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Assessing the Role of International Judicial Advisory Opinions in the Evolution of International Environmental Law in Response to Climate Change

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ABSTRACT

Climate change has emerged as a global menace, threatening human existence and Earth's biodiversity. The urgency to address this crisis intensifies, yet the window for effective action is narrowing. Failure to act disproportionately impacts marginalised communities, highlighting the need for legal clarity. Judicial authorities, such as the International Court of Justice (I.C.J.), the International Tribunal for the Law of the Sea (I.T.L.O.S.), and the Inter-American Court of Human Rights (I.A.C.H.R.), have increasingly been requested to provide advisory opinions on addressing climate change. Although generally non-binding, these advisory opinions have become a vital source of international law, particularly in the evolving fields of environmental and human rights law, and can, in certain institutional and legal framework contexts, carry significant legal and practical influence. They offer the flexibility needed to develop new instruments or legal and policy reform in response to changing practices. This article explores the evolution of advisory opinions, their contributions to addressing climate change, and the benefits and challenges of utilizing them to mitigate climate change. It also attempts to delineate reflections and implications concerning the development of advisory opinions in the context of climate change.

KEYWORDS

Advisory Opinion, Climate Change, Judicial Authorities, International Environmental Law, International Law

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INTRODUCTION

Climate change has emerged as one of the paramount issues of our era, with this moment being critical. In his address at the opening of the 2024 Climate Ambition Summit, United Nations [hereinafter U.N.] Secretary-General António Guterres declared that humanity has “opened the gates to hell” by exacerbating the climate crisis.¹ According to recent findings by the Intergovernmental Panel on Climate Change [hereinafter I.P.C.C.], human activities such as power generation, manufacturing, industrial processes, and various other consumption practices that involve the exploitation and combustion of fossil fuels and alterations in land use – are the primary contributors to the rise in greenhouse gases [hereinafter GHGs]. The elevated atmospheric concentrations of GHGs result in the entrapment of heat within the atmosphere, thereby causing an increase in the Earth’s average temperature.² The increase in average global temperatures has triggered a chain reaction, culminating in the melting of polar ice caps and subsequent sea level rise. Additionally, the rising global surface temperatures have altered atmospheric circulation patterns, resulting in a greater frequency and intensity of extreme weather events.³

Recent reports from the I.P.C.C. have highlighted the urgent necessity to limit the rise in the Earth’s average temperature to no more than 1.5 °C.⁴ While it is possible to limit the temperature increase to 1.5 °C, the window of opportunity is closing rapidly. The impacts of climate change on human societies and ecosystems are more extensive and severe than anticipated, with each additional fraction of the degree of warming exacerbating future risks. The climate crisis presents significant challenges, necessitating a concerted effort from the international community to address all aspects, including the development of an effective international legal framework. U.N. Secretary-General António Guterres has expressed deep concern over the severe impacts of climate change on specific countries, particularly small island states, which he

¹ See United Nations, *Humanity Has Opened the Gates to Hell’ Warns Guterres as Climate Coalition Demands Action*, United Nations - UN News Global Perspective Human Stories (Sept. 20, 2023), <https://news.un.org/en/story/2023/09/1141082> (last visited Feb. 28, 2025).

² See I.P.C.C., *Climate Change: The I.P.C.C. Scientific Assessment* 414 (J.T.Houghton et al. eds., 1990); see also I.P.C.C., *Climate Change 1992: The Supplementary Report to the I.P.C.C. Impacts Assessment* 130 (W.J.McG. Tegart and G.W. Sheldon eds., 1993); I.P.C.C., *I.P.C.C. Second Assessment: Climate Change 1995* 588 (1995); Clare Breidenich et al., *The Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 92 AM. J. INT’L L. 315, 316-17 (1998).

³ See generally I.P.C.C., *supra* note 2, at 3-4, 5, 7-8; Emily Richman, *Emissions Trading and the Development Critique: Exposing the Threat to Developing Countries*, 36 N.Y.U. J. INT’L L. & POL. 133, 133-36 (2003); Breidenich et al., *supra* note 2, at 316-17.

⁴ I.P.C.C., *Global Warming of 1.5°C: An I.P.C.C. 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* 1 (Valérie Masson-Delmotte et al. eds., 2018).

described as “an existential threat” and called for actions from the rest of the world.⁵ Although countries have made progress in enhancing their mitigation and adaptation targets, such progress is insufficient, and considerable efforts are still required to attain the long-term temperature goals and objectives outlined in the Paris Agreement.⁶⁷

The role of courts and judicial bodies has received significant attention and recognition for addressing climate change challenges within the international legal framework. International courts and tribunals are considered avenues for addressing and clarifying states’ responsibilities amidst the climate emergency. Nevertheless, no international judicial body has been tasked with determining states’ duties under international law concerning climate change. This is an issue that is currently expected to be addressed.⁸ In recent times, small island nations such as Palau⁹ and Vanuatu¹⁰ have actively pursued the likelihood of obtaining an advisory opinion from the International Court of Justice [hereinafter I.C.J.]. In October 2021, to facilitate the pursuit of seeking an advisory opinion from the International Tribunal for the Law of the Sea [hereinafter I.T.L.O.S.], the Commission of Small Island States on Climate Change and International Law [hereinafter C.O.S.I.S.] was formed based on an agreement between Antigua and Barbuda and Tuvalu [hereinafter C.O.S.I.S. Agreement].¹¹ In alignment with the United Nations Convention on the Law of the Sea [hereinafter U.N.C.L.O.S.], an advisory opinion on climate change and the law of the sea was sought by the C.O.S.I.S. from the I.T.L.O.S. in December 2022.¹² Another advisory opinion from the Inter-American Court of Human Rights [hereinafter Inter-Am.Ct.H.R.] was also requested by the governments of Chile

⁵ See Press Release, U.N. Secretary-General, To Tackle Climate Change, Leaders Must Tax Pollution, Not People, End Coal Plant Construction by 2020, Secretary-General Urges, Concluding Pacific Region Visit (May 18, 2019), <https://press.un.org/en/2019/sgsm19584.doc.htm> (last visited Feb. 28, 2025).

⁶ See U.N.F.C.C.C., Paris Agreement, (Nov. 2015), <https://unfccc.int/documents/184656>.

⁷ See generally Maria A. Tigre, *It Is (Finally) Time for an Advisory Opinion on Climate Change: Challenges and Opportunities on a Trio of Initiatives*, 17 CHARLESTON L. REV. 623, 625 (2024).

⁸ See *id.* at 626.

⁹ See United Nations, *Palau Seeks UN World Court Opinion on Damage Caused by Greenhouse Gases*, United Nations - UN News Global perspective Human stories (Sept. 22, 2011), <https://news.un.org/en/story/2011/09/388202> (last visited Feb. 28, 2025); see also Richard Barnes, *An Advisory Opinion on Climate Change Obligations Under International Law: A Realistic Prospect?*, 53 OCEAN DEV. & INT’L L. 180, 180 (2022).

¹⁰ See Radina Gigova, *Vanuatu Will Seek International Court of Justice Opinion on Climate Protection*, CNN (Sept. 26, 2021), <https://edition.cnn.com/2021/09/26/asia/vanuatu-climate-change-protection-rights-intl/index.html> (last visited Feb. 28, 2025); see also Barnes, *supra* note 9, at 181.

¹¹ See Agreement for the Establishment of a Commission of Small Island States on Climate Change and International Law, Ant. & Barb.-Tuvalu, Oct. 31, 2021 (hereinafter C.O.S.I.S. Agreement); see also Barnes, *supra* note 9, at 181.

¹² See Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal) (2022), <https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request.for.Advisory.Opinion.COSIS.12.12.22.pdf> (last visited Feb. 28, 2025); see also Manon Rouby, *The Role of International and Regional Courts in Future-Proofing Environmental Jurisprudence Through Advisory Opinions*, Centre for International Law - National University of Singapore (Aug. 1, 2023), <https://cil.nus.edu.sg/blogs/the-role-of-international-and-regional-courts-in-future-proofing-environmental-jurisprudence-through-advisory-opinions/> (last visited Feb. 28, 2025).

and Colombia to elucidate the human rights obligations of states amidst the climate change crisis.¹³ Vanuatu, in particular, has taken a leading role in proposing a resolution submitted to the I.C.J. regarding states' obligations to safeguard the rights of current and future generations from the adverse effects of climate change. This initiative succeeded, as the resolution was unanimously adopted by the United Nations General Assembly [hereinafter U.N.G.A.] on 29th of March 2023.¹⁴

Advisory opinions from the relevant judicial bodies hold significant importance and can have a profound impact on the international legal system. These opinions offer crucial insights into existing international legal obligations in the context of climate change emergencies, addressing the pressing need for clarification on states' responsibilities regarding climate change and promoting climate justice. Furthermore, advisory proceedings are effective mechanisms for vulnerable communities and nations, despite not being major contributors, yet experiencing severe consequences due to climate change, can actively pursue avenues for climate justice and pathways for undertaking climate actions and implementing climate adaptation measures for sustainable development. This tendency reflects an increasing recognition of the imperative for legal guidance, serving the dual purpose of holding states accountable for their actions or inactions and navigating the intricate landscape of responsibilities related to addressing challenges posed by climate change, thereby ensuring climate justice.

Although the Paris Agreement's commitments to reduce emissions represent a milestone in addressing climate change, they fall short of ensuring that global warming remains "well below" 2°C, the target established by the agreement. Achieving this objective requires countries to commit to progressively more stringent emission reductions over time. In this context, an advisory opinion of the judicial bodies, such as

¹³ See *Request for an advisory opinion on the scope of the state obligations for responding to the climate emergency*, Climate Change Litigation (2023), <https://climatecasechart.com/non-us-case/request-for-an-advisory-opinion-on-the-scope-of-the-state-obligations-for-responding-to-the-climate-emergency/> (last visited Feb. 28, 2025); see also Maria Antonia Tigre, Natalia Urzola & Juan Sebastián Castellanos, *A Request for an Advisory Opinion at the Inter-American Court of Human Rights: Initial Reactions*, Climate Law - Sabin Center Blog (Feb. 17, 2023), <https://blogs.law.columbia.edu/climatechange/2023/02/17/a-request-for-an-advisory-opinion-at-the-inter-american-court-of-human-rights-initial-reactions/> (last visited Feb. 28, 2025); Rouby, *supra* note 12.

¹⁴ See United Nations General Assembly, Resolution Adopted by the General Assembly on 29 March 2023 on Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change, A/RES/77/276 (Apr. 4, 2023), <https://documents.un.org/doc/undoc/ltd/n23/094/52/pdf/n2309452.pdf> (last visited Feb. 28, 2025); see also Sue Farran, *Vanuatu Leads Drive to Secure an Opinion from the International Court of Justice on State Responsibilities to Turn Words into Action on Climate Change*, 42 U. QUEENSL. L.J. 411, 414 (2023) (Austl.); United Nations, International Court's Advisory Opinions on Climate Change Obligations of States 'of Tremendous Importance', Secretary-General Tells General Assembly (Mar. 29, 2023), <https://press.un.org/en/2023/sgsm21750.doc.htm> (last visited Feb. 28, 2025).

the I.C.J., on climate change could provide valuable support. Such an opinion could stimulate further negotiations and help establish clear expectations for all stakeholders involved in climate initiatives. While it would not address all issues, it merits consideration as a component of a comprehensive strategy to tackle climate change.¹⁵

1. ADVISORY JURISDICTION OF JUDICIAL AUTHORITIES IN INTERNATIONAL LAW

1.1 ADVISORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE

International tribunals and courts typically possess both contentious and advisory jurisdiction. Given that international obligations and dispute resolution are primarily based on state consent, treaty provisions serve as the foundation for the controversial and advisory jurisdiction of international courts and tribunals. Thereby, the provisions of such treaties should prescribe and limit the advisory jurisdiction of a court.¹⁶ An advisory opinion aims to offer guidance to individuals or entities on a specific legal issue. In national legal systems, the judicial branch and the executive or legislative branches communicate to facilitate advisory proceedings. A nation's supreme court has the authority to issue advisory opinions within its domestic jurisdiction. However, these opinions are not legally binding unless a specific statute mandates their enforceability.¹⁷

The international judicial authorities, namely the I.C.J., operate on a similar principle. The I.C.J. was established to serve as the principal judicial organ and legal advisory body of the U.N. It is empowered to resolve disputes peacefully by international law and to issue advisory opinions on legal questions submitted to it. States cannot unilaterally request the I.C.J. to provide an advisory opinion; only the U.N.G.A., other U.N. organs, and specialised U.N. agencies have this authority.¹⁸ The U.N. General Assembly, the Security Council, specific international organisations, and other authorised or specialised U.N. bodies can request an advisory opinion, which serves as legal advice, from the I.C.J. The U.N.G.A. and the Security Council enjoy seeking advisory

¹⁵ See generally Daniel Bodansky, *The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections*, 49 ARIZ. STATE L.J. 689, 692 (2017).

¹⁶ See Tigre, *supra* note 7, at 626.

¹⁷ See *id.* at 626–27; see also Myrto Stavridi, *The Advisory Function of the International Court of Justice: Are States Resorting to Advisory Proceedings as a “Soft” Litigation Strategy?*, J. PUB. & INT’L AFFS. (Apr. 22, 2024), <https://jpia.princeton.edu/news/advisory-function-international-court-justice-are-states-resorting-advisory-proceedings-%E2%80%9Csoft%E2%80%9D> (last visited Feb. 28, 2025).

¹⁸ See Anxhela (Angela) Mile, *Emerging Legal Doctrines in Climate Change Law-Seeking an Advisory Opinion from the International Court of Justice*, 56 TEX. INT’L L.J. 59, 62 (2021).

opinions from the I.C.J. on “any legal question”. In contrast, the scope of advisory opinions requested by other U.N. bodies or specialised agencies is limited to legal questions related to their specific areas of activity.¹⁹ Climate change has become a new security threat, endangering the existence of nations and all of humanity.²⁰ In response, the U.N.G.A. has issued numerous resolutions to ensure that states fulfil their responsibilities under international law. These resolutions aim to protect present and future generations, reaffirming the international community’s goals from the 2030 Agenda for Sustainable Development, the Addis Ababa Action Agenda of the Third International Conference on Financing for Development, and the United Nations Framework Convention on Climate Change [hereinafter U.N.F.C.C.C.].²¹ Throughout its recent session, the U.N.G.A. acknowledged and continuously urged efforts to limit global warming to below 2 °C.²²

In its opinion on the *Legality of the Threat or Use of Nuclear Weapons* in 1996, the I.C.J. affirmed “its responsibilities as the principal judicial organ of the United Nations”, and it is thus dedicated to providing advisory opinions upon request.²³ In alignment with this principle, the I.C.J. is prepared to issue an advisory opinion upon the U.N.G.A.’s adoption of a resolution requesting one.²⁴ The I.C.J. determined whether it had the jurisdiction to respond to the U.N.G.A.’s request for an advisory opinion. The I.C.J. is competent in providing advisory opinions, in light of Article 65(1) of its Statute, to the requesting body authorised by the U.N. Charter. Article 96(1) of the U.N. Charter bestows ample discretion on the U.N.G.A. and the Security Council to request an advisory opinion from the I.C.J. on “any legal question”. Some states opposing the advisory opinion argued that the U.N.G.A. and Security Council should only request views on matters related to their work, similar to other U.N. organs and agencies under Article 96(2) of the U.N. Charter. However, the I.C.J. found that, regardless of this interpretation, the General Assembly has the competence to refer the question to the Court. The General Assembly is entitled to question or request the I.C.J. for an advisory opinion regarding any matters within the scope of the U.N. Charter. Article 11 of the U.N. Charter explicitly confers the

¹⁹ See U.N. Charter, art. 96; see also U.N., Statute of the International Court of Justice, art. 65 (Oct. 24, 1945) <https://treaties.un.org/doc/Publication/CTC/uncharter.pdf>; Stavridi, *supra* note 17; 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, 403-04 (Ivano Alogna et al. eds., 2021) (Neth.).

²⁰ See generally Emyr Jones Parry, *The Greatest Threat to Global Security: Climate Change is not Merely an Environmental Problem*, UN CHRON., June 2007, at 20.

²¹ G.A. Res. 78/153, Protection of global climate for present and future generations of humankind (Dec. 21, 2023).

²² See Mile, *supra* note 18, at 64–65.

²³ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 14 (July 8), <https://www.icj-cij.org/sites/default/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>.

²⁴ See Mile, *supra* note 18, at 66.

power on the U.N.G.A. to consider general principles related to maintaining international peace and security. Additionally, Article 13 of the U.N. Charter mandates the U.N.G.A. to initiate studies and make recommendations for the progressive development and codification of international law.²⁵ Therefore, the question presented to the I.C.J. is relevant to many of the U.N.G.A.'s activities and concerns regarding the maintenance of global peace and security, including addressing climate change emergencies, and the development of international law.

1.2 ADVISORY JURISDICTION OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

At the time the United Nations Convention on the Law of the Sea was negotiated, climate change was not a recognised issue. Although the Convention does address the protection and preservation of the marine environment in Part XII, it does not specifically address climate change or its impacts on the oceans and marine life. Nevertheless, the U.N.C.L.O.S. is regarded as “a living instrument”,²⁶ meaning it is intended to be dynamic rather than static. This allows for its provisions to be interpreted and applied in ways that reflect contemporary issues. Scholars have noted that, given this adaptability, the general obligations of states under the U.N.C.L.O.S. to manage marine pollution, as elaborated in cases such as the *Pulp Mills* case and the *Advisory Opinion on Seabed Activities*²⁷ – should also apply to GHGs emissions. Therefore, in line with the U.N.C.L.O.S.'s nature as “a living instrument” and the relevant jurisprudence from both I.T.L.O.S. and the I.C.J., it is appropriate for the I.T.L.O.S. to consider requests for advisory opinions on climate change issues under the U.N.C.L.O.S.²⁸ The U.N.C.L.O.S. established a system to maintain its consistency and ensure uniform interpretation and enforcement. This system includes the I.T.L.O.S., the I.C.J., arbitral tribunals, or special arbitral tribunals. States can choose their preferred forum for dispute resolution by the U.N.C.L.O.S.²⁹ The U.N.C.L.O.S., while establishing the I.T.L.O.S., does not expressly grant advisory jurisdiction to the I.T.L.O.S. The I.T.L.O.S. has developed its own rules for issuing advisory opinions. The advisory jurisdiction of the I.T.L.O.S. is established in Article 21 of

²⁵ See *Legality of the Threat or Use of Nuclear Weapons*, ¶¶ 10–12; see also *Mile*, *supra* note 18, at 64.

²⁶ See *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Case No. 31, Advisory Opinion of 21 May 2024, ¶ 130.

²⁷ *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* (Request for Advisory Opinion Submitted to the Seabed Disputes Chamber), Case No. 17, Advisory Opinion (Feb. 1, 2011), https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/17_adv_op_010211_en.pdf.

²⁸ See Monica Fera-Tinta, *On the Request for an Advisory Opinion on Climate Change Under UNCLOS Before the International Tribunal for the Law of the Sea*, 14 J. INT'L DISP. SETTLEMENT 391, 393–94 (2023) (U.K.).

²⁹

its Statute³⁰ and Article 138(1) of its Rules.³¹ However, this development has been a subject of controversy, as there are concerns that the U.N.C.L.O.S. may not have fully authorised the I.T.L.O.S. to undertake such a function.³²

Additionally, under the U.N.C.L.O.S., the Seabed Disputes Chamber [hereinafter S.D.C.] – a specialised branch of the I.T.L.O.S. – was established with a narrowly focused jurisdiction specifically addressing issues related to the Area, which encompasses the seabed and ocean floor beyond national jurisdictions, as delineated in Part XI of the U.N.C.L.O.S. The S.D.C. has exclusive authority over matters regarding the exploration and exploitation of mineral resources in this region, as detailed in Article 187 of the U.N.C.L.O.S. While the S.D.C. is conferred with contentious and advisory authorities under Article 191 of the U.N.C.L.O.S., this Article comprises a provision referring to the advisory functions of other bodies. This suggests that the I.T.L.O.S. may not possess general advisory authority outside the specific remit of the S.D.C.³³

The C.O.S.I.S. requested an advisory opinion from the I.T.L.O.S., rather than from the S.D.C. The advisory opinion pertains to the responsibilities of State Parties under the U.N.C.L.O.S. to address marine pollution resulting from climate change and to protect the marine environment from its effects. Since this request falls outside the scope of the S.D.C., it raises the issue of whether the I.T.L.O.S. has the authority to issue such an advisory opinion. The challenge against the I.T.L.O.S.'s competence in issuing advisory opinions was previously debated in the Advisory Opinion submitted by the Sub-Regional Fisheries Commission [hereinafter *S.R.F.C. Advisory Opinion*].³⁴ It was notably argued between states that the U.N.C.L.O.S. does not explicitly grant the I.T.L.O.S. the authority to issue advisory opinions, nor can the I.T.L.O.S. confer such power upon itself. It was also contended that if the U.N.C.L.O.S. had intended for the I.T.L.O.S. to have advisory authority, it would have explicitly stated so. In the absence of such a provision, these

See Armando Rocha, *The Advisory Jurisdiction of the ITLOS in the Request Submitted by the Commission of Small Island States*, Climate Law - Sabin Center Blog (Apr. 12, 2023), <https://blogs.law.columbia.edu/climatechange/2023/04/12/the-advisory-jurisdiction-of-the-itlos-in-the-request-submitted-by-the-commission-of-small-island-states/> (last visited Feb. 28, 2025).

³⁰ U.N., United Nations Convention for the Law of the Sea, Annex VI, (Dec. 10, 1982) https://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

³¹ International Tribunal for the Law of the Sea, Rules of the Tribunal, ITLOS/8 (Oct. 28, 1997), https://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf.

³² See Carlos A. Cruz Carrillo, *The Advisory Jurisdiction of the ITLOS: From Uncertainties to Opportunities for Ocean Governance*, in *THE ENVIRONMENTAL RULE OF LAW FOR OCEANS: DESIGNING LEGAL SOLUTIONS* 236, 240-42 (Froukje M. Platjouw & Alla Pozdnakova eds., 2023) (U.K.); see also Rocha, *supra* note 29.

³³ See Barnes, *supra* note 9, at 183-86; see also Rocha, *supra* note 29.

³⁴ I.T.L.O.S., Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion Submitted to the Tribunal), Advisory Opinion (Apr. 2, 2015), <https://www.itlos.org/itlos/documents/cases/21/-E.pdf>.

states concluded that I.T.L.O.S. could not issue advisory opinions, except those given by the S.D.C. under Article 191 of the U.N.C.L.O.S.³⁵

Nevertheless, by reference to Article 21 of the I.T.L.O.S.'s Statute, despite the absence of an express mention of advisory competence, the I.T.L.O.S. interpreted the term "all other matters" in Article 21 of its Statute as encompassing advisory jurisdiction. The phrase "all other matters" is interpreted to include more than just "disputes". Had it been intended to cover only disputes, Article 21 of the I.T.L.O.S.'s Statute would have used the term "disputes" alone.³⁶ Thus, the term must extend to other types of issues, such as advisory opinions, provided these are specifically mentioned in any agreement that grants jurisdiction to the Tribunal.³⁷

The I.T.L.O.S., under Article 138 of its Rules adopted in 1997, formalised procedures for issuing advisory opinions, stipulating that such views must be based on an international agreement, a legal question, and a request from an authorised entity. The Tribunal possesses inherent authority to determine the scope of its jurisdiction, which includes interpreting its rules and mandates. Under the *S.R.F.C. Advisory Opinion*, the I.T.L.O.S. additionally confirmed that it is empowered to issue advisory opinions under international agreements, with the procedural framework outlined in Article 138 of its Rules.³⁸

Under the auspices of the I.T.L.O.S., the establishment of the C.O.S.I.S. is aimed at providing a sturdy legal basis for seeking an advisory opinion from the I.T.L.O.S. under the U.N.C.L.O.S. The C.O.S.I.S. initially comprised Antigua and Barbuda and Tuvalu. Subsequently, the group has expanded to include other small island nations, with Palau participating in November 2021, Niue in September 2022, and both Vanuatu and Saint Lucia in December 2022. Further additions include Saint Vincent and the Grenadines and Saint Kitts and Nevis in June 2023. Any member of the Alliance of Small Island States [hereinafter A.O.S.I.S.] can join the C.O.S.I.S.³⁹ The C.O.S.I.S. is empowered to request advisory opinions from the I.T.L.O.S. on any legal question about the U.N.C.L.O.S.⁴⁰ This includes issues such as the impacts of climate change on small island states, considering the crucial role of oceans as carbon sinks and their direct relevance to the climate effects experienced by these states. The establishment of C.O.S.I.S. leverages a unique provision within the I.T.L.O.S. Rules, which permits the Tribunal to issue an advisory opinion on

³⁵ See Barnes, *supra* note 9, at 184 ; see also Rocha, *supra* note 29.

³⁶ See ITLOS, *Advisory Opinion*, *supra* note 34, ¶ 55.

³⁷ See Barnes, *supra* note 9, at 187; see also Feria-Tinta, *supra* note 28, at 400.

³⁸ See Carrillo, *supra* note 32, at 241–42; see also Feria-Tinta, *supra* note 28, at 400–01.

³⁹ See Commission of Small Island States on Climate Change and International Law - Organisation - Members, C.O.S.I.S. Members, <https://www.cosis-ccil.org/members> (last visited Feb. 28, 2025).

⁴⁰ See *id.* art. 2(2).

legal matters if an international agreement related to the U.N.C.L.O.S. specifically authorises such requests.⁴¹ A request to the I.T.L.O.S. for an advisory opinion regarding the responsibilities of states under the U.N.C.L.O.S. for safeguarding the marine environment, with a particular focus on the impact of excessive GHGs. The C.O.S.I.S. submitted it in December 2022. The request seeks to resolve two key legal questions under the U.N.C.L.O.S.: one, related to the protection of the marine environment, and the other, requiring all nations to mitigate pollution that threatens the global oceans.⁴²

1.3 ADVISORY JURISDICTION OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

The Inter-Am.Ct.H.R. is a specialised Tribunal dedicated to human rights, with jurisdiction over the American Convention on Human Rights [hereinafter A.C.H.R.] and other treaties within the Inter-American framework. Under the A.C.H.R., the Inter-Am.Ct.H.R. is empowered to interpret and apply the A.C.H.R.,⁴³ adjudicate legal disputes,⁴⁴ and issue advisory opinions.⁴⁵ Article 64 of the A.C.H.R. outlines the Court's advisory role, which is extensive and includes not only regional treaties but also "other treaties" about human rights protection in the Americas. This broad authority enables the Court to draw upon interpretations from various international bodies and human rights instruments, regardless of their primary objectives or the involvement of non-Member States of the Inter-American system.⁴⁶

Unlike the I.C.J., the advisory opinions of the Inter-Am.Ct.H.R. have considerable legal impact on Member States. The Court has stated that its opinions carry "undeniable legal effects",⁴⁷ and all Member States are expected to adhere to these interpretations, even though the A.C.H.R. does not explicitly mandate their binding nature. Despite this, Canada and the United States, two major greenhouse gas emitters, have not ratified the A.C.H.R. and are therefore not bound by the Court's advisory opinions.

⁴¹ See Tigre, *supra* note 7, at 634–35.

⁴² See *id.* at 635.

⁴³ See Organization of American States, American Convention on Human Rights, Nov. 22, 1969, No. 36, 1144 U.N.T.S. 123, art. 62 (1), <https://treaties.un.org/doc/publication/unts/volume%201144/volume-1144-i-17955-english.pdf>.

⁴⁴ See *id.* at 63.

⁴⁵ See *id.* at 64.

⁴⁶ See Monica Feria-Tinta, *An Advisory Opinion on Climate Emergency and Human Rights Before the Inter-American Court of Human Rights*, QUESTIONS INT'L L., Nov. 2023, at 45, 47 (It.); see also Lena Riemer & Luca Scheid, *Leading the Way: The IACtHR's Advisory Opinion on Human Rights and Climate Change*, VERFASSUNGSBLOG (Jan. 18, 2024), <https://verfassungsblog.de/leading-the-way/> (last visited Feb. 28, 2025).

⁴⁷ IACtHR, *Advisory Opinion OC-16/99 on The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, ¶ 48, available here; Feria-Tinta, *supra* note 46, at 60.

Advisory Opinion proceedings before the Court are intended to provide the Organisation of American States [hereinafter O.A.S.] members and organs with judicial interpretations of provisions in the Convention or other human rights treaties applicable in the Americas. As outlined in Article 64, Member States can consult the Court on the interpretation of both the A.C.H.R. and other relevant treaties. The Court's jurisdiction encompasses not only regional human rights treaties but also other international agreements concerning human rights.⁴⁸ Following this, on January 9, 2023, Chile and Colombia sought clarification from the Inter-Am.Ct.H.R. on the scope of state obligations in response to the climate emergency. The request outlines the climate emergency's impacts on human rights and contains numerous questions which are mainly related to due diligence and "common but differentiated responsibilities" and aims to clarify how mitigation, adaptation, and loss and damage intersect with human rights obligations.⁴⁹

⁴⁸ See Feria-Tinta, *supra* note 46, at 47–48; see also Verena Kahl, *Warming Up: 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/> (last visited Feb. 28, 2025).

⁴⁹ See The Center for Justice and International law (CEJIL), *Chile and Colombia Join Forces to Ask a Regional Human Rights Court for Guidelines to Respond to the Climate Emergency*, (Jan. 9, 2023), <https://cejil.org/en/blog/chile-and-colombia-join-forces-to-ask-regional-human-rights-court-for-guidelines-to-respond-to-climate-emergency>.

2. THE INFLUENCE OF ADVISORY OPINIONS ON CLIMATE CHANGE RESPONSES

Although the U.N.F.C.C.C. has recognised the detrimental impacts of climate change and aims to stabilise GHGs emissions, it does not define specific responsibilities for individual countries to achieve this goal. The Kyoto Protocol, which set emission reduction targets for many countries, excluding developing nations, was unable to reach a decrease in greenhouse gas emissions from 1990 levels. The Paris Agreement, building on the lessons from the Kyoto Protocol, mandates that all countries establish their emission reduction targets in their Nationally Determined Contributions [hereinafter N.D.Cs.], tailored to their national contexts. However, the Paris Agreement faces criticism for its aspirational targets and lack of binding obligations. This ongoing issue in climate governance has led many nations, particularly those most affected by climate change, to seek advisory opinions from judicial bodies to clarify the responsibilities of states in addressing climate change.⁵⁰

When courts and tribunals issue advisory opinions, they are not tasked with resolving disputes between parties. Instead, they are requested to provide explanations on specific issues related to international law.⁵¹ In advisory proceedings, the core activity is a dialogue between the states or entities involved and the court or tribunal. This exchange shapes the interpretation of the legal norms at hand, ideally resulting from a comprehensive deliberative process. Such a process enhances the acceptance and legitimacy of advisory opinions. Advisory opinions, due to their less restrictive nature compared to contentious judgments, provide courts or tribunals with greater potential to develop the law. This flexibility is particularly valuable when interpreting U.N.C.L.O.S. in the context of climate change.⁵²

Although a commonly noted limitation of advisory opinions is their generally non-binding nature, they may carry binding implications in certain institutional or legal framework contexts. While advisory opinions differ from judgments in this respect, the practical impact of this distinction is often more theoretical than substantive.⁵³ Unlike the decisions rendered by judicial authorities in state-to-state disputes, advisory opinions do not carry binding legal force unless this is explicitly established beforehand. Despite their non-binding nature, these advisory opinions wield considerable legal impact and moral authority, “contributing to the clarification and development of

⁵⁰ See Jianping Guo et al., *The Climate Advisory Opinion: A Medicine with Side-Effects?*, MARINE POL’Y, Oct. 2023, at 1, 2 (U.K.).

⁵¹ See Tigre, *supra* note 7, at 627.

⁵² See Feria-Tinta, *supra* note 28, at 394–95.

⁵³ See *id.* at 395.

international law”.⁵⁴ While cases establish legal precedents, advisory opinions have the substantial possibility to reveal states’ obligations under international law. In contrast to binding judgments, which are specifically linked to the particular facts of a dispute, advisory opinions provide a broad, authoritative interpretation of international law that is not directly tied to specific factual scenarios. Hence, except in the case of presenting cogent reasons to deviate from the interpretation provided, it is likely to influence future decisions by the court or tribunal.⁵⁵

The rulings of regional and domestic courts can be influenced by advisory opinions, particularly in cases involving states or private entities related to climate change and loss and damage. Additionally, advisory opinions play a crucial role in raising awareness, contributing to the development of a global public consciousness about climate change as a pressing international concern. Advisory opinions can further shape and solidify normative expectations among the diverse range of public and private entities involved in climate-related initiatives.⁵⁶ Advisory opinions significantly contribute to elucidating the obligations of states outlined in treaties, such as the U.N.F.C.C.C.,⁵⁷ the Kyoto Protocol,⁵⁸ and the Paris Agreement. Furthermore, they can clarify the principles of international environmental law, including the prohibition against transboundary environmental damage, as well as environmental and human rights, such as the right to a healthy environment [hereinafter R.2.H.E.].⁵⁹

2.1 UNDER THE AUSPICES OF THE INTERNATIONAL COURT OF JUSTICE

Unlike other international courts and tribunals, the I.C.J. benefits from its universal jurisdiction, enabling it to review diverse perspectives and an extensive body of case law when addressing legal questions. This unique position allows the I.C.J. to provide valuable guidance to the global community on state responsibilities and the corresponding legal implications under international law. By the Paris Agreement, the I.C.J. may highlight that enhancing the targets specified in the N.D.Cs. is not a matter of choice (“discretion”) but rather a legal obligation (“diligence”). In other words, following

⁵⁴ International Court of Justice, Advisory Jurisdiction, INTERNATIONAL COURT OF JUSTICE, <https://www.icj-cij.org/advisory-jurisdiction> (last visited Feb. 28, 2025); *see also* Wewerinke-Singh et al., *supra* note 19, at 404; Mile, *supra* note 18, at 66; Tigre, *supra* note 7, at 627; FERIA-TINTA, *supra* note 28, at 395.

⁵⁵ *See* Tigre, *supra* note 7, at 627.

⁵⁶ *See* Wewerinke-Singh et al., *supra* note 19, at 404; *see also* Bodansky, *supra* note 15, at 692; Tigre, *supra* note 7, at 628.

⁵⁷ U.N. Framework Convention on Climate Change, May 9, 1992, https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf.

⁵⁸ U.N., Kyoto Protocol to the United Nations Framework Convention on Climate Change, (Dec. 11, 1997), <https://digitallibrary.un.org/record/250111>.

⁵⁹ *See* Mile, *supra* note 18, at 66–67.

the I.C.J.'s interpretation, international law mandates that countries must treat their N.D.Cs. objectives with seriousness and actively undertake to improve them, as stipulated by the Paris Agreement and other relevant international regulations.⁶⁰

While there is no direct engagement of the I.C.J. in addressing a case explicitly focused on climate change, there exist numerous environmental disputes adjudicated and issued with advisory opinions pertinent to the current proceedings by the I.C.J. Throughout its operation, the I.C.J. has significantly contributed to the development of international environmental law by providing advisory opinions in adjudicating contentious cases such as the *Corfu Channel*,⁶¹ the *Gabcikovo-Nagymaros*,⁶² the *Nuclear Weapons*,⁶³ and the *Pulp Mills*,⁶⁴ and the *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*.^{65,66}

In the advisory opinion related to the *Corfu Channel* case, which addressed the dispute between Albania and the United Kingdom over Albania's failure to notify the United Kingdom of mines in its waters, although this case did not specifically focus on environmental issues, the I.C.J.'s assertion that "every [s]tate's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other [s]tates"⁶⁷ laid the groundwork for the formulation of Principle 21 of the Stockholm Declaration. This principle states that, by the U.N. Charter and established principles of international law, states have the right to exploit their resources through their environmental policies. However, they also bear the responsibility to ensure their activities do not cause environmental harm to other states or areas beyond national jurisdiction.^{68,69}

⁶⁰ See Teresa F. Mayr & Jelka Mayr-Singer, *Keep the Wheels Spinning: The Contributions of Advisory Opinions of the International Court of Justice to the Development of International Law*, 76 HEIDELBERG J. INT'L L. 425, 442 (2016) (Ger.); see also Margaretha Wewerinke-Singh et al., *The Advisory Proceedings on Climate Change Before the International Court of Justice*, QUESTIONS INT'L L., Nov. 2023, at 23, 38 (It.).

⁶¹ *Corfu Channel (U.K. and N. Ir. v. Alb.)*, Judgment, I.C.J. 1949 Rep. 4, (Apr. 9), <https://www.icj-cij.org/sites/default/files/case-related/1/001-19490409-JUD-01-00-EN.pdf>.

⁶² *Gabcikovo-Nagymaros Project, Hungary/Slovakia*, I.C.J. 1997 Rep. 7, (Sept. 25), <https://www.icj-cij.org/sites/default/files/case-related/92/092-19970925-JUD-01-00-EN.pdf>.

⁶³ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 14 (July 8), <https://www.icj-cij.org/sites/default/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>.

⁶⁴ *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, I.C.J. 2010 Rep. 14, (Apr. 20), <https://www.icj-cij.org/sites/default/files/case-related/135/135-20100420-JUD-01-00-EN.pdf>.

⁶⁵ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.) and Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica)*, Judgment, 2015 I.C.J. Rep. 665, (Dec. 16), <https://www.icj-cij.org/sites/default/files/case-related/150/150-20151216-JUD-01-00-EN.pdf>.

⁶⁶ See Mile, *supra* note 18, at 67–68.

⁶⁷ *Corfu Channel, (U.K. and N. Ir. v. Alb.)*, Judgment, I.C.J. 1949 Rep. 4, at 22 (Apr. 9), <https://www.icj-cij.org/sites/default/files/case-related/1/001-19490409-JUD-01-00-EN.pdf>.

⁶⁸ See United Nations Conference on the Human Environment, Declaration of the Human Environment, June 16, 1972.

⁶⁹ See Mile, *supra* note 18, at 68.

In the *Nuclear Weapons* Advisory Opinion, the I.C.J. emphasised the significance of the environment, stating that “it is not an abstraction but represents the living space, the quality of life, and the health of human beings, including generations unborn”.⁷⁰ Moreover, the I.C.J. emphasised the necessity of incorporating environmental considerations, even in the context of military objectives. Based on the Rio Declaration⁷¹ and the Additional Protocol I to the Geneva Conventions⁷² (Articles 35 and 55), the I.C.J. imposes a general obligation on states to ensure that their actions, both within their territories and under their control, do not adversely impact the environment of other states or areas beyond their national jurisdiction. This general obligation is recognised and integrated into international environmental law.⁷³

In the *Pulp Mills* case resolving the dispute between Argentina and Uruguay over Uruguay’s alleged violation of the 1975 Statute of the River Uruguay regarding the planned construction and authorisation of two pulp mills on the river, the I.C.J. established the requirement for an environmental impact assessment [hereinafter E.I.A.], which is determined to identify potential risks that could cause adverse effects in a transboundary context, particularly on a shared resource.⁷⁴ The imposition of the obligation of due diligence aims to evaluate whether a nation has neglected its obligations to avert substantial environmental damages, including impacts on the climate system. The requirement for conducting an E.I.A. signifies a responsibility for states to anticipate and evaluate the climate-related effects of their activities.⁷⁵

In light of the *Pulp Mills* case, when resolving the *Certain Activities Carried out by Nicaragua in the Border Area* (*Costa Rica v. Nicaragua*) case, the I.C.J. reaffirmed the duty of due diligence imposed on states to undertake an E.I.A. to predict and appraise any harm potentially caused to the environment. The I.C.J. viewed and linked environmental law standards with the general law of state responsibility, stating that “to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a [s]tate must, before embarking on an activity having the potential adversely to affect the

⁷⁰ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 14, (¶) 29 (July 8), <https://www.icj-cij.org/sites/default/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>.

⁷¹ Certain Activities Carried Out by Nicaragua in the Border Area (*Costa Rica v. Nicar.*) and Construction of a Road in Costa Rica along the San Juan River (*Nicar. v. Costa Rica*), Judgment, 2015 I.C.J. Rep. 665, (Dec. 16), <https://www.icj-cij.org/sites/default/files/case-related/150/150-20151216-JUD-01-00-EN.pdf>.

⁷² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977, artt. 35 and 55, https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.34_AP-I-EN.pdf.

⁷³ See generally Legality of the Threat or Use of Nuclear Weapons, (¶) 29; see also Wewerinke-Singh et al., *supra* note 60, at 35–36; Mile, *supra* note 18, at 69.

⁷⁴ See *Pulp Mills on the River Uruguay* (*Arg. v. Uru.*), Judgment, I.C.J. 2010 Rep. 14, 204 (Apr. 20), <https://www.icj-cij.org/sites/default/files/case-related/135/135-20100420-JUD-01-00-EN.pdf>; see also Mile, *supra* note 18, at 68–69.

⁷⁵ See Wewerinke-Singh et al., *supra* note 60, at 37.

environment of another [s]tate, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry an environmental impact assessment”.⁷⁶

In the *Gabcikovo-Nagymaros Project* case, which addressed the dispute over the construction of dams and power plants on the border between Hungary and Slovakia,⁷⁷ the I.C.J. employed the concept of “sustainable development” to redress the balance between economic development and environmental protection. In particular, the I.C.J. recognised that safeguarding the environment requires careful consideration and preventive measures because once environmental damage occurs, it can be irreversible and lasting. Historically, economic development has led to significant interference with natural systems, often without adequate regard for environmental impacts. With the emergence of new environmental standards and norms, the I.C.J. advised nations to adhere to these regulations both when initiating new projects and when continuing existing ones. The I.C.J. highlighted the importance of “reconciling economic development with protection of the environment”, an underlying principle embedded in the concept of sustainable development.⁷⁸

2.2 UNDER THE AUSPICES OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

Seeking advisory opinions from the I.T.L.O.S. is more possible due to its procedural advantage. It permits extensive involvement from a diverse range of actors, encompassing states, intergovernmental organisations, and non-governmental organisations. This broad participation contrasts with the more restrictive process for seeking advisory opinions from the I.C.J., which does not engage non-governmental organisations in advisory opinions.⁷⁹

With the rise in global average temperatures, marine ecosystems worldwide have also been adversely affected. According to the I.P.C.C.’s 2019 report, the oceans have been experiencing relentless warming since 1970, absorbing over 90% of the heat in the climate system. The salinity of marine waters was altered by the melting of glaciers,

⁷⁶ Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.) and Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica), Judgment, 2015 I.C.J. Rep. 665, (¶) 104 (Dec. 16), <https://www.icj-cij.org/sites/default/files/case-related/150/150-20151216-JUD-01-00-EN.pdf>; see also Wewerinke-Singh et al., *supra* note 60, at 37.

⁷⁷ *Gabcikovo-Nagymaros Project*, Hungary/Slovakia, I.C.J. 1997 Rep. 7, (Sept. 25), <https://www.icj-cij.org/sites/default/files/case-related/92/092-19970925-JUD-01-00-EN.pdf>.

⁷⁸ See *id.* at 140; see also Mile, *supra* note 18, at 69; Wewerinke-Singh et al., *supra* note 60, at 36–37.

⁷⁹ See Feria-Tinta, *supra* note 28, at 394.

jeopardising marine habitats and detrimentally impacting aquatic life.⁸⁰ The ocean suffers from the effects of climate change through the absorption of GHGs emissions, which leads to ocean acidification and offers a potential remedy through its capacity for carbon storage.⁸¹ Therefore, in addressing climate change, it is crucial to mitigate its effects on the oceans. This underscores the need for statutory frameworks that promