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Climate Justice through International Courts and Tribunals: Advisory Opinions in the International Tribunal on the Law of the Sea (ITLOS), the Inter-American Court of Human Rights (IACtHR) and the International Court of Justice (ICJ)

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Climate Justice through International Courts and Tribunals: Advisory Opinions in the International Tribunal on the Law of the Sea (ITLOS), the Inter-American Court of Human Rights (IACtHR) and the International Court of Justice (ICJ)

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Abstract

Climate change is the justice challenge of our century, and the increasingly serious impacts of climate change on human societies and ecosystems are raising important international legal challenges. States and stakeholders are appealing to international courts for clarity concerning their responsibilities in the global response to climate change, as well as their accountability for climate-related loss and damage. Through advisory proceedings, these institutions are being asked to clarify the legal obligations of States in addressing climate change, including the prevention of ocean impacts, the protection of human rights, and in international law more broadly. The International Tribunal for the Law of the Sea (ITLOS), the Inter-American Court of Human Rights (IACtHR) and the International Court of Justice (ICJ) are at the forefront of such proceedings with the potential to reshape international climate law and governance. In this article, expert legal scholars highlight the significance of climate advisory proceedings in these tribunals, briefly underlining the legal reasoning of the ITLOS advisory opinion, its implications for international climate governance, and the questions and arguments before the IACtHR and the ICJ. The article explores, in the context of global efforts to implement the Paris Agreement under the United Nations Framework Convention on Climate Change (UNFCCC) and other climate litigation including in international courts and tribunals, the transformative potential of recent advisory opinions sought from the ITLOS, the IACtHR and the ICJ. In their responses to the pressing need for legal clarity in a world grappling with unprecedented climate challenges, the article suggests, courts are offered an historic opportunity to shape the contributions of international law to global sustainability, justice and the survival of life on Earth.

Keywords: climate change, climate litigation, international courts, international law, human rights.

Η κλιματική δικαιοσύνη μέσα από τα διεθνή δικαστήρια: οι γνωμοδοτήσεις του Διεθνούς Δικαστηρίου Δικαίου της Θάλασσας (ΔΔΔΘ), του Διαμερικανικού Δικαστηρίου Ανθρωπίνων Δικαιωμάτων (ΔΔΑΔ) και του Διεθνούς Δικαστηρίου Δικαιοσύνης (ΔΔΔ)

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Περίληψη

Η κλιματική αλλαγή είναι η πρόκληση της δικαιοσύνης του αιώνα μας και οι ήολενά πιο σοβαρές επιπτώσεις της στις ανθρώπινες κοινωνίες και τα οικοσυστήματα εγείρουν σημαντικές διεθνείς νομικές προκλήσεις. Τα κράτη και οι ενδιαφερόμενοι απευθύνονται στα διεθνή δικαστήρια προκειμένου να αποσαφνίσουν τις υποχρεώσεις όσον αφορά την αντιμετώπιση της κλιματικής αλλαγής καθώς και για τις απώλειες και ζημιές. Μέσα από τη γνωμοδοτική διαδικασία, ζητείται από αυτούς τους θεσμούς να διευκρινίσουν τις νομικές υποχρεώσεις των κρατών για την αντιμετώπιση της κλιματικής αλλαγής, συμπεριλαμβανομένης της πρόληψης των επιπτώσεων στους ωκεανούς και της προστασίας των ανθρώπινων δικαιωμάτων. Το Διεθνές Δικαστήριο για το Δίκαιο της Θάλασσας (ΔΔΔΘ), το Διαμερικανικό Δικαστήριο των Δικαιωμάτων του Ανθρώπου (ΔΔΑΔ) και το Διεθνές Δικαστήριο Δικαιοσύνης (ΔΔΔ) βρίσκονται στην πρώτη γραμμή τέτοιων διαδικασιών με τη δυνατότητα να αναδιαμορφώσουν το διεθνές δίκαιο και τη διακυβέρνηση για το κλίμα. Σε αυτό το άρθρο, ειδικοί νομικοί επιστήμονες υπογραμμίζουν τη σημασία των γνωμοδοτήσεων για το κλίμα, σχολιάζοντας το νομικό σκεπτικό της γνωμοδότησης του ΔΔΔΘ, τις επιπτώσεις της στη διεθνή διακυβέρνηση για το κλίμα και τα επιχειρήματα ενώπιον του ΔΔΔΑ και του ΔΔΔ. Το άρθρο διερευνά, στο πλαίσιο των παγκόσμιων προσπαθειών για την εφαρμογή της Συμφωνίας του Παρισιού τη μετασχηματιστική δυναμική των γνωμοδοτήσεων. Υποστηρίζει ότι μέσα από τις απαντήσεις τους στην πιεστική ανάγκη για νομική σαφήνεια σε ένα κόσμο που παλεύει με πρωτόγνωρες κλιματικές προκλήσεις, προσφέρεται στα δικαστήρια μια ιστορική ευκαιρία να διατυπώσουν τη συμβολή του διεθνούς δικαίου στην παγκόσμια βιωσιμότητα, τη δικαιοσύνη και τη διατήρηση της ζωής στη Γη.

Λέξεις κλειδιά: κλιματική αλλαγή, κλιματική δικαιοσύνη, διεθνή δικαστήρια, διεθνές δίκαιο, ανθρώπινα δικαιώματα.

