen advisory opinions since its inception in 1945,<sup>21</sup> the requests, with some notable exceptions,<sup>22</sup> have generally been limited to clarifying matters of internal United Nations governance or legal issues otherwise directly involving the United Nations. By taking the bureaucracy and politics out of the ability of states to secure advisory opinions, the proposed Judicial Organ would provide a regularized process for the Court to hear cases that would never otherwise come before it.

While opponents could likely come up with arguments challenging the General Assembly's powers to create such an organ, its competence to do so rests on a legally sound reading of the Charter, and as a practical matter, the Court would be unlikely to want to stand against such an expansion of its powers from a resolute General Assembly.<sup>23</sup> The real question is one of politics within the General Assembly. Could the General Assembly muster the political will to create such a body? Certainly, the political barriers to action by the Assembly are far less than are involved in amending the Court's Statute. The members of the Security Council could not veto the creation of the Judicial Organ, the requisite vote would either be a majority or two-thirds<sup>24</sup> of the General Assembly instead of three quarters, and there would be no requirement of national ratification.

<sup>18</sup> Rome Statute of the International Criminal Court, June 15-17, 1998, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc A/CONF.183/9, [hereinafter ICC Statute] reprinted in 1 Weston & Carlson I.H.13., art. 16 ("No investigation or prosecution may be commenced or proceeded with under the Statute for a period of 12 months after the Security Council in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.")

<sup>19</sup> UN Charter, *supra* note 10, arts. 10, 11, 12, 35.

<sup>20</sup> See Western Sahara Advisory Opinion 1975 I.C.J. 12, 32 (Oct. 16).

<sup>21</sup> A complete list of ICJ advisory opinions can be found at <http://www.icj-cij.org/docket/index.php?p1=3&p2=4>.

<sup>22</sup> In recent years these have been the Nuclear Weapons and Israeli Wall requests for advisory opinions. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion 1996 I.C.J.226 (July 8); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 131 (July 9).

<sup>23</sup> If this proposal were to be seriously considered by the General Assembly, it would, of course, be important to consult with the Court before proceeding and to gain assurance from the Court that it would be favorably received. One matter of concern is that in the *Status of Eastern Carelia* case the Court's predecessor, the Permanent Court of International Justice, rejected a request for an advisory opinion concerning Russia, a country that had refused to accept any form of that court's jurisdiction. The Permanent Court ruled that advisory opinions may not be used "for circumventing the principle that a state is not obliged to allow its disputes to be submitted to judicial settlement without its consent." See *Status of Eastern Carelia* 1923 P.C.I.J. 29 (Ser. B) No. 5 (Reply of the Court of July 23, 1923 to Request for an Advisory Opinion). The International Court of Justice has never directly contradicted this holding, but it has likewise never let it stand in its way of accepting requests for advisory opinions. To get around the Permanent Court's holding, it has distinguished between directly deciding contentious cases between parties and honoring requests to provide a UN organ with legal advice that on the circumstances of each case it has found to be necessary for that organ's own purposes. This distinction, however, would not well support the Court's accepting requests for advisory opinions instigated by individual countries, but it would seem past time to explicitly put to rest the Permanent Court's basic proposition that states have a right to consent to whether the Court can issue a decision to which they are not bound to follow.

<sup>24</sup> The requisite vote depends upon whether the decision at hand should be regarded as an "important question" requiring a two-thirds as opposed to majority vote under Article 18 of the United Nations Charter. While Article 18 specifies certain voting matters as important questions, additional unspecified matters are also according to its terms important questions. There is, however, little precedent on which other matters generally qualify, and, as most subsidiary organs have been approved by consensus, the requisite vote required for their establishment is unclear. See UN Charter, *supra* note 10, art. 18.

Relatively less powerful developing countries that constitute a majority of the General Assembly might look with favor on the instigation of a mechanism for allowing cases to be brought against dominant countries that enhances the role of law as a force for constraining raw power. In particular, concerns about the effects of climate change, which have been disproportionately caused by wealthy countries,<sup>25</sup> and are likely to impact disproportionately both present and future generations of residents in poor countries,<sup>26</sup> might encourage the General Assembly to act.

The establishment of what I am calling universal advisory jurisdiction is, in fact, a political compromise between the restrictions that presently allow the Court to exercise binding jurisdiction only with consent and a system of binding jurisdiction obligatory for all countries. Recommending an incremental progression toward expanding the jurisdiction of the Court is that such an approach has been the formula for success at the World Trade Organization. The WTO's system of compulsory and binding dispute resolution was not created out of whole cloth in the Marrakesh Agreement, which formally established the WTO.<sup>27</sup> Rather, in the early days of the trade regime, the parties to the GATT came to the conclusion that some process for authoritatively determining the respective rights and obligations of conflicting parties would help resolve trade disputes.

With very little textual authority from the GATT treaty,<sup>28</sup> the original approach of referring disputes to “working parties” consisting of the disputing parties and any other interested GATT parties gave way to the establishment of three or five member neutral panels.<sup>29</sup> Over time these panels became more legalistic in their approach and their processes became more formalized by subsequent agreements and understandings.<sup>30</sup> Wary of ceding too much of their political autonomy, and consistent with the fact that panels had no independent legal authority under the GATT, the parties originally allowed that the panel reports would only be advisory unless all of the parties to the GATT (including the losing party) agreed by adopting them to make them binding.<sup>31</sup> Over many years, and based on a slowly gained comfort with the GATT system, the parties took the step of instituting compulsory and binding dispute resolution<sup>32</sup> in the 1994 Marrakesh Agreement.<sup>33</sup> While the issues surrounding trade and the trade regime are in many ways unique, the general principle holds that a system of advisory dispute resolution could eventually give states enough

<sup>25</sup> See World Resources Institute Chart of Total Greenhouse Gas Emissions in 2000, available at <http://cait.wri.org/figures.php?page=/World-FlowChart> (last visited 22 March 2008).

<sup>26</sup> See generally, Intergovernmental Panel on Climate Change, *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (2007).

<sup>27</sup> Marrakesh Agreement Establishing the World Trade Organization, in *World Trade Organization, The Legal Texts: The Results of The Uruguay Round of Multilateral Trade Negotiations* (1999), reprinted in 4 *Weston & Carlson IV.C.2a*.

<sup>28</sup> What authority exists is found in Articles XXII, dealing with consultation and XXIII, dealing with “nullification and impairment.” Under Article XXIII:1 if a contracting party considered that a benefit accruing to it under the GATT was being nullified or impaired by another party, it could complain in writing to that other party. If this did not lead to a satisfactory resolution of the situation, the complaining party was Authorized by Article XXIII:2 to refer matters to the Contracting Parties, who were then to investigate and make recommendations.

<sup>29</sup> For further discussion, see generally DAVID PALMETER & PETROS C. MAVROIDIS, *DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION, PRACTICE AND PROCEDURE* 7 (2d ed., 2004).

<sup>30</sup> Most significantly the Tokyo Round (1973–1979) resulted in the adoption of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (Nov. 28, 1979) GATT B.I.S.D. (26th Supp.), at 210 (1980).

<sup>31</sup> For further discussion of this process, see G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 *DUKE L.J.* 829, 831-33 (1995). For a listing of those panel reports which were adopted as binding, see *The World Trade Organization, Adopted Panel Reports Within the Framework of GATT 1947*, available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/gt47ds\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm).

<sup>32</sup> Decisions are now binding unless all of the parties, including the winning party, agree that they are not binding.

<sup>33</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (Apr. 5, 1994).

familiarity with the Court as a stalwart of international conflict resolution to make them comfortable moving toward a universal system of binding dispute resolution.

In the interim, the difference between advisory and binding decisions is not as great as it might appear. Presently, the International Court of Justice has no adjunct international administrative structure to enforce even its binding decisions. In theory, the United Nations Security Council is empowered under Article 94<sup>34</sup> to enforce the Court's decisions, but it has never done so.<sup>35</sup> One reason compliance with the Court's decisions have generally been quite high is because of the moral pressure it places on the losing country, and, of course, even advisory decisions are important in helping settle the law.

### C. The Case for Universal Advisory Jurisdiction

Both the GATT and WTO dispute resolution systems were instituted, at least in theory, with the consent of the states involved. Under the proposal being advanced, the institution of universal advisory jurisdiction is realized through the authorization of the requisite majority of the General Assembly rather than by the individual consent of each state that could be the subject of an advisory opinion. Some would no doubt claim that allowing for states to be the subject of decisions, even advisory ones, without their consent is normatively illegitimate. In a system based on the fundamental principle of state sovereignty, each state, they would argue, should be free to determine which international regimes it wishes to join and which international processes it should be subject to.

The international community has, however, already departed from the principle of state consent in the area of conflict resolution such as with the Security Council's establishment of tribunals to try individuals from the former Yugoslavia and Rwanda without the consent of the relevant states. Of perhaps greatest recent institutional relevance is that the United Nations Security Council can refer cases to the International Criminal Court (ICC) involving individuals from countries that have not consented to that court's competence.<sup>36</sup> This departure from consent should not just be limited to the discretion of the politically driven Security Council. To maintain that states should continue to be able to unilaterally decide the extent to which their compliance with international law can be authoritatively reviewed is to inhibit the evolution toward an international system based on rule of law. Certainly, it is universally recognized in domestic societies, from the most simple to the most complex, that minimal public order (including the interests of future generations) requires that members of the community not be allowed to opt out of institutions for identifying infractions with community law. The mechanism for establishing this review, authorization by the requisite majority of the General Assembly, would as well be a positive development on the road to a more law-based

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<sup>34</sup> UN Charter, *supra* note 10, art. 94(2) ("If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.").

<sup>35</sup> A resolution calling for the United States to comply with the Court's judgment in the Nicaragua case referred to in note 37 *infra* was introduced into the Security Council, but it was vetoed by the United States. *See* S/PV.2718 October 1986, p. 51 (UN Doc. S/18428).

<sup>36</sup> *See* ICC Statute, *supra* note 18, art. 13(b). The ICC has competence also to try individuals who hail from countries that have not joined that Court but who commit offenses within the territory of states that have. Some argue that this power to prosecute non-party nationals is a form of universal jurisdiction that contradicts the principle of state consent. *See, e.g.*, statement of Senator Jesse Helms, *Hearing on the United Nations International Criminal Court Before the Senate Foreign Relations Comm.*, July 23, 1998, available in 1998, Federal Document Clearing House Congressional Testimony, July 23, 1998. Such claims notwithstanding, the power to prosecute non-party nations who commit offenses within the territory of states parties is consistent with the principle of state consent in as much as it provides that states can agree to delegate their territorially based jurisdictional right to try individuals (even if they be non-nationals) who commit offenses within their territory.

international system. After all, there are few areas in international society where the General Assembly can implement its decisions as a proto-legislature. This could be one of them.

A more pragmatic argument against the proposal is that the alienation of states, and especially powerful states, who might find themselves the unwilling subjects of the Court's decisions could damage the Court and by extension the international system. Unlike the normative defense of states' ability to preclude authoritative review of their actions, this claim should give pause to those who support strengthening the rule of international law. At least some countries committed to the world order status quo would object and do what they could to undermine the innovation. In particular, as with the International Criminal Court, the United States might actively oppose this innovation as very likely would the other permanent members of the Security Council who are not currently accepting the binding jurisdiction of the Court.

Even more than with the International Criminal Court, however, it is difficult to see what these countries could practically do to stop such an innovation. They could threaten to cut off funding for the Court, but if the political will is there, other countries could make up the relatively small (in national budgetary terms) difference. They could decline to conform their practices to the advisory opinions of the Court thereby undermining its legitimacy by making it appear impotent, but this potentiality is not unique to advisory cases. In fact, when the Court has exercised compulsory jurisdiction under the optional clause or has taken jurisdiction pursuant to a compromisory clause in a treaty, respondent parties usually contest jurisdiction and are unhappy when they lose. At times they have even refused to appear in the merits phase of the decision.<sup>37</sup> Indeed, securing compliance with the Court's judgments has been one of the central challenges that the Court has faced in its continuing growth and evolution. Recent empirical evidence suggests, however, that compliance is generally forthcoming,<sup>38</sup> and there is no reason to believe the compliance problems associated with the proposal would be of a different order. In fact, if the Court were to become more ubiquitous, it might well be that acceptance of its judgments would grow over time as was the case with the GATT panel decisions.

Finally, opposing countries and their supporters in the press and the academy might unleash a public relations assault designed to undermine the Court's legitimacy. While this potentiality needs to be taken seriously, recent history suggests the limited effectiveness of such assaults. The U.S. did this after the Nicaragua case, and the Court's influence actually grew. The International Criminal Court which has not garnered the support of the U.S., China or Russia has been subject to considerable criticism by U.S. government officials and their ideological allies. At least so far their efforts to derail that court have largely failed. In fact, recent experience has shown that powerful countries are as dependent on the legitimacy they derive from being supported by the international system as the other way around. The Bush administration attempted to undermine the credibility of the United Nations when the Security Council refused to authorize its invasion of Iraq only to immediately return to the organization to seek approval for its occupation of that country. If history is any guide, once the institution of universal advisory jurisdiction is established even opposing countries will find resort to the Court's chambers in strategically important cases where they have the legal upper hand all but irresistible. The United States has already acquiesced to allow the Security Council to refer the Darfur situation to the International Criminal Court.<sup>39</sup> If, for example, the U.S. could now secure an ICJ advisory judgment regarding Iran's

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<sup>37</sup> There are four instances where one of the parties in a contentious case refused to appear before the Court, Fisheries Jurisdiction (Gr. Brit. v. Ice.), 1974 I.C.J. 3 (July 25) and Fisheries Jurisdiction (F.R.G. v. Ice.), 1974 I.C.J. 175 (July 25) (deciding case without Iceland's participation); France in Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457 (Dec. 20) (deciding case without France); United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24) (deciding case without Iran); Military and Paramilitary Activities in and Against Nicaragua, (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) (deciding case without the United States).

<sup>38</sup> See CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE (2004).

<sup>39</sup> See Marlise Simons, *Sudan Poses First Big Trial for World Criminal Court*, N.Y. TIMES, April 29, 2005, at 12.

pursuit of nuclear technology that would significantly help it secure UN sanctions and otherwise isolate that country, its temptation to do so would be extremely strong.

Another serious and related argument against the establishment of universal advisory jurisdiction is that it will interfere with the political settlement of disputes. This is already a common claim that countries make in both contentious and advisory cases.<sup>40</sup> It is currently being leveled in a powerful way against the International Criminal Court,<sup>41</sup> and it was for a long time an argument against moving toward a more legalized system of dispute resolution at the GATT.<sup>42</sup>

No doubt, in the world as it exists today there are times when disputes might be more easily settled without judicial involvement, just as there are times when they might be more easily settled with judicial involvement. As I suggest above, the Security Council should have the ability to defer the referral of cases to the Court, and the Court itself is, of course, sensitive to real world political dynamics. While it is constrained by the boundaries of international law, such dynamics no doubt play a role in influencing the formulation of its decisions. If the Court's ability to hear cases were to be expanded in the way suggested here, it could, if necessary, introduce judicial preclusion devices to limit further its adjudication in cases of intractable hostilities where its intervention would be counterproductive. Conveniently, the Court was given the unqualified discretion to decline to hear an advisory case.<sup>43</sup>

In the final analysis, since at this point in history we are not in a political position to create a functioning world judiciary out of whole cloth, the key determination we must make is whether we are committed to working through the anomalies that will naturally arise on the path to a more law-based international system. Currently we are caught in the contradiction between a global order that is partially based on raw power politics and even violence and one that is partially based on rule of law. The path to a more rule-based system will not happen over night, and it will not be easy to achieve. If we proceed with that end in sight, however, such contradictions will gradually diminish.

Finally there are a variety of practical and logistical problems that would need to be resolved if the Court's ability to hear advisory cases is to be expanded in the way suggested here. If a relevant party refuses to participate, what should be done to ensure that the Court fairly considers all the legal and factual questions? In what ways could the Court adapt to the inevitable and probably dramatic increase in its case load? Are there procedures which could preclude the Court from taking on an essentially law-making function? These kinds of questions are inevitable in the development of any judicial system, and there is no reason to believe they cannot be successfully resolved. In fact, the Court has already dealt with many of them in contentious cases or in advisory opinions.

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<sup>40</sup> For example, the Israeli's made this claim in the Israeli Wall advisory case and the United States made this claim in the Nicaragua case. The legal basis for the claim is grounded in the meaning of "legal dispute" under Article 36 and "legal question" under Article 65 of the Court's statute.

<sup>41</sup> Joseph Kony, the commander of the Lord's Resistance Army, a Ugandan rebel organization alledged to be responsible for serious human rights abuses, including abducting more than 25,000 children to serve as soldiers and sex slaves, has been indicted by the International Criminal Court. As a condition for signing a permanent peace accord with the government of Uganda, Kony has demanded that the ICC withdraw the indictment against him and two deputies. Thus far, despite pressure from the Ugandan government, eager to see the conclusion of the peace treaty, the prosecutor has refused. See Nora Boustany, *Ugandan Rebel Reaches Out to International Court; Kony's Legal Team Explores an Exit that Could Seal Peace Pact*, WASH. POST, Mar. 19, 2008, at A12.

<sup>42</sup> See generally William J. Davey, *Symposium: International Economic Conflict and Resolution: The World Trade Organization's Dispute Settlement System*, 42 S. TEX L. REV. 1099 (2001).

<sup>43</sup> The language of Article 65 of the Court's statute providing that the Court "may give" an advisory opinion has always been interpreted to mean that the Court has discretion to comply with a request. See *Interpretations of Peace Treaties with Bulgaria, Hungary and Romania, First Phase*, I.C.J Reports 1950, p. 65, at 71; *Reservations to the Convention on the Prevention and punishment of the Crime of Genocide*, I.C.J Reports 1951, p. 15 at 19.

## D. Conclusion: Universal Advisory Jurisdiction and Climate Change

Establishing a mechanism for the Court to obtain universal advisory jurisdiction would benefit the global system in ways that go well beyond helping to ameliorate climate change and its impact on future generations. The growing recognition, however, that the earth's climate is warming and that this warming will impose tremendous social costs may provide a concrete incentive for the General Assembly to establish the Judicial Organ. Both the remediation of and adaptation to climate change is likely to be enormously expensive, and the Court could be uniquely helpful in establishing equitable principles grounded in law that define the obligations of states towards each other as well as towards future generations.

Not only does the Court's venerable status allow it to make rulings that would be widely regarded as authoritative, but it also has significant institutional expertise upon which it could draw. The Court has previously decided numerous environmental law cases,<sup>44</sup> and in 1993 it even set up a special chamber for environmental matters.<sup>45</sup>

In issuing climate change advisory opinions, the Court could positively influence the inter-state dynamics of negotiation over the future of the post-Kyoto treaty regime. Those states that are significant producers of greenhouse gases and wish to stay out of a treaty regime or otherwise free ride would have greater reason to concern themselves with the uncertain legal environment this could create. Apprehension that gaps in the law will be filled by courts is a reason those who face potential legal exposure in domestic systems often support regulation.<sup>46</sup>

Likewise, to the extent that corporations face a credible threat of exposure to climate change litigation, corporate managers are likely to want to reduce that potential by encouraging constructive participation by their governments in a post-Kyoto regime that contains clearly identifiable limits on greenhouse gases to which they can comply.<sup>47</sup> While the Court would likely rule on state responsibility under international law rather than corporate responsibility under domestic law, such rulings would carry liability implications for corporations. In potential domestic nuisance or negligence cases against corporations for causing harm, it is necessary to establish that the defendant corporation's contribution to the climate change problem contravened some community-wide standard of behavior.<sup>48</sup> A decision by the Court could help to establish the existence of such standards and perhaps be a guide as to the limits on corporate greenhouse gas emissions they require.

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<sup>44</sup> See *Fisheries Jurisdiction (Gr. Brit. v. Ice.)*, 1974 I.C.J. 3 (July 25) and *Fisheries Jurisdiction (F.R.G. v. Ice.)*, 1974 I.C.J. 175 (July 25); *France in Nuclear Tests (N.Z. v. Fr.)*, 1974 I.C.J. 457 (Dec. 20); *Case concerning Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, 1992 I.C.J. 240 (June 26); *Request for an Examination of the Situation in accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests Case (N. Z. v. Fr.)*, 1995 I.C.J. 288 (Sept. 22); *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Request by the World Health Organization for an Advisory Opinion)*, 1996 I.C.J. 66 (July 8); *Legality of the Threat or Use of Nuclear Weapons (Request by the United Nations General Assembly for an Advisory Opinion)*, 1996 I.C.J. 93 (July 8); *Case concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slov.)*, 1997 I.C.J. 7 (Sept. 25); *Fisheries Jurisdiction Case (Spain v. Can.)*, 1998 I.C.J. 432 (Dec. 4); *Case Concerning Pulp Mills on the River Uruguay (Arg. v. Uru.)* *Request for the Indication of Provisional Measures*, 2006 I.C.J. 135 (July 13). In addition to its own cases, the Court could also draw upon cases decided by arbitral tribunals. See, e.g., *Trail Smelter Arbitration (U.S. v. Can.)*, 3 R.I.A.A. 1938; *Lake Lanoux Arbitration (Fr. v. Spain)*, 24 I.L.R 101 (1957); *Bering Sea Fur Seals Fisheries Arbitration (Great Britain v. U.S.)* *Moore's International Arbitration* 755 (1893).

<sup>45</sup> The Chamber consists of the ICJ president and vice-president and five judges who are elected every three years. Recourse to the chamber is by agreement of the parties and thus far no cases have been submitted to it.

<sup>46</sup> See GABRIEL KOLKO, *THE TRIUMPH OF CONSERVATISM; A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916* (1977).

<sup>47</sup> See David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1 (2003); J. Kevin Healy & Jeffrey M. Tapick, *Climate Change: It's not Just a Policy Issue for Corporate Counsel—It's a Legal Problem*, 29 COLUM. J. ENVTL. L. 89 (2004).

<sup>48</sup> See generally DAN D. DOBBS, *THE LAW OF TORTS* 393-403 (2000).

Finally, the Court's relative insulation from the day to day political realm ideally situates it to further the development of equitable principles that account for the interests of future generations. Among the few institutions of the global system where the pull of clamoring contemporary interests do not hold sway, the Court operating in its advisory mode is perhaps most capable of serving in a stewardship role as a kind of guardian-for-future-generations.

The problem of global warming is perhaps only the most salient today of the many areas that could benefit from expanding the advisory jurisdiction of the Court. As discussed in this recommendation, Court involvement in other domains of conflict between states would offer different advantages and different challenges. Common to all, however, is the opportunity for the Court to expand its role in promoting an international system based on the rule of law.