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It Is (Finally) Time for and Advisory Opinion on Climate Change: Challenges and Opportunities on a Trio of Initiatives

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IT IS (FINALLY) TIME FOR AN ADVISORY OPINION ON CLIMATE CHANGE: CHALLENGES AND OPPORTUNITIES ON A TRIO OF INITIATIVES

*Maria Antonia Tigre*¹

In recent years, the number and diversity of climate-related lawsuits have increased, with courts in over seventy jurisdictions now handling such cases. After the expansion through domestic courts, stakeholders worldwide are turning to international courts and tribunals to help define the responsibilities of states in light of the climate crisis. Three initiatives requesting advisory opinions to international courts or tribunals have been announced within six months. These advisory opinions could have significant implications for international climate change law, defining the human rights obligations of states (and potentially corporations) in light of the climate crisis. It is expected the International Court of Justice, the International Tribunal on the Law of the Seas, and the Inter-American Court of Human Rights will publish advisory opinions on climate change in 2024–2025. These advisory opinions are nonbinding. Nonetheless, the rank and prestige of the courts and tribunals involved convey the importance and influence of advisory opinions in articulating states' obligations under international law. The advent of these advisory opinions makes this a momentous occasion for global climate litigation, with the world's highest courts weighing in on the legal rights and duties related to the climate crisis.

1. This article builds on a presentation given at the Charleston Law Review's February 2023 Symposium, Climate Change and the Law: Rising Tides Wash Up Legal Concerns. It further expands on several conversations held with a variety of colleagues throughout 2023. The author is grateful to Armando Rocha, Dina Lupin Townsend, Kevin Chand, Jorge Contesse, Lea Main-Klingst, Lucía Solano, Margaretha Wewerinke-Singh, Michael Burger, Michael Gerrard, and Tomás Pascual for conversations that helped frame this article. The author is also extremely thankful to Skylar A. Shulman and Robert M. Larese for invaluable research assistance in drafting this article.

This article traces the beginnings of the trio of requests, placing them within the context of global climate litigation. It discusses why the time is ripe for these advisory opinions' contributions to developing international climate-change law while comparing the legal questions posed to the judicial bodies. The article further discusses the challenges and opportunities these requests present.

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INTRODUCTION

“Climate justice is both a moral imperative and a prerequisite for effective global climate action. The climate crisis can only be overcome through cooperation—between peoples, cultures, nations, generations. But festering climate injustice feeds divisions and threatens to paralyse global climate action.”

-Antonio Gutierrez²

Climate litigation is facing an unprecedented moment. In recent years, the number and diversity of climate-related lawsuits have increased, with courts in over seventy jurisdictions now handling such cases. As of Sept. 8, 2023, the Sabin Center for Climate Change Law’s Global and U.S. Climate Litigation Databases jointly include 2,415 cases.³ The expansive growth of climate litigation results from the—still—inadequate climate ambition worldwide. Despite improvement in countries’ mitigation and adaptation targets, the long-term temperature goals and objectives of the Paris Agreement remain a distant future.⁴

As a result, stakeholders around the world are turning to

2. Press Release, U.N. Secretary-General, International Court’s Advisory Opinions on Climate Change Obligations of States ‘of Tremendous Importance’, Secretary-General Tells General Assembly, SG/SM/21750 (Mar. 29, 2023), <https://press.un.org/en/2023/sgsm21750.doc.htm>.

3. See Sabin Ctr. for Climate Change L., *Climate Change Litigation Databases*, CLIMATECASECHART, <http://climatecasechart.com/> (last visited July 15, 2023).

4. After assessing the nationally determined contributions (NDCs) of 166 countries, the UNFCCC secretariat estimated that countries would likely use up 86% of the remaining carbon budget in 2020–2030. See U.N. Framework Convention on Climate Change, Nationally Determined Contributions Under the Paris Agreement: Synthesis Report by the Secretariat, FCCC/PA/CMA/2022/4 (Oct. 26, 2022), https://unfccc.int/sites/default/files/resource/cma2022_04.pdf. UNEP has calculated that current policies point to a 2.8°C warming by the end of the century. See United Nations Environmental Programme [UNEP], *The Closing Window: Climate Crisis Calls for Rapid Transformation of Societies*, UNED Doc. DEW/2477/NA (2022), <https://wedocs.unep.org/bitstream/handle/20.500.11822/40874/EGR2022.pdf?sequence=1&isAllowed=y>.

international courts and tribunals to help define the responsibilities of states in light of the climate crisis. A wide range of cases have been filed before regional courts, tribunals, quasi-judicial bodies, or other adjudicatory bodies in addition to domestic jurisdictions. “These include complaints submitted to special procedures of the United Nations Human Rights Council (HRC), the United Nations Secretary-General,” the United Nations Framework Convention on Climate Change (UNFCCC), “and other United Nations bodies (including the . . . [Committees on] Human Rights . . . and the . . . Rights of the Child), arbitration tribunals (International Centre for Settlement of Investment Disputes . . . , Stockholm Chamber of Commerce, and the Permanent Court of Arbitration), and complaints before the Organisation for Economic Co-operation and Development (OECD).”⁵ However, until recently, a significant gap remained. No international court or tribunal had yet been prompted to answer the question of states’ responsibilities under international law for climate change. That prospect is now here. In a span of six months, a trio of requests for advisory opinions from international and regional courts and tribunals was announced.⁶

International courts and tribunals often have both contentious and advisory jurisdiction. Because state consent is the primary basis of international obligation and dispute settlement, international courts’ and tribunals’ contentious and advisory jurisdiction must be expressly established by a treaty provision. Therefore, a court’s advisory jurisdiction must be explicitly attributed and granted within the limits of such a grant.⁷ For example, the International Court of Justice (Art. 96 U.N. Charter and Arts. 65 to 68 ICJ Statute),⁸ the African Court on Human and

5. See United Nations Environment Programme [UNEP], *Global Climate Litigation Report: 2023 Status Review*, at 10–11, UNEP Doc. DEL/2550/NA (2023), https://wedocs.unep.org/bitstream/handle/20.500.11822/43008/global_climate_litigation_report_2023.pdf.

6. A fourth initiative is expected to be presented to the African Court on Human and Peoples’ Rights.

7. CHITHARANJAN F. AMERASINGHE, JURISDICTION OF INTERNATIONAL TRIBUNALS 509 (2002).

8. See generally, Rosalyn Higgins, *A Comment on the Current Health of Advisory Opinions*, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 567 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996).

Peoples' Rights (Art. 4 Protocol on the Establishment of an African Court on Human and Peoples' Rights), the European Court of Human Rights (Art. 47, 48 ECHR and Art. 1 Protocol 16 to the ECHR), the Court of Justice of the European Union (Article 300 (ex 228) of the TEU), the Inter-American Court of Human Rights (Art. 64 ACHR),⁹ and the International Tribunal of the Law of the Seas each have advisory jurisdiction.

In the case of the advisory jurisdiction, courts and tribunals are not asked to settle a dispute between the parties but rather to provide their views on a specific matter relating to the interpretation of a norm of international law, contributing to the so-called judicial development of international law. Indeed, in giving an advisory opinion, the court "makes judicial pronouncements which do not possess 'binding force' as between parties" or attract any compliance obligation.¹⁰ However, as judicial pronouncements on the law, advisory opinions have distinct and intrinsic value as "authoritative statements of the law."¹¹ There is an agreement to accept, "as a form of judicial settlement, an advisory opinion as decisive and binding, either as an alternative to a judgment rendered after contentious proceedings or where no contentious jurisdiction exists."¹² In that sense, the institutional reputation of the international court or tribunal rendering an advisory opinion explains the authority that opinion carries regardless of its lack of binding effect. Cases make law, but compared with binding judgments, advisory opinions have a tremendous potential to unveil states' obligations under international law. Whereas, with binding decisions, the reasoning of the court or tribunal is analytically connected with the intricate facts of the dispute, advisory opinions are an authoritative, facts-detached interpretation of international law for the world. Accordingly, unless there are compelling reasons to detach from that interpretation, the interpretation adopted in that opinion will likely guide the court or tribunal in future cases.

9. See generally, Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AM. J. INT'L L. 1 (1985).

10. AMERASINGHE, *supra* note 7, at 508.

11. *Id.* at 509.

12. *Id.* at 508.

While advisory opinions are not binding, the expected opinions will be highly influential in articulating states' obligations under international law. Their influence goes beyond their respective jurisdictions due to the reputation and prestige of the courts and tribunals involved. These advisory opinions will certainly impact ongoing domestic and regional climate litigation because the standing of these judicial bodies makes their interpretation authoritative worldwide. As courts continue to define the obligations of states under the UNFCCC and the Paris Agreement, the narratives these judicial bodies adopt will shape the legal framework for addressing the climate crisis in the coming years.

First, the Commission of Small Island states on Climate Change and International Law (COSIS) requested an advisory opinion from the International Tribunal of the Law of the Sea (ITLOS) in December 2022. The request addresses the "obligations of State Parties to the United Nations Convention on the Law of the Sea (UNCLOS) . . . to prevent, reduce[,] and control pollution of the marine environment" and to "protect and preserve [it] in relation to climate change impacts."¹³

Second, Chile and Colombia submitted a request in January 2023 for an advisory opinion on climate change at the Inter-American Court of Human Rights (IACtHR).¹⁴ The request seeks clarification on the scope of state obligations regarding climate change, particularly regarding shared responsibilities between countries.

Third, Vanuatu announced in October 2022 it would seek an advisory opinion at the International Court of Justice (ICJ) regarding the obligations of states under international law to ensure the protection of the climate system and other parts of the environment for present and future generations.¹⁵ After a year-

13. Comm'n of Small Island States on Climate Change & Int'l L., *Request for Advisory Opinion*, INT'L TRIBUNAL L. SEA (Dec. 12, 2022), https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf.

14. *See Chile y Colombia piden a la CIDH que aclare la implicación latinoamericana contra el cambio climático*, NOTIMERICA (Jan. 10, 2023), <https://www.notimerica.com/politica/noticia-clima-chile-colombia-piden-cidh-aclare-implicacion-latinoamericana-contra-cambio-climatico-20230110013256.html>.

15. *See Pacific Firm to Lead Global Legal Team Supporting Vanuatu's*

long campaign, the United Nations General Assembly (UNGA) adopted a resolution by consensus on March 29, 2023, posing questions on states' responsibilities for climate change to the ICJ.

These recent requests make 2023 a historic moment for global climate litigation and the starting point of a renewal phase. While the ICJ advisory opinion is not expected until early 2025, and the other opinions are not anticipated before 2024, there is already a rich academic debate around these initiatives. However, legal analysis usually centers around each advisory opinion or forum. A comparative analysis of the three advisory opinions is still lacking. This article attempts to bridge this gap. There is also great value in looking at these initiatives jointly. A comparative perspective is valuable not only because of the significant overlap between them but also because a transnational approach is consistent with the trend of global climate litigation. Challenged by legal questions that are at times unprecedented, courts often look to one another to seek inspiration. It is likely—and advisable—that these initiatives will engage with one another, interpreting obligations consistently and holistically.

As one of the first academic publications that broadly assesses these initiatives, this article traces their early stages and poses initial thoughts on their relevance for shaping international climate change law. The goal of this analysis is not to discuss how these courts will define the obligations of states or which direction they can lead. A debate on the value of advisory opinions on climate change, although briefly addressed in Section III, warrants its own analysis. Instead, this article opens a window into a comparative perspective of these initiatives, providing guidance for future work and inviting others to build on these initial thoughts as these processes further develop. The article, therefore, sets the scene for the coming years as the courts and tribunals prepare to analyze the challenging questions posed

Pursuit of Advisory Opinion on Climate Change from International Court of Justice, BLUE OCEAN L. (Oct. 23, 2021), <https://www.blueoceanlaw.com/blog/pacific-firm-to-lead-global-legal-team-supporting-vanuatus-pursuit-of-advisory-opinion-on-climate-change-from-international-court-of-justice>; see also Margaretha Wewerinke-Singh et al., *Bringing Climate Change Before the International Court of Justice: Prospects for Contentious Cases and Advisory Opinions*, in CLIMATE CHANGE LITIGATION: GLOBAL PERSPECTIVES 393 (2021).

before them.

The article is structured as follows. Section I sets the scene by introducing the processes observed so far to bring these requests to the ICJ, ITLOS, and IACtHR, respectively. Section II discusses why this is an opportune moment for these requests to reach international and regional courts and tribunals. Section III compares the legal questions posed to the three judicial bodies. Finally, the article concludes with what to expect next.

I. A TRIO OF INITIATIVES FOR REQUESTS OF ADVISORY OPINIONS

In a span of six months, throughout the end of 2022 and the first semester of 2023, A trio of organizations each requested an advisory opinion from different international tribunals. This Section analyzes the development of the initiatives separately led by (A) Vanuatu, (B) COSIS, and (C) Chile and Colombia to request advisory opinions from the ICJ, ITLOS, and IACtHR, respectively.¹⁶ This section focuses on process, retelling—from an outsider’s perspective—how and why each advisory opinion request developed, based on conversations with colleagues directly involved with each request, while the content of each legal question is analyzed in Section III.

Separately, these initiatives would already be of enormous significance. Jointly, they gain even more force. It has been argued that the initiatives provide an engagement in the form of “lawfare.”¹⁷ This “lawfare” seeks to use the law—and climate litigation in particular—to advance the diplomatic and political agenda of Small Island Developing States (SIDS) and Global South countries and their response to the impacts of climate change on their lands and communities. Tracing back the origins of these initiatives is crucial since it shows the growth of judicial activism as a strategy for climate activists worldwide. Through grassroots movements, these stakeholders from civil society

16. Although the article traces the three processes, there is a lot more information available related to the ICJ initiative.

17. Donald R. Rothwell, *The Acid Test: Legal Moves to Force Action on Climate Change*, LOWY INSTITUTE (Jan. 19, 2023), <https://www.lowyinstitute.org/the-interpretor/acid-test-legal-moves-force-action-climate-change>.

organizations and Global South countries have reclaimed power over the consequences of climate change, finding innovative solutions based on international law to push for increased activity in a climate that remains slow and ineffective. It also represents a response to the lack of progress at the UNFCCC Conference of the Parties (COP) meetings, which have failed to reach timely and efficient responses to the global climate crisis.

A. *COSIS Request for an Advisory Opinion from ITLOS*

The Commission of Small Island States on Climate Change and International Law (COSIS) was established by the Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law (the Agreement) between the Prime Ministers of Antigua and Barbuda (Hon. Gaston Browne) and Tuvalu (Hon. Kausea Natano) in Edinburgh, Scotland on October 31, 2021, at the 26th Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC).¹⁸ Also known as the Climate Commission Agreement, it was deposited with the Secretariat of the United Nations on the same day.¹⁹ “Since its establishment, Palau (November 2021), Niue (September 2022), Vanuatu (December 2022)[,] and Saint Lucia (December 2022) joined the Commission.”²⁰ Membership is open to all 39 Alliance of Small Island States (AOSIS) members.

18. Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law, Oct. 31, 2021, 61 I.L.M. 739, <https://treaties.un.org/doc/Publication/UNTS/No%20Volume/56940/Part/I-56940-08000002805c2ace.pdf> [hereinafter COSIS Agreement]. For a discussion, see David Freestone, Richard Barnes & Payam Akhavan, *Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law*, 37 INT’L J. MARINE & COASTAL L. 166 (2022).

19. See COSIS Agreement, *supra* note 18. For an updated list of signatories, see *Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law*, U.N. TREATY COLLECTION, <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002805c2ace> (last accessed Apr. 24, 2023).

20. Lea Main-Klingst & Sophie Marjanac, *Legal Analysis: Request for an Advisory Opinion from the International Tribunal for the Law of the Sea*, CLIENTEARTH (Mar. 2023), https://www.clientearth.org/media/c1spsafh/itlosao_legal-briefing_final.pdf.

The Agreement's preamble sets out COSIS' context, objectives, and state parties while noting the growing concern with the threat of climate change to the livelihood and existence of SIDS.²¹ These issues are placed within a framework of the disproportionate effects of a warming climate borne by SIDS and from the emissions of greenhouse gasses (GHGs). The Agreement's preamble states:

Recognizing that Climate Change is the Common Concern of Humanity,

Mindful of the fundamental importance of the oceans as sinks and reservoirs of greenhouse gases and the devastating impact for Small Island States of related changes in the marine environment,

....

Considering that the emission of greenhouse gases by Small Island States is negligible but that they bear a disproportionate and overwhelming burden of the adverse effects thereof,

....

Determined to take immediate action to protect and preserve the climate system and marine environment based on equity and the common but differentiated responsibilities of States to combat climate change,

Recognizing the imperative necessity of pursuing climate justice in accordance with the principles of progressive development of international law in response to the unprecedented crisis facing humankind,

Having regard to the obligations of States under the 1992 United Nations Framework Convention on Climate Change and related instruments, the 1982 United Nations Convention on the Law of the Sea, and other conventions and principles of international law applicable to the protection and preservation of the climate system and marine environment²²

Pointing to “the catastrophic effects of climate change which threaten the survival of Small Island States, and in some cases, their very existence” and the determination of these actors to take

21. COSIS Agreement, *supra* note 18.

22. *Id.*

“immediate action to protect and preserve the climate system and marine environment,” the Agreement establishes the Commission.²³ Specifically, the predictions of sea-level rise have prompted some SIDS to seek recognition of maritime zones based on the baselines as submitted according to UNCLOS, which would protect their existing maritime zones in the event of low-water lines shifting landward.²⁴

The preamble further alludes to states’ obligation to “provide compensation for injuries arising from internationally wrongful acts.”²⁵ The issue of compensation from large fossil fuel emitters for losses and damages incurred by extreme weather events attributed to climate change has also been a central point in the political agenda of the AOSIS,²⁶ to which Antigua and Barbuda was a chair when the request was filed.²⁷

The mandate of the COSIS is set out in Article 1(3):

[T]o promote and contribute to the definition, implementation and progressive development of rules and principles of international law concerning climate change, including, but not limited to, the obligations of States relating to the protection and preservation of the marine environment and the responsibility for injuries arising from internationally wrongful acts in respect of the breach of such obligations.²⁸

The responsibilities further include directly assisting SIDS with these efforts, including through the jurisprudence of international courts and tribunals.²⁹ The Agreement specifically grants COSIS international legal personality,³⁰ which allows it certain rights and obligations under international law, including

23. *Id.*

24. *Id.* at 739; *see generally* United Nations Convention on the Law of the Sea, art. 7, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

25. COSIS Agreement, *supra* note 18.

26. AOSIS represents “the interests of the 39 small island and low-lying coastal developing states in international climate change, sustainable development negotiations and processes.” *About Us*, ALL. OF SMALL ISLAND STATES, <https://www.aosis.org/about/chair-of-aosis/> (last visited Apr. 23, 2023).

27. *See* COSIS Agreement, *supra* note 18.

28. *Id.* at art. 3(1).

29. *Id.* at art. 2(1).

30. *Id.* at art. 1(2).

the ability to enter treaties or bring a matter before an international tribunal. Its chairs and co-chairs represent COSIS.³¹

The Commission has the powers to settle its own “rules and procedures,” “appoint a Secretariat,” and “establish committees and subcommittees.”³² It can also nominate experts and advisors as necessary to further its mandate. “The Co-chairs immediately appointed Professor Payam Akhavan to . . . Chair the Committee of Legal Experts.”³³ He was made responsible for proposing appropriate experts to compose this Committee for approval, in the first instance, by the Co-Chairs (as the original signatories). Like the ICJ advisory opinion, “COSIS is assisted by a Committee of Legal Experts consisting of 14 distinguished jurists from around the world.”³⁴

Amongst other activities, COSIS has the authority to request an advisory opinion from the ITLOS to address “any legal question” within the scope of the UNCLOS on issues such as the “adverse effects of climate change on the Small Island States,” bearing in mind the “fundamental importance of oceans as sinks and reservoirs of greenhouse gases . . . and the direct relevance of the marine environment to the adverse effects of climate change on Small Island States.”³⁵ The Agreement to create COSIS takes advantage of a unique provision in the ITLOS Rules allowing the Tribunal to give an Advisory Opinion on a legal question if an international agreement related to UNCLOS specifically provides for making such a request.³⁶ Only one other international agreement is known to expressly authorize an entity to bring legal

31. Freestone, Barnes & Akhavan, *supra* note 18.

32. COSIS Agreement, *supra* note 18, art. 3(4).

33. Freestone, Barnes & Akhavan, *supra* note 18, at 167.

34. *Commission of Small Island States on Climate Change and International Law Files Historic Case on Greenhouse Gas Emissions Before the International Tribunal for the Law of The Sea*, ANT. & BARB. HIGH COMM’N (Dec. 15, 2022), <https://antigua-barbuda.com/commission-of-small-island-states-on-climate-change-and-international-law-files-historic-case-on-greenhouse-gas-emissions-before-the-international-tribunal-for-the-law-of-the-sea> [hereinafter Ant. & Barb. High Comm’n].

35. COSIS Agreement, *supra* note 18, at art. 2(2).

36. *Rules of the Tribunal*, INT’L TRIBUNAL FOR L. SEA (Mar. 25, 2021), https://www.itlos.org/fileadmin/itlos/documents/basic_texts/ITLOS_8_25.03.21.pdf [hereinafter Rules of the Tribunal].

matters before ITLOS for an advisory opinion.³⁷

In February 2022, the COSIS convened its first meeting to provide “a platform for small island states to channel their grievances on the impact of climate change to legal bodies.”³⁸ As noted by Payam Akhavan—the legal counsel advising COSIS—COSIS was intended to “be a vehicle for collective action by small island states[,] [t]o add yet another instrument in the toolbox to ensure that [loss and damage] is taken seriously,” and to “exact a cost so that major polluters radically change their behavior.”³⁹

On December 12, 2022, COSIS lodged the request for an advisory opinion from the ITLOS regarding states’ obligations under UNCLOS concerning the preservation and protection of the marine environment in light of excessive GHG emissions.⁴⁰ The request was presented by the Co-Chairs of COSIS, Prime Minister Gaston Browne of Antigua and Barbuda, and Prime Minister Kausea Natano of Tuvalu.⁴¹

As detailed in Section III, COSIS’s request seeks the resolution of two legal questions under UNCLOS that would secure the protection of the marine environment and require all nations to reduce pollution that jeopardizes the world’s oceans. ITLOS’s response to these legal questions could have “major knock-on effects in terms of countries’ obligations around climate-

37. Sub-Reg’l Fisheries Comm’n, *Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources Within the Maritime Areas Under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission (SRFC)*, JUSMUNDI art. 33 (Jun. 8, 2012), <https://jusmundi.com/en/document/pdf/treaty/en-convention-on-the-determination-of-the-minimal-conditions-for-access-and-exploitation-of-marine-resources-within-the-maritime-areas-under-jurisdiction-of-the-member-states-of-the-sub-regional-fisheries-commission-crfc-convention-on-the-determination-of-the-minimal-conditions-for-access-and-exploitation-of-marine-resources-within-the-maritime-areas-under-jurisdiction-of-the-member-states-of-the-sub-regional-fisheries-commission-crfc-friday-8th-june-2012>.

38. Aaron White, *Island States Meet to Discuss Suing Global North Over Climate Change*, OPENDEMOCRACY (Feb. 18, 2022), <https://www.opendemocracy.net/en/oureconomy/reparations-global-north-climate-crisis/>.

39. *Id.*

40. Comm’n of Small Island States on Climate Change & Int’l L., *supra* note 13.

41. Ant. & Barb. High Comm’n, *supra* note 34.

harming emissions.”⁴²

The request is “ground[]breaking”⁴³ and “unprecedented for both the law of the sea and international law[—legal areas which are often fragmented—]and is the first such advisory opinion sought on specific issues associated with sea-level rise[] and climate change more generally.”⁴⁴ Moreover, the request “is the first inter-State case addressing the international legal obligations of States regarding climate change.”⁴⁵ For Antigua and Barbuda, it marked a “historic step” for SIDS, who are invoking international law to “ensure that the major polluters take their obligations seriously, to prevent harm to vulnerable states or to compensate them for damage.”⁴⁶ For Tuvalu, this is a matter of treating GHG emissions with the same seriousness as “other forms of pollution. . . . require[ing] even greater urgency and a commitment to respect existing principles of international law.”⁴⁷ However, the lodging of the request was held with “minimal fanfare,” unlike the ICJ advisory opinion request.⁴⁸

However, as noted by McGarry and Chávez Aco, the “simplicity” and “straightforwardness” of the legal process to submit the request should not obscure some legal challenges that may arise.⁴⁹ From a procedural perspective, a few challenges are already present for a successful response from ITLOS on the request.

The first challenge relates to ITLOS’s advisory jurisdiction. Contrary to the long-standing and well-established advisory

42. *Island States Want Answers on Climate Change from International Courts*, CLIENTEARTH (Mar. 29, 2023), <https://www.clientearth.org/latest/latest-updates/news/island-states-want-answers-on-climate-change-from-international-courts/>.

43. *Id.*

44. Rothwell, *supra* note 17.

45. Ant. & Barb. High Comm’n, *supra* note 34.

46. *Id.*

47. *Id.*

48. Main-Klingst & Marjanac, *supra* note 20.

49. Brian McGarry & Francis Chávez Aco, *The Competence of the International Tribunal for the Law of the Sea in its New Advisory Proceedings on Climate Change*, EUR. J. INT’L L.: TALK! (Dec. 16, 2022), <https://www.ejiltalk.org/the-competence-of-the-international-tribunal-for-the-law-of-the-sea-in-its-new-advisory-proceedings-on-climate-change/>.

jurisdiction of the ICJ and IACtHR, ITLOS has only had two requests for advisory opinions. The UNCLOS does not explicitly address the advisory jurisdiction of ITLOS as a full court. However, in the Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), ITLOS addressed the question of whether it does have the capacity to render advisory opinions.⁵⁰ In SRFC, ITLOS considered whether the questions posed fell within the framework of “all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.”⁵¹ ITLOS unanimously declared that the legal basis of its advisory jurisdiction is found in the combined effect of Article 21 of the ITLOS Statute and “any other agreement” that confers jurisdiction on the Tribunal.⁵² The Tribunal interpreted Article 21 as granting it competency over “all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.”⁵³ Because Article 21 separately mentions “disputes” as eligible for submission to the Tribunal, the Tribunal’s view was that using the term “matters” must mean something more, including advisory opinions.⁵⁴

This interpretation has been contested.⁵⁵ Many states,

50. Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Case No. 21, Advisory Opinion of Apr. 2, 2015, ITLOS Reports 2015, ¶ 69, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/advisory_opinion_published/2015_21-advop-E.pdf [hereinafter SRFC Advisory Opinion].