1. Introduction¹

Climate change is the justice challenge of our century, and the increasingly serious impacts of climate change on human societies and ecosystems are raising important international legal challenges.² States and stakeholders are appealing to international courts for clarity concerning their responsibilities in the global response to climate change, as well as their accountability for climate-related loss and damage.³ Through climate litigation within countries, and also across borders through regional and international dispute settlement bodies, justice is being sought and obligations are being recognised.

Of particular note are recent requests to international courts and tribunals for advisory opinions on climate-related legal questions. Through advisory proceedings, these institutions are being asked to clarify the legal obligations of States in addressing climate change, including the prevention of ocean impacts, the protection of human rights, and in international law more broadly. The International Tribunal for the Law of the Sea (ITLOS), the Inter-American Court of Human Rights (IACtHR) and the International Court of Justice (ICJ) are at the forefront of such proceedings with the potential to reshape international climate law and governance.⁴ This article highlights the significance of climate advisory proceedings in these tribunals, briefly underlining the legal reasoning of the ITLOS advisory opinion, its implications for international climate governance, and the questions and arguments before the IACtHR and the ICJ. It explores, in the con-

¹ The authors thank Adv Matheus Frederico Paes Garcia, LLB (University Centre of Brasilia), MA (Geneva Graduate Institute), Manager of the CISDL Sustainable Trade and Investment Law Initiative (STILI) and CISDL Associate Fellow, for his substantive insights, also his excellent research and editing skills.

² Marie-Claire Cordonier Segger and Christina Voigt (eds), *Routledge Handbook of Climate Law and Governance: Courage, Contributions and Compliance* (Taylor & Francis 2024).

³ Marie-Claire Cordonier Segger et al, 'Defending the Defenders: State Responsibility to Respect Climate Justice, Rule of Law and Rights of Counsel in Climate Litigation Worldwide' in Ezio Costa Cordella and Pilar Moraga (eds), *State Responsibilities in the Climate Crisis: Legal Standards and Global Litigation* (Tirant lo Blanch 2024).

⁴ *Obligations of States in Respect of Climate Change (Request for Advisory Opinion)* [2023] ICJ Rep (UNGA Res 77/276, 29 March 2023) <https://www.icj-cij.org/sites/default/files/case-related/187/187-20230412-app-01-00-en.pdf> accessed 12 January 2025; *Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion)* ITLOS Case No 31 (12 December 2022) <https://www.itlos.org/en/cases/list-of-cases/request-for-advisory-opinion-31> accessed 12 January 2025; *Request for an Advisory Opinion on the Climate Emergency and Human Rights*, submitted by the Republic of Colombia and the Republic of Chile, IACtHR OC-1/23 (9 January 2023) https://corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf accessed 12 January 2025 and *International Tribunal for the Law of the Sea (Advisory Opinion)* ITLOS Case No 31 (21 May 2024) <https://www.itlos.org/en/cases/list-of-cases/request-for-advisory-opinion-31> accessed 12 January 2025.

text of global efforts to implement the Paris Agreement under the United Nations Framework Convention on Climate Change (UNFCCC) and other climate litigation including in international courts and tribunals, the transformative potential of recent advisory opinions sought from the ITLOS, the IACtHR and the ICJ as part of a response to the pressing need for legal clarity in a world grappling with unprecedented climate challenges.

2. The Rise of International Climate Litigation

International climate litigation, in particular efforts to seek advisory opinions and bring disputes addressing climate change to international courts and tribunals, has gained momentum in recent years. In recent decades, climate litigation was primarily focused on domestic courts, where plaintiffs sought to compel governments and corporations to reduce greenhouse gas emissions (GHG), to protect human rights affected by climate change, to prevent or adapt to the dangerous effects of climate change.⁵ However, as science demonstrates persuasively, the global climate crisis is deepening.⁶ And there has been a notable shift toward international judicial forums, where legal arguments transcend national borders and address the collective responsibility of States to mitigate GHG emissions, ensure adaptation and resilience, or redirect financial flows in relation climate change.

One of the key features of international climate litigation is a reliance, in many cases, on human rights obligations. The human rights impacts of climate change are profound, with vulnerable populations facing the loss of livelihoods, displacement, and threats to their right to life, health, and a clean environment.⁷ Legal scholars and practitioners argue that climate change directly affects the enjoyment of fundamental human rights, creating a strong case for invoking international human rights law in litigation.

⁵ Jannika Jahn, "Domestic Courts as Guarantors of International Climate Cooperation: Insights from the German Constitutional Court's Climate Decision" (2023) 21 International Journal of Constitutional Law 859; Melanie Jean Murcott and Maria Antonia Tigre, "Developments, Opportunities, and Complexities in Global South Climate Litigation" (2024) 16 Journal of Human Rights Practice 1; César Rodríguez-Garavito, *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action* (Cambridge University Press 2022); Wolfgang Kahl and Marc-Philippe Weller (eds), *Climate Change Litigation* (Beck/Hart 2021).

⁶ IPCC Sixth Assessment Report (AR6) Synthesis Report (2023), https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf; IPCC Special Report on Global Warming of 1.5°C (2018), https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SPM_version_report_LR.pdf; IPCC Fifth Assessment Report (AR5) (2014), https://archive.ipcc.ch/pdf/assessment-report/ar5/syr/AR5_SYR_FINAL_SPM.pdf ; and Global Stocktake Report Synthesis Report by the Co-Facilitators on the Technical Dialogue (2023), https://unfccc.int/sites/default/files/resource/sb2023_09E.pdf?download

⁷ Sumudu Atapattu, *Human Rights Approaches to Climate Change: Challenges and Opportunities* (Routledge 2015).

Moreover, international climate litigation also draws on international climate law and governance, and international principles of law on sustainable development including precaution, sustainable use of natural resources, equity and integration.⁸ These principles are enshrined in major international treaties on sustainable development, such as the Paris Agreement under the United Nations Framework Convention on Climate Change (UNFCCC),⁹ the Convention on Biological Diversity¹⁰ and the United Nations Convention on the Law of the Sea (UNCLOS).¹¹ Such instruments set the stage for the legal arguments in international climate litigation, particularly with regard to states' obligations to contribute to global mitigation efforts and take preventive measures, adapt to climate impacts and promote resilience, and redirect financial flows towards more sustainable development.

As noted by scholars, international courts and tribunals have long engaged with climate-related disputes,¹² and the recent advisory opinions on climate change are not the first instances where international law has intersected with environmental concerns. International courts have addressed a range of climate-related issues over the years, including the responsibility of states for environmental harm, the human rights implications of climate change, the need to secure more sustainable development of energy and other resources, and the growing role of international law in addressing collaboration on, and impacts of global climate change.¹³ State responsibility is increasingly being invoked, driven by an increasing recognition of the legal obligations of States to mitigate climate change, strengthen adaptation and resilience, redirect financial flows, and address loss and damage due to climate change. Through various cases, including human rights litigation, investment arbitration, and state-to-state disputes, international courts have progressively clarified the scope of state responsibility in relation to climate change, laying the groundwork for future climate litigation.

⁸ International Law Association, New Dehli Declaration of Principles of International Law Relating to Sustainable Development, ILA Resolution 3/2002 (2002), https://www.ila-hq.org/en_GB/documents/conference-resolution-english-new-delhi-2002-3 International Law Association, Sofia Guiding Statements on Sustainable Development, ILA Resolution 7/2012 (2012) https://www.ila-hq.org/en_GB/documents/conference-resolution-english-sofia-2012-2 and International Law Association, Kyoto Guidelines on Sustainable Management of Natural Resources for Development, ILA Resolution 4/2020 (2020) see also Marie-Claire Cordonier Segger and Damilola Olawuyi, *Sustainable Development Law: Principles, Practices and Prospects* (2nd edn Oxford University Press 2025 forthcoming).

⁹ Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UNTS 54113.

¹⁰ Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79.

¹¹ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

¹² Marie-Claire Cordonier Segger and HE Judge CG Weeramantry, *Sustainable Development Principles in the Decisions of International Courts and Tribunals: 1992-2012* (Routledge 2017).

¹³ Ibid.

One notable example is the Klimaseniorinnen case, brought before the European Court of Human Rights (ECtHR) by a group of elderly women in Switzerland.¹⁴ The plaintiffs argued that the Swiss government's insufficient climate action violated their rights under the European Convention on Human Rights, particularly the right to life and the right to a healthy environment. The case emphasized the legal duty of states to protect vulnerable populations from the harmful effects of climate change. In its ruling, the ECtHR marks a significant milestone in recognizing climate change as a human rights issue. This growing linkage between climate change and human rights has been echoed in various other international legal proceedings and continues to influence how courts address state obligations in the context of global warming.

In the African context, the Ogoni case before the African Commission on Human and Peoples' Rights offers another important example of regional climate-related litigation.¹⁵ In this case, the Commission addressed degradation caused by oil extraction activities in Nigeria, which led to significant harm to local communities. While the case focused on the violations of rights under the African Charter on Human and Peoples' Rights, it also highlighted the broader implications of fossil fuel development impacts for human rights, including the right to health. The African Commission's decision underscored the responsibility of States to prevent damage and protect their citizens from climate-related harm, contributing to the development of a legal framework that connects degradation due to fossil fuel exploitation to human rights obligations. It highlighted that "The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources."¹⁶

Climate change-related financial disputes are also heard in investment arbitration, as demonstrated by various cases heard under the International Centre for Settlement of Investment Disputes (ICSID) and UN Centre for Investment and Trade Law (UNCITRAL) rules, though scholars note it is at best

¹⁴ Klimaseniorinnen v Switzerland (Application No 53600/20) (ECtHR) (2020) and Kanstantsin Dzehtsiarov, "KlimaSeniorinnen Revolution: The New Approach to Standing" (2024) 5 European Convention on Human Rights Law Review 423.

¹⁵ Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria (2001) Communication No 155/96 African Commission on Human and Peoples' Rights, (2001) AHRLR 60 (ACHPR 2001) and Fons Coomans, "The Ogoni Case Before the African Commission on Human and Peoples' Rights" (2003) 52 International and Comparative Law Quarterly 749.

¹⁶ Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria (2001) Communication No 155/96 African Commission on Human and Peoples' Rights, (2001) AHRLR 60 (ACHPR 2001) 52.

a double-edged sword for climate justice.¹⁷ Disputes can arise when private investors challenge State actions intended to reduce dependence on fossil fuels or to undermine renewable energy commitments, claiming that such measures unfairly affect their investments. As an example of the former, in *Vattenfall v. Germany*, a Swedish energy company Vattenfall challenged Germany's decision not to grant a water permit for a coal-fired power plant. The investor argued that Germany's regulatory measures violated their rights under the Energy Charter Treaty. The case was ultimately settled but highlighted the tension between state regulation to reduce GHG emissions and the protection of investor rights, raising key questions about the balance between climate action and investor protection in international law.¹⁸ An example of the latter is found in the *Eiser Infrastructure Limited and Energía Solar Luxembourg S.A. v. Spain* award, in which investors in the Spanish solar energy sector brought a claim against Spain for planned changes to its renewable energy subsidy regime.¹⁹ The investors argued that Spain's modifications to the feed-in tariff scheme, posited to reduce the country's fiscal burden, amounted to expropriation and violated their rights under the Energy Charter Treaty, and the tribunal ruled in favour of investors who had relied on the rate commitment to finance renewable energy.

The Permanent Court of Arbitration (PCA) has also considered climate change-related issues in the PCA South China Sea, in which the Philippines brought a case against China regarding its construction of artificial islands in the South China Sea.²⁰ The arbitration focused on law of the sea, with significant

¹⁷ Markus Gehring et al, 'Investment Treaties and SDG 13 Climate Action', in Marie-Claire Cordonier-Segger, Sean Stephenson and Ted Gleason (eds), *Research Handbook on Investment Law and Sustainable Development* (Edward Elgar 2025 forthcoming); Markus Gehring and Avidan Kent, 'Investment Law and the Environment: Evolving International Practice and Norms' in Erika Techera et al. (eds) *Routledge Handbook of International Environmental Law* (2nd edn Routledge 2020). See also United Nations Commission on International Trade Law, 'UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration' (UNCITRAL 2014).

¹⁸ International Centre for the Settlement of Investment Disputes *Vattenfall AB and others v. Federal Republic of Germany* (2020) Case No. ARB/12/12 and Venetia Argyropoulou, "Vattenfall in the Aftermath of Achmea: Between a Rock and a Hard Place?" (2019) 4 European Investment Law and Arbitration Review 203.

¹⁹ International Centre for the Settlement of Investment Disputes *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, see Muskaan Singh, 'The Incorporation of International Investment Protection Law in Renewable Energy Disputes: The Case of Spain' (2022) 2(5) Indian J Intg Res Law 34.

²⁰ The Tribunal found "with respect to the protection and preservation of the marine environment in the South China Sea: a. that China's land reclamation and construction of artificial islands, installations, and structures at Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), Johnson Reef, Hughes Reef, Subi Reef, and Mischief Reef has caused severe, irreparable harm to the coral reef ecosystem; b. that China has not cooperated or coordinated with the other States bordering the South China Sea concerning the protection and preservation of the marine environment concerning such activities; and

implications for climate change, as activities such construction of islands could affect marine ecosystems, including coral reefs, which are vital to climate resilience. The PCA's award emphasised the responsibility of States and its findings continue to influence international law, particularly in the context of ocean governance and climate change adaptation.

Together, these cases form part of a growing body of international legal precedent that is shaping the landscape of climate change law. While the recent advisory opinion on climate change from the ITLOS, and the opinions being drafted in the IACtHR and the ICJ are highly significant, they build on a rich and growing foundation of judicial engagement with disputes related to climate change, human rights, the environment and sustainable development. Claimants and tribunals are increasingly seeking independent, peaceful resolution to disputes on climate change. As the Klimaseniorinnen, African human rights cases, ICSID disputes and PCA case suggests, our understanding of State responsibility in the context of climate change is evolving. Potentially, as some scholars advocate, these developments could encourage and shape more robust and enforceable climate commitments, by clarifying the legal obligations of States and the rights of individuals and communities in the face of a global climate crisis.²¹

3. The Role of Advisory Opinions in International Climate Litigation

In recent years, stakeholders and states have moved forward to seek advisory opinions from influential international tribunals. Advisory opinions are non-binding legal opinions issued by international courts or tribunals at the request of authorized entities, such as United Nations bodies or other international organizations.²² While these opinions do not resolve specific disputes between Parties, they can provide valuable legal guidance on complex issues of international law.

In the context of climate change, advisory opinions have been sought to clarify the legal obligations of States under international law, including on law of the sea, human rights, protection of the environment and sustainable development. These opinions have the potential to help interpret and shape the legal frameworks that govern State and others' policies and actions in relation to

c. that China has failed to communicate an assessment of the potential effects of such activities on the marine environment, within the meaning of Article 206 of the Convention" The South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China) (2013-19) (2016) and Thomas J Schoenbaum, "The South China Sea Arbitration Decision: The Need for Clarification" (2016) 110 AJIL Unbound 290.

²¹ Maria Antonia Tigre 'Climate Litigation in the Global South: Mapping Report', (Columbia Law School, Sabin Centre for Climate Change Law 2024) and Benoit Mayer and Harro van Asselt, 'The rise of international climate litigation', RECIEL 32(2) (2024) <<https://onlinelibrary.wiley.com/doi/10.1111/reel.12515>>

²² James Crawford and Ian Brownlie, Brownlie's Principles of Public International Law (OUP 2019); Malcolm N. Shaw, International Law (9th edn CUP 2021).

climate change. They could also fill gaps in international law, where treaties may be silent or ambiguous on specific climate-related issues, such as the duty to mitigate climate impacts, the protection of vulnerable communities, or the rights of future generations.

The ITLOS, IACtHR, and ICJ have been approached for advisory opinions on climate change matters, reflecting the growing recognition of their role in climate governance. These tribunals, with their distinct mandates, offer different but complementary perspectives on the legal dimensions of climate change.