51. *Id.* at ¶ 46 (quoting UNCLOS, *supra* note 24, at 181).

52. SRFC Advisory Opinion, *supra* note 50, at ¶ 58–60. This is based on art.138(1) of the Rules of the Tribunal, *supra* note 36: “The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion,” read together with Article 21 of the Statute of the International Tribunal for the Law of the Sea, which provides that “the jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.” See UNCLOS, *supra* note 24, at 183 (emphasis added); Yoshifumi Tanaka, *The Role of an Advisory Opinion of ITLOS in Addressing Climate Change: Some Preliminary Considerations on Jurisdiction and Admissibility*, 32 REV. EUR. COMPAR. & INT’L ENV’T L. 206, 208 (2022), <https://onlinelibrary.wiley.com/doi/abs/10.1111/reel.12459>.

53. SRFC Advisory Opinion, *supra* note 50 ¶ 58.

54. See COSIS Agreement, *supra* note 18, at art. 2(2).

55. Tanaka, *supra* note 52.

including the United States, submitted written statements disputing this interpretation.⁵⁶ In particular, given the lack of an explicit legal basis for advisory jurisdiction of the full Tribunal in UNCLOS itself, there is a risk that the legitimacy of future ITLOS advisory opinions could be questioned.⁵⁷

According to Article 138(2) of the Rules of the Tribunal, advisory opinion requests can be submitted by “whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal.”⁵⁸ However, the scope of “body” under Article 138(2) is not yet settled, and members of ITLOS are divided on the correct interpretation of that phrase.⁵⁹ Some members, including current and former Presidents of ITLOS, have advocated for a broad understanding of “body” that includes any entity, such as states or international organizations. Other members, however, in light of the risk of abuse of advisory proceedings under a broad interpretation, have called for the more restrictive interpretation that “a body” only includes international organizations and not states.⁶⁰

Under Article 138(1) of the Rules of the Tribunal, an advisory

56. Tim Stephens, *ITLOS Advisory Opinion: Coastal and Flag State Duties to Ensure Sustainable Fisheries Management*, 19 ASIL INSIGHTS 8 (Apr. 16, 2015), <https://www.asil.org/insights/volume/19/issue/8/itlos-advisory-opinion-coastal-and-flag-state-duties-ensure>.

57. See Rozemarijn J. Roland Holst, *Taking the Current When it Serves: Prospects and Challenges for an ITLOS Advisory Opinion on Oceans and Climate Change*, 32 REV. EUR. COMPAR. INT'L ENV'T L. 217 (2023), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/reel.12481>. For a critical assessment of the Tribunal's reasoning, see SRFC Advisory Opinion, *supra* note 50; Massimo Lando, *The Advisory Jurisdiction of the International Tribunal for the Law of the Sea: Comments on the Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, 29 LEIDEN J. INT'L L. 441 (2016); Tom Ruys & Anemoon Soete, *'Creeping' Advisory Jurisdiction of International Courts and Tribunals? The Case of the International Tribunal for the Law of the Sea*, 29 LEIDEN J. INT'L L. 155 (2016).

58. Rules of the Tribunal, *supra* note 36, art. 138(2).

59. *See id.*

60. Tafsir Malick Ndiaye, *The Advisory Function of the International Tribunal for the Law of the Sea*, 9 CHINESE J. INT'L L. 565 (2010), <https://academic.oup.com/chinesejil/article-abstract/9/3/565/306464>; Tullio Treves, *Advisory Opinions Under the Law of the Sea Convention*, in CURRENT MARINE ENVIRONMENTAL ISSUES AND THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA 81 (2001), https://brill.com/display/book/edcoll/9789004480872/B9789004480872_s016.xml.

opinion may be given on a “legal question.” Still, the precise scope of a “legal question” in this context is unclear.⁶¹ Like the ICJ, ITLOS has discretionary power to refuse advisory opinion requests and has held that requests should only be denied for compelling reasons.⁶²

The Special Chamber of ITLOS has granted significant weight to an ICJ advisory opinion as recently as January 2021 in a maritime boundary dispute case between Mauritius and the Maldives. In its ruling on a jurisdictional issue, the Special Chamber stated that determinations made by the ICJ in a prior advisory opinion have “legal effect” in that matter. Such a finding may effectively enshrine the ICJ’s advisory determinations into judicial precedent.⁶³

B. Chile and Colombia’s Request for an Advisory Opinion from the IACtHR

In January 2023, Chile and Colombia filed a request for an advisory opinion to the IACtHR concerning states’ climate-related obligations under the American Convention on Human Rights (ACHR), intending to clarify the involvement of Latin American states in the climate emergency.⁶⁴ As noted by Tomás Pascual from the Chilean Ministry of Foreign Affairs, the advisory opinion presents an opportunity to mobilize the state apparatus within the context of human rights, deploying the international level to tackle the issue of climate change in addition to measures at the national level.⁶⁵ The idea for the request came from an international organization that approached Chile and Colombia, because only members of the Organization of American States (OAS) can

61. Ndiaye, *supra* note 60, at 575.

62. *Id.*

63. See COSIS Agreement, *supra* note 18, at art. 2(1).

64. *Request for an Advisory Opinion on Climate Emergency and Human Rights to the Inter-American Court of Human Rights from the Republic of Colombia and the Republic of Chile*, CLIMATE CHANGE LITG. DATABASES (Jan. 9, 2023), https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20230109_18528_petition-2.pdf [hereinafter the Chile-Colombia Request] (Spanish original available at https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20230109_18528_petition.pdf).

65. Interview with Tomás Pascual, Rutgers School of Law (Mar. 29, 2023).

request advisory opinions from the court. The choice of countries was not random. Chile and Colombia both showed a political willingness to conduct this approach for a few reasons.

For Chile, the pursuit of an advisory opinion complements the development of a political agenda highly focused on human rights and environmental protection.⁶⁶ Chile's government under Gabriel Boric, which started in March 2022, includes the respect and guarantee of human rights in its programmatic axis. Chile became a member state of the Human Rights Council in 2023⁶⁷ and became a party to the Escazú Agreement in 2022.⁶⁸ The problematization of human rights further includes a significant environmental perspective with a blue-green (ocean-forest) agenda. The request for the advisory opinion catalyzes this agenda. Colombia spearheaded another landmark request for an advisory opinion in 2016 when it asked the court to clarify the relationship between human rights and the environment under the American Convention.⁶⁹

The choice of an advisory opinion to mobilize the climate agenda at the international level is based on a few factors, according to Tomás Pascual.⁷⁰ First, the urgency of the climate crisis warrants an innovative legal measure that clarifies the content of legally binding obligations on climate change. Advisory opinions at the IACtHR typically take around twelve to eighteen months, as opposed to almost twenty years, for a contentious case to be resolved by the court.⁷¹ Second, this urgency requires the

66. Ciara Nugent-Santiago, *Chile's Millennial President Is a New Kind of Leftist Leader*, TIME (Aug. 31, 2022, 7:00 AM EDT), <https://time.com/6209552/gabriel-boric-chile-constitution-interview/>.

67. Chile Foreign Affs. Ministry, *Chile Is Elected Member of the United Nations Human Rights Council*, GOB.CL (Oct. 11, 2022), <https://www.gob.cl/en/news/chile-elected-member-united-nations-human-rights-council/#:~:text=The%20United%20Nations%20General%20Assembly,states%20that%20supported%20this%20candidacy.>

68. *Chile Ratifies Treaty to Protect Green Activists in Latin America*, LA PRENSA LATINA (May 31, 2022), <https://www.laprensalatina.com/chile-ratifies-treaty-to-protect-green-activists-in-latin-america/>.

69. The Environment and Human Rights, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23 (Nov. 15, 2017), www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf.

70. Interview with Tomás Pascual, *supra* note 65.

71. For example, see Case of the Indigenous Communities of the Lhaka

development of an international “tool” that allows for establishing international obligations. Third, the advisory opinion procedure allows for broader participation of various states and civil society, as explained below. Fourth, the advisory opinion provides legal safeguards in case the political will of these countries—and, more broadly, of other OAS states—changes. Finally, this path is advisable because it does not require any approval from the legislative or judicial branches of government and rather depends only on the willingness of the executive branch. For these reasons, the countries chose to develop these conventional legal obligations through an advisory opinion.

Compared to the ICJ and ITLOS, the IACtHR has a much more extensive advisory jurisdiction. Advisory opinions can be requested from all organs of the Organization of American States (OAS) listed in Chapter X of the Charter of the Organization and every OAS member state, regardless of whether they are a party to the American Convention on Human Rights.⁷² In addition, the court is not limited to questions regarding the interpretation of the American Convention; it is also empowered to interpret “other treaties” that concern “the protection of human rights in the American states.”⁷³ Like the ICJ, however, the court’s advisory jurisdiction is not mandatory but permissive because the court has discretionary power to reject requests if it has “specific reasons” for doing so.⁷⁴ For instance, the IACtHR has previously rejected advisory opinion requests when the request “could produce, under the guise of an advisory opinion, a determination of contentious matters not yet referred to the Court.”⁷⁵ Since its first advisory

Honhat (Our Land) Association v. Argentina, Inter-Am. Ct. H.R. (ser. C) No. 420 (Feb. 6, 2020), which was brought to the Inter-American Commission in 1998.

72. Bert B. Lockwood, *Advisory Opinions of the Inter-American Court of Human Rights*, 13 DENV. J. INT’L L. & POL’Y 245, 248 (1984) (citing Article 64 of the American Convention on Human Rights).

73. *Id.*

74. “Other Treaties” Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion OC-1/82, Inter-Am. Ct. H.R. (ser. A) No. 1, 1 (Sep. 24, 1982), https://www.corteidh.or.cr/docs/opiniones/seriea_01_ing1.pdf.

75. Compatibility of Draft Legislation with Article 8(2)(h) of the American Convention on Human Rights, Advisory Opinion OC-12/91, Inter-Am. Ct. H.R. (ser. A) No. 12, ¶ 28 (Dec. 6, 1991).

opinion in 1982, the IACtHR has issued thirty advisory opinions in total as of October, 2023.⁷⁶

To initiate advisory proceedings, a party must submit a formal request for an advisory opinion, and the necessary contents of the request depend to some extent on the type of question presented and whether it falls under Article 64(1) or Article 64(2) of the American Convention.⁷⁷ Once the court accepts the request, the subsequent procedure generally tracks the procedures the court follows in contentious cases.⁷⁸ The full court considers advisory opinions, and the proceedings are typically divided into a written and oral phase, although the court may choose to skip the oral stage.⁷⁹ During the written proceedings, with one exception,⁸⁰ “the President [of the court] is authorized to invite any interested party to submit a written brief on the relevant issues.”⁸¹ The entire process can be lengthy. For instance, the request for an advisory opinion in *The Right to Information on Consular Assistance* was filed in December 1997, and the court did not publish its advisory opinion until almost two years later in October 1999.⁸²

As noted, an advisory opinion at the IACtHR takes around eighteen months to two years to be adopted. The advisory proceedings provide the chance to address a wide variety of topics and thematic areas within the general theme of rights-based climate-change obligations. This is reflected in Chile and Colombia’s broad spectrum of questions. Furthermore, the questions are not limited by any facts of the case. While advisory opinions at the IACtHR are not strictly binding, they significantly influence legal developments in Latin America through the

76. *Advisory Opinions*, INTER-AM. CT. HUM. RTS., https://www.corteidh.or.cr/opiniones_consultivas.cfm?lang=en (last visited Aug. 15, 2023).

77. JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 41 (2d ed. 2012).

78. *Id.* at 67 (“The Rules of Procedure of the Court specify that the procedural rules for contentious cases shall be applied by analogy in advisory proceedings to the extent that the Court finds them compatible”).

79. *Id.*

80. When a state asks the Court for an advisory opinion on the compatibility of its laws under Article 64(2), “the President must first consult the agent of the State before inviting interested parties to submit a brief.” *Id.* at 71.

81. *Id.*

82. *Id.* at 68.

doctrine of conventionality control, applicable to all decisions of the court.⁸³

The request builds on the standards outlined in *Advisory Opinion 23/17*, specifically on recognizing the right to a healthy environment concerning the climate crisis. It acknowledges the crucial impact of the advisory opinion in advancing the interrelationship between the environment and human rights. Specifically, Chile and Colombia submitted the request

with the purpose of clarifying the scope of State obligations, in their individual and collective dimension[s], to respond to the climate emergency within the framework of international human rights law, taking into account the differentiated effects that such emergency has on the people of different regions and population groups, nature[,] and human survival on our planet.⁸⁴

The request calls for a more thorough clarification of the grounds and reach of climate-change related human-rights violations; states' obligations to address them collectively and individually; and non-state actors' obligations.⁸⁵ It recalls the need to tackle the root causes and consequences of climate change urgently. It invokes the principles of "equity, justice, precaution, and sustainability" with a human rights approach.⁸⁶ The request underscores the global climate litigation trend that seeks to determine states' obligations to the climate crisis, hinting that the IACtHR has a significant role in further defining these at the regional level.⁸⁷ It further recalls the unequal ways climate change impacts are experienced globally, with the most vulnerable communities feeling disproportionate impacts relevant to their

83. Verena Kahl, *The Chilean and Colombian Request for an Inter-American Advisory Opinion on the Climate Emergency and Human Rights*, VERFASSUNGSBLOG (Mar. 10, 2023), <https://verfassungsblog.de/warming-up/>; see also *The Environment and Human Rights, Advisory Opinion OC-23/17*, Inter-Am. Ct. H.R. (ser. A) No. 23, ¶ 26 (Nov. 15, 2017), www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf.

84. The Chile-Columbia Request, *supra* note 64, at 1.

85. *Id.* at 6.

86. *Id.*

87. *Id.* at 7.

contribution to its causes.⁸⁸

Within this context, Chile and Colombia requested legal guidance on state obligations during climate emergencies related to: (i) “prevention and guarantee of human rights linked to the climate emergency;” (ii) “climate mitigation and adaptation measures” and “responses to prevent, minimize, and address economic and noneconomic loss[] and damage[];” (iii) the rights of children, future generations, and other vulnerable groups such as indigenous peoples and peasant communities; (iv) differentiated and shared responsibilities of states, as well as cooperation between the countries in the region; (v) how the climate crisis affects fundamental rights, including the right to life and procedural rights such as the right to access to information and justice (with links to the implementation of the Escazú Agreement); (vi) protection of environmental defenders, especially women, afro-descendant and indigenous peoples; (vii) judicial remedies and consultation on climate impacts; (viii) climate migration and forced displacement.⁸⁹

This request could potentially lead to establishing climate-related norms for Latin America and the Caribbean. The IACtHR has the opportunity to shed light on some of the world’s most pressing issues by interpreting regional and international human rights and environmental instruments to determine whether, and if so, to what extent states have obligations to confront climate emergencies.

The advisory jurisdiction of the IACtHR was described in *Advisory Opinion No. 1* as being particularly wide and “more extensive . . . than that enjoyed by any international tribunal in existence today.”⁹⁰

C. Vanuatu’s Campaign to Bring a Request for an Advisory Opinion to the ICJ

The movement to request an advisory opinion before the ICJ began in 2019 with twenty-seven law students at the University

88. *Id.* at 4, n.15.

89. *Id.* at 8–16; see also NOTIMERICA, *supra* note 14.

90. I/A Court H.R. Series A No. 1 (1982), 3HRLJ at p. 140.

of the South Pacific's⁹¹ (USP) Elamus campus in Vanuatu in the South Pacific. The idea was sparked by a class taught by Professor Justin Rose in an exercise that asked them to look at ways “to address the climate crisis head-on through various international legal pathways.”⁹² The campaign provides an interesting example of the power of youth movements towards climate action, which have used litigation as a tool for their activism.

Fueled by the desire to make a transformative global impact, the students decided to persuade the ICJ to issue an advisory opinion on climate change.⁹³ Their passion and inspiration to start the campaign had multiple sources. First, with origins in several Pacific Island nations,⁹⁴ the students had personally dealt with the hardships of climate change.⁹⁵ Second, their international environmental law class left them dissatisfied with the lack of progress in reducing global GHG emissions and the international community's inadequate response to the existential threat posed

91. The University of The South Pacific (USP) is a public research university that has many campuses connected to the twelve countries who own the University. The Elamus campus located in Vanuatu is the specific campus that brought this climate change idea to light. See *Why USP*, UNIV. S. PAC., <https://www.usp.ac.fj/why-usp/> (last visited Mar. 10, 2023).

92. Rachel Ramirez, *'A Win of Epic Proportions': World's Highest Court Can Set Out Countries' Climate Obligations After Vanuatu Secures Historic UN Vote*, CNN, <https://www.cnn.com/2023/03/29/world/un-advisory-opinion-vanuatu-climate-change/index.html> (Mar. 29, 2023, 11:27 AM EDT) (quoting PISFCC's president Cynthia Houniuihi).

93. See Valerie Volcovici, *Pacific Islands Students Target U.N. Court as Key Weapon to Fight Climate Change*, REUTERS (Sept. 16, 2022), <https://www.yahoo.com/video/pacific-islands-students-target-u-184709709.html>.

94. See *Who We Are?*, PAC. ISLANDS STUDENTS FIGHTING CLIMATE CHANGE, <https://www.pisfcc.org/who-we-are> (last visited Mar. 10, 2023) (representing nations such as Solomon Islands, Tonga, Fiji and The Island of Vanuatu). Solomon Islands is represented by President Cynthia Houniuihi, Secretary Tanya Afu, and Treasurer Rodrick Rollands; Fiji is represented by Sahil Chandra, the Focal Chair, and Vishal Prasad, the Campaigner for Fiji; Tonga is represented by Siosua Veikune, the Vice-President, and Sepasitiano Patelisio, the Awareness Chair; Vanuatu is represented by Jeffrey Wells, the Social Media Chair. *Id.*

95. See *Fact Sheet: Pacific Climate Change*, SECRETARIAT PAC. REG'L ENV'T PROGRAMME, <https://www.sprep.org/attachments/Publications/FactSheet/pacificclimate.pdf> (Aug. 2008) (“Pacific islands are extremely vulnerable to climate change. The most substantial impacts of climate change include losses of coastal infrastructure and land, more intense cyclones[,] and droughts . . .”).

by climate change to small island developing states (SIDS).⁹⁶ Third, the students intended to change the narrative of Pacific voices from victims to advocates of climate justice at the “forefront of the climate debate.”⁹⁷

As such, they “came together to discuss how [they] could put [their] legal knowledge to work in order to take a stand on the climate crisis that threatened [their] countries, [their] cultures, and [their] futures.”⁹⁸ The campaign began with the goal of “taking the world’s biggest problem to the world’s highest court.”⁹⁹ The campaign centers around a rights-based approach and the principle of intergenerational equity and revolves around the idea of pushing for an opportunity to assess the rights related to the impacts of climate change on youth’s human rights under international law.¹⁰⁰

The youth mobilization has strived to create movements that impact decision-making bodies and governments on climate change.¹⁰¹ Students from the island states of Vanuatu, Fiji, Solomon Islands, and Tonga created the Pacific Island Students Fight for Climate Change (PISFCC) to further their efforts in March 2019.¹⁰²

96. See Kate Lyons, *From Vanuatu Law School to The Hague: The Fight to Recognise Climate Harm in International Law*, GUARDIAN (June 19, 2022, 16:00 EDT), <https://www.theguardian.com/world/2022/jun/20/from-vanuatu-law-school-to-the-hague-the-fight-to-recognise-climate-harm-in-international-law> [hereinafter *Vanuatu Law to Hague*] (“Previous attempts to get questions about climate change before the ICJ – including one from fellow Pacific country Palau in 2011 – have struggled to gain the necessary diplomatic support, and so Vanuatu is on a major offensive.”).

97. Solomon Yeo & Vishal Prasad, *Taking Climate Change to the Top Court*, PROJECT SYNDICATE (Sept. 12, 2022), <https://www.project-syndicate.org/magazine/climate-change-campaign-for-icj-advisory-opinion-by-solomon-yeo-and-vishal-prasad-2022-08>.

98. *Id.*

99. Pac. Islands Students Fighting Climate Change (@PISFCC), INSTAGRAM, <https://www.instagram.com/pisfcc/?hl=en> (last visited Apr. 20, 2023).

100. Aditi Shetye & Manon Rouby, *Climate Justice: Advisory Opinion of the International Court of Justice and the Impact of Youth Advocacy*, 27 COMPAR. L.J. PAC. 79, 82 (2022), <https://static1.squarespace.com/static/5f063a0c8f53b604aed84729/t/64172a15ad9ad21bb601c468/1679239701878/CLJP+27%3A2022.pdf>.

101. *Id.* at 81.

102. See Pac. Islands Students Fighting Climate Change (@PISFCC), INSTAGRAM, <https://www.instagram.com/pisfcc/?hl=en> (last visited Apr. 20, 2023);

Solomon Yeo, a native of the Solomon Islands and a USP graduate with a degree in law and arts, is one of their full-time campaigners.¹⁰³ Led by an executive team and president Cynthia Houniuihi—a Solomon Island native and USP graduate—PISFCC seeks to “convinc[e] the governments of the world to seek an Advisory Opinion from the International Court of Justice answering a question that will develop new international law integrating legal obligations around environmental treaties and basic human rights,” bringing the campaign worldwide.¹⁰⁴ “To get support for their idea, the Pacific Island students passed around a petition that garnered signatures from teachers and students[,] [a]nd while campaigning for the initiative, they drafted a letter and proposal sent to Pacific Island governments.”¹⁰⁵

Four years passed between the initial debate at the law school and the United Nations General Assembly’s (UNGA) vote on the resolution. As the idea of an advisory opinion began to gain steam, the students needed a representative country to lead the charge within the United Nations (U.N.). This is because the advisory function of the ICJ is limited. The court can only issue an advisory opinion if (1) the request for an advisory opinion was submitted by an authorized body, (2) the issue at hand is within the competence of the requesting body, and (3) the request is for an opinion on a legal question.¹⁰⁶ Therefore, states cannot individually submit a request for an advisory opinion. The competent bodies are the UNGA and the U.N. Security Council (UNSC).¹⁰⁷ The UNGA may

PAC. ISLANDS STUDENTS FIGHTING FOR CLIMATE CHANGE, <https://www.pisfcc.org/> (last visited Apr. 20, 2023).

103. *Solomon Yeo*, NORMANDY CHAIR FOR PEACE, <https://normandychairforpeace.org/member/solomon-yeo/> (last visited Mar. 10, 2023); *Solomon Yeo*, SECRETARIAT PAC. REG’L ENV’T PROGRAMME, <https://www.sprep.org/piela-2020/leadership-awards/solomon-yeo> (last visited Mar. 10, 2023).

104. PISFCC, *An International Court of Justice Advisory Opinion on Climate Change*, PAC. ISLANDS STUDENTS FIGHTING CLIMATE CHANGE 10 (2022), <https://static1.squarespace.com/static/6090cc1eec59dc2ed057b027/t/6362cb44ee1b7202d029291f/1667418958144/PISFCC+Campaign+Brief+2022.pdf>.

105. Ramirez, *supra* note 92.

106. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶15 (July 9) [hereinafter Wall] (“It is for the Court to satisfy itself that the request for an advisory opinion comes from an organ or agency having competence to make it.”).

107. U.N. Charter art. 96.

also authorize other organs of the U.N. and specialized agencies to request advisory opinions. Still, such requests must concern “legal questions [that] aris[e] within the scope of their activities.”¹⁰⁸

Vanuatu became a leading choice as a nation bearing some of the most damaging consequences of climate change¹⁰⁹ because it is “[l]ocated in the Pacific Ring of Fire[;] . . . [it] fac[es] frequent earthquakes and volcanic eruptions, and . . . [its] annual cyclone season, regular droughts[,] and floods . . . make [Vanuatu] . . . one of the world’s [nations] most vulnerable to natural hazards.”¹¹⁰ Even as the campaign was reaching the day of the UNGA vote, Vanuatu was “under a state of emergency after two cyclones and two earthquakes hit” the island.¹¹¹ After receiving positive feedback from Vanuatu, the students then met with Ralph Regenvanu, Vanuatu’s current minister of climate change adaptation, who was then the foreign affairs minister.¹¹² Vanuatu endorsed the proposal and started the mobilization to take it to the international stage.

The next step was to persuade the leaders of the Pacific Islands Forum to take on their initiative.¹¹³ In 2019, the PISFCC’s

108. *Id.*

109. See Betül Yuruk, *World’s Most ‘At-Risk’ Country Vanuatu Seeks Climate Justice at UN Court*, ANADOLU AGENCY (Sept. 9, 2022), <https://www.aa.com.tr/en/environment/worlds-most-at-risk-country-vanuatu-seeks-climate-justice-at-un-court/2758331> (“Vanuatu is the world’s most at-risk country for natural hazards, according to a UN University World Risk Index.”); Vanuatu Law to Hague, *supra* note 96 (“The campaign is being led by the nation of Vanuatu, a Pacific state of around 300,000 people It sits at the forefront of the climate crisis and has been ranked the country most prone to natural disasters by the United Nations, regularly suffering devastating cyclones”); Kate Lyons, *IPCC Report Shows ‘Possible Loss of Entire Countries Within the Century,’* GUARDIAN (Aug. 9, 2021), <https://www.theguardian.com/world/2021/aug/10/ipcc-report-shows-possible-loss-of-entire-countries-within-the-century> (illustrating how Pacific Island nations are more vulnerable to climate change issues such as natural disasters).

110. *Vanuatu: Tackling The Impact of Natural Disasters by Building a Resilient Education System*, GLOB. P’SHP FOR EDUC., <https://www.globalpartnership.org/results/stories-of-change/vanuatu-tackling-impact-natural-disasters-building-resilient-education> (last visited Mar. 10, 2023).

111. John Braddock, *Pacific Island of Vanuatu Devastated by Twin Cyclones*, WORLD SOCIALIST WEB SITE (Mar. 9, 2023), <https://www.wsws.org/en/articles/2023/03/09/arvw-m09.html>.

112. See Ramirez, *supra* note 92.

113. See PISFCC, *An International Court of Justice Advisory Opinion on Climate Change*, PAC. ISLANDS STUDENTS FIGHTING CLIMATE CHANGE 9 (2022),

proposal was tabled by Vanuatu at the Pacific Islands Forum. On that occasion, eighteen member states of the Forum responded positively to the submission of a UNGA resolution seeking an advisory opinion from the ICJ on climate change and human rights.¹¹⁴ As a result, official support from Pacific leaders through the Pacific Islands Forum was granted in July 2022.¹¹⁵

Subsequently, PISFCC gathered support from several civil society organizations, including the Vanuatu Climate Action Network, the Pacific Climate Action Network, and the Climate Action Network. In May of 2022, PISFCC formed an alliance of non-governmental organizations (NGOs), “includ[ing] Oxfam, Greenpeace, 350.org, and Amnesty International.”¹¹⁶ In 2020, the students also recognized the global nature of the campaign and catalyzed the formation of a global network: the World’s Youth for Climate Justice (WYCJ).¹¹⁷ With the primary goal of bringing the advisory opinion request to the ICJ, WYCJ is spearheading the campaign alongside PISFCC. The group includes young people from Asia, Africa, Latin America, and Europe. In 2022, the Alliance for a Climate Justice Advisory Opinion was created, with more than 1,600 civil society organizations.¹¹⁸

In September 2022, during the U.N. Climate Week in New

<https://static1.squarespace.com/static/6090cc1eec59dc2ed057b027/t/6362cb44ee1b7202d029291f/1667418958144/PISFCC+Campaign+Brief+2022.pdf>.

114. *Human Rights in the Face of the Climate Crisis: A Youth-Led Initiative to Bring Climate Justice to the International Court of Justice*, WORLD’S YOUTH FOR CLIMATE JUSTICE 9 (JULY 2021), <https://static1.squarespace.com/static/5f063a0c8f53b604aed84729/t/60e53dd9d93f1a66fb57edad/1625636347082/Human+rights+in+the+face+of+the+climate+crisis%3A+a+youth-led+initiative+to+bring+climate+justice+to+the+International+Court+of+Justice>.

115. *Fifty-First Pacific Islands Forum Suva Fiji 11 – 14 July 2022: Forum Communiqué*, PAC. ISLANDS F. (July 14, 2022), <https://www.forumsec.org/wp-content/uploads/2022/07/FINAL-51st-Pacific-Islands-Forum-Communique-2022.pdf>.

116. *Vanuatu Leading the World on International Climate Change Responses*, PAC. ISLANDS STUDENTS FIGHTING CLIMATE CHANGE (July 2022), <https://www.pisfcc.org/news/van-taking-lead>.

117. See WORLD’S YOUTH FOR CLIMATE JUST., <https://www.wy4cj.org/> (last visited Apr. 23, 2023).

118. Aditi Shetye, *It Is So Decided: Promoting Climate Justice Through International Law*, BRIT. INST. INT’L & COMPAR. L. (Apr. 12, 2023), <https://www.biicl.org/blog/56/it-is-so-decided-promoting-climate-justice-through-international-law>.

York City, Pacific Islander climate activists and civil society organizations sailed in a flotilla of boats along the East and Hudson Rivers. The flotilla stopped in front of the U.N. headquarters and under the Statue of Liberty, “flying the flags of more than a dozen Pacific Island nations while calling on leaders to vote ‘yes’ to their request for an advisory opinion.”¹¹⁹ “The voyage represents the Pacific concept of the vaka (traditional canoe), taking the campaign directly from the Pacific to the United Nations.”¹²⁰

In September 2021, Vanuatu announced its intention to seek an advisory opinion.¹²¹ During the announcement, Vanuatu’s Prime Minister, Bob Loughman, noted climate change is “increasingly beyond the control of individual national governments and international cooperation is therefore essential for Vanuatu and other small island developing states to combat the threat of climate change.”¹²²

What followed were years of behind-the-scenes prep work led by the youth campaigners, along with a team of lawyers from the Pacific law firm Blue Ocean Law,¹²³ an advisory group,¹²⁴ and the

119. Ramirez, *supra* note 92.

120. *Pacific Youth Hold Flotilla in New York Calling on Vote for Climate Justice at United Nations*, PAC. ISLANDS STUDENTS FIGHTING CLIMATE CHANGE (Sept. 18, 2022), <https://www.pisfcc.org/news/pacific-youth-hold-flotilla-in-new-york-calling-on-vote-for-climate-justice-at-united-nations>.

121. See Bernadette Carreon, *Vanuatu to Seek International Court Opinion on Climate Change Rights*, GUARDIAN (Sept. 25, 2021), <https://www.theguardian.com/world/2021/sep/26/vanuatu-to-seek-international-court-opinion-on-climate-change-rights>.

122. *Id.*

123. *Blue Ocean Law Represents Vanuatu in Historic Victory as UNGA Adopts Resolution to Seek ICJ Advisory Opinion on Climate Change*, BLUEOCEANLAW (Mar. 29, 2023), <https://www.blueoceanlaw.com/blog/blue-ocean-law-represents-vanuatu-in-historic-victory-as-unga-adopts-resolution-to-seek-icj-advisory-opinion-on-climate-change>.

124. The initiative was led by Julian Aguon and Margaretha Wewerinke-Singh. External counsels were appointed by Vanuatu in 2021 to support the effort. These were Lavanya Rajamani, Pierre-Marie Dupuy, Jennifer Robinson, and Jorge Viñuales. See *Lavanya Rajamani Appointed External Counsel by Vanuatu Government to Seek Advisory Opinion from International Court of Justice*, UNIV. OXFORD FAC. L. (Oct. 28, 2021), <https://www.law.ox.ac.uk/news/2021-10-27-lavanya-rajamani-appointed-external-counsel-vanuatu-government-see-advisory-opinion>.

government of Vanuatu and its mission at the United Nations. For over a year following the announcement, Vanuatu built a coalition to support the initiative.¹²⁵ During this period, several milestones were celebrated. First, Pacific and Caribbean¹²⁶ nations joined Vanuatu in supporting the initiative, “build[ing] a coalition of like-minded vulnerable countries.”¹²⁷ Additional support was announced from several countries through petitions and campaigns,¹²⁸ developing the legal elements and arguments for the case, building strong “civil society” support,¹²⁹ and providing input for the draft U.N. Resolution.

Another significant achievement was the development of a core group that took charge of supporting the negotiation.¹³⁰ The core group agreed to be at the forefront of advocacy and talks at

125. See Amy Gunia, *Pacific Island Nations Are Bringing Their Climate Justice Fight to the World’s Highest Court*, TIME (July 18, 2022, 8:34 AM), <https://time.com/6197027/pacific-island-nations-vanuatu-climate-change/>.

126. See *Communique – Thirty-Third Inter-Sessional Meeting of CARICOM Heads of Government*, CARICOM (Mar. 3, 2022), <https://caricom.org/communique-thirty-third-inter-sessional-meeting-of-caricom-heads-of-government/>.

127. Chloé Farand, *Island States Back Vanuatu’s Quest for Climate Justice at the UN*, CLIMATE HOME NEWS (May 24, 2022), <https://www.climatechangenews.com/2022/05/24/island-states-back-vanuatus-quest-for-climate-justice-at-the-un/>.

128. PISFCC, *supra* note 113.

129. Lagipoiva Cherelle Jackson, *Vanuatu’s Push for Legal Protection from Climate Change Wins Crucial Support*, GUARDIAN (May 10, 2022), <https://www.theguardian.com/world/2022/may/11/vanuatus-push-for-legal-protection-from-climate-change-wins-crucial-support>. Vanuatu has received support from 1,500 Civil Society Organizations (CSOs) as well as 130 countries. *Id.* The weight of these CSOs has created significant momentum for the initiative, giving it a high chance of being successful in garnering enough votes. Especially notable support has come from preeminent climate groups such as Climate Action Network International, Greenpeace Australia Pacific, Oxfam in the Pacific, 350 Pacific, Pacific Islands Climate Action Network, and Vanuatu Climate Action Network. *Id.*; *Thousands of Civil Society Organisations Call on Countries to Support Vanuatu Climate Justice Initiative*, CLIMATE ACTION NETWORK INT’L (May 5, 2022), <https://climatenetwork.org/2022/05/05/thousands-of-civil-society-organisations-call-on-countries-to-support-vanuatu-climate-justice-initiative/>.

130. See *The Republic of Vanuatu Succeeded in the Adoption of a UNGA Resolution Calling for an Advisory Opinion on Climate Change from the International Court of Justice*, VANUATU INT’L CT. JUST. INITIATIVE, <https://www.vanuatuicj.com> (last visited Mar. 10, 2023) (identifying the core group as Antigua & Barbuda, Bangladesh, Costa Rica, Federated States of Micronesia, Morocco, Mozambique, New Zealand, Portugal, Samoa, Sierra Leone, Singapore, Uganda, Vanuatu, and Vietnam).

significant meetings regarding the resolution and consultations. Simply put, the core group operates like a committee board headed by Vanuatu. A group of states came together, encouraging others to support and be directly involved with the campaign.¹³¹ With Vanuatu positioned as the leading country for the campaign, additional support for drafting the resolution and garnering enough support to vote in favor of the ICJ climate Resolution at the UNGA was needed.¹³² This engagement used several summits and public events, such as the twenty-seventh Conference of the Parties to the UNFCCC (COP27)¹³³ and the Conference on the Promise of an Advisory Opinion on Climate Change.¹³⁴

On November 29, 2022, the core group sent the draft Resolution to all U.N. member states to initiate the process leading to a UNGA vote at the seventy-seventh session on whether to refer the resolution to the ICJ.¹³⁵ On January 23, 2023, the core group circulated a revised draft resolution incorporating feedback from consultations with member states.¹³⁶ Notable feedback came from The Alliance of Small Island States,¹³⁷ which “has

131. Joining the core group means you allow Vanuatu to speak on your behalf and you are directly involved in drafting the resolution and are publicly recognized as a key part of the initiative.

132. The resolution required the majority of countries at the U.N. General Assembly to instruct the ICJ to do so.

133. See Chloé Farand, *Vanuatu Publishes Draft Resolution Seeking Climate Justice at UN Court*, CLIMATE HOME NEWS (Nov. 30, 2022), <https://www.climatechangenews.com/2022/11/30/vanuatu-publishes-draft-resolution-seeking-climate-justice-at-un-court/> (“Vanuatu’s president Nikenike Vurobaravu used the Cop27 climate summit in Sharm el-Sheikh to consolidate support for the initiative.”); Pac. Islands Students Fighting Climate Change (@PISFCC), TWITTER (Nov. 18, 2022, 8:13 AM) <https://mobile.twitter.com/pisfcc/status/1593593358718566400?ext=HHwWgIC87e2typ0sAAAA; @VanuatuUN, Recap at #COP27>, TWITTER (Nov. 7, 2022, 4:26 PM) <https://twitter.com/VanuatuUN/status/1589730941081374720>; Valerie Volcovici, *From Pacific to Red Sea: Climate Court Action Gathers Wave of Support*, REUTERS, <https://www.reuters.com/business/cop/pacific-red-sea-climate-court-action-gathers-wave-support-2022-11-18/> (Nov. 18, 2022, 11:11 AM).

134. @VanuatuUN, TWITTER (Oct. 24, 2022, 4:18 PM), https://twitter.com/VanuatuUN/status/1584640415306653697?ext=HHwWgoClsfuD4_OrAA.

135. First Draft of U.N. Doc. A/77/L.58 (on file with author).

136. Second Draft of U.N. Doc. A/77/L.58 (on file with author).

137. See Isaia Lautasi, *Statement by Samoa on Behalf of the Alliance of Small Island States (AOSIS) Under Agenda Item 70: Report of the International Court of Justice*, ALL. SMALL ISLAND STATES (Feb. 2, 2023), <https://www.aosis.org/>

represent[ed] the interests of the thirty-nine small island and low-lying coastal developing states in international climate change, sustainable development negotiations and processes.”¹³⁸ Although they are not part of the core group, they contain members of the core group, such as Vanuatu.¹³⁹ In their feedback, they noted previously they had been quiet but would request an advisory opinion of the ICJ on the obligations of States in respect of climate change that should reflect human rights and human rights law and highlight SIDS’ “lack of finance.”¹⁴⁰ These consultations were private, and traces of what was said and what feedback was given are scarce. However, looking through the resolutions, it is clear that it was specified that the most adversely affected countries were underdeveloped countries and small island developing countries and that there must be specific goals of where to hold global temperatures.¹⁴¹ The original purposes of ensuring a human rights approach and that the request addressed intergenerational equity were also not watered down.

On February 20, 2023, the final draft resolution was circulated by Vanuatu and the core group.¹⁴² In addition, the initiative has continued to gain significant support. “Of the 193 United Nations member states, 105 have now supported Vanuatu’s call to request that the International Court of Justice (ICJ) gives an advisory opinion on States’ legal obligation for climate action and the consequences of causing harm.”¹⁴³ The resolution was co-sponsored by more than 120 countries.¹⁴⁴

statement-by-samoa-on-behalf-of-the-alliance-of-small-island-states-aosis-under-agenda-item-70-report-of-the-international-court-of-justice/.

138. *About Us*, *supra* note 26.

139. *About Us: Member States*, ALL OF SMALL ISLAND STATES, <https://www.aosis.org/about/member-states/> (last visited Sept. 8, 2023).

140. *See* Lautasi, *supra* note 137; PISFCC, *supra* note 113.

141. *See* Lautasi, *supra* note 137.

142. Final Draft of U.N. Doc. A/77/L.58 (on file with author).

143. *See* Isabella Kaminski, *Vanuatu Gathers Support for UN Climate Justice Statement*, CLIMATE HOME NEWS (Feb. 3, 2023), <https://www.climatechangenews.com/2023/03/02/vanuatu-gathers-international-support-for-un-climate-justice-statement/>.

144. U.N. Gen. Assembly, Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change, U.N. Doc. A/77/L.58 (Mar. 1, 2023), <https://documents-dds-ny.un.org/doc/UNDOC/LTD/N23/063/82/PDF/N2306382.pdf> (listing the co-sponsors as

Requests by the UNGA generally require a simple majority of U.N. member states present and voting, although a two-thirds majority vote is required when deciding on “important questions.”¹⁴⁵ Abstentions do not count as votes. On March 29, 2023, the UNGA adopted *Resolution 77/276*, requesting an advisory opinion from the ICJ “on the obligations of States with respect to climate change.”¹⁴⁶ The resolution was adopted by consensus with the support of 18 core group states¹⁴⁷ and 132 co-sponsors.¹⁴⁸ The media highly reported the resolution as “a win for climate justice of epic proportions”¹⁴⁹ and “a milestone in defining the human rights obligations of governments.”¹⁵⁰ Before Vanuatu

Algeria, Andorra, Angola, Antigua and Barbuda, Australia, Austria, Azerbaijan, Bahamas, Bangladesh, Barbados, Belgium, Belize, Bulgaria, Cabo Verde, Canada, Chile, Colombia, Costa Rica, Croatia, Cyprus, Czechia, Denmark, Djibouti, Dominican Republic, Eritrea, Estonia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Guinea-Bissau, Guyana, Hungary, Iceland, Ireland, Italy, Jamaica, Kiribati, Latvia, Lebanon, Libya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Maldives, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia (Federated States of), Monaco, Montenegro, Morocco, Mozambique, Myanmar, Namibia, Nauru, Nepal, Netherlands, New Zealand, North Macedonia, Norway, Palau, Panama, Papua New Guinea, Portugal, Republic of Moldova, Romania, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Serbia, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, Spain, Sri Lanka, Suriname, Sweden, Switzerland, Timor-Leste, Togo, Tonga, Trinidad and Tobago, Tunisia, Tuvalu, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, Vanuatu, Vietnam and State of Palestine).

145. U.N. Charter art. 18, ¶ 2, <https://treaties.un.org/doc/Publication/CTC/uncharter.pdf>.

146. G.A. Res. 77/276 (Mar. 29, 2023), <https://documents-dds-ny.un.org/doc/UNDOC/LTD/N23/094/52/PDF/N2309452.pdf> [hereinafter UNGA Request].

147. *ICJ Resolution*, VANUATU INT’L CT. JUST. INITIATIVE, <https://www.vanuatuicj.com/resolution> (last accessed Apr. 23, 2023) (identifying those States as Angola, Antigua and Barbuda, Bangladesh, Costa Rica, Germany, Liechtenstein, Federated States of Micronesia, Morocco, Mozambique, New Zealand, Portugal, Romania, Samoa, Sierra Leone, Singapore, Uganda, and Vietnam).

148. *Id.*

149. Nina Lakhani, *United Nations Adopts Landmark Resolution on Climate Justice*, GUARDIAN (Mar. 29, 2023, 12:14 EDT), <https://www.theguardian.com/environment/2023/mar/29/united-nations-resolution-climate-emergency-vanuatu>.

150. Hum. Rts. Watch, UN General Assembly Seeks World Court Ruling on Climate Change, HUM. RTS. WATCH (Mar. 29, 2023, 11:00 AM EDT),

presented the resolution, U.N. Secretary-General António Guterres said in his remarks to the assembly that the resolution decision is “essential,” and “climate justice is both a moral imperative and a prerequisite for effective global climate action.”¹⁵¹ Passing the resolution by consensus was significant, as it “demonstrate[d] to the ICJ that UN member countries are eager for clear, definitive, and well-reasoned answers to crucial questions of state responsibility.”¹⁵² It further demonstrated the “effective multilateral diplomacy” led by Vanuatu, a SIDS country from the Global South.¹⁵³

Requests are then communicated to the ICJ in written form, containing an exact statement of the relevant legal question.¹⁵⁴ After the ICJ receives the request, states are allowed to submit written statements and to comment on the statements submitted by other states. States may also make oral statements at public proceedings typically held by the ICJ. The length of the process varies, but most advisory opinions have been issued between one and two years after receipt of the initial request.¹⁵⁵ However, the ICJ is not required to give advisory opinions when requested: it may, as a matter of judicial discretion, dismiss requests for “compelling” reasons, such as if the request is a “contentious dispute in disguise,” although this basis for declining requests was interpreted narrowly in the court’s *Wall* advisory opinion.¹⁵⁶ The

<https://www.hrw.org/news/2023/03/29/un-general-assembly-seeks-world-court-ruling-climate-change>.

151. Ramirez, *supra* note 92.

152. Hum. Rts. Watch, *supra* note 150.

153. *Id.*

154. *Statute of the International Court of Justice*, INT’L CT. JUST. art. 65, ¶2 (June 26, 1945), <https://www.icj-cij.org/statute> [hereinafter ICJ Statute]. The process moving forward is largely detailed in Katelyn Horne, Maria A. Tigre & Michael B. Gerrard, *Status Report on Principles of International and Human Rights Law Relevant to Climate Change*, COLUM. L. SCH. SCHOLARSHIP ARCHIVE 9 (Apr., 2023), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=4942&context=faculty_scholarship.

155. *Advisory Proceedings*, INT’L CT. JUST., <https://www.icj-cij.org/en/advisory-proceedings> (last accessed April 23, 2023).

156. See *Western Sahara, Advisory Opinion*, 1975 I.C.J. 12, 32–33 (Oct. 16); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. 226, ¶19 (July 8); *Wall, supra* note 106, ¶¶ 42–50; ICJ Statute, *supra* note 154, at art. 65(1).

ICJ has also “rejected requests based on the motives of the sponsoring state and, based on those motives, alleged harmful consequences.”¹⁵⁷ To date, the ICJ has issued at least twenty-seven advisory opinions, seventeen of which were requested by the UNGA and one of which was requested by the UNSC.¹⁵⁸

The UNGA’s competence to request an advisory opinion is extensive and can relate to “questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations.”¹⁵⁹ Issues related to climate change and human rights fall within the scope of the U.N. Charter since they pertain to maintaining international peace and security.¹⁶⁰ Overall, the UNGA has exercised authority over climate change through several high-level discussions and the adoption of a series of resolutions over the past decades.

II. WHY NOW? OPPORTUNITIES FROM DECADES OF PROGRESSIVE DEVELOPMENT IN CLIMATE CHANGE LITIGATION AND CLIMATE SCIENCE

This Section examines the opportune moment for seeking an advisory opinion on climate change from international courts, building upon significant developments and shifts in the global landscape of climate change governance.

Notably, the 2008 efforts of small island nation-states, led by Palau, in linking climate change to international peace and security and urging action within the United Nations Security Council (UNSC) set the stage for subsequent initiatives.¹⁶¹ Although progress in addressing climate change within a security

157. Maria Antonia Tigre & Natalia Urzola, *The 2017 Inter-American Court’s Advisory Opinion: Changing the Paradigm for International Environmental Law in the Anthropocene*, 12 J. HUM. RTS. & ENV’T. 24, 32 (2021).

158. Daniel Bodansky, *An ICJ Advisory Opinion on Climate Change: Ten Questions and Answers*, CTR. FOR CLIMATE & ENERGY SOLS. (Oct. 2022), <https://www.c2es.org/wp-content/uploads/2022/10/an-icj-advisory-opinion-on-climate-change-ten-questions-and-answers.pdf>.

159. *Wall*, *supra* note 106, ¶17.

160. Horne, Tigre & Gerrard, *supra* note 154.

161. *See Statement by the Honorable Elias Camsek Chin: Vice President of the Republic of Palau to the 63rd Regular Session of the United Nations General Assembly*, UNITED NATIONS (Sept. 25, 2008), <https://www.un.org/en/ga/63/generaldebate/palau.shtml>.

framework has been impeded by a lack of political will among UNSC permanent members, a historic resolution passed by the United Nations General Assembly (UNGA), supported by every member state, called on all U.N. organs to intensify their consideration and action on climate change, including its potential security implications.¹⁶² Leveraging this resolution, Germany, during its presidency of the UNSC in 2011, issued a seminal Presidential Statement emphasizing the “risks of climate change to international peace and security.”¹⁶³

Following the UNGA resolution, Palau, during the UNGA’s 67th Session in September 2011, proposed requesting “an advisory opinion from the [ICJ] on the responsibilities of States under international law” to prevent their GHG-emitting activities from causing harm to other states.¹⁶⁴ President Johnson Toribiong of Palau invoked the customary international law obligation for states to respect the environment of other states exemplified in the *Trail Smelter* arbitration¹⁶⁵ and Article 194(2) of the United Nations Convention on the Law of the Sea (UNCLOS),¹⁶⁶ which requires states to take measures to prevent pollution damage to other states.¹⁶⁷ As argued by Palau, an advisory opinion establishing the application of the norm prohibiting transboundary harm from GHG emissions would have influenced negotiations within the United Nations Framework Convention on Climate Change (UNFCCC) and informed decisions by national courts and legislatures while framing climate change mitigation as a matter of justice and law.¹⁶⁸

The initiative for Responsibility on Climate Change (ARC

162. Stuart Beck & Elizabeth Burleson, *Inside the System, Outside the Box: Palau’s Pursuit of Climate Justice and Security at the United Nations*, 3 *TRANSNAT’L ENV’T L.* 17, 22 (2014).

163. *Id.* at 22–23.

164. U.N. Gen. Assembly, 16th Plenary Meeting Thursday, 22 September 2011, 3 p.m. New York, at 27, U.N. Doc. A/66/PV.16 (Sept. 22, 2011), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/508/71/PDF/N1150871.pdf?OpenElement>.

165. *Trail Smelter Case (U.S. v. Can.)*, 3 R.I.A.A. 1905 (Apr. 16, 1938 & Mar. 11, 1941), https://legal.un.org/riaa/cases/vol_III/1905-1982.pdf.

166. UNCLOS, *supra* note 24, at art. 194(2).

167. U.N. Gen. Assembly, *supra* note 164, at 28.

168. *See id.*

Group) was launched by ambassadors from over thirty countries, including Germany as a significant cosponsor, to bring the issue of climate change to the ICJ. However, political pressure from the United States and China, both opposed to submitting the topic of climate change to the ICJ, resulted in insufficient support from UNGA members to proceed with the request.¹⁶⁹ Ultimately, “nowhere near a majority of [UNGA] members supported present[ing] . . . the question” to the ICJ, and the initiative failed.¹⁷⁰

Another significant landmark in getting to the current scenario is set at the Inter-American System of Human Rights. As one of the earliest attempts to use international human rights law in climate litigation, the Inuit Circumpolar Conference’s (ICC) petition to the Commission sought relief from human rights violations resulting from the impacts of global warming and climate change caused by acts and omissions of the United States.¹⁷¹ The Inuit petition articulated a novel “climate rights” frame that emphasized the moral dimensions of climate change and brought forth the voices of marginalized communities.¹⁷² For the first time, a novel set of legal arguments was presented to hold a state responsible for the human rights impacts of climate change.¹⁷³ The claim was lodged in 2005 by a group of Inuit petitioners on account of the United States’ historic greenhouse

169. See *Jesse Cameron Glickenhau, Potential ICJ Advisory Opinion: Duties to Prevent Transboundary Harm from GHG Emissions*, 22 N.Y.U. ENV’T. L.J. 117, 119 (2015).

170. Michael Gerrard, Taking Climate Change to the International Court of Justice: Legal and Procedural Issues, CLIMATE L. SABIN CTR. BLOG (Sept. 9, 2021), <https://blogs.law.columbia.edu/climatechange/2021/09/29/taking-climate-change-to-the-international-court-of-justice-legal-and-procedural-issues/>.

171. Inuit Circumpolar Conf., *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States*, CLIMATE CHANGE LITIG. DATABASES (Dec. 7, 2005), https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2005/20051208_na_petition.pdf; see also Hari M. Osofsky, *Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples’ Rights*, 31 AM. INDIAN L. REV. 675, 675 (2007).

172. Jen Iris Allan & Jennifer Hadden, *Exploring the Framing Power of NGOs in Global Climate Politics*, 26 ENV. POL. 600, 606 (2017).

173. See Sebastien Jodoin et al., *Realizing the Right to Be Cold? Framing Processes and Outcomes Associated with the Inuit Petition on Human Rights and Global Warming*, 54 L. & SOC’Y REV. 168, 169–70 (2020).

gas emissions.¹⁷⁴ The petitioners argued that climate policy failures contributed to the harmful effects of climate change damage in the Arctic.

The petition had mitigation and adaptation claims and questioned the adverse effects of climate change on vulnerable populations. The Inuit people alleged that the impacts of global warming constituted a violation of their human rights, including their “right[] to the benefits of culture, . . . property, . . . the preservation of health, life, physical integrity, security, and a means of subsistence, and . . . residence, movement, and inviolability of the home.”¹⁷⁵ The case is based on the Inuit’s status as a distinct people, unified in their cultural values and practices and belonging to their traditional lands and territories irrespective of the political boundaries of the nation-states.¹⁷⁶ The petition is illustrative of recent environmental justice claims, as it was not a sovereignty claim but rather a claim for “environmental self-determination.”¹⁷⁷

The IACHR rejected the petition arguing a lack of proof of actual rights violation and damages suffered by the Inuit peoples, and no precautionary measures were issued. The application was deemed inadmissible on the basis that it had not sufficiently determined whether “the alleged facts would . . . characterize a violation of rights protected by the American Declaration.”¹⁷⁸ While the petition ultimately failed in assigning any responsibility for climate change to the United States, it did exert legal influence at the international level by jumpstarting the connection between human rights and climate change.¹⁷⁹ The petition “has had some indirect regulatory influence, particularly in terms of changing norms and values through increasing the public profile of Arctic

174. Inuit Circumpolar Conf., *supra* note 171.

175. *Id.* at 5. Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625, 1673 (2007).

176. Tsosie, *supra* note 175, at 1770.

177. *Id.* at 1670.

178. *Letter from Ariel E. Dulitzky to Paul Crowley*, COLUM. (Nov. 16, 2006), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2006/20061116_na_decision.pdf (last accessed Oct. 21, 2019).

179. Jodoin et. al., *supra* note 173, at 192–93.

climate change impacts.”¹⁸⁰ It also advanced the development of environmental justice claims of Indigenous groups by opening the dialogue about the link between climate change and human rights and its effects on Indigenous communities.¹⁸¹

These early initiatives are crucial to the moment we are currently in. In light of advancements in rights-based climate litigation in particular, the scenario is now more fruitful for the progress of climate change law at international and regional courts. In recent years, there have been notable advancements in climate litigation, demonstrating a growing recognition of the importance of legal avenues for addressing the urgent challenges posed by climate change. These developments, particularly in rights-based climate litigation, have paved the way for a more conducive environment for advancing climate change law within international and regional courts.

One significant factor contributing to the increased effectiveness of climate litigation is the evolving understanding of the legal principles and frameworks that underpin climate change action. As scientific evidence continues to highlight the severe impacts of climate change on human rights, ecosystems, and the planet, the legal community has responded by exploring new avenues to hold governments and corporations accountable for their contributions to climate change. Rights-based climate litigation has emerged as a powerful tool in this regard because it seeks to link the protection of fundamental rights with the need for ambitious climate action.

Furthermore, the success of landmark climate litigation cases in different jurisdictions has emboldened plaintiffs and provided important precedents for future legal actions. These cases have often sought to establish the duty of governments to act decisively to mitigate climate change and protect the rights of present and future generations. They have also challenged the actions of corporations and other entities whose activities contribute

180. Jacqueline Peel & Hari M. Osofsky, *Climate Change Litigation's Regulatory Pathways: A Comparative Analysis of the United States and Australia*, 35(3) L. & POL'Y 150, 160 (2013).

181. See Veronica de la Rosa Jaimes, *The Arctic Athabaskan Petition: Where Accelerated Arctic Warming Meets Human Rights*, 45 CAL. W. INT'L L.J. 213, 218 (2014).

significantly to greenhouse gas emissions and environmental degradation. The outcomes of these cases have showcased the potential for courts to play a crucial role in shaping climate change policy and promoting accountability.

In addition to the progress made within national courts, there is a growing recognition of the need for international and regional courts to contribute to the development of climate change law. The urgency and complexity of the climate crisis have prompted calls for these higher-level judicial bodies to provide guidance and clarification on key legal issues related to climate change. International and regional courts are uniquely positioned to interpret and apply international legal instruments, including environmental treaties and human rights conventions, in the context of climate change. Their involvement can help establish legal standards, define state responsibilities, and reinforce the obligation of states to take ambitious climate action.

The expanding body of case law in climate litigation and the increasing understanding of the interplay between climate change and human rights has created a more favorable landscape for advancing climate change law at international and regional courts. The accumulation of legal knowledge and precedents, along with the growing awareness of the urgent need for effective climate action, makes it a ripe moment to harness the potential of these judicial institutions to address the complex and far-reaching challenges climate change poses.

The following sub-sections delve into specific examples of climate litigation and legal developments at the international and regional levels that exemplify this promising scenario. By examining the progress made and the key legal arguments put forth in recent cases, we aim to demonstrate the readiness of international courts to issue advisory opinions and the significance of courts issuing them. As highlighted by Kahl, the present landscape offers renewed opportunities for the pursuit of advisory opinions on climate change due to a “reshuffle[ing]” of “The Cards.”¹⁸² This section expands on Kahl’s observation of reshuffling dynamics and explores the timely rationale behind the trio of advisory opinions. Moreover, Philippe Sands KC’s assertion

182. Kahl, *supra* note 83.

that international courts have a role in defining state obligations concerning climate change aligns with the arguments presented here.¹⁸³

Part *A* touches on the state of the climate emergency as detailed by science, particularly reports Intergovernmental Panel on Climate Change (IPCC) reports. Part *B* provides a brief overview of global climate litigation's status, providing a fruitful scenario for the advisory opinions. Part *C* touches on the recent international recognition of the right to a healthy environment, broadening the scope of rights these requests can build on.

A. The State of the Climate Emergency

In the face of the escalating climate crisis, the urgency and gravity of the situation have reached unprecedented levels, placing the world in a state of climate emergency. This heightened awareness and recognition of the critical nature of the crisis have been bolstered by significant advancements in climate science and an array of reports underscoring the pressing need for immediate action. As the global community grapples with the multifaceted challenges posed by climate change, the timing has never been more suitable for developing advisory opinions that can provide authoritative guidance on the legal dimensions of addressing this emergency. Building upon the growing body of knowledge and acknowledging the state of the climate emergency, these advisory opinions have the potential to galvanize transformative action and enhance the effectiveness of international and national responses to the crisis.

Advisory opinions allow states or international organizations to appear before the court to submit written or oral statements relevant to the issue at hand.¹⁸⁴ However, rules of procedure vary. For example, any interested party may submit a brief to the IACtHR. In the case of a high-profile matter like this, it is expected that the judicial bodies will receive numerous submissions,

183. Philippe Sands, *Climate Change and the Rule of Law: Adjudicating the Future in International Law*, SUP. CT. U.K. (Sept. 17, 2015), <https://www.supremecourt.uk/docs/professor-sands-lecture-on-climate-change-and-the-rule-of-law.pdf>.

184. *See id.* at 13–14.

potentially ranging from dozens to even hundreds.

The trio of requests for advisory opinions were firmly rooted in scientific findings, indicating science's significance within the proceedings. The parties invoking the advisory opinions recognized the crucial role that scientific knowledge plays in understanding and addressing complex issues related to the climate crisis. By acknowledging the scientific foundation of their requests, they aimed to highlight the essential role of empirical evidence in informing legal decision-making processes. This recognition underscores the interdependence of science and law in comprehensively addressing the challenges posed by climate change.

For advisory opinions, "all documents likely to throw light upon the question" should be submitted with the request for the advisory opinion.¹⁸⁵ This request will likely include reports or statements from the IPCC (submitting as an international organization) and others that clarify the undeniable science related to climate change, as well as evidence about the human rights affected by it, especially in SIDS. Indeed, the IPCC will likely be a "primary source of facts," and the court will probably accept those facts as given, as they are unlikely to be disputed.¹⁸⁶ However, the IPCC reports can often be hard to digest, especially for judges and others with a legal background who do not have any underlying knowledge of the science. This is a problem in climate litigation in general.

Chile and Colombia extensively referenced various reports by the IPCC¹⁸⁷ and other scientific research¹⁸⁸ to emphasize the grave

185. ICJ Statute, *supra* note 154, at art. 65(2).

186. Glickenhau, *supra* note 169, at 127.

187. See generally Intergovernmental Panel on Climate Change [IPCC], *Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C Above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty* (2018), https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SR15_Full_Report_HR.pdf; Intergovernmental Panel on Climate Change [IPCC], *Climate Change 2022: Impacts, Adaptation and Vulnerability* (2022), https://report.ipcc.ch/ar6/wg2/IPCC_AR6_WGII_FullReport.pdf.

188. See generally William J. Ripple et al., *World's Scientists' Warning of a Climate Emergency*, 70 BIOSCIENCE 8, 8–12 (2020); Will Steffen et al., *Trajectories*

nature of the current climate emergency. They underscored the irreversible harm from inadequate climate action and stressed the scientific and political consensus evident in the IPCC's findings. The geographical focus of the IACtHR allowed for specific attention to be drawn to the impacts of climate change on Central and South America.¹⁸⁹ The arguments by Chile and Colombia aimed to highlight the region's vulnerability and the urgent need for effective measures to address the climate crisis.

The UNGA resolution that sought an advisory opinion from the ICJ did not specifically cite any particular study or report. Nevertheless, it did include several general statements concerning the science of climate change. The UNGA expressed deep concern over the ongoing increase in GHG emissions and the adverse impacts of climate change that certain developing nations, particularly the least developed countries and small island developing states, were already witnessing.¹⁹⁰ Additionally, the UNGA expressed significant apprehension in light of the scientific consensus as presented in the IPCC reports.¹⁹¹

The utilization of scientific experts and their participation in ICJ proceedings has been extensively debated within academic

of the Earth System in the Anthropocene, 115 PNAS 8252 (2018); Timothy M. Lenton et al., *Climate Tipping Points—Too Risky to Bet Against*, 575 NATURE 592 (2019), <https://www.nature.com/articles/d41586-019-03595-0> (corrected Apr. 9, 2020); Nico Wunderling et al., *Interacting Tipping Elements Increase Risk of Climate Domino Effects Under Global Warming*, 12 EARTH SYS. DYNAMICS 601 (2021), <https://esd.copernicus.org/articles/12/601/2021/esd-12-601-2021.pdf>.

189. Intergovernmental Panel on Climate Change [IPCC], *Climate Change 2014: Impacts, Adaptation and Vulnerability*, at 1499–1566 (2014), https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-PartB_FINAL.pdf; Intergovernmental Panel on Climate Change [IPCC], *Climate Change 2022: Impacts, Adaptation and Vulnerability*, at 1689–1816 (2022), https://report.ipcc.ch/ar6/wg2/IPCC_AR6_WGII_FullReport.pdf.

190. UNGA Request, *supra* note 146, at p.mbl.

191. *Id.*

circles,¹⁹² subsequent to the *Pulp Mills* judgment.¹⁹³ Several cases, such as *Whaling in the Antarctic*,¹⁹⁴ *Certain Activities Carried Out by Nicaragua in the Border Area (Certain Activities)*,¹⁹⁵ *Construction of a Road in Costa Rica Along the San Juan River (Construction of a Road)*,¹⁹⁶ *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Maritime Delimitation)*,¹⁹⁷ *Land Boundary in the Northern Part of Isla Portillos (Land Boundary)*,¹⁹⁸ and *Dispute over the Status and Use of the Waters of the Silala*¹⁹⁹ have incorporated scientific experts for fact-finding processes.

Naturally, the utilization of science and scientific experts in advisory opinions differs from their involvement in fact-finding processes during contentious cases. Limited opportunities exist so

192. See CAROLINE E. FOSTER, SCIENCE AND THE PRECAUTIONARY PRINCIPLE IN INTERNATIONAL COURTS AND TRIBUNALS 10 (2011); J. Alvarez, *Are International Judges Afraid of Science?: A Comment on Mbengue*, 34 LOYOLA INT'L & COMPAR. L. REV. 12, 86 (2012); Makane Mbengue, *Scientific Fact-Finding by International Courts and Tribunals*, 3 J. INT'L DISP. SETTLEMENT 509 (2012); Jean D'Aspremont & Makane Mbengue, *Strategies of Engagement with Scientific Fact-Finding in International Adjudication*, 5 J. INT'L DISP. SETTLEMENT 247 (2014); Guillaume Gros, *The ICJ's Handling of Science in the Whaling in the Antarctic Case: A Whale of a Case?*, 6 J. INT'L DISP. SETTLEMENT 578 (2015); Loretta Malintoppi, *Fact Finding and Evidence Before the International Court of Justice (Notably in Scientific-Related Disputes)*, 7 J. INT'L DISP. SETTLEMENT 421 (2018); Lucas Carlos Lima, *The Debate on The Use of Experts by the International Court of Justice: An Inquiry Through Sociological Lenses*, 34 TEMPLE INT'L & COMP. L.J. 253 (2020); James Gerard Devaney, *The Role of Science and Expert Evidence in the ICJ's Silala Judgment: How Bolivia's Incoherent Claims Ran Up Against Reality*, 98 QUESTIONS INT'L L. 5 (2023).

193. See *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. 14 (Apr. 20).

194. *Whaling in the Antarctic (Austl. v. Japan)*, Judgment, 2014 I.C.J. 226 (Mar. 31).

195. *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.)*, Judgment, 2015 I.C.J. 665 (Dec. 16).

196. *Construction of a Road in Costa Rica Along the San Juan River (Nicar. v. Costa Rica)*, Judgment, 2015 I.C.J. 665 (Dec. 16).

197. *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicar.)*, Judgment, 2018 I.C.J. 139 (Feb. 2).

198. *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicar.)*, Judgment, 2018 I.C.J. 139 (Feb. 2).

199. *Dispute Over the Status and Use of the Waters of the Silala (Chile v. Bol.)*, Judgment (Dec. 1, 2022), <https://www.icj-cij.org/sites/default/files/case-related/162/162-20221201-JUD-01-00-EN.pdf>.

far to define the applicable parameters in this context. Despite progress in climate litigation, with over 2,400 cases filed, the first climate trial in the United States recently occurred.²⁰⁰ The case of *Held v. Montana* involved a judge’s examination of whether the state’s policies significantly contributed to climate impacts.²⁰¹ The district court’s decision heavily relied on an extensive and uncontested scientific record presented at trial to confirm that human-induced environmental changes are driving global warming.²⁰² Undoubtedly, the utilization of attribution science to establish government obligations in mitigating and adapting to climate change has witnessed notable advancements in recent years.²⁰³ For example, science’s application in climate claims based on human rights has helped substantiate that climate change is an existing phenomenon with tangible adverse effects, attributable at least in part to the policies and actions of government defendants.²⁰⁴

Burger et al. clarify that proving climate change-induced damage at the community level may be relatively easier compared to the individual level “because evidence of attribution tends to be more robust when” considering “broad[er] geographic and temporal” impacts.²⁰⁵ Since advisory opinions do not address

200. See *Held v. Montana*, et al., No. CV 22-137-BLG-SPW-TJC, slip op. (Mont. 1st Jud. Dist. Ct. Aug. 14, 2023), https://climatecasechart.com/wp-content/uploads/case-documents/2023/20230814_docket-CDV-2020-307_order.pdf (“Plaintiffs’ Complaint challenged the constitutionality of the State’s fossil fuel-based state energy system, which they allege causes and contributes to climate change in violation of their constitutional rights guaranteed under . . . the Montana Constitution[] and the Public Trust Doctrine.”); Dharna Noor, *Young Montana Residents Bring Climate Change Case to Court for First Time Ever*, *GUARDIAN* (Jun. 12, 2023), <https://www.theguardian.com/us-news/2023/jun/12/montana-young-residents-first-ever-climate-change-trial>.

201. See *Held*, slip op.; Noor, *supra* note 200.

202. See *Held*, slip op. at 19 (making the factual finding “[th]ere is overwhelming scientific consensus that Earth is warming as a direct result of human GHG emissions, primarily from the burning of fossil fuels.”).

203. Michael Burger et al., *The Law and Science of Climate Change Attribution*, 45 *COLUM. J. ENV’T L.* 57, 61–62 (2020).

204. MICHAEL BURGER, JESSICA WENTZ & DANIEL J. METZGER, *Climate Science and Human Rights Using Attribution Science to Frame Government Mitigation and Adaptation Obligations*, in *LITIGATING THE CLIMATE EMERGENCY 223* (Cesar Rodriguez-Garavito ed., 2023).

205. *Id.* at 226.

specific or individualized impacts, the recognition of climate attribution science by the ICJ and other courts holds significant advantages. Gerrard suggests that the ICJ will likely generate comprehensive scientific findings and engage in rigorous questioning based on its assessment of the scientific evidence presented during the proceedings.²⁰⁶ Additionally, he highlights that an ICJ opinion could establish an authoritative judicial determination regarding the validity of the scientific knowledge synthesized by the IPCC.²⁰⁷ Similar potential exists for the advisory opinions of ITLOS and the IACtHR.

The request made by COSIS for an advisory opinion from ITLOS is, as explicated in subsequent sections, narrower in its scope. Notably, the request does not incorporate any contextual information pertaining to the scientific aspects related to the posed question or any form of introductory or background material. Nonetheless, the question presented to ITLOS contains a fundamental scientific dimension, as it pertains to the delineation of marine pollution arising from GHG emissions.

As noted, the expansion of scientific studies in recent years has been significant. It is crucial that the advisory opinions begin by unequivocally acknowledging and actively engaging with the scientific consensus on climate change and the urgent need for decisive action. This recognition would entail acknowledging the overwhelming evidence and consensus among scientists regarding the reality of climate change, its underlying causes, and the severe consequences it imposes on human societies and the environment. By emphasizing the scientific foundation of climate change, these advisory opinions would fortify the critical importance of grounding legal responses in sound scientific knowledge. Moreover, it would play a pivotal role in dispelling any lingering doubt surrounding the impacts of climate change on communities worldwide, unequivocally addressing climate deniers and countering the spread of misinformation. Six notable examples of

206. Michael B. Gerrard, *Taking Climate Change to the International Court of Justice: Legal and Procedural Issues*, CLIMATE L. SABIN CTR. BLOG (Sep. 29, 2021), <https://blogs.law.columbia.edu/climatechange/2021/09/29/taking-climate-change-to-the-international-court-of-justice-legal-and-procedural-issues/> (edited by Tiffany Challe-Campiz).

207. *Id.*

studies published in 2022–2023 that may inform advisory opinions are worth mentioning.

In March 2023, the Intergovernmental Panel on Climate Change—the “United Nations body for assessing the science related to climate change”²⁰⁸—released its sixth synthesis report²⁰⁹ outlining the most up-to-date science concerning climate change.²¹⁰ This report “summarizes five years of reports on global temperature rises, fossil fuel emissions[,] and climate impacts.”²¹¹ The IPCC report is significant, among other features, because it does not recount scientific facts in a vacuum. The report is written with an understanding of the “interdependence of climate, ecosystems and biodiversity, and human societies; the value of diverse forms of knowledge; and the close linkages between climate change adaptation, mitigation, ecosystem health, human well-being[,] and sustainable development.”²¹² As climate litigation continues to develop as an avenue, especially for those communities vulnerable to climate change, understanding the depth of climate change’s integration can be critical.

The IPCC report is structured as follows. First, it begins with an “assessment of observational evidence for our changing climate, historical and current drivers of human-induced climate change, and its impacts[,] [and] assesses the current implementation of adaptation and mitigation response options.”²¹³ Then, the report

208. *About the IPCC*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, <https://www.ipcc.ch/about/> (last visited Apr. 5, 2023).

209. The reports are typically published every six to seven years. See Press Release, Intergovernmental Panel on Climate Change [IPCC], Urgent Climate Action Can Secure a Liveable Future for All, IPCC Press Release 2023/06/PR (Mar. 20, 2023), https://www.ipcc.ch/site/assets/uploads/2023/03/IPCC_AR6_SYR_PressRelease_en.pdf.

210. The report summarized the “state of knowledge of climate change, its widespread impacts and risks, and climate change mitigation and adaptation.” Intergovernmental Panel on Climate Change [IPCC], *Climate Change 2023: Synthesis Report*, at 3 (2023), https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_FullVolume.pdf [hereinafter the 2023 Synthesis Report].

211. Nathan Cooper, *Climate Change: The IPCC Just Published Its Summary of 5 Years of Reports – Here’s What You Need to Know*, WORLD ECON. F. (Mar. 20, 2023), <https://www.weforum.org/agenda/2023/03/the-ipcc-just-published-its-summary-of-5-years-of-reports-here-s-what-you-need-to-know/>.

212. 2023 Synthesis Report, *supra* note 210, at 3.

213. *Id.* at 38.

“provides a long-term assessment of climate change to 2100 and beyond in a broad range of socio-economic futures,” and in doing so, “considers long-term characteristics, impacts, risks[,] and costs in adaptation and mitigation pathways in the context of sustainable development.”²¹⁴ The IPCC report concludes with a review of the “opportunities for scaling up effective action in the period up to 2040, in the context of climate pledges, . . . commitments, and the pursuit of sustainable development.”²¹⁵

The IPCC report includes several highlighted boxes, drawing attention to their conclusions. The first of these contains the following text:

Human activities, principally through emissions of greenhouse gases, have unequivocally caused global warming, with global surface temperature reaching 1.1°C above 1850–1900 in 2011–2020. Global greenhouse gas emissions have continued to increase over 2010–2019, with unequal historical and ongoing contributions arising from unsustainable energy use, land use and land-use change, lifestyles and patterns of consumption and production across regions, between and within countries, and between individuals (high confidence). Human-caused climate change is already affecting many weather and climate extremes in every region across the globe. This has led to widespread adverse impacts on food and water security, human health and on economies and society and related losses and damages [including economic and non-economic ones] to nature and people (high confidence).²¹⁶

The IPCC report leaves little doubt that “[o]bserved increases in well-mixed [greenhouse gas] concentrations since around 1750 are unequivocally caused by [greenhouse gas] emissions from human activities.”²¹⁷ Indeed, the “likely range of total human-caused global surface temperature increase from 1850–1900 to 2010–2019 is 0.8°C to 1.3°C, with a best estimate of 1.07°C.”²¹⁸

The report demonstrates that “[e]missions have grown in most regions but are distributed unevenly, both in the present day and

214. *Id.*

215. *Id.*

216. *Id.* at 42.

217. *Id.*

218. *Id.* (footnote omitted).

cumulatively since 1850.”²¹⁹ With high confidence, the IPCC report asserts that “[t]he 10% of households with the highest per capita emissions contribute 34[%]–45% of global consumption-based household GHG emissions, while . . . the bottom 50% contribute 13[%]–15%.”²²⁰ It should be unsurprising that “vulnerable communities who have historically contributed the least to current climate change are disproportionately affected.”²²¹

The report discusses what has resulted from these emissions: “It is unequivocal that human influence has warmed the atmosphere, ocean[,] and land[] [with] [w]idespread and rapid changes in the atmosphere, ocean, cryosphere[,] and biosphere”²²² This “[h]uman-caused climate change is already affecting many weather and climate extremes in every region across the globe.”²²³ This increase in extreme weather patterns “has led to widespread adverse impacts and related losses and damages to nature and people (high confidence).”²²⁴

The global population has felt these effects in a variety of ways, including “water scarcit[ies];” “climate-related food-borne and water-borne diseases;” mental health problems; “loss of livelihoods and culture;” and a host of others: economic damage to “agriculture, forestry, fishery, energy, and tourism.”²²⁵ The population faces the “destruction of homes and infrastructure, and loss of property and income, human health and food security,” in addition to “adverse effects on gender and social equity.”²²⁶ Tragically, again, the IPCC report claims with “high confidence” that “[v]ulnerable communities who have historically contributed the least to current climate change are disproportionately affected” by these more extreme weather patterns.²²⁷

The IPCC report devotes some discussion to current mitigation efforts. While the report recognizes “[t]here has been a consistent

219. *Id.* at 45.

220. *Id.* at 44.

221. *Id.* at 42.

222. *Id.* at 46.

223. *Id.*

224. *Id.* at 5.

225. *Id.* at 50–51.

226. *Id.* at 6.

227. *Id.* at 42.

expansion of policies and laws addressing mitigation”²²⁸ since the fifth assessment report in 2014, it is not enough:

At the time of the present assessment there are gaps between global ambitions and the sum of declared national ambitions. These are further compounded by gaps between declared national ambitions and current implementation for all aspects of climate action. For mitigation, global GHG emissions in 2030 implied by NDCs announced by October 2021 would make it *likely* that warming will exceed 1.5°C during the 21st century and would make it harder to limit warming below 2°C. Despite progress, adaptation gaps persist, with many initiatives prioritising short-term risk reduction, hindering transformational adaptation. Hard and soft limits to adaptation are being reached in some sectors and regions, while maladaptation is also increasing and disproportionately affecting vulnerable groups. Systemic barriers such as funding, knowledge, and practice gaps, including lack of climate literacy and data hinders adaptation progress. Insufficient financing, especially for adaptation, constrain[s] climate action in particular in developing countries.²²⁹

The long and short of the IPCC’s report is that current mitigation efforts are simply not comprehensive enough. Although the report recognizes the challenges and high costs of implementing mitigation efforts,²³⁰ over “100 countries have either adopted, announced, or are discussing net zero GHG or net zero CO₂ emissions commitments, covering more than two-thirds of global GHG emissions.”²³¹ However, the IPCC report is skeptical of this because “limited policies are . . . [currently] in place to deliver on them.”²³²

The report emphasizes that “[g]lobal warming will continue to increase in the near term in nearly all considered scenarios and modelled pathways.”²³³ This is a critical problem because “[w]ith every increment of warming, climate change impacts and risks

228. *Id.* at 52.

229. *Id.* at 57 (emphasis in original) (footnotes omitted).

230. *Id.* at 61.

231. *Id.*

232. *Id.*

233. *Id.* at 68.

will become increasingly complex and more difficult to manage.”²³⁴ Therefore, “[p]rojected adverse impacts and related losses and damages from climate change escalate with every increment of global warming . . . , but they will also strongly depend on socio-economic development trajectories and adaptation actions to reduce vulnerability and exposure.”²³⁵ This is because, in part, “development pathways with higher demand for food, animal feed, and water, more resource-intensive consumption and production, and limited technological improvements result in higher risks from water scarcity in drylands, land degradation and food insecurity.”²³⁶ The IPCC report claims with “high confidence:”

Without rapid, deep and sustained mitigation and accelerated adaptation actions, losses and damages will continue to increase, including projected adverse impacts in Africa, LDCs, SIDS, Central and South America, Asia and the Arctic, and will disproportionately affect the most vulnerable populations.²³⁷

And on top of that, it is the Least Developed Countries (LDCs) and the Small Island Developing states who have “much lower per capita emissions . . . than the global average.”²³⁸ Yet these are what the IPCC report calls “global hotspots of high human vulnerability” due to climate change.²³⁹

The IPCC reports have not gone unnoticed. The president and CEO of the NRDC, the National Resources Defense Council, called the report the “stone cold truth laid out in unassailable science by the world’s top climate experts.”²⁴⁰ In 2021, around the same time the IPCC’s sixth assessment report’s findings were first circulated, “U.S. Senate Banking Committee Ranking Member Pat Toomey of Pennsylvania and all Republican members of the committee, urged the SEC to reject any proposal to implement new global

234. *Id.* at 72.

235. *Id.*

236. *Id.*

237. *Id.* at 93 (footnote omitted).

238. *Id.* at 44.

239. *Id.* at 51.

240. Manish Bapna, *IPCC Report an Urgent Call to Global Action on Clean Energy Investment and Climate Assistance*, NAT’L RES. DEF. COUNCIL (Mar. 20, 2023), <https://www.nrdc.org/press-releases/ipcc-report-urgent-call-global-action-clean-energy-investment-and-climate-assistance>.

warming disclosures.”²⁴¹

Regardless of the lobbying and politicking, Scientific American called the IPCC report a “key validation” for all climate “lawsuits that prod fossil fuel companies to pay for climate damages and governments to move more aggressively on climate mitigation.”²⁴² That article draws attention to the composition of the group that produces the report: “The IPCC report is by the world’s leading climate scientists and focuses on how society can curb greenhouse gas emissions and stem the worst effects of global warming.”²⁴³ What is more, industries rarely challenge the IPCC’s findings in litigation, as private sector “scientists have input into the review process.”²⁴⁴ Bloomberg News called the report the “most established body of knowledge on climate change[,] . . . unique in that . . . [it] gets a sign-off from every country on the planet,” and noted how “the report’s findings feature in everything from government policy to investment decisions.”²⁴⁵

Before the final synthesis report was released, all U.N.

241. Frank Van Gansbeke, *The IPCC Report – What Do Findings Entail For Governance And Duty Of Care? (2/2)*, FORBES, <https://www.forbes.com/sites/frankvangansbeke/2021/08/14/the-ipcc-report--what-do-findings-entail-for-duty-of-care-22/?sh=1c4538b713bf> (last visited Apr. 5, 2023).

242. Lesley Clark, *Climate Litigation Boosted by IPCC Report*, SCI. AM. (Apr. 12, 2022), <https://www.scientificamerican.com/article/climate-litigation-boosted-by-ipcc-report/>.

243. *Id.*

244. *Id.* On writing the IPCC Sixth Report Summary for Policymakers, which accompanies the longer, research-intensive report:

Oil company representatives were also included in this process as both authors and editors of the report, which has been the case since the IPCC began. For the latest report, a senior staffer for Saudi Aramco – Saudi Arabia’s state-owned oil and gas company – was one of the two coordinating lead authors, a position of considerable influence, for the chapter on cross-sector perspectives. A longtime Chevron staffer was also the review editor for the chapter on energy systems.

Amy Westervelt, *IPCC: We Can Tackle Climate Change if Big Oil Gets Out of the Way*, GUARDIAN (Apr. 5, 2022, 11:29 AM), <https://www.theguardian.com/environment/2022/apr/05/ipcc-report-scientists-climate-crisis-fossil-fuels>.

245. Akshat Rathi & Oscar Boyd, *Transcript Zero Bonus Episode: Why the New IPCC Report Is So Important*, BLOOMBERG (Mar. 21, 2023, 2:34 PM EDT), <https://www.bloomberg.com/news/articles/2023-03-21/transcript-zero-bonus-episode-why-the-new-ipcc-report-matters?leadSource=uverify%20wall>.

countries had to approve the report by signing off on it.²⁴⁶ This “unusual process of having countries sign off on a scientific report is intended to ensure that governments accept its findings as authoritative advice on which to base their actions.”²⁴⁷ Regardless of industry opinion, world “governments cannot ignore the findings they have themselves endorsed.”²⁴⁸

Even the 2023 ExxonMobil Advancing Climate Solutions Progress Report leverages the IPCC report’s “projections and scenarios,” calling the IPCC a “reputable third part[y],” to “help inform [ExxonMobil’s] thinking, including the resiliency of our portfolio and opportunities.”²⁴⁹ The ExxonMobil report references the IPCC, its report, and the data included in the report sixty times in their 2023 Advancing Climate Solutions Progress Report. Indeed, even a major figure in the oil industry uses and relies on the IPCC sixth report.

This recent IPCC report represents a step in the right direction regarding increasing the diversity of voices and perspectives amplified in the report. “In 1990, fewer than 10 per cent of the 100 authors were women and less than 20 percent came from the Global South The current assessment cycle has 700 authors with 30 percent women and more than 40 percent from the Global South.”²⁵⁰ While the IPCC’s “first ever assessment report had around 100 . . . authors of whom only eight were

246. Joana Setzer & Catherine Higham, *Global Trends in Climate Change Litigation: 2022 Snapshot*, LONDON SCH. OF ECON. & POL. SCI. (2022), https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global_trends_in_climate_change_litigation_2023_snapshot.pdf.

247. Frank Jordans, *Nations Approve Key UN Science Report on Climate Change*, ASSOCIATED PRESS (Mar. 19, 2023), <https://apnews.com/article/un-climate-change-science-report-ipcc-meeting-e3469f69980fe949eb21b4bc25cb018f>.

248. Fiona Harvey, *What Is the IPCC and Why Is Its New Climate Report Different from Others?*, GUARDIAN (Aug. 9, 2021, 6:56 AM), <https://www.theguardian.com/environment/2021/aug/09/what-is-ipcc-why-new-climate-report-different>.

249. *Advancing Climate Solutions Progress Report*, EXXONMOBIL 22 (2023), <https://corporate.exxonmobil.com/-/media/global/files/advancing-climate-solutions-progress-report/2023/2023-advancing-climate-solutions-progress-report.pdf>.

250. Rosie Frost, *“Make No Mistake, Inaction and Delays Are Not Options”: Latest IPCC Report Has Been Approved*, EURONEWS.GREEN (Mar. 20, 2023), <https://www.euronews.com/green/2023/03/17/what-is-the-ipcc-report-heres-what-to-expect-from-the-latest-un-climate-change-assessment>.

women[,] [f]emale representation in the IPCC has since steadily risen over time[,] and by the publication of [the most recent report,] more than one-third of authors were female.”²⁵¹ For the first assessment report the IPCC released, roughly 11% of the authors were from the Global South.²⁵² While that representation has grown to over 40%, this is insufficient as the Global South encompasses 84% of the world’s population.²⁵³

Several prominent international court cases have relied upon the IPCC’s reports concerning climate change science. In its 2021 decision *Neubauer et al. v. Germany*, the German Constitutional Court “broadly held there is an obligation on the State to revisit the intertemporal distribution effects of its climate laws and to equitably distribute allowable emissions over time and generations.”²⁵⁴ The court, in that case, engaged fully with the facts of anthropogenic climate change by “relying on assessments of the IPCC, an intergovernmental committee that collects and scientifically evaluates peer reviewed findings of earth system science-based climate studies from around the world” and finding the IPCC report “sufficiently authoritative.”²⁵⁵ In its 2019 decision *State of the Netherlands v. Urgenda Foundation*, the Supreme Court of the Netherlands held that the “Netherlands has a positive obligation under the European Convention on Human Rights (ECHR) to take reasonable and suitable measures for the prevention of climate change.”²⁵⁶ In the Urgenda decision, “the high court cited IPCC reports as broadly supported scientific insights that should be taken into account when giving substance to the positive obligations imposed on the State.”²⁵⁷

The UNEP’s Emissions Gap Report offers pertinent insights.

251. Ayesha Tandon, *Analysis: How the Diversity of IPCC Authors Has Changed over Three Decades*, CARBON BRIEF (Mar. 15, 2023, 7:00 AM), <https://www.carbonbrief.org/analysis-how-the-diversity-of-ipcc-authors-has-changed-over-three-decades/>.

252. *Id.*

253. *See id.*

254. Louis J. Kotzé, *Neubauer et al. Versus Germany: Planetary Climate Litigation for the Anthropocene?*, 22 GERMAN L.J. 1423, 1424 (2021).

255. *Id.* at 1432–33.

256. Maiko Meguro, *State of The Netherlands v. Urgenda Foundation*, 114 AM. J. INT’L L. 729–35 (2020).

257. Clark, *supra* note 242 (internal quotations omitted).

According to the report, the current global climate measures fall short of achieving the emissions reductions required to fulfill the objectives outlined in the Paris Agreement. The progress made since COP26 has been alarmingly inadequate, with the updated Nationally Determined Contributions (NDCs) only predicted to lead to marginal reductions in emissions by 2030. Existing policies indicate a trajectory towards a 2.8° Celsius temperature increase by 2100, surpassing the target of limiting global warming to 1.5° Celsius. Even with the implementation of current pledges, the temperature rise is only mitigated to a range of 2.4°–2.6° Celsius. The report underscores the urgency for intensified and accelerated actions in multiple sectors, namely electricity, industry, transportation, and buildings, to facilitate the transition towards zero GHG emissions. These efforts should encompass the avoidance of carbon lock-in and the advancement of zero-carbon technologies.²⁵⁸

The *State of the Global Climate 2022* report published by the World Meteorological Organization (WMO) presents crucial climate indicators, including GHG concentrations, temperature variations, rising sea levels, ocean heat and acidification, and extreme weather events.²⁵⁹ It emphasizes the adverse consequences of climate change such as widespread droughts, floods, and heatwaves; the unprecedented global temperature records observed over the past eight years; and the alarming extent of glacier melting. The report also underscores the detrimental effects of climate change on human populations and communities, including the exacerbation of food insecurity and undernourishment, the displacement of large numbers of people due to environmental factors, and the substantial economic losses incurred.

The *2022 State of Climate Services: Energy Report*, published by the World Meteorological Organization (WMO), outlines how climate change is presently jeopardizing global energy security through its direct impact on fuel supply, energy production and

258. See UNEP, *supra* note 4.

259. World Meteorological Org. [WMO], *State of the Global Climate: 2022* (2022), https://library.wmo.int/doc_num.php?explnum_id=11593.

demand, and the physical resilience of energy infrastructure.²⁶⁰ Notably, as of 2020, 87% of electricity generation from thermal, nuclear, or hydroelectric systems relied on water supply, with a significant portion of these power plants located in regions experiencing high water stress. Climate change has already had profound repercussions on energy systems worldwide in recent years. Examples include the power shortages affecting hundreds of thousands of Russian households due to severe, freezing rain in 2020 and the massive power outages caused by a historic heatwave in Buenos Aires in 2022.

However, despite these evident impacts, only approximately 40% of countries' Nationally Determined Contributions (NDCs) prioritize adaptation measures within the energy sector. The report advocates for a comprehensive global energy system transformation, emphasizing the imperative to shift towards renewable energy sources. It further calls for sustainable investments in water, weather, and climate services to enhance resilience and facilitate informed decision-making in the energy sector.

The *Global Landscape of Renewable Energy Finance: 2023* report provides a comprehensive overview. Although global investments in energy transition technologies reached record levels in 2022, the report highlights that the current rate of investment falls short of what is necessary to achieve the energy transition aligned with the 1.5° Celsius scenario.²⁶¹ This scenario necessitates redirecting approximately \$1 trillion annually from fossil fuel investments to technology related to the energy transition. However, investments in fossil fuels continue to rise, with projections indicating that approximately \$570 billion will be invested annually in new oil and gas fields until 2030.

Furthermore, the report identifies that the current pace of

260. See World Meteorological Org. [WMO], *2022 State of Climate Services: Energy Report*, WMO-No. 1316 (2022), https://library.wmo.int/doc_num.php?explnum_id=11340.

261. Climate Pol'y Initiative & Int'l Renewable Energy Agency, *Global Landscape of Renewable Energy Finance: 2023*, at 10 (2023), https://mc-cd8320d4-36a1-40ac-83cc-3389-cdn-endpoint.azureedge.net/-/media/Files/IRENA/Agency/Publication/2023/Feb/IRENA_CPI_Global_RE_finance_2023.pdf?rev=6213e7fa55ec4991a22514572e7996c5.

investments is insufficient to achieve the welfare and livelihood targets outlined in the 2030 Agenda for Sustainable Development. As of the end of 2020, 733 million individuals still lacked access to electricity, and nearly 2.4 billion people relied on traditional fuels for cooking. Additionally, there is an imbalance in renewable energy investments, with a concentration of investments in a limited number of countries and regions, while emerging markets receive significantly less investment. In 2022, over 50% of the world's population received only 15% of global investments in renewable energy. The report calls for an inclusive energy transition through international collaboration and public financing across various aspects, including deployment, integration, and enabling policies to address these challenges. Fostering a comprehensive approach encompassing diverse sectors and regions will facilitate equitable and sustainable energy access worldwide.

Additionally, the report *United in Science 2021*,²⁶² published by the WMO,²⁶³ presents key findings, revealing that concentrations of the three major greenhouse gases—carbon dioxide, methane, and nitrous oxide—have continued to increase, reaching unprecedented levels. Although there was a significant decline in CO₂ emissions in 2020 primarily due to the COVID-19 pandemic, emissions in the power and industry sectors have already rebounded and reached pre-pandemic levels. Additionally, the global mean surface temperature of the planet between 2017 and 2021 ranks among the highest on record, exceeding pre-industrial levels by approximately 1.06 to 1.26 degrees Celsius. This substantial temperature rise has contributed to extreme

262. World Meteorological Org. [WMO], *United in Science 2021: A Multi-Organization High-Level Compilation of the Latest Climate Science Information* (2021), https://library.wmo.int/doc_num.php?explnum_id=10794.

263. The report is compiled by the World Meteorological Organization (WMO) on behalf of the United Nations Secretary-General to bring together the latest climate science related updates from a group of key global partner organizations: WMO, Global Carbon Project (GCP), Intergovernmental Panel on Climate Change (IPCC), United Nations Environment Programme (UNEP), World Health Organization (WHO), the Met Office (United Kingdom, UK) and the jointly sponsored WMO/Intergovernmental Oceanographic Commission (IOC) of UNESCO/International Science Council (ISC) and World Climate Research Programme (WCRP). *Id.*

weather and climate events including severe heatwaves in North America, devastating floods in Europe, and the loss of Arctic sea ice.

Elevated temperatures are closely associated with increased heat-related mortality and reduced work productivity, disproportionately affecting vulnerable populations. Moreover, even with efforts to stabilize the climate, some level of adaptation will be inevitable to address the residual temperature rise, particularly in coastal regions, small islands, and river deltas most susceptible to the impacts of rising sea levels. The report provides these comprehensive findings from leading climate science organizations to underscore the urgent need for decisive climate-mitigation action. It emphasizes the significance of adaptation strategies to safeguard communities and ecosystems from the escalating effects of global warming.

In conclusion, the urgency behind pushing for these initiatives is the dire state of emergency regarding climate change reached by scientific consensus. The devastating consequences of inaction are exemplified by low-lying atoll states like Vanuatu, which “are projected to become uninhabitable by mid-century,” posing a direct threat to their “cultures, statehood, and sovereignty.”²⁶⁴ In June 2022, “Vanuatu . . . bec[a]me the first Pacific Small Island Developing State to declare . . . a climate emergency,” highlighting the gravity of the situation.²⁶⁵

Vanuatu, with 60% of its population residing within a mile of the coast, is highly vulnerable to even minor sea level changes.²⁶⁶ Already, dozens of villages in Vanuatu have been marked for relocation in the next two years due to rising sea levels. Fiji has earmarked forty-two villages for potential relocation in the next decade, six of which have already been moved.²⁶⁷ These relocation

264. *The Republic of Vanuatu*, VANAUTU ICJ INITIATIVE, <https://www.vanuatuicj.com/vanuatu> (last visited July 14, 2023).

265. *Vanuatu Declares a Climate Emergency*, TODA PEACE INSTITUTE (June 2, 2022), <https://toda.org/news-and-announcements/2022/vanuatu-declares-a-climate-emergency.html>.

266. *Climate ‘Tragedy’: Vanuatu to Relocate ‘Dozens’ of Villages*, FRANCE24, <https://www.france24.com/en/live-news/20221201-climate-tragedy-vanuatu-to-relocate-dozens-of-villages> (Jan. 12, 2022, 7:56).

267. Kate Lyons, *How to Move a Country: Fiji’s Radical Plan to Escape Rising Sea Levels*, GUARDIAN (Nov. 8, 2022, 01:00 EST), <https://www.theguardian.com/>

efforts not only incur significant costs but also lead to the erosion of cultural identities.²⁶⁸

The motivation behind these campaigns extends beyond addressing localized losses and damages. It recognizes that combating climate change requires tackling its root cause: reducing emissions. The United Nations Environment Programme (UNEP) emphasizes that for any fund to be effective, emissions must be drastically reduced; otherwise, more countries will inevitably experience “the devastating effects of climate change.”²⁶⁹ Simply pouring money into addressing the aftermath of climate-related disasters is insufficient, as the threat extends to the very existence of small island states and the transformation of entire countries into deserts.

The requests for advisory opinions are part of a larger advocacy strategy adopted by nations in peril, such as Vanuatu, as they strive to bring attention to their plight and seek solutions within the international system; they are a recognition that collective action and systemic change are essential to safeguarding their world from the adverse impacts of climate change. By leveraging these advocacy avenues, nations in peril hope to galvanize global efforts to address climate change comprehensively and prevent irreversible damage to their lands, cultures, and identities.

environment/2022/nov/08/how-to-move-a-country-fiji-radical-plan-escape-rising-seas-climate-crisis.

268. See *Statement Delivered by Ambassador Antas Sumbue, Vanuatu’s Embassy in Switzerland: Republic of Vanuatu, High Level Segment of the 26th Conference of the Parties to the United Nations Framework Convention on Climate Change*, INT’L TRIBUNAL FOR THE L. OF THE SEA (Nov. 10, 2021), https://www.itlos.org/fileadmin/itlos/documents/cases/31/Dossier_COSIS_20221212/26_COP26.pdf; see Celia McMichael & Teresia Powell, *Planned Relocation and Health: A Case Study from Fiji*, INT’L J. ENV’T RSCH. & PUB. HEALTH (Apr. 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8072796/pdf/ijerph-18-04355.pdf> / (“[W]hile the community relocated as a whole, and aimed to sustain the integrity of existing social and political structures and community life—e.g., governance structures including the village head and Chief, and village development committees continue to operate—many villagers reported some erosion of traditional hierarchies and values.”).

269. *What You Need to Know About the COP27 Loss and Damage Fund*, U.N. ENV’T PROGRAMME, (Nov. 29, 2022), <https://www.unep.org/news-and-stories/story/what-you-need-know-about-cop27-loss-and-damage-fund>.

B. The Status of Global Climate Litigation

As a result of the inadequate responses to climate action and the exponential development of climate science, “individuals, children, . . . youth, women, . . . human rights groups, communities, Indigenous groups, [NGOs], business entities, . . . national [governments], and subnational governments” are turning “to courts, tribunals, quasi-judicial bodies, . . . special procedures of the United Nations, and arbitration tribunals [to] seek[] relief through” various means, including

[t]he enforcement of existing climate laws[,] [i]ntegration of climate action into existing . . . laws[,] [o]rders to . . . policymakers . . . to be more ambitious . . . in their approaches to climate change[,] . . . [c]lear definitions of human rights and obligations affected by climate change, [and] [c]ompensation for climate harms.²⁷⁰

The expansion of climate litigation is not new, and it now counts on over two decades of experience. However, novel theories appear each year, and the variety of climate litigation continues to expand and diversify.

In the third installment of its assessment of global climate litigation, UNEP’s *Global Climate Litigation Report: 2023 Status Review*, written in partnership with the Sabin Center for Climate Change Law, “provides an overview of the current state of climate change litigation,” identifying general trends in the legal arguments advanced in courts worldwide.²⁷¹ As of December 31, 2022, the Sabin Center’s Climate Change Litigation databases (Global Climate Change Litigation and United States Climate Change Litigation) have documented 2,180 climate change cases that have been filed in sixty-five “international or regional courts, tribunals, quasi-judicial bodies, or other adjudicatory bodies, including special procedures of the United Nations and arbitration tribunals.”²⁷² Of these cases, 1,522 were filed in the United States

270. United Nations Env’t Programme [UNEP], *Global Climate Litigation Report: 2023 Status Review*, at XI, DEL/2550/NA (2023), https://wedocs.unep.org/bitstream/handle/20.500.11822/43008/global_climate_litigation_report_2023.pdf?sequence=1&isAllowed=y.

271. *Id.* at XII.

272. *Id.* at XIV.

of America, while the remaining 658 cases were filed in other jurisdictions. In total, over sixty-five national jurisdictions and other judiciary bodies at the regional or international level have identified climate litigation cases.

With the accumulation of extensive experience, climate litigation has emerged as a potent tool employed by civil society, individuals, and various stakeholders to enforce accountability on governments and the private sector in their insufficient efforts to address the climate crisis. It serves as an equalizing force by harnessing the influence of courts and the media spotlight that certain cases attract, thereby advocating for heightened climate action. By employing diverse legal approaches within national and international jurisdictions, plaintiffs endeavor to compel the public and private sectors to adopt more ambitious goals concerning mitigation and adaptation. According to the IPCC, climate litigation has influenced the outcome and ambition of climate governance and is an important avenue for actors to influence climate policy outside of the formal UNFCCC processes.²⁷³

The proliferation of climate litigation cases has naturally engendered a corresponding surge in scholarly attention for an empirical understanding of this phenomenon.²⁷⁴ While most scholarly focus has traditionally centered around cases in the Global North, there is a gradual expansion towards increased scrutiny of Global South cases.²⁷⁵ Concurrently, climate litigation has garnered heightened media coverage, capturing public attention even during the initial stage of case filings.²⁷⁶ This mounting volume of cases and the amplified media spotlight have

273. See Intergovernmental Panel on Climate Change [IPCC], *Climate Change 2022: Mitigation of Climate Change*, at 13 (2022), https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_FullReport.pdf.

274. See Joana Setzer & Lisa C. Vanhala, *Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance*, 10 WIREs CLIM CHANGE 580 (2019).

275. See Melanie Jean Murcott et al., *Evolving Annotated Bibliography for 'Climate Litigation in the Global South,'* THE GLOB. NETWORK FOR HUM. RTS. AND THE ENV'T (Dec. 2022), <https://gnhre.org/wp-content/uploads/2023/09/GNHRE-September-2023-Bibliography-1.pdf>.

276. See, e.g., THE WAVE, <https://www.the-wave.net/> (last visited Aug. 16, 2023) (publishing a climate litigation focused newsletter).

further bolstered the momentum of this burgeoning movement. It is evident that climate change litigation is experiencing an upswing, extending its geographical reach, and encompassing a broader array of legal arguments. Notably, the success of some instances, characterized by favorable outcomes for plaintiffs resulting in definitive resolutions, has inspired similar claims in other jurisdictions, instilling confidence in litigants to pursue similar legal strategies or explore innovative approaches. With the advancement of scientific research on climate science and attribution, coupled with the exploration of novel legal theories, climate litigation continues to evolve and expand in its scope.

The notable accomplishments of climate litigation cases contribute to a broader “transnational narrative” encompassing various aspects of these legal proceedings. Khan recognizes the significance of this narrative in the global climate justice movement, as these cases effectively convey a message of accountability and responsibility.²⁷⁷ For instance, Paiement highlights how litigation has played a crucial role in shaping a narrative surrounding the concepts of “time, the future, timelines for action[,] . . . and the urgency with which societies should responsibly” undertake mitigation efforts to combat global warming, considering “the inevitable costs and difficult decisions” associated with such endeavors.²⁷⁸ While there are apparent variations in the legal strategies and arguments employed in a wide array of cases, an underlying rationale persists: asserting the judiciary’s role in addressing the climate crisis. Despite criticisms and instances where cases have encountered obstacles such as separation-of-powers arguments, a prevailing narrative is emerging that emphasizes the engagement of the judiciary to compensate for the lack of political will exhibited by governments and corporations to pursue more ambitious mitigation and adaptation measures in response to climate change.

277. See Tessa Khan, *Litigation is a Powerful Tool for Holding Those Responsible for the Climate Crisis to Account*, TIME (Sept. 25, 2019 6:00 PM EDT), <https://time.com/5686087/courtroom-climate-change-litigation/>.

278. Phillip Paiement, *Urgent Agenda: How Climate Litigation Builds Transnational Narratives*, 11 TRANSNAT’L L. THEORY 121, 122 (2020), <https://www.tandfonline.com/doi/epdf/10.1080/20414005.2020.1772617?needAccess=true&role=button>.

Nevertheless, despite the progress made in climate litigation, several significant challenges impede its continued success. Firstly, it is important to acknowledge that many legal strategies employed in climate litigation do not achieve the desired outcomes, a fact often overlooked in media coverage and legal scholarship. Setzer and Higham conducted a comprehensive analysis and found that slightly over half of cases with interim or final decisions (approximately 53%) resulted in outcomes favorable to climate action.²⁷⁹ This implies that nearly half of the cases either received a neutral or unfavorable decision, were withdrawn, or settled. Examining these unsuccessful cases represents a critical research gap within the academic literature. It is worth noting that various procedural factors contribute to these unfavorable outcomes, such as arguments related to the separation of powers, non-exhaustion of domestic remedies, or the non-justiciability of the claim. Secondly, establishing a causal link between the lack or insufficiency of climate action and the resulting negative consequences of climate change remains a persistent challenge, despite some successful instances of rights-based climate litigation in recent years. Thirdly, another significant challenge in climate litigation is the role of climate science, which, despite being widely recognized by courts, primarily through the advancements presented in reports by the Intergovernmental Panel on Climate Change (IPCC), continues to face questioning and scrutiny.

The current landscape of global climate litigation, as briefly discussed here by highlighting key advancements and challenges, presents a favorable backdrop for the forthcoming advisory opinions. Firstly, these advisory opinions are being sought when a substantial body of case law on climate change already exists. Individual courts or quasi-judicial bodies' collective narrative and progress hold significant potential to shape future outcomes. Secondly, the growing scholarly attention in this field has contributed to a deeper understanding and interpretation of the diverse range of climate laws developed by courts. Thirdly, the progress in climate science and its reception by courts has also witnessed notable developments.

This divergence in the interpretation of climate laws among

279. Setzer & Higham, *supra* note 246.

courts has created a fragmented landscape, causing uncertainties and inconsistencies in certain legal norms and principles and their practical application. The lack of uniformity in judicial approaches poses challenges for litigants seeking consistent and predictable outcomes across jurisdictions. Moreover, the complexity and evolving nature of climate change law, coupled with the interdisciplinary nature of climate science, further contribute to the need for clarity and guidance from authoritative sources.

For example, while courts have generally accepted the scientific consensus on climate change and its projected impacts, they have exhibited variation in interpreting the corresponding obligations of states under international law. Despite the consensus on the existence and urgency of climate change, there is a lack of clarity regarding the specific legal responsibilities and obligations of states in mitigating GHG emissions. This presents an opportunity for an “authoritative statement” to be issued by the ICJ, ITLOS, or IACtHR regarding the state obligations arising from international law in relation to GHG mitigation.²⁸⁰

Such an opinion from one of these international judicial bodies would carry substantial weight and clarify states’ legal obligations in mitigating GHG emissions. Domestic and regional courts, which are already engaged in cross-fertilization through a transnational judicial movement, would likely seek guidance from the ICJ’s authoritative statement when framing their own decisions. Likewise, international human rights bodies and tribunals that address climate change and its impacts would also look to the ICJ for guidance.

Being the most authoritative judicial body within the United Nations, the ICJ’s pronouncement on the obligations imposed on states by international law to mitigate GHG emissions would likely have far-reaching effects. Other U.N. bodies, such as the Committee on the Rights of the Child (CRC), the Committee on the Elimination of Discrimination against Women (CEDAW), the Committee on the Elimination of Racial Discrimination (CERD), and others that deal with climate change in the future, are likely to follow the lead of the ICJ in their deliberations and decisions. Similarly, domestic courts are likely to follow the ICJ’s lead in the

280. Gerrard, *supra* note 206.

legal interpretation it provides. The same could be said for ITLOS and the IACtHR.

In essence, an authoritative opinion from the ICJ or other international judicial bodies on state obligations in mitigating GHG emissions would not only provide much-needed clarity but also establish a legal precedent that can guide the actions of domestic and regional courts, as well as other U.N. bodies, in addressing climate change through the lens of international law and human rights.

In this context, the forthcoming advisory opinions hold great potential to address these challenges and contribute to the harmonization of legal principles in global climate litigation. By offering authoritative interpretations and clarifications on critical aspects of the law, advisory opinions can provide a unifying framework that guides courts and litigants worldwide. This can promote legal consistency, enhance the effectiveness of climate litigation, and strengthen the overall global response to climate change.

Furthermore, the influence of advisory opinions extends beyond their immediate impact on ongoing cases. These opinions can serve as persuasive precedents, shaping the development of future legal strategies and arguments in climate litigation. They can contribute to the evolution of legal norms, principles, and standards in response to the climate crisis, influencing not only judicial decisions but also the actions of governments, corporations, and civil society.

C. The International Recognition of the Right to a Healthy Environment

It has long been recognized that a clean and healthy environment is integral to the enjoyment of human rights, such as the rights to life, health, food, water, privacy and family life, and an adequate standard of living, among others.²⁸¹ With the environmental challenges faced in the Anthropocene,²⁸² and the

281. Bridget Lewis, *Environmental Rights or a Right to the Environment: Exploring the Nexus Between Human Rights and Environmental Protection*, 8 MACQUARIE J. INT'L & COMP. ENVTL. L. 36 (2012).

282. See Joseph Stromberg, *What is the Anthropocene and Are We in It?*,

failure of the international community to adequately address them, environmental rights provide an increasingly relevant framing to address environmental and climate protection.²⁸³ “Anthropogenic climate change is the largest, most pervasive threat to the natural environment and human societies the world has ever experienced.”²⁸⁴ Therefore, a rights-based approach to climate litigation has emerged as a solid strategy to increase climate action, developing where the links between human rights and climate change are foreseen.²⁸⁵

The number of cases that promote rights-based climate litigation is growing significantly.²⁸⁶ Rights-based climate litigation cases have advanced a creative framing of the unprecedented problem of climate change, which defies traditional legal constructions and responses. Carmaine noted that the issue of lack of action on climate change relied on how the existing global paradigm—confining “climate change within the boundaries of international environmental law”—was “flawed.”²⁸⁷ Its “scale and complexity” defied a resolution through an international environmental treaty. Much has been said about whether human rights law could fill this gap. Yet, despite advances in legal

SMITHSONIAN MAG. (Jan. 2013), <https://www.smithsonianmag.com/science-nature/what-is-the-anthropocene-and-are-we-in-it-164801414/> (describing the Anthropocene as the current epoch in earth’s time scale, characterized by the human race’s effects on the planet that have “caused mass extinctions of plant and animal species, polluted the oceans[,] and altered the atmosphere, among other lasting impacts”).

283. See Carmen G. Gonzalez, *Bridging the North-South Divide: International Environmental Law in the Anthropocene*, 32 PACE ENV’T. L. REV. 407, 420 (2015).

284. United Nations Environmental Programme [UNEP], *Climate Change and Human Rights*, at VIII (Dec. 2015), https://wedocs.unep.org/bitstream/handle/20.500.11822/9530/-Climate_Change_and_Human_Rightsclimate-change.pdf?sequence=2&%3BisAllowed.

285. See LITIGATING THE CLIMATE EMERGENCY: HOW HUMAN RIGHTS, COURTS, AND LEGAL MOBILIZATION CAN BOLSTER CLIMATE ACTION (Cesar Rodríguez-Garavito ed., Cambridge University Press 2022).

286. See Jacqueline Peel & Jolene Lin, *Transnational Climate Litigation: The Contribution of the Global South*, 113 AM. J. INT’L L. 679 (2019); Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?*, 7 TRANSNAT’L ENV’T L. 37, 61–62 (2018).

287. Cinnamon Carlarne, *Delinking International Environmental Law & Climate Change*, 4 MICH. J. ENV’T & ADMIN. L. 1, 3–4 (2014).

scholarship and legal strategies adopted in litigation, human rights framing remained impaired as applied to climate change.

While the link between human rights and the environment has long been investigated by scholars worldwide and the right to a healthy environment is recognized in the constitutions of 80% of the globe, international recognition was still lacking until recently.²⁸⁸ In 2021, the United Nations Human Rights Council (HRC) adopted a resolution recognizing the right to a clean, healthy, and sustainable environment as a human right.²⁸⁹ In 2022, Member States of the UNGA adopted another landmark resolution recognizing that a clean, healthy, and sustainable environment is a human right (the right to a healthy environment).²⁹⁰

The resolutions represent a landmark moment in a years-long evolution at the HRC,²⁹¹ within the Office of the High Commissioner of Human Rights (OHCHR),²⁹² in the work of the Special Rapporteur on human rights and the environment,²⁹³ elsewhere around the United Nations,²⁹⁴ and in outside advocacy

288. See David Boyd, *Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment*, in *THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT 17* (John H. Knox & Ramin Pejan eds., 2018).

289. U.N. General Assembly, Human Rights Council, *The Human Right to a Safe, Clean, Healthy and Sustainable Environment*, at 2, U.N. Doc. A/HRC/48/L.23/Rev.1 (Oct. 5, 2021), <https://documents-dds-ny.un.org/doc/UNDOC/CLTD/G21/270/15/PDF/G2127015.pdf>.

290. U.N. General Assembly, *The Human Right to a Clean, Healthy and Sustainable Environment*, A/76/L.75 (July 26, 2022), <https://documents-dds-ny.un.org/doc/UNDOC/LTD/N22/436/72/PDF/N2243672.pdf>.

291. See Human Rights Council Resolutions on Human Rights and Climate Change, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, <https://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/Resolutions.aspx> (last visited Oct. 19, 2021).

292. See OHCHR and Climate Change, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, <https://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HRClimateChangeIndex.aspx> (last visited October 19, 2021).

293. See *Special Rapporteur on Human Rights and the Environment*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SREnvironmentIndex.aspx> (last visited Oct. 19, 2021).

294. See United Nations Environmental Programme [UNEP], *Climate Change and Human Rights*, at 13 (Dec. 2015), https://wedocs.unep.org/bitstream/handle/20.500.11822/9530/-Climate_Change_and_Human_Rights_human-rights-climate-change.pdf.pdf?sequence=2&%3BisAllowed.

and legal scholarship.²⁹⁵ “While the resolution is not legally binding, it represents a significant political statement . . . shap[ing] global standards . . . [and] can embolden stakeholders and courts to adopt a rights-based approach to [environmental and] climate change litigation.”²⁹⁶ Significantly, it decisively encompasses climate change as part of the human rights legal framework, with positive and effective results for the current advisory opinion requests.

The path to recognizing the right to a healthy environment at the international level was nothing but linear. At the U.N., the HRC has considered the matter of human rights and the environment since 2012 by adopting seven resolutions,²⁹⁷ appointing an independent expert,²⁹⁸ and then two consecutive special rapporteurs to study the issue of human rights and the environment.²⁹⁹ The relationship between human rights and the environment has advanced significantly due to the work of the special rapporteurs. Three special rapporteurs have been appointed to study the connections between human rights and the environment: Madame Fatma Zohra Ksentini,³⁰⁰ Professor John

295. *Journal of Human Rights and the Environment*, ELGARONLINE, <https://www.elgaronline.com/view/journals/jhre/jhre-overview.xml> (last accessed Oct. 19, 2021).

296. Maria Antonia Tigre, *Major Developments for Global Climate Litigation: The Human Rights Council Recognizes the Right to a Healthy Environment and the Committee on the Rights of the Child Publishes its Decision in an International Youth Climate Case*, CLIMATE L.: SABIN CTR. BLOG (Oct. 12, 2021), <http://blogs.law.columbia.edu/climatechange/2021/10/12/major-developments-for-global-climate-litigation-the-human-rights-council-recognizes-the-right-to-a-healthy-environment-and-the-committee-on-the-rights-of-the-child-publishes-its-decision-in-an-inter/>.

297. *About the Mandate of the Special Rapporteur on Human Rights and the Environment*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R, <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/Mandate.aspx> (last visited Oct. 19, 2021).

298. John Knox, *Former Special Rapporteur on Human Rights and the Environment (2012–2018)*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R, <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/JohnKnox.aspx> (last visited Oct. 19, 2021).

299. *Special Rapporteur on Human Rights and the Environment*, *supra* note 293.

300. U.N. Econ. & Soc. Council, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on Its Forty-First Session, at 78, U.N. Doc. E/CN.4/Sub.2/1989/58 (Nov. 13, 1989), <https://digitallibrary.un.org/>

Knox,³⁰¹ and Professor David Boyd.³⁰² These contributions have been integral to advancing the field, making evident that environmental harm can and does interfere with the full enjoyment of human rights. The work and leadership of the special rapporteurs were crucial in advancing the debate recognizing the right to a healthy environment.

From 1989 to 1994, Ksentini presided over a pioneering study of the connections between human rights and the environment. Her investigation culminated in the *Draft Principles on Human Rights and the Environment*³⁰³ produced by a group of experts assembled on her behalf. The Draft Declaration recognized the right to a healthy environment as such:

Recognizing that sustainable development links the right to development and the right to a secure, healthy[,] and ecologically sound environment

. . . .

. . . All persons have the right to a secure, healthy and ecologically sound environment. This right and other human rights, including civil, cultural, economic, political and social

record/83330/files/E_CN-4_1990_2%26E_CN-4_Sub-2_1989_58-EN.pdf?ln=en; U.N. Econ. & Soc. Council, Review of Further Developments in Fields with Which the Sub-Commission Has Been Concerned, U.N. Doc. E/CN.4/Sub.2/1994/9 (Jul. 6, 1994); *Id.* at Annex I [hereinafter *Draft Principles on Human Rights and the Environment*]; see also Neil A. F. Popovic, *In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment*, 27 COLUM. HUM. RTS. L. REV. 487 (1996).

301. See Human Rights Council Res. 19/10, at ¶ 2 (Mar. 22, 2012); Human Rights Council Res. 28/11 (Mar. 26, 2015); Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H. Knox: Preliminary Report, U.N. Doc. A/HRC/22/43 (Dec. 24, 2012) [hereinafter *Knox Draft Report*]; Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H. Knox: Mapping Report, at ¶¶ 17–22, U.N. Doc. A/HRC/25/53 (Dec. 30, 2013).

302. David R. Boyd, *Special Rapporteur on Human Rights and the Environment*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R (Oct. 12, 2021), <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/DavidBoyd.aspx>.

303. *Draft Principles on Human Rights and the Environment*, *supra* note 300; see Popovic, *supra* note 300, at n.19.

rights, are universal, interdependent and indivisible. . . .

. . . .

. . . All persons have the right to an environment adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet equitably their needs. . . .³⁰⁴

The declaration was ambitious but politically controversial, and the U.N. Human Rights Commission refused to adopt the draft declaration.³⁰⁵ In 2009, the OHCHR returned to the connection between human rights and the environment, emphasizing that,

[w]hile the universal human rights treaties do not refer to a specific right to a safe and healthy environment, the United Nations human rights treaty bodies all recognize the intrinsic link between the environment and the realization of a range of human rights, such as the right to life, to health, to food, to water, and to housing.³⁰⁶

Three theoretical approaches were subsequently identified.³⁰⁷ The first sees the environment as a “precondition to the enjoyment of human rights.”³⁰⁸ The second views human rights as “tools to address environmental issues, both procedurally and substantively.”³⁰⁹ The third integrates human rights and the environment under the concept of sustainable development.

The special rapporteurs did subsequent work to understand further what the right to a healthy environment entails. For example, the *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe,*

304. Draft Principles on Human Rights and the Environment, *supra* note 300.

305. Alan Boyle, *Climate Change, The Paris Agreement, and Human Rights*, 67 INT'L & COMPAR. L.Q. 759, 766 (2018).

306. U.N. Gen. Assembly, Hum. Rts. Council, Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights, at ¶18, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009).

307. U.N. Gen. Assembly, Hum. Rts. Council, Analytical Study on the Relationship Between Human Rights and the Environment, at ¶¶ 2, 6–9, U.N. Doc. A/HRC/19/34 (2011).

308. *Id.* at ¶ 7.

309. *Id.* at ¶ 8.

Clean, Healthy, and Sustainable Environment underlined the necessity to recognize the right to a healthy environment to protect people's health, deliver cleaner air, and improve access to safe water and sustainably-produced food.³¹⁰ Their reports also recall states' obligations to respect, protect, and promote human rights, including through measures to address environmental challenges. In addition, the 2020 report of the special rapporteur provides a study on good practices related to the implementation and promotion of the right to a healthy environment that should constitute a map to efficiently implement the right to a healthy environment worldwide.³¹¹

Several other special rapporteurs appointed by the HRC have encompassed the relationship between human rights and the environment within their mandates.³¹² In 2019, the HRC issued a *General Comment on the Right to Life*, imposing obligations on state parties to "take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity [including inter alia] . . . degradation of the environment . . . [and] deprivation of indigenous peoples' land, territories and resources."³¹³

The support of civil society organizations also positively contributed to adopting the right to a healthy environment by the HRC. In September 2020, a Core Group of States on Human Rights and the Environment—Costa Rica, Morocco, Slovenia, Switzerland, and the Maldives—started informal discussions on the possible international recognition of the right to a safe, clean, healthy, and sustainable environment. The Core Group's initiative gathered thundering support. 1,350 NGOs and Indigenous Peoples

310. U.N. Gen. Assembly, Hum. Rts. Council, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, at 2, U.N. Doc. A/HRC/37/59 (Jan. 24, 2021).

311. Boyd, *supra* note 302.

312. See, e.g., U.N. Gen. Assembly, Report of the Special Rapporteur on the Right to Food, U.N. Doc. A/HRC/34/48 (Jan. 24, 2017).

313. U.N. Int'l Covenant on Civ. & Pol. Rts., General Comment No. 36, Article 6: Right to Life, at ¶ 26, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019) (adopted by the committee at its 124th session, Oct. 8, 2018 to Nov. 2, 2018).

rallied behind their clarion call.³¹⁴ These include renowned organizations including Birdlife International, Greenpeace, and Amnesty International, and specialized organizations like the Center for International Environmental Law and the Global Pact Coalition.³¹⁵ Fifteen U.N. Agencies also issued a letter endorsing the right's recognition.³¹⁶ This prodigious mobilization owes much to the tremendous leadership of U.N. Special Rapporteur on Human Rights and Environment David R. Boyd and his predecessor John Knox. In October 2020, the HRC adopted *Resolution A/HRC/RES/45/30*,³¹⁷ urging states to adopt national legislation affecting measures to ensure children's rights through a healthy environment and the recognition of a right to a healthy environment.³¹⁸

In March 2021, sixty-nine states, including previously reluctant states such as Germany, endorsed a statement unequivocally calling for the recognition of this right.³¹⁹ With the endorsement of over twenty organizations, the Right to a Healthy Environment Campaign supported the Core Group's statement.³²⁰ In June 2021, the Core Group delivered a joint message inviting governments to recognize the right to a healthy environment for all as the "key to address[ing] the environmental crisis and protect[ing] human rights."³²¹ However, despite significant

314. *Call for the Global Recognition of the Right to a Healthy Environment: List of Organizational Endorsements*, HEALTHYENVIRONMENTISARIGHT, <https://healthyenvironmentisaright.org/signatories> (last visited July 14, 2023).

315. *Id.*

316. U.N. Entities, *Joint Statement of United Nations Entities on the Right to Healthy Environment*, U.N. ENV'T PROGRAMME (Mar. 08 2021), <https://www.unep.org/news-and-stories/statements/joint-statement-united-nations-entities-right-healthy-environment>.

317. Human Rights Council Res. 45/30 (Oct. 13, 2020).

318. *Id.*

319. See *Joint Statement: Human Rights and the Environment*, HEALTHYENVIRONMENTISARIGHT (March 2021), <https://healthyenvironmentisaright.org/wp-content/uploads/2021/04/Core-Group-Joint-Statement.pdf>.

320. See *Joint NGO Statement at HRC46*, HEALTHYENVIRONMENTISARIGHT, https://healthyenvironmentisaright.org/wp-content/uploads/2021/03/R2E-joint-statement-for-endorsement_Web_English.pdf (last visited Aug. 16, 2023).

321. Joint Statement by UN Human Rights Experts for World Environment Day, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R (June 5, 2021), <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=27130&LangID=E>.

support from several countries, a positive outcome was far from guaranteed. On the eve of adopting the resolution, several states, including the United States and the U.K., expressed a lack of enthusiasm for the proposal.³²² Nevertheless, on the day of the vote, Members' differences were bridged. The resolution was adopted with forty-three votes in favor and four abstentions: China, India, Japan, and Russia.³²³ Despite these abstentions and the absence of the United States from the Council, the adoption of this resolution reveals near-unanimous support from the international community for the right to a healthy environment.

The HRC and UNGA's recognition of the right to a healthy environment at the international level has indisputable advantages that scholars have widely enumerated. International recognition of a human right to a healthy environment puts to rest a decades-long debate on its status in international law. It definitively includes environmental protection as a core aspect of human rights protection. It crystallizes and integrates the human rights norms relating to the environment, helping ensure that they "continue to develop in a coherent, consistent and integrated manner."³²⁴ Although Professor Knox clarifies that "[t]he absence of a universally acknowledged right has not prevented the evolution of environmental human rights law, . . . the presence of the right . . . provide[s] a kind of capstone to that body of law, giving it a more unified and integrated presence."³²⁵ Indeed, confirming "that the global language of rights applies to environmental issues" is the most immediate benefit of

322. See Emma Farge et. al, *Clean Environment Could Become U.N. Human Right. Not so Fast, Say U.S., Britain*, REUTERS (Oct. 5, 2021), <https://www.reuters.com/business/environment/clean-environment-could-become-un-human-right-not-so-fast-say-us-britain-2021-10-05/>.

323. Katie Surma, *The U.N.'s Top Human Rights Panel Votes to Recognize the Right to a Clean and Sustainable Environment*, INSIDE CLIMATE NEWS (Oct. 7, 2021), <https://insideclimatenews.org/news/07102021/human-rights-panel-right-to-clean-sustainable-environment/>.

324. U.N. Gen. Assembly, *Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, at ¶ 39, U.N. Doc. A/73/188 (July 19, 2018), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/231/04/PDF/N1823104.pdf>.

325. John H. Knox, *The Global Pact for the Environment: At the Crossroads of Human Rights and the Environment*, 28 REV. EUR. INT'L & COMP. ENV'T L. 40 (2019).

recognition.³²⁶ Finally, describing an interest as a right expresses a shared, collective sense of its fundamental importance which may “energize movements and coalitions advocating for the right.”³²⁷

The recognition also reinforces the inextricable link between human rights and the environment. It provides cohesion and uniformity to two interlinked regimes, giving rise to a baseline for a fresh perspective on environmental protection from a rights-based approach. As Knox noted in 2018, “[W]hile there is no shortage of statements on human rights obligations relating to the environment, the statements do not come together on their own to constitute a coherent set of norms.”³²⁸ Without an explicit recognition, the inclusion of environmental rights within other human rights laws relies upon a case-by-case interpretation by judges.³²⁹ Orellana notes that the normative content of human rights regarding the environment would thus no longer be dispersed or fragmented across a range of rights but would come together under a single normative frame.³³⁰ The resolution thus raises the awareness and reinforces the understanding that human rights norms require protection of the environment, and environmental protection depends on the exercise of human rights. Furthermore, it highlights that “environmental protection must be assigned the same level of importance as other interests that are fundamental to human dignity, equality and freedom.”³³¹

Recognizing the right to a healthy environment would make the right “universal in application,” improving the current

326. John H. Knox, *Constructing the Human Right to a Healthy Environment*, 16 ANN. REV. L. & SOC. SCI. 79 (2020).

327. Cesar Rodriguez-Garavito, *A Human Right to a Healthy Environment? Moral, Legal and Empirical Considerations*, in THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT 155 (John H. Knox & Ramin Pejan eds., 2018).

328. Knox Draft Report, *supra* note 301, at ¶38.

329. See Dinah Shelton, *Human Rights and the Environment: Jurisprudence of Human Rights Bodies*, 32 ENV'T POL'Y & L. 158 (2002), <https://content.iospress.com/download/environmental-policy-and-law/epl32-3-4-10?id=environmental-policy-and-law%2Fepl32-3-4-10>.

330. See Marcos Orellana, *Quality Control of the Right to a Healthy Environment*, in THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT 176 (John H. Knox & Ramin Pejan eds., 2018).

331. U.N. Gen. Assembly, *supra* note 324.

“patchwork of protection.”³³² ICEL notes that “[a]greement on the principles, such as the right to a healthy environment, and clarification of the other principles, can equip States to build resilience and capacity amidst present and future environmental adversity.”³³³ He argues that the advent of the Anthropocene calls “us to rethink how we interact with each other and . . . with nature” by reinterpreting existing human rights instruments such as the UDHR.³³⁴ Recognizing the right to the environment brings human rights to the Anthropocene, just as emerging forms of “new Earth politics”³³⁵ “are revising political thought and action in light of the conditions of our epoch.”³³⁶ Of course, reading the right as integrating existing norms would not foreclose future evolution. Still, it would immediately provide a minimum basis of interpretation, a hermeneutic floor, that would enable its promotion and implementation.

The recognition further places greater attention on those more vulnerable to the effects of environmental harm³³⁷ as it provides for greater predictability.³³⁸ Treating environmental protection as a human right would help human beings most affected by environmental damage, putting a “human face” on a problem that

332. David Boyd, *The Right to a Healthy and Sustainable Environment*, in *A GLOBAL PACT FOR THE ENVIRONMENT - LEGAL FOUNDATIONS* 30, 36 (Yann Aguila & Jorge E. Viñuales eds., 2019), <https://globalpactenvironment.org/uploads/Aguila-Vinuales-A-Global-Pact-for-the-Environment-Cambridge-Report-March-2019.pdf>.

333. Int’l Council of Env’t L., *Note on Options to Address Gaps Under Resolution 72/277 (10 May 2018): “Towards a Global Pact for the Environment,”* U.N. ENV’T PROGRAMME, https://wedocs.unep.org/bitstream/handle/20.500.11822/27609/ICEL_Report.pdf?sequence=1&isAllowed=y (last visited Oct. 3, 3023).

334. Ellen Hey, *The Universal Declaration of Human Rights in “The Anthropocene,”* 112 *AJIL UNBOUND* 350, 351–52 (2018).

335. *NEW EARTH POLITICS: ESSAYS FROM THE ANTHROPOCENE* (Simon Nicholson & Sikina Jinnah eds., 2016).

336. Rodriguez-Garavito, *supra* note 327, at 160.

337. U.N. Gen. Assembly, *Gaps in International Environmental Law and Environment-Related Instruments: Towards a Global Pact for the Environment: Report of the Secretary General*, at ¶ 45, U.N. Doc. A/73/419* (Nov. 30, 2018) [hereinafter *Gaps in International Environmental Law*].

338. See Atapattu Sumudu, *The Right to a Healthy Environment and Climate Change: Mismatch or Harmony?*, in *THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT* 252, 267 (John H. Knox & Ramin Pejan eds., 2018).

might otherwise be too “abstract or technical.”³³⁹ When applied by the judiciary, the right helps provide a safety net to protect against gaps in laws and creates opportunities for better access to justice. To further increase the protection, a future declaration could strengthen individual or collective citizens’ rights. Potentially, it could include the protection of environmental rights defenders and whistleblowers, the rights of environmentally displaced persons, the victims of sudden and slow onset disasters. Issues related to environmental justice; the rights of indigenous peoples; access to justice and administrative documents for citizens and NGOs; and the rights of stakeholder groups in international negotiations could also be covered by specific provisions.³⁴⁰

Additionally, the recognition “raises the profile and importance of environmental protection.”³⁴¹ It provides a basis for enacting stronger environmental laws, standards, regulations, and policies, thus improving the overall effectiveness of international environmental law.³⁴² Boyd argues that,

[l]egal recognition of the right to a healthy environment usually spurs governments to review and strengthen environmental laws and policies, improve implementation and enforcement, provide greater opportunities for public participation, and address environmental injustices.³⁴³

Nations with the right to a healthy environment in their constitutions have smaller ecological footprints, rank higher on comprehensive indices of environmental indicators, and are more likely to ratify international environmental agreements. Additionally, these nations have made faster progress in reducing emissions of sulfur dioxide, nitrogen oxides, and greenhouse gases than nations without such provisions.³⁴⁴ Additionally, it would fill

339. Knox, *supra* note 326, at 15.

340. Damien Barchiche et al., *What to Expect from a Global Pact for the Environment?*, IDDRI 3 (Jan. 2019), <https://www.iddri.org/sites/default/files/PDF/Publications/Catalogue%20Iddri/D%C3%A9cryptage/201901-IB0119EN-pacte%20mondial%20env.pdf>.

341. U.N. Gen Assembly, *supra* note 310, at 25.

342. Gaps in International Environmental Law, *supra* note 337, at ¶40.

343. Boyd, *supra* note 332, at 35.

344. See Chris Jeffords & Lanse Minkler, *Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental*

gaps in international environmental law. A new human right might increase attention to environmental harm that does not cross borders. Transboundary environmental harm is a topic still under exploited by international law. As human rights law focuses on internal obligations, recognizing a new human right could support advocacy for a global agreement or new regional treaties. It could further provide more robust rights for the public to “receive environmental information from their government[,] . . . participate in environmental decision-making, and . . . access . . . domestic remedies for environmental harm.”³⁴⁵ Almost all environmental claims brought to human rights tribunals involve internal harm not regulated by international environmental law.

The resolution should instill further global environmental cooperation and more decisive environmental action by national governments. At the national level, the resolution might further encourage states that have not explicitly recognized the right to a healthy environment to join the more than 150 states that formally recognize the right in their legal frameworks. Similarly, it could bolster efforts to officially recognize the right at the regional level by groups such as the Council of Europe.³⁴⁶ The recognition of the right to a healthy environment, when associated with a robust implementation framework at the national level, undeniably improves environmental and human health outcomes.³⁴⁷ But, more importantly, the right provides an additional tool to challenge state and corporate actors for failing to take prompt and adequate action to address the triple environmental crises of climate change, pollution, and nature

Outcomes, 69 KYKLOS 294 (2016); Christopher Jeffords, *On the Temporal Effects of Static Constitutional Environmental Rights Provisions on Access to Improved Sanitation Facilities and Water Sources*, 7 J. HUM. RTS. & ENV'T. 74, 77 (2016).

345. Knox, *supra* note 326, at 16.

346. See Annalisa Savaresi, *The UN HRC Recognizes the Right to a Healthy Environment and Appoints a New Special Rapporteur on Human Rights and Climate Change. What Does It All Mean?*, EJIL:TALK (Oct. 12, 2021), <https://www.ejiltalk.org/the-un-hrc-recognizes-the-right-to-a-healthy-environment-and-appoints-a-new-special-rapporteur-on-human-rights-and-climate-change-what-does-it-all-mean/>.

347. See James. R. May, *The Case for Environmental Rights: Recognition, Implementation and Outcomes*, 42 CARDOZO L. REV. 983 (2021).

loss.³⁴⁸

One instrumental function of the international human rights regime is to fill gaps left by constitutional rights. The potential influence of U.N. recognition on a particular country might be limited by how far the government has already committed to codifying and implementing environmental rights in its legal system. Countries such as Costa Rica, which have already recognized the right in their constitutions and implemented it through hundreds of judicial decisions, would have less room for positive influence than countries that have not realized the right or implemented it. On the other hand, qualitative studies illuminate how governments fall short of what their constitutions seem to promise and describe many cases that have successfully relied on environmental rights.³⁴⁹ For example, rights-based claims are increasingly prevalent in climate litigation in the Global South.³⁵⁰ The enactment of “implementation laws,” in which states promote effective integration in national laws and procedures, is essential for the right to a healthy environment to realize its full potential. If U.N. recognition influences more countries to adopt and enforce environmental rights in their domestic law, what effect could those rights be expected to have on their environmental performance? Intuitively, one might believe that rights enable advocates and courts to bring more pressure on their governments to protect the environment. This will strengthen the support for states at the national level to improve their performance on environmental issues, including those that have not yet done so to formally recognize the right to a healthy environment in their national legislation.

Based on a more rigorous methodology that uses cross-sectional instrumental variables, Jeffords and Minkler report that countries with a constitutional environmental right have, on

348. See Press Release, U.N. Secretary-General, *Alongside Pandemic, World Faces ‘Triple Planetary Emergency’*, Secretary-General Tells World Forum for Democracy, Citing Climate, Nature, Pollution Crises, U.N. Press Release SG/SM/20422 (Nov. 16, 2020), <https://press.un.org/en/2020/sgsm20422.doc.htm>.

349. See IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM: CURRENT GLOBAL CHALLENGES 3 (Erin Daly & James R. May eds., 2018).

350. See Jacqueline Peel & Jolene Lin, *Transnational Climate Litigation: The Contribution of the Global South*, 113 AM. J. INT’L L. 679, 682 (2019).

average, a higher score on the comprehensive Yale Environmental Performance Index.³⁵¹ Focusing on procedural rights, Gellers and Jeffords find that countries with constitutional rights to environmental information have higher rates of access to improved water sources and sanitation facilities. Finally, Jeffords and Gellers examine the intersection of environmental rights with states' coercive and administrative capacity. They find that, in general, "greater economic wealth and . . . adherence to the rule of law are associated with higher levels of environmental performance [in] countries that have adopted substantive . . . environmental rights."³⁵²

Another benefit of explicit recognition of the right to a healthy environment would be to give civil society new tools to hold governments accountable.³⁵³ Some scholars have argued that the right to a healthy environment is too vague to give rise to practical rights and obligations.³⁵⁴ However, the jurisprudence has already led to a remarkably detailed and consistent set of state obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment, including states that have not yet recognized the right to a healthy and sustainable environment. The scope of the HRC's resolution is even broader as it provides an additional tool to challenge state and corporate actors for failing to take timely and appropriate measures to address the triple environmental crisis. Given the rights-based approach often followed by national courts, the resolution may encourage progressive judges in adjudicating environmental disputes worldwide, even in countries where the right is not explicitly recognized in domestic law. The environmental jurisprudence of international and regional bodies

351. Jeffords & Minkler, *supra* note 344, at 296.

352. Chris Jeffords & Joshua C. Gellers, *Implementing Substantive Constitutional Environmental Rights: A Quantitative Assessment of Current Practices Using Benchmark Rankings*, in *IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM: CURRENT GLOBAL CHALLENGES* 34, 56 (Erin Daly & James R. May eds., 2018).

353. Rebecca Bratspies, *Do We Need a Human Right to a Healthy Environment?*, 13 *SANTA CLARA J. INT'L L.* 31, 36 (2015).

354. See J.B. Ruhl, *The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don't Measure Up*, 74 *NOTRE DAME L. REV.* 245 (1999); HURST HANNUM, *RESCUING HUMAN RIGHTS: A RADICALLY MODERATE APPROACH* 47–50 (Cambridge University Press., 2019).

is particularly relevant to inform the content of the right in international human rights law. These obligations are outlined in extensive detail in the framework principles presented to the HRC by John Knox.³⁵⁵

Raising awareness of the link between human rights and the environment might encourage more claimants to bring more environmental claims. Human rights claims of environmental harms could more easily be argued and litigated within the human rights system. While there is no explicit consideration of the environment in most international human rights treaties, the implicit importance of environmental health on human rights has been recognized on many occasions.³⁵⁶ The jurisprudence elaborated by international human rights bodies is particularly interesting given the lack of mechanisms of the environmental treaties to enforce the right to a healthy environment.³⁵⁷ Recognizing the right provides a lever to overcome classical hurdles in human rights-based environmental litigation, reduces costs, decreases delays, and minimizes risks associated with pursuing other judicial remedies.³⁵⁸

It can further define the specific content of the right to a healthy environment. The substantive component of the right to a healthy environment has allowed national and regional courts to impose duties on states to effectively implement the right to a healthy environment. For example, in *Indigenous Communities of the Lhaka Honhat Association v. Argentina*,³⁵⁹ the Inter-American

355. John H. Knox, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, at ¶ 6–10, U.N. Doc. A/HRC/37/59 (Jan. 24, 2018).

356. See G.A. Res. 45/94 (Dec. 14, 1990); U.N. Gen. Assembly, Hum. Rts. Council, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, A/HRC/31/52 (Feb. 1, 2016), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/015/72/PDF/G1601572.pdf>.

357. Dinah Shelton, *Human Rights, Health and Environmental Protection: Linkages in Law and Practice*, 1 HUM. RTS. & INT'L L. DISCOURSE 9, 17 (2007).

358. See DAVID R. BOYD, *THE ENVIRONMENTAL RIGHTS REVOLUTION* 474 (University of British Columbia Press, 2011).

359. *Indigenous Communities of the Lhaka Honat (Our Land) Association v. Argentina*, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 400 (Feb. 6, 2020), https://www.corteidh.or.cr/docs/casos/articulos/seriec_400_ing.pdf.

Court of Human Rights held that Argentina had violated Indigenous groups' right to a healthy environment due to the lack of effective measures to stop activities harmful to the Indigenous groups, thus recognizing that states must prevent violations of the right to a healthy environment.³⁶⁰

The human rights system already provides a structure for raising concerns of violations associated with environmental issues. "The existence of international petition procedures allows those harmed to bring international pressure to bear when governments lack the will to prevent . . . severe pollution that threatens human health and well-being."³⁶¹ As a result, petitioners are often afforded redress, forcing governments to remedy the violations.

[E]nforcement of human rights law is more developed than . . . the procedures of international environmental law [] [because] [t]he availability of individual complaints procedures to denounce violations of human rights has given rise to extensive jurisprudence in which . . . specific obligations of states to protect and preserve the environment are detailed.³⁶²

Thus, the explicit recognition of the right to a healthy environment is predicated on enabling individuals, groups, civil society organizations, and the judiciary to contribute to the improved implementation and enforcement of environmental laws. A more substantial effect would be to strengthen efforts to raise environmental issues at the Universal Periodic Review (UPR) of countries by the HRC. Recognition of the right to a healthy environment would provide the basis for more rigorous review and "facilitate raising environmental concerns without . . . show[ing] clear causal links between the environmental harm and

360. See Maria Antonia Tigre, *Inter-American Court of Human Rights Recognizes the Right to a Healthy Environment*, AM. SOC'Y OF INT'L L. (June 2, 2020), <https://www.asil.org/insights/volume/24/issue/14/inter-american-court-human-rights-recognizes-right-healthy-environment>; Maria Antonia Tigre, *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, 115 AM. J. INT'L L. 706 (2021).

361. Dinah Shelton, *Human Rights and the Environment: Substantive Rights*, in RESEARCH HANDBOOK ON INTERNATIONAL ENVIRONMENTAL LAW 265, 278 (Malgosia Fitzmaurice, et al. eds., 2013).

362. *Id.* at 266.

the interference with a particular human right.”³⁶³

“[T]he emphasis on rights . . . encourages [the] integration of democratic values and [the] promotion of the rule of law in[to] broad-based structures of governance.”³⁶⁴ By linking environmental and human rights, this integration is less likely to be disregarded when balanced against other considerations such as the right to development. Indeed, “human rights bodies . . . [have] . . . consistent[ly] . . . balance[ed] the government’s desire for economic development with the environmental impacts of projects and activities on individuals and groups.”³⁶⁵ The balance is often found considering a series of factors: (1) “whether . . . the government has complied with . . . laws and regulations on environmental protection;” (2) “the seriousness of the harm,” according to the health consequences and the proportionality of the measures taken by the government; and (3) whether the state has complied with procedural duties.³⁶⁶

The resolution is vital for “environmental human rights defenders [who] work[], often at great personal risk, to safeguard the land, air, water, and ecosystems . . . we all depend on.”³⁶⁷ It is also vital for the people and communities who suffer disproportionate impacts of environmental degradation, including women, children, indigenous people, and other potentially vulnerable and marginalized populations. These advantages are now well comprehended globally. Nonetheless, the field of human rights and the environment developed over decades of study by scholars and practitioners. Furthermore, the right to a healthy environment has been adopted worldwide at the national and regional levels.

363. Knox, *supra* note 326, at 17.

364. Shelton, *supra* note 357, at 38.

365. *Id.* at 278.

366. *Id.* at 278–79.

367. Rebecca L. Root, *What Can Stop Environmental Activism from Being So Deadly?*, DEVEX (Oct. 13, 2021), <https://www.devex.com/news/what-can-stop-environmental-activism-from-being-so-deadly-101705>.

III. “COMPETITION” BETWEEN THE COURTS IN RESPONDING TO THE LEGAL ISSUES IN QUESTION

The previous sections detail progress towards this this potentially transformational moment and why now is an opportune time for three of the world’s most important judicial bodies to engage the issue of climate change in international law. This section analyzes the main topics in the questions posed to these judicial bodies and how these interact in the three separate advisory opinion requests, highlighting some challenges and opportunities for regime interaction, defragmentation of international law, and clarification of state obligations under various norms. It briefly discusses, without exhausting the matter, the legal norms that might play a role in how the courts address the questions posed. Several procedural questions exist as part of the debate on these pending advisory opinions, particularly regarding the legitimacy and efficiency of “ruling” through advisory opinions, the advisory jurisdiction of these courts and tribunals,³⁶⁸ and competition between them. This article does not engage with these questions. This article’s main goal is to initiate a conversation about the substantive questions asked to these judicial bodies, using the obligations of states under the principle of prevention as an example.

Although the courts’ opinions will not have a mandatory effect on local courts, setting international legal standards can be persuasive to judges and governments. As noted by Mayer, the lack of binding force of advisory opinions can be insignificant when enforcing binding decisions is already challenging.³⁶⁹ International court advisory opinions can play a key role in shaping the evolution of international law by serving as credible interpretations of it.³⁷⁰ Their “normative authority” stems from the “perceived legitimacy” of the institutions that issue them and the

368. See Alina Miron, *COSIS Request for an Advisory Opinion: A Poisoned Apple for the ITLOS?*, 38 INT’L J. MARINE & COASTAL L. 249 (2023); Tanaka, *supra* note 52, at 215.

369. Benoit Mayer, *International Advisory Proceedings on Climate Change*, 44 MICH. J. INT’L L. 41, 44 (2023).

370. See Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania, Advisory Opinion, 1950 I.C.J. 65, 71 (Mar. 30).

opinions' persuasiveness.³⁷¹ Scholars and international institutions have consistently noted the “quantitatively and qualitatively outstanding jurisprudence” of the court.³⁷²

Additionally, this is the initial effort to establish climate action responsibilities under global law, which can empower climate-related lawsuits by aiding vulnerable states and advocates in holding countries responsible for their actions and lack of action. Advisory opinions can develop international law in several different ways. Their broad participatory rules mean that a court's opinion will be vastly informed by a variety of parties, better “reflect[ing] the global nature of climate change.”³⁷³ When engaging in treaty interpretation, the court must look at the parties' intents to determine the treaty's object and purpose; in doing so, it exerts significant influence over the content and scope of an international agreement.³⁷⁴ For example, the ICJ's *Reparations* advisory opinion became “a watershed in the development of the law of international organizations” by interpreting the U.N. Charter to give the U.N. the ability to bring a claim against a state for harm suffered by an employee of the organization.³⁷⁵

Advisory opinions offer a distinct advantage in the realm of climate change law as they enable the resolution of contentious legal issues without being encumbered by case-specific facts, procedural complexities, or legal inconsistencies that may hinder the clarification or advancement of foundational principles. Moreover, they present an avenue for vulnerable states to actively participate in shaping climate change law, while avoiding potential friction with influential states with whom they maintain international negotiations and upon whom they may rely for aid

371. Niccolò Lanzoni, *The Authority of ICJ Advisory Opinions as Precedents: The Mauritius/Maldives Case*, 2 ITALIAN REV. INT'L & COMPAR. L. 296, 299–304 (2022).

372. *Id.* at 302.

373. Mayer, *supra* note 369, at 44; *see also* Miron, *supra* note 368, at 251; Freestone, Barnes & Akhavan, *supra* note 18.

374. *See* Vienna Convention on the Law of Treaties, art. 31(1), *adopted* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

375. SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920–1996, 313 (3d ed. 1997); *see generally* Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 ICJ Rep. 174 (Apr. 11).

assistance.³⁷⁶ The advisory function of courts has been explained by the ICJ as a form of “preventive diplomacy” that aims to strengthen rather than weaken the relationships between states.³⁷⁷

While specific instances of advisory opinions shaping international law are easiest to find in the context of the ICJ due to its age and unique position, advisory opinions issued by other international courts are playing an increasingly important role in the development of international law. For example, in 2017, the IACtHR issued a landmark advisory opinion in response to a petition by Colombia concerning the relevance of human rights law to large-scale infrastructure projects in the Caribbean Sea.³⁷⁸ In the opinion, the court advanced international law “[b]y defining how extraterritorial jurisdiction applies in cases of human rights-related environmental damage” and “recognizing an autonomous right to a healthy environment.”³⁷⁹ Furthermore, this advisory opinion is already having a substantial impact on litigation. In a contentious 2020 judgment holding Argentina liable for violations of the right to a healthy environment and other rights, the IACtHR drew heavily on its 2017 advisory opinion’s interpretation.³⁸⁰ Additionally, in 2022, the Committee on the Rights of the Child (CRC) also relied on the IACtHR’s interpretation of extraterritorial responsibility.³⁸¹ Several questions have been raised about the advisory jurisdiction of ITLOS; these are beyond

376. See Miron, *supra* note 368, at 251.

377. *Advisory Jurisdiction*, INT’L CT. JUST., <https://www.icj-cij.org/advisory-jurisdiction> (last visited Aug. 17, 2023).

378. *The Environment and Human Rights, Advisory Opinion OC-23/17*, Inter-Am. Ct. H.R. (ser. A) No. 23 (Nov. 15, 2017).

379. Tigre & Urzola, *supra* note 157, at 49.

380. Tigre, *supra* note 360, at 706–09.

381. *Sacci, et al. v. Argentina, et al.*, CLIMATECASECHART, <http://climatecasechart.com/non-us-case/sacchi-et-al-v-argentina-et-al/> (last visited Oct. 3, 2023); U.N. Convention on the Rts. Of the Child, Decision Adopted by the Committee on the Rights of the Child Under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure in Respect of Communication No. 104/2019, U.N. Doc. CRC/C/88/D/104/2019 (Oct. 8, 2021), https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20211008_Communication-No.-1042019-Argentina-Communication-No.-1052019-Brazil-Communication-No.-1062019-France-Communication-No.-1072019-Germany-Communication-No.-1082019-Turkey_decision-4.pdf.

the scope of this article.

Some scholars, however, have been skeptical about the practical effects—or even the desirability—of these advisory opinions. Mayer, for example, challenges the “prevailing view,” noting how these “well-intended initiatives are almost certain to fall short of their goals and may even be counterproductive.”³⁸² This article will also not engage with the desirability of an advisory opinion on climate or the challenges and potential pitfalls of that alternative, which have been discussed elsewhere.³⁸³ Instead, it follows the premise that the advisory opinion route is advisable for clarifying states’ obligations under climate change law because it presents a highly novel and complex legal issue, which significantly depends on the understanding of the science behind it and requires broad understanding of a variety of different and intersecting fields of law. “[A]dvisory opinions have shaped the development of international law on the subject matters presented.”³⁸⁴

Building on the previous section that clarified the evolution of environmental rights, Section *A* discusses the questions as they relate to the obligations of states to prevent and guarantee human rights considering the climate crisis. Section *B* addresses the principle of prevention as an example of a question that was posed to the three judicial bodies and can provide challenges and opportunities in how they respond to it.

A. Addressing Fragmentation of Regimes

One of the advantages of seeking an advisory opinion on climate change is addressing the fragmentation within international law, specifically by harmonizing interpretations of

382. Mayer, *supra* note 369, at 41.

383. See Daniel Bodansky, *Advisory Opinions on Climate Change: Some Preliminary Questions*, 32 REV. EURO. COMPAR. & INT’L ENV’T L. 185 (Apr. 7, 2023), <https://onlinelibrary.wiley.com/doi/abs/10.1111/reel.12497>; Mayer, *supra* note 369.

384. Tiffany Challe-Campiz, *Taking Climate Change to the International Court of Justice: Legal and Procedural Issues*, CLIMATE L. SABIN CTR. BLOG (Sept. 29, 2021), <https://blogs.law.columbia.edu/climatechange/2021/09/29/taking-climate-change-to-the-international-court-of-justice-legal-and-procedural-issues/>.

international law as it pertains to climate change. This harmonization aims to establish coherence within the overall legal system, particularly in areas that have been excessively fragmented, such as the intersection of the law of the seas and climate change law.³⁸⁵ At the core of the three advisory opinions lies the question of how the Paris Agreement will be interpreted within each system's normative framing. The interpretation of the Paris Agreement, which will take place within different legal frameworks, will determine how each judicial body will interpret states' responsibilities considering the climate crisis.

"[S]pecialized and relatively autonomous spheres of social action and structure" have resulted in the proliferation, regionalization, and specialization of international regulations.³⁸⁶ As a consequence, international law is currently conceived as multiple dedicated and relatively autonomous branches, such as international human rights law, international trade law, international environmental law, and international law of the sea.³⁸⁷ These self-contained regimes in international law have different rules, legal institutions, and levels of legal integration.³⁸⁸ International climate law is a self-contained regime with "a set of primary rules relating to a particular subject-matter" that are "connected with a special set of secondary rules that claims

385. Miron, *supra* note 368, at 256.

386. U.N. Gen. Assembly, Int'l L. Comm'n, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, at ¶ 4, U.N. Doc. A/CN.4/L.682 (July 18, 2006); *see also* Gerhard Hafner, *Pros and Cons Ensuing from Fragmentation of International Law*, 25 MICH. J. INT'L L. 849, 849–50 (2004); Steven Bernstein & Maria Ivanova, *Institutional Fragmentation and Normative Compromise in Global Environmental Governance: What Prospects for Re-Embedding?*, in GLOBAL LIBERALISM AND POLITICAL ORDER: TOWARDS A NEW GRAND COMPROMISE? 161, 169–72 (Steven Bernstein & Louis W. Pauly eds., 2007), https://works.bepress.com/maria_ivanova/7/download/.

387. A Khrebtukova, *A Call to Freedom: Towards a Philosophy of International Law in an Era of Fragmentation*, 4 J. INT'L L. & INT'L RELS. 51, 51–52 (2008).

388. *See id.*; *see generally* Bruno Simma, *Self-Contained Regimes*, 16 NETH. Y.B. INT'L L. 111 (1985); Bruno Simma and D Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17 EUR. J. INT'L L. 483 (2006); Hafner, *supra* note 386, at 850; U.N. Gen. Assembly, *supra* note 386, at ¶ 10.

priority to the secondary rules provided by general law.”³⁸⁹ Each represents a framework for systematically resolving a set of conflicting interests according to a particular hierarchy of norms and values.³⁹⁰

As specialized fields emerged, little attention has been paid to their interrelation to related areas, leading to conflicts between rules, deviating institutional practices, and the possible loss of an overall perspective on the law.³⁹¹ Without a homogenous system of international law, these parts interact with one another in an “unorganized system” with “contradictions and frictions.”³⁹² Conflicts arise because each regime is interpreted as the proper forum by those who apply it.³⁹³

“The incremental and piecemeal nature of . . . environmental law-making . . . resulted in . . . sectoral . . . regimes and a fragmented . . . legal framework for . . . [environmental] protection.”³⁹⁴ The issue-by-issue governance approach has resulted in treaties well-tailored to address individual challenges, “form[ing] the scaffolding of today’s . . . international environmental legal architecture.”³⁹⁵ However, it is worth noting that Mayer highlights limitations in the subject-matter jurisdiction of the IACtHR advisory opinion, suggesting that it may not encompass the full range of norms relevant to climate change, including those derived from climate treaties and customary international law.³⁹⁶ This statement is far from true. The role of international and regional courts is precisely to interpret a wide range of international norms, working to harmonize them. Miron counters this argument by asserting that

389. U.N. Int’l L. Comm’n, Study Grp. On Fragmentation, *Fragmentation of International Law*, UNITED NATIONS, https://legal.un.org/ilc/sessions/55/pdfs/fragmentation_outline.pdf (last visited Aug. 17, 2023).

390. See Khrebtukova, *supra* note 387, at 52.

391. U.N. Gen. Assembly, *supra* note 386, at ¶ 11.

392. Hafner, *supra* note 386, at 850 n.16.

393. Khrebtukova, *supra* note 387, at 56; see, e.g., Case C-459/03, Comm’n of the Eur. Cmty. v. Ir., 2006 E.C.R. I-04635.

394. Gaps in International Environmental Law, *supra* note 337, at ¶ 2.

395. Teresa Parejo Navajas & Nathan Lobel, *Framing the Global Pact for the Environment: Why It’s Needed, What It Does, and How It Does It*, 30 FORDHAM ENV’T L. REV. 35 (2018).

396. Mayer, *supra* note 369, at 46.

the courts will undoubtedly need to interpret climate change instruments and possess the authority to do so. She cites the IACtHR's *Advisory Opinion 23/17* as an example, as the court analyzed principles intrinsic to environmental law beyond its traditionally applicable human rights framework.³⁹⁷

Similarly, some scholars have feared the risk of fragmentation in law application, meaning that these international courts could have different interpretations of the international climate regime given the overlapping jurisdictions of those courts. Indeed, over the past decades, international courts and tribunals have adopted several innovative procedures, creating a space for pluralism and strengthening the effectiveness and legitimacy of international law.³⁹⁸

B. Duty of Prevention: An Example of Regime Interaction and Competition

The first question posed by the different stakeholders bringing forth the advisory opinions relate to states' obligations considering the climate crisis, particularly the duty to prevent climate change harm. While the questions are framed differently, relying on a diverse legal framework, they have several similarities.

The IACtHR's questions, as they pertain to states' responsibilities considering the climate crisis, are framed as:

What is the scope of the duty of States to prevent climate phenomena generated by global warming . . . in accordance with Inter-American treaty obligations in light of the Paris Agreement and the scientific consensus that encourages not to increase the global temperature beyond 1.5°C?

. . . [W]hat measures should States take to minimize the impact of the damages caused by the climate emergency[?] . . . [W]hat differentiated measures should be taken with respect to populations in situations of vulnerability or intersectional considerations?

. . . What considerations should a State take to implement its

397. Miron, *supra* note 368, at 251.

398. Anne Peters, *The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization*, 15 INT'L J. CONST. L. 671, 672 (2017).

obligation to (i) regulate, (ii) monitor and oversee, (iii) require and approve social and environmental impact studies, (iv) establish a contingency plan and (v) mitigate activities within its jurisdiction that aggravate or may aggravate the climate emergency?

What principles should inspire mitigation, adaptation and response actions to the losses and damages generated by the climate emergency in the affected communities?³⁹⁹

The questions posed to the IACtHR are broad in scope and touch on various topics. Chile and Colombia have requested the IACtHR's opinion address mitigation, adaptation, loss and damage; states' obligations to prevent climate change; minimize, regulate, monitor and oversee climate change impact; require and approve environmental impact assessments (EIAs); establish contingency plans; and mitigate activities that aggravate the climate emergency. Therefore, IACtHR's questions relate to prevention and rely not only on the Inter-American legal framework but also on the Paris Agreement and the scientific consensus. The source of law of the Inter-American Court of Human Rights is the American Convention on Human Rights, also known as the Pact of San José.⁴⁰⁰ The court exercises both adjudicatory as well as advisory jurisdiction with the mission of interpreting and applying the convention. As there is a sufficient tie to the human rights claims brought before the court, other laws could be applied or deemed in violation of a state's ratification of the convention. This means that the Paris Agreement and the UNFCCC will be considered by the court in responding to the questions.

The ICJ's question is framed as: "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?"⁴⁰¹ The ICJ's question is, therefore, more concise but also broader, as it generally refers to

399. Chile-Argentina Request, *supra* note 64.

400. See *Statute*, INTER-AM. CT. H.R., <https://corteidh.or.cr/estatuto.cfm?lang=en> (last visited Aug. 17, 2023).

401. U.N. Gen. Assembly, *supra* note 144.

the obligations of states to ensure climate protection. Framed under international law—including, naturally, the international climate framework, i.e., the UNFCCC and the Paris Agreement—it specifically relates to the duty of protection, as opposed to prevention, for present and future generations. The ICJ was formed out of the Permanent Court of International Justice in 1946 with the adoption of the Statute at the San Francisco Conference. The ICJ's jurisdiction is limited to the following:⁴⁰²

[T]he interpretation of a treaty; any question of international law; the existence of any fact which, if established, would constitute a breach of an international obligation; the nature or extent of the reparation to be made for the breach of an international obligation.

....

Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.⁴⁰³

Similarly, the Paris Agreement and the UNFCCC will help inform the answers.

Finally, the UNCLOS questions are phrased as:

What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (the “UNCLOS”), including under Part XJI:

(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

402. See Antônio Augusto Cançado Trindade, *Statute of the International Court of Justice: Introductory Note*, U.N. AUDIOVISUAL LIBR. OF INT'L L. (Sept. 2014), [https://legal.un.org/avl/ha/sicj/sicj.html#:~:text=Many%20treaties%20and%20conventions%20conferred,Conference%20on%2026%20June%201945;ICJ Statute, supra note 154, at art. 36](https://legal.un.org/avl/ha/sicj/sicj.html#:~:text=Many%20treaties%20and%20conventions%20conferred,Conference%20on%2026%20June%201945;ICJ%20Statute,supra%20note%20154,at%20art.%2036).

403. ICJ Statute, *supra* note 154, at art. 36(2), (5).

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?⁴⁰⁴

UNCLOS' questions relate to the duty to prevent marine pollution, specifically to ocean warming, sea level rise, and ocean acidification. The obligations referred to in the questions include preventing, reducing, and controlling marine pollution to protect and preserve the marine environment. The source of law for the International Tribunal for the Law of the Sea (ITLOS) is the 1982 United Nations Convention on the Law of the Sea. Under Article 288 of the convention, the Tribunal has jurisdiction over "any dispute concerning the interpretation or application of an international agreement related to the purposes of the convention which is submitted to it in accordance with the agreement."⁴⁰⁵ The ITLOS will also base its answer on norms such as the UNFCCC and the Paris Agreement.

Since international law applies to all three judicial bodies, part of the answer to this topic will be commonly addressed. The questions share the same baseline as they relate to the international environmental law principles of prevention. While an analysis of the principle is beyond the scope of this article, a few considerations are worth mentioning. Central to responding to the legal questions at the core of the advisory opinions is the duty to ensure activities taken within one's jurisdiction do not harm areas outside that jurisdiction. These questions, however, and the answers the judicial bodies can provide, are framed differently based on the law applied.

The principle of avoiding transboundary harm is essential in addressing the questions because climate change has cross-border impacts.⁴⁰⁶ This principle requires states to ensure that their actions within their own borders do not cause harm to the environment and territories of other states even if those affected states do not share a border with them.⁴⁰⁷ The International Law

⁴⁰⁴ Chile-Columbia Request, *supra* note 64.

⁴⁰⁵ UNCLOS, *supra* note 24.

⁴⁰⁶. See Horne et al., *supra* note 154, at 9–10.

⁴⁰⁷. Phil. v. China, PCA Case No. 2013-19, Award, ¶ 941 (July 12, 2016),

Commission's *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities* define transboundary harm by four elements: a physical relationship between the activity and the damage, human causation, a certain threshold of severity requiring legal action, and the transboundary movement of harmful effects.⁴⁰⁸

To comply with this principle, states must take various measures, including preventing significant transboundary harm, cooperating with other states in good faith to minimize risks, establishing monitoring mechanisms, seeking prior authorization for potentially harmful activities, relying on risk assessments and environmental impact assessments, notifying and sharing relevant information with potentially affected states, consulting with other impacted states on measures to prevent harm, exchanging relevant information, informing the public likely to be affected, preparing contingency plans for emergencies, and notifying about emergencies of transboundary harm.

The principle of avoiding transboundary harm is found in the preambles and operative text of several treaties such as the *U.N. Framework Convention on Climate Change*,⁴⁰⁹ the 1972 London Convention,⁴¹⁰ the *Convention on Long-range Transboundary Air Pollution*,⁴¹¹ the 1985 *Vienna Convention for the Protection of the Ozone Layer*,⁴¹² Article 3 of the *Convention on Biological*

<https://pcacases.com/web/sendAttach/2086> (“The corpus of international law relating to the environment . . . requires that States ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control.” (internal quotations omitted)).

408. See *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries*, art. 2(c) (2001), https://legal.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf (adopted by the International Law Commission in U.N. Doc. A/56/10).

409. U.N. Framework Convention on Climate Change, May 9, 1992, S. TREATY DOC. NO. 102-38, 1771 U.N.T.S. 107.

410. Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, opened for signature Dec. 29, 1972, <https://www.epa.gov/sites/default/files/2015-10/documents/lc1972.pdf> [hereinafter as *The London Convention*].

411. Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, 1302 U.N.T.S. 217, [https://unece.org/sites/default/files/2021-05/1979%20CLR TAP.e.pdf](https://unece.org/sites/default/files/2021-05/1979%20CLR%20TAP.e.pdf).

412. Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, 1513 U.N.T.S. 293, <https://cil.nus.edu.sg/wp-content/uploads/2019/02/1985->

Diversity,⁴¹³ and the *United Nations Convention on the Law of the Sea*.⁴¹⁴ Principle 21 of the Stockholm Declaration provides that “[s]tates have, in accordance with the Charter of the United Nations and the principles of international law, [...] the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”⁴¹⁵ The Rio Declaration states in Principle 2 that

[s]tates have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.⁴¹⁶

The principle has endured significant debate over its content, whether it is limited to “substantial” or “significant” damage, and whether it requires a procedural obligation—understood here as an obligation of due diligence—or an obligation of result.⁴¹⁷

The duty to avoid transboundary harm is considered a due diligence obligation, imposing standards of conduct on states to protect persons and activities beyond their territories.⁴¹⁸ States are required to anticipate, prevent, or mitigate harmful events and

Vienna-Convention-for-the-protection-of-the-ozone-layer.pdf.

413. Convention on Biological Diversity, art. 3, Dec. 29, 1993, 1760 U.N.T.S. 79, <https://www.cbd.int/doc/legal/cbd-en.pdf>.

414. UNCLOS, *supra* note 24, at art. 194(2).

415. Report of the United Nations Conference on the Human Environment, at 5, U.N. Doc. A/CONF/48/14/Rev.1, U.N. Sales No. E.73.II.A.14 (1972), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/NL7/300/05/PDF/NL730005.pdf>.

416. U.N. Gen. Assembly, Report of the United Nations Conference on Environment and Development, at Principle 2, U.N. Doc. A/CONF.151/26(Vol. I) (Aug. 12, 1992); *see also* PHILIPPE SANDS & JAQUELINE PEEL, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 42 (3d ed. 2012).

417. *See* John H. Knox, *The Myth and Reality of Transboundary Environmental Impact Assessment*, 96 AM. J. INT’L L. 291, 293–94 (2002) (discussing how scholars read limits into the Principle).

418. *See* Phil. v. China, PCA Case No. 2013-19, Award, ¶ 944 (July 12, 2016), <https://pcacases.com/web/sendAttach/2086>.

outcomes resulting from activities within their jurisdiction.⁴¹⁹ The principle is confirmed by various legal cases and opinions, emphasizing that states should not knowingly allow their territories to be used for acts that harm other states.⁴²⁰ The ICJ looks at state practice and *opinio juris*⁴²¹ in assessing customary international law.⁴²² The court often relies on the work of scholars and other courts to survey evidence of state practice because this often demands a “massive undertaking” to gather evidence.⁴²³ In this case, the ILC has done extensive work in the field which fuels the understanding that the principle is clearly customary international law supported by state practice.⁴²⁴

In summary, the principle of avoiding transboundary harm is crucial in addressing contemporary environmental threats as the principle requires states to prevent harm to the environment and territories of other states resulting from their activities. The principle sets forth a range of measures and obligations that states must fulfill to minimize or avoid cross-border impacts. What the judicial bodies will now address is how precisely to interpret the duty to prevent transboundary harm as it relates to the climate crisis.

419. See Horne et al., *supra* note 154, at 10.

420. See *Corfu Channel (U.K. v. Alb.)*, Judgement, 1949 I.C.J. Rep. 4 (1949) (April 9), <https://icj-cij.org/sites/default/files/case-related/1/001-19490409-JUD-01-00-EN.pdf>; *Trail Smelter Case (U.S. v. Can.)*, 3 R.I.A.A. 1905 (16 April 1938 & 11 March 1941), https://legal.un.org/riaa/cases/vol_III/1905-1982.pdf; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 29 (July 8), <https://www.icj-cij.org/sites/default/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>; *Gabčíkovo-Nagymaros Project (Hun. v. Slov.)*, Separate Opinion of Vice-President Weeramantry, 1997 I.C.J. Rep. 7, 88–116 (Sept. 25).

421. See *Opinio Juris*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/opinio_juris_ (last visited Oct. 3, 2023) (*international law*) (defining the term as “an unsettled and debated notion in international law,” “denot[ing] a subjective obligation . . . of a state that it is bound to the law in question”).

422. *Paramilitary Actives*, 1986 I.C.J. 14, ¶ 183 (“The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice.”).

423. Glickenhau, *supra* note 169, at 134.

424. See SANDS & PEEL, *supra* note 416, at 196 ([T]he ILA . . . concluded from examination that state practice was founded upon the rule in the *Trail Smelter case*.”); *Id.*, at 188 (Principle 2 of the Rio Declaration is “sufficiently well established . . . to reflect an international customary legal obligation”).

However, these questions were phrased carefully to avoid the notion of “extraterritorial obligations.” In Palau and the Marshall Islands’ attempt to present a question to the ICJ, the question was framed under that notion: “What are the obligations under international law of a State for ensuring that activities under its jurisdiction or control that emit greenhouse gases do not cause, or substantially contribute to, serious damage to another State . . . ?”⁴²⁵ Glickenhau notes—on the occasion of Palau’s attempt at an advisory opinion—that the court would only need to define the type of obligation the principle entails in the context of serious damage “outside [of] their territories.”⁴²⁶ However, this obligation remains contested.

As noted, the IACtHR addressed the issue of extraterritorial responsibility in its *Advisory Opinion 23/17*.

[T]he Court found that States must promptly, adequately, and effectively repair transboundary damage resulting from activities in their territory or under their jurisdiction. States can be held responsible for significant damage caused to persons outside their territory as a result of activities within their territory, and such claims are not limited to damage caused by a State’s agents, but include activities conducted under their authority or effective control. This obligation of repair does not depend on the lawful or unlawful character of the conduct causing the damage, including whether the activity in question is prohibited under international law. However, “there must always be a causal link between the damage caused and the act or omission of the State of origin in [relation to] [such] activities [with]in its territory or [otherwise] under its jurisdiction or control.”⁴²⁷

The court broadened the interpretation of extraterritorial jurisdiction to accept a new jurisdictional link based on the factual nexus between conduct within the territory of the state and a human rights violation occurring abroad,⁴²⁸ which arises because the state has “effective control” over the damaging activities in

425. Challe-Campiz, *supra* note 384.

426. Glickenhau, *supra* note 169, at 133.

427. Tigre & Urzola, *supra* note 157, at 38 (quoting *The Environment and Human Rights*, *supra* note 69, at ¶¶ 103–04 (alterations in original)).

428. *Id.* at ¶ 95, ¶¶ 101–02.

question and could prevent the consequent harm.⁴²⁹ The IACtHR thus confirmed that states must prevent significant environmental damage inside and outside of their territory, which prompts specific duties in terms of regulation and supervision of activities under their jurisdiction. The link drawn is “arguably broader” than any previously recognized nexus, because it reflects state responsibility for failure to exercise due diligence within its territory when human rights are at stake elsewhere.⁴³⁰ This extraterritorial obligation was further delineated by *Resolution 3/21*, which recognized that “the obligation to prevent transboundary environmental harm” in the context of climate change includes developing and implementing GHG mitigation targets that reflect a level of ambition consistent with the obligations of the Paris Agreement.”⁴³¹ It is likely that the IACtHR will further expand on this interpretation with specific application to the context of climate change.

Transboundary environmental and climate change harm challenges the foundational role that territory plays in defining state obligations under international law.⁴³² The extraterritorial application of human rights responsibilities concerning environmental harm can substantially influence the significance of these advisory opinions for future climate litigation. *Advisory Opinion 23/17* confirmed that it is possible to argue that a state’s human rights obligations have an extraterritorial reach, and significantly expanded the extraterritorial reach of state obligations in this connection.⁴³³ In this context, “[w]hat are the obligations under international law of a state for ensuring that activities under its jurisdiction or control that emit GHG do not cause, or substantially contribute to serious damage of another

429. *Id.* at ¶ 102.

430. Antal Berkes, *A New Extraterritorial Jurisdictional Link Recognised by the IACtHR*, EJIL:TALK! (Mar. 28, 2018), <https://www.ejiltalk.org/a-new-extraterritorial-jurisdictional-link-recognised-by-the-iacthr/>.

431. Inter-Am. Comm’n of Hum. Rts. [IACHR], *Climate Emergency: Scope of the Inter-American Human Rights Obligations*, at 21, Resolution 3/2021 (2021), https://www.oas.org/en/iachr/decisions/pdf/2021/resolucion_3-21_ENG.pdf.

432. See D Shelton, *Legitimate and Necessary: Adjudicating Human Rights Violations Related to Activities Causing Environmental Harm or Risk*, 6 J HUM RTS & ENV’T 139, 142 (2015).

433. Tigre & Urzola, *supra* note 157.

State or States?”⁴³⁴ The pending advisory opinions will likely touch on this issue.

For the ICJ’s advisory opinion, the court will need to assess whether, under Article 38 of its charter defining the sources of applicable law, the duty to prevent harm outside a state’s jurisdiction represents international law. Based on the ICJ Statute and past practice, the ICJ looks at five sources of international law: (1) treaty law, (2) customary international law,⁴³⁵ (3) general principles of international law, (4) past decisions, and (5) academic writings.⁴³⁶ In theory, past decisions and academic writings are considered “subsidiary means” for determining the rules of law.⁴³⁷ In practice, the ICJ cites prior decisions, including advisory opinions, as evidence of international law.⁴³⁸ It remains to be seen whether the ICJ will follow the interpretation of the IACtHR in *Advisory Opinion 23/17*.

Glickenhau previously analyzed how different sources of law would apply to a similar scenario.⁴³⁹ For example, several treaty preambles have referenced the principle that states should not allow actions within their jurisdictions to cause harm to other jurisdictions. These include the UNFCCC,⁴⁴⁰ the 1972 London

434. Douglas A. Kysar, *Climate Change and the International Court of Justice* 8 (Yale L. Sch. Pub. L. Rsch. Paper No. 315, Aug. 15, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2309943 (click “Open PDF in Browser”).

435. Customary international laws are the binding rules that form when a widespread state practice occurs along with *opinio juris* (a belief by the states that the practice represents a legal or customary obligation). *Customary International Law*, CORNELL L. SCH., http://www.law.cornell.edu/wex/customary_international_law (last visited Feb. 28, 2014) (“Customary international law refers to international obligations arising from established state practice, as opposed to obligations arising from formal written conventions and treaties. . . . [It] can be established by showing (1) state practice and (2) *opinio juris*.”).

436. ICJ Statute, *supra* note 154, at art. 38.

437. *Id.* at art. 38(1)(d).

438. *See, e.g.*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J 136, ¶ 41 (July 9) (citing I.C.J. advisory opinions, which were themselves citing I.C.J. advisory opinions as evidence of international law).

439. *See* Glickenhau, *supra* note 169, at 133.

440. United Nations Framework Convention on Climate Change, May 9, 1992, S. TREATY DOC. NO. 102-38, 1771 U.N.T.S 31, (“Recalling, also . . .” the principle).

Convention,⁴⁴¹ the *Convention on Long-Range Transboundary Air Pollution* (LRTAP),⁴⁴² and the 1985 Vienna Convention.⁴⁴³ The principle is also referenced in Article 3 of the *Convention on Biological Diversity* (CBD), in the operational text of the treaty,⁴⁴⁴ and in the *United Nations Convention on the Law of the Sea* (UNCLOS).⁴⁴⁵ Since the analysis done by Glickenhau, other norms can be included, such as the newly adopted Biodiversity Beyond National Jurisdiction (BBNJ) agreement. In terms of the transboundary harm principle, the BBNJ largely upholds the standards set in UNCLOS.

Relevant principles include: (1) “[t]he polluter-pays principle;” (2) “[t]he principle of the common heritage of humankind which is set out in the Convention;” (3) “[t]he use of relevant traditional knowledge of Indigenous Peoples and local communities, where available;” (3) “[t]he respect, promotion, and consideration of their respective obligations . . . relating to the rights of Indigenous Peoples or of . . . local communities when taking action to address the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction;” (5) “[t]he non-transfer, directly or indirectly, of damage or hazards from one area to another and the non-transformation of one type of pollution into another, in taking measures to prevent reduce, and control pollution of the marine environment.”⁴⁴⁶ Avoiding transboundary

441. The London Convention, *supra* note 410 (“Recognizing” the principle).

442. Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, 1302 U.N.T.S. 217 (“Considering . . . in particular principle 21.”).

443. Vienna Convention for the Protection of the Ozone Layer, March 22, 1985, 1513 U.N.T.S. 323 (“[r]ecalling . . . in particular Principle 21”).

444. See SANDS & PEEL, *supra* note 416, at 198 (describing how the principle is expressed in the CBD “without express limitations to matters within the scope of the Convention.”).

445. UNCLOS, *supra* note 24, at art. 192 (“States have the obligation to protect and preserve the marine environment.”); *id.* at art. 193 (“States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.”).

446. U.N. Gen. Assembly, Draft Agreement Under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (Mar. 4, 2023), https://www.un.org/bbnj/sites/www.un.org.bbnj/files/draft_agreement_advanced_unedited_for_posting_v1.pdf.

harm under UNCLOS was outlined in Article 136, with the principle of the common heritage of humankind. The BBNJ's bridging of regulatory gaps expands on the transboundary harm principle inherently but also with the mention of protecting future generations, the polluter pays principle, and with the recognition of the non-transfer of damage or hazards.

While there is optimism that the judicial bodies will be progressive, one of the “pitfalls” of the advisory opinions, as noted by Mayer, is that it may lead merely to a “rephrasing” of abstract legal principles rather than providing “useful guidance to international negotiations on climate change.”⁴⁴⁷ In this case, the judicial bodies can simply reaffirm that there is a duty to prevent transboundary harm without specifically assessing what that means in terms of the climate crisis. Mayer notes that reaffirming existing legal principles would serve “no useful purpose.”⁴⁴⁸ It would be advantageous for courts to accurately determine if there is a universal responsibility to reduce greenhouse gas emissions. This includes identifying each state's obligation based on current climate science, considering how human rights play a role in these obligations, and determining consequences when emissions from one country causes damage beyond its borders—such as when German emissions cause flooding in Bangladesh, for example.

Mayer identifies a second “pitfall,” which would be for the court to interpret treaty provisions, or, as Mayer puts it, “inventing rules on which states have never agreed,” which would mean treading “into a political minefield” of highly controversial conclusions that states would ignore.⁴⁴⁹ However, this view is a rather simplistic one. Interpretation of treaty norms is at the core of the role of international judicial bodies. It is precisely what is expected of these courts, in terms of interpreting the international framework of climate change law in line with international law norms and principles.

For example, Voigt notes that determining compliance with the Paris Agreement's due diligence obligation requires assessing whether: (1) states are complying with “rapid, deep[,] and

447. Mayer, *supra* note 369, at 47.

448. *Id.* at 48.

449. *Id.*

sustained” GHG emissions reductions (i.e., “by 45% by 2030 relative to the 2010 level,” global net zero by mid-century, and net emissions negative thereafter); (2) states are acting in proportion to the climate risk, which frames the standard of due diligence; (3) states are adopting proportional and equitable measures, according to their common but differentiated responsibilities and respective capabilities (i.e., that states with more capacity set higher targets earlier, to enable parties with less capacity to take longer to reach them); (4) states are considering the temporal implications of their actions or lack of action and how this frames their due diligence; (5) states are considering the spatial dimension of due diligence (i.e., the global net-zero goal, and the effects of carbon leakage and exported emissions); and (6) the standard of care is being analyzed in a dynamic and variable way (i.e., that climate science is constantly developing, and the notion of necessary measures changes constantly).⁴⁵⁰ As these judicial bodies interpret the international climate framework, a cohesive and consistent interpretation will likely fall along these guidelines.

CONCLUSION

In the face of an unprecedented moment in the global response to climate change, the legal landscape is rapidly evolving. The urgency of the climate crisis, as highlighted by the 2023 IPCC Sixth Assessment Report, emphasizes the need for immediate action to avert irreversible and devastating consequences. The trio of advisory opinion requests from the ITLOS, the IACtHR, and the ICJ holds significant potential to shape the global response to climate change. While advisory opinions lack binding force, their authoritative value can influence future judicial decisions and ongoing climate litigation. Seeking to define states’ responsibilities under international law for climate change, these opinions offer valuable insights into the interpretation of relevant norms.

450. Christina Voigt, *The Power of the Paris Agreement in International Climate Litigation*, 32 REV. EURO. COMPAR. & INT’L ENV’T L. 237, 246–48 (2023).

These advisory opinion initiatives represent a form of “lawfare,” where Global South countries and vulnerable communities utilizing the law as a tool to address climate change impacts on their lands and communities. The collective force of these requests from diverse stakeholders in civil society organizations showcases a growing commitment to finding innovative solutions based on international law. Analyzing these advisory opinion initiatives together is crucial due to their shared overlap and alignment with the trend of global climate litigation. Courts often look to each other for guidance on complex legal matters, suggesting that these opinions may influence each other’s interpretation of obligations consistently and holistically. This article provided a first view at that and intends to share some initial considerations to be expanded and built upon as these processes evolve.

In conclusion, the potential of these advisory opinions to be transformative milestones in the global response to the climate crisis is immense. Favorable advisory opinions would encompass several key elements that advance the progressive development of international law and climate action. This includes acknowledging and engaging with the scientific consensus on climate change, integrating human rights considerations within their framework, and providing unequivocal clarity on specific state obligations related to mitigating GHG emissions, adapting to climate change impacts, and establishing mechanisms to address loss and damage.

By embracing these elements, the advisory opinions would not only contribute to the development of international climate change law but also serve as guiding documents for policymakers, legal practitioners, and advocates worldwide. Their impact would extend beyond legal discourse, shaping effective and just climate change policies and frameworks at the international level. As the movement gains momentum, it is possible that similar requests will be made to the African Court of Human Rights (African Court) and the European Court of Human Rights (ECtHR) in the coming months, further strengthening this initiative. In summary, the advent of these advisory opinions signifies a historic turning point for climate litigation, offering hope and renewal as nations and communities seek legal benchmarks to address the climate crisis.