4. Advisory Proceedings in ITLOS

The International Tribunal for the Law of the Sea (ITLOS) is an important international dispute settlement body with a specific focus on the law of the sea.²³ ITLOS was established under the United Nations Convention on the Law of the Sea (UNCLOS) to adjudicate disputes related to the use and conservation of the world's oceans.²⁴ Given the profound impacts of climate change on marine ecosystems—such as rising sea levels, ocean acidification, and the destruction of coral reefs—climate change-related legal issues are being raised to ITLOS.

The Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal) was requested on 12 December 2022. The request for an advisory opinion focused on the legal obligations of States under UNCLOS to prevent harm caused by climate change, particularly with regard to the protection of the marine environment and the rights of coastal states to maintain control over their maritime zones.

The questions asked were: "What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (the "UNCLOS"), including under Part XI: (a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere? (b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?"²⁵

²³ Yoshifumi Takana, *The International Law of the Sea* (4th edn CUP 2023), and Cassie Lumsden et al, 'Navigating High Seas Biodiversity and Climate Change', in Marie-Claire Cordonier Segger and Christina Voigt, *Routledge Handbook of Climate Law and Governance: Courage, Contributions and Compliance* (Taylor & Francis 2024).

²⁴ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, Annex VI.

²⁵ Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion) ITLOS Case No 31 (12 December 2022) < <https://www.itlos.org/en/cases/list-of-cases/request-for-advisory-opinion-31> > accessed 12 January 2025.

The Advisory Opinion issued by ITLOS provided a significant contribution to international climate law, providing a clear articulation of the legal obligations of States to protect the marine environment from the effects of climate change. The tribunal ruled that anthropogenic GHG emissions into the atmosphere constitute pollution of the marine environment and that through UNCLOS State Parties have specific obligations to cooperate, directly or through competent international organizations, continuously, meaningfully and in good faith, in order to prevent, reduce and control marine pollution from anthropogenic GHG emissions. States also have a specific obligation to assist developing States, in particular vulnerable developing States, in their efforts to address marine pollution from anthropogenic GHG emissions. The obligation to protect and preserve the marine environment constitutes a strict due diligence obligation, given the high risks of serious and irreversible harm to the marine environment from climate change impacts and ocean acidification.²⁶ It highlighted that law of the seas and the global climate regime are mutually supportive.

5. The Advisory Opinion of the Inter-American Court of Human Rights (IACtHR)

The Inter-American Court of Human Rights (IACtHR) has also been called to respond to climate change from a human rights perspective. In recent years, the Inter-American Commission on Human Rights received a petition from the Arctic Athabaskan Council on behalf of the Athabaskan peoples, claiming that Canada's lack of action against regulating black carbon emissions will affect their rights related to the enjoyment of the benefits of their culture, to property, to the preservation of health, and to their own means of subsistence.²⁷ Then in January 2023, the Court was asked for an advisory opinion on the human rights implications of climate change, specifically focusing on the obligations of States with regards to climate change, including rights of children and future generations in the Americas. In particular, the IACtHR has been asked to consider the specific obligations under

²⁶ Ezio Costa Cordella et. al (eds), *State Responsibilities in the Climate Crisis: Legal Standards and Global Litigation* (Tirant lo Blanch 2024), Marie-Claire Cordonier Segger and Christina Voigt, *Routledge Handbook of Climate Law and Governance: Courage, Contributions and Compliance* (Taylor & Francis 2024) and Marie-Claire Cordonier Segger and Damilola Olawuyi, *Sustainable Development Law: Principles, Practices and Prospects* (2nd edn Oxford University Press forthcoming 2025).

²⁷ Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada, (2013) https://judicialportal.informeia.org/sites/default/files/court-case/AAC_PETITION_13-04-23a.pdf and Agnieszka Szpak, "Arctic Athabaskan Council's Petition to the Inter-American Commission on Human Rights and Climate Change—Business as Usual or a Breakthrough?" (2020) 162 *Climatic Change* 1575.

the Inter-American Convention on Human Rights.²⁸ The request for an advisory opinion seeks to clarify the relationship between climate change and human rights, particularly the right to life, health, and rights arising from the Escazu Agreement.²⁹

The IACtHR's advisory opinion has the opportunity to be groundbreaking, affirming that the right to a healthy environment as part of the obligations of states in the climate crisis. The Court might find, for instance, that States have an obligation not only to prevent harm to the environment but also to ensure that climate change does not interfere with the enjoyment of fundamental human rights. It could emphasise that failure to take adequate climate action could lead to violations of the right to life, health, and the right to a clean, healthy and sustainable environment. Furthermore, the IACtHR's opinion could offer clear guidance on the obligations of States to protect vulnerable populations from the impacts of climate change. The Court might reaffirm that States must ensure the participation of affected communities in decision-making processes related to climate change, protect environmental defenders and provide communities with access to remedies in cases where their rights are violated. The advisory opinion holds potential for significant implications for human rights-based climate litigation, offering a strong legal framework for arguing that climate change-related harm constitutes a violation of human rights. It remains to be seen, at the time of publication, whether and how this opportunity is taken up by the Court.

6. Advisory Proceedings in the International Court of Justice (ICJ)

The International Court of Justice (ICJ) stands as the principal judicial body of the United Nations and plays a pivotal role in adjudicating disputes between states on matters of international law.³⁰ Given its mandate to provide legal opinions on contentious cases and advisory proceedings, the ICJ is uniquely positioned to influence the development of international law on climate change. Indeed, over recent decades, the ICJ has been called to address the rights of vulnerable populations, territorial sovereignty, sustainable development, transboundary

²⁸ See Request for an Advisory Opinion on the Climate Emergency and Human Rights, submitted by the Republic of Colombia and the Republic of Chile, IACtHR OC-1/23 (9 January 2023) https://corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf and American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.

²⁹ Request for an Advisory Opinion on the Climate Emergency and Human Rights, submitted by the Republic of Colombia and the Republic of Chile, IACtHR OC-1/23 (9 January 2023) https://corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf and Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (adopted 4 March 2018, entered into force 22 April 2021) UNTS Registration No 56055 ('Escazu Agreement').

³⁰ James Crawford, *Brownlie's Principles of International Law* (9th edn OUP 2019).

pollution, and the obligations of States under international conventions—matters that intersect directly with the legal challenges posed by climate change, and are highly relevant to climate justice.³¹

One of the most significant contributions of the ICJ to date is found in the 2010 case Pulp Mills on the River Uruguay (Argentina v. Uruguay). This case, which concerned plans for a pulp mill built on a shared river, dealt directly with sustainable development concerns, also the duty of States to integrate environmental concerns into development decision-making.³² Some scholars also argue that the ICJ's ruling recognised the need to prevent transboundary harm, respect impact assessments, and take precaution into account.³³ It was also, however, argued that the mill would support local livelihoods and value-added development of paper products, reducing GHG emissions from long-distance transportation of wood to be refined into paper, and that certain actions should not be mandated as they would increase GHG emissions.³⁴ The case reinforced the concept that the potential for transboundary impacts on human health, community livelihoods and the Parties shared environment demands international cooperation and responsibility—crucial findings in the context of climate change.³⁵

³¹ Marie-Claire Cordonier Segger and Judge CG Weeramantry, *Sustainable Development Principles in the Decisions of International Courts and Tribunals: 1992-2012* (Routledge 2017) and Christina Voigt and Zen Makuch, *Courts and the Environment* (Edward Elgar Publishing).

³² The ICJ noted that “Regarding Article 27, it is the view of the Court that it embodies the interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development.” *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgement) [2010] ICJ 1.20 164. See Marie-Claire Cordonier Segger and Damilola Olawuyi, *Sustainable Development Law: Principles, Practices and Prospects* (2nd edn Oxford University Press 2025 forthcoming); Marie-Claire Cordonier Segger and HE Judge CG Weeramantry, *Sustainable Development Principles in the Decisions of International Courts and Tribunals: 1992-2012* (Routledge 2017).

³³ The ICJ did not ignore precaution entirely, noting, “[A] precautionary approach may be relevant in the interpretation and application of the provisions of the Statute.” *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgement) [2010] ICJ 1.20 164. Scholars suggest that, in a later decision, ITLOS saw this acknowledgment as an affirmation of the precautionary principle, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Res Activities in the Area (Advisory Opinion)* ITLOS 135. See Cymie R. Payne, ‘Environmental Impact Assessment as a Duty under International Law: The International Court of Justice Judgment on Pulp Mills on the River Uruguay’, *European Journal of Risk Regulation* 1(3) (2010); Ling Chen, ‘Realizing the Precautionary Principle in Due Diligence’, *Dalhousie Journal of Legal Studies* 24 (2016) 14; Daniel Kazhdan, ‘Precautionary Pulp: “Pulp Mills” and the Evolving Dispute between International Tribunals over the Reach of the Precautionary Principle’ *Ecology Law Quarterly* 38(2) (2011).

³⁴ *Ibid*, supra n. 31.

³⁵ Ezio Costa Cordella et. al (eds), *State Responsibilities in the Climate Crisis: Legal Standards and Global Litigation* (Tirant lo Blanch 2024) and Marie-Claire Cordonier Segger and Judge CG Weeramantry, *Sustainable Development Principles in the Decisions of*

In the context of climate litigation, a deeply anticipated advisory opinion from the ICJ concerns Obligations of States in respect of Climate Change, which has been requested unanimously by the UN General Assembly after 111 UN states co-sponsored the resolution under the leadership of Vanuatu. As the “world’s highest court”,³⁶ scholars argue that the ICJ’s legal guidance on the responsibility of States for their role in global climate change holds the prospects to be groundbreaking.³⁷

Given the Court’s authoritative position in international law, the ICJ is being asked to clarify several legal issues related to climate change. The question before the Court, as agreed in the United Nations, is based on a challenging compromise:

“(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?”³⁸

Indeed, with regards to State responsibility for climate change, the ICJ has the opportunity to interpret the obligations of States under the UNFCCC and the Paris Agreement, particularly in relation to their duties to prevent significant harm from climate change. States could be asked to demonstrate how they are meeting their obligations to reduce emissions, help vulnerable states, and take preventative actions against climate-related disasters. Further, in terms of the duty of States to protect human rights, the ICJ could provide advisory guidance on the relationship between foreclosure of sustainable development opportunities, harm to human life, health and the environment caused by climate change, and

International Courts and Tribunals: 1992–2012 (Routledge 2017).

³⁶ Pacific Islands Students Fighting Climate Change, <https://www.pisfcc.org/> Accessed 12 January 2025.

³⁷ Maria Antonia Tigre, ‘It is (Finally) Time for an Advisory Opinion on Climate Change: Challenges and Opportunities on a Trio of Initiatives’ *Charleston Law Review*, 17 (2023); Ian Fry, ‘Providing Legal Options to Protect the Human Rights of Persons Displaced Across International Borders due to Climate Change: Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change, Ian Fry’, United Nations General Assembly, Human Rights Council 35th Session (2023).

³⁸ Obligations of States in Respect of Climate Change (Request for an advisory opinion) [2023] ICJ.

the violation of human rights. The ICJ might clarify whether the failure to address climate change constitutes a breach of fundamental human rights, including the right to life, the right to health, and the right to an adequate standard of living. In addition, with regards climate-induced displacement, climate refugees and the duty of States to protect populations displaced by the impacts of climate change, the ICJ might be able to interpret existing international treaties on refugees in the context of climate-induced displacement, which is expected to increase dramatically in the coming decades. Of key further importance, in terms of the obligations and responsibilities of industrialized countries which historically have been the largest contributors to greenhouse gas emissions and benefited most, economically, from their development and use in recent decades, the ICJ may address whether developed nations have a special duty to assist developing countries in adapting to climate change, pursuant to the “common but differentiated responsibilities” principle.

Given the ICJ's ability to provide authoritative legal opinions, in its historic Advisory Opinion on climate change, the Court has the opportunity to significantly influence the interpretation and enforcement of international law in relation to climate change, and to guide domestic, regional and related international legal developments on these challenges. The Court could provide clarity on the legal responsibilities of states to curb emissions, protect vulnerable populations, and support adaptation and resilience efforts globally. Moreover, a strong ICJ advisory opinion could offer a legal framework for States to adopt more ambitious climate action plans, shaping their nationally determined contributions (NDCs) to the global response to climate change under the Paris Agreement and beyond. The advisory opinion might reinforce the signal to global markets which were placed on notice, in the 28th Conference of the Parties to the UN Framework Convention on Climate Change in Dubai, UAE, that the world must transition “away from fossil fuels in energy systems, in a just, orderly and equitable manner, accelerating action in this critical decade, so as to achieve net zero by 2050 in keeping with the science.”³⁹ The Court could, in its advisory opinion, reinforce the momentum towards sustainable development generated by agreement, in the 29th Conference of the Parties to the UN Framework Convention on Climate Change in Baku, Azerbaijan, on a New Collective Quantified Goal on Climate Finance (NCQG) of “at least USD 300 billion per year by 2035 for developing country Parties for climate action.”⁴⁰ The opinion may also guide and shape future climate litigation, helping to align national policies with international legal obligations, to protect human rights to life, to health, and to a clean, healthy and sustainable

³⁹ Conference of the Parties to the Paris Agreement, 'Outcome of the first Global Stocktake' Decision CMA.5 https://unfccc.int/sites/default/files/resource/cma5_auv_4_gst.pdf?download [2023] para 28(d), (h).

⁴⁰ Conference of the Parties to the Paris Agreement, 'New Collective Quantified Goal on Climate Finance' Decision CMA.6 https://unfccc.int/sites/default/files/resource/CMA_11%28a%29_NCQG.pdf [2023], 8.

environment, to respect the rights and interests of future generations,⁴¹ and to encourage States to take more proactive measures to mitigate and adapt to climate change impacts.

Further, and as noted in the International Union for Conservation of Nature (IUCN) submission to the ICJ, the climate advisory case represents a critical contribution to the evolving field of climate law, particularly in terms of reinforcing states' obligations to protect the global environment.⁴² In particular, as IUCN highlighted, the Court might take account of the importance of the precautionary principle and the obligation of states to prevent harm to the environment, even in the face of scientific uncertainty regarding the full scope of climate impacts.⁴³ In doing so, as the IUCN emphasized, that States' failure to mitigate climate change could result in transboundary environmental harm, impacting not just the States directly involved but also the global community at large.⁴⁴ In addition, the UNFCCC, the Paris Agreement, UNCLOS (as per the ITLOS advisory opinion) and other international treaties do not merely offer aspirational targets but create legal obligations that bind States to take effective measures to limit greenhouse gas emissions.⁴⁵ In its advisory opinion the ICJ has the opportunity to affirm that the duty to protect the environment extends to the protection of shared natural resources, such as the atmosphere, and that failure to meet emission reduction targets constitutes a violation of international law. This emphasis on binding obligations is a key element in understanding how international law can be leveraged to hold states accountable for their contributions to climate change. As the IUCN submission also argued, the intersection of climate change and human rights law is crucial in this case. Drawing on the growing body of case law linking environmental protection with fundamental human rights, such as the right to life and the right to a clean, healthy and sustainable environment, as IUCN requests, the ICJ holds a key opportunity to recognize the link between climate change and its impacts on human rights.⁴⁶ By framing climate change as a human rights issue, the Court could strengthen the legal basis compelling States to take urgent action to protect vulnerable populations from the harmful effects of climate change. This would align with the broader movement in international law to incorporate human rights standards into climate governance, as part of a commitment to sustainable development, ensuring that the most affected communities are given a voice in climate negotiations and actions.⁴⁷

⁴¹ Marie-Claire Cordonier Segger, Marcel Szabó and Alexandra R Harrington, *Intergenerational Justice in Sustainable Development Treaty Implementation* (Cambridge University Press 2021).

⁴² *Obligations of States in Respect of Climate Change* (Written Statement of the International Union for Conservation of Nature) ICJ [2024].

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Marie-Claire Cordonier Segger and Christina Voigt (eds), *Routledge Handbook of Climate*

Finally, as the IUCN highlighted, the Advisory Opinion offers an important opportunity for the ICJ to recognise the principle of intergenerational equity in the context of climate change. As IUCN, expert scholars, the judiciary and others have recommended,⁴⁸ in its Advisory Opinion the ICJ could consider the rights of future generations, framing climate change as a cross-generational issue that requires States to act not only in the present but also for the protection of nature and sustainable development for future generations. By invoking this principle, climate change mitigation is positioned as a urgent moral and legal responsibility that transcends national boundaries and time. In essence, the ICJ has been offered a historic opportunity to pave the way for more binding international legal actions, bolstering global climate governance efforts and inspiring states to meet their climate commitments. It remains to be seen, at the time of publication, if this opportunity can be realised.

7. Comparative Analysis: ITLOS, IACtHR, and ICJ Advisory Proceedings

While the ITLOS, IACtHR, and ICJ are governed by distinct mandates, their advisory opinions have the opportunity to provide coherent international legal guidance, particularly in terms of State responsibility in responding to the global challenge of climate change. Each tribunal's approach to climate litigation might bring a unique perspective to the table, while collectively highlighting the growing contributions of international law to common concerns such as respect for human rights, the protection of nature, and the need for more sustainable development, worldwide.

The ITLOS, with its focus on the law of the sea, addresses the legal issues related to ocean governance and the impacts of climate change on marine environments. The IACtHR, meanwhile, is uniquely concerned with the protection of human rights, particularly the rights of vulnerable populations affected by climate change across the Americas. The ICJ, as the main judicial body of the UN, has the opportunity to clarify the obligations of all states with regards to climate change.⁴⁹ Despite these differing mandates, all three international courts

Law and Governance: Courage, Contributions and Compliance (Taylor & Francis 2024); Marie-Claire Cordonier Segger and Damilola Olawuyi, Sustainable Development Law: Principles, Practices and Prospects (2nd edn Oxford University Press 2025 forthcoming).

⁴⁸ Marie-Claire Cordonier Segger, Marcel Szabó and Alexandra R. Harrington (eds), Intergenerational Justice in Sustainable Development Treaty Implementation: Advancing Future Generations Rights through National Institutions (CUP 2021), Christina Voigt (ed), International Judicial Practice on the Environment: Questions of Legitimacy, (CUP 2019) and Sumudu Atapattu, UN Human Rights Institutions and the Environment, (Taylor & Francis 2023).

⁴⁹ Tejas Rao, Marie-Claire Cordonier Segger and Markus Gehring, “The Advisory Opinion Could Reshape Global Climate Governance” [2024] Verfassungsblog.

and tribunals can emphasise the importance of international cooperation, the responsibility of states to prevent harm, and the protection of human rights. Further, the ITLOS, IACtHR, and ICJ have different jurisdictional boundaries and procedural rules. ITLOS focuses specifically on issues related to the law of the sea and maritime disputes. In contrast, the IACtHR handles cases related to human rights violations within the Americas, and its advisory opinions are especially relevant for climate-related human rights concerns. The ICJ, as the principal judicial organ of the UN, has jurisdiction over a wide range of international disputes, including those related to environmental law, state responsibility, and treaty law. Despite these differences, these key international tribunals are increasingly engaging with climate change issues, and their opinions have the opportunity to shape the development of climate law and governance climate worldwide.

Indeed, while advisory opinions are legally binding only on the requesting institution, they carry significant weight in international law and can influence the legal norms governing climate change. The advisory opinions issued by these tribunals have the potential to establish new legal understanding, guiding States in the implementation of climate commitments, framing future climate litigation, and reinforcing the contributions of climate law and governance to rule of law and peaceful settlement of disputes. For instance, ITLOS' advisory opinion on marine environmental protection provides important guidance for ocean governance in the context of climate change. Similarly, depending on their findings, the IACtHR's opinion the human rights obligations with regards to climate change may be referenced for decades, shaping in legal cases across the Americas. Indeed, as international climate litigation continues to evolve, it is likely that the advisory opinions of these tribunals will form a key part of the legal landscape. States may increasingly turn to these courts for guidance on how to fulfil their obligations under international law, particularly as the climate crisis intensifies and its impacts become more widespread. These advisory opinions could also play a critical role in fostering international cooperation, strengthening the international climate regime and ensuring that States fulfil their obligations to promote more sustainable development, protect nature and respect human rights in the face of climate change.

8. Conclusion

The recent advisory proceedings in ITLOS, IACtHR, and ICJ represent a significant development in the field of international climate litigation. These tribunals are helping to shape the legal framework for addressing the global climate crisis, providing critical legal guidance on state obligations, human rights, and climate protection. As the world confronts increasingly severe climate impacts, the role of international courts in guiding global climate governance will become even more crucial.

Through their advisory opinions, ITLOS, IACtHR, and ICJ have the opportunity to make important contributions to climate law and governance, worldwide. While these opinions are non-binding, their influence is undeniable, as they clarify State responsibilities and help create a legal framework that can address the complex and interconnected challenges of climate change. Indeed, the rule of law and peaceful settlement of disputes may depend, in the end, on the courage of Courts such as these, whose opinions can provide necessary legal clarity and direction for States as they navigate the complex terrain of climate action and justice.

The need for strong, coordinated international climate action in the context of sustainable development is clear. The advisory opinions of ITLOS, IACtHR, and ICJ have a historic opportunity to shape our understanding of the duties of States and stakeholders advancing this action, offering legal guidance that can strengthen international commitments and ensure the protection of human rights, the climate system and the rights of future generations to address this common concern of humankind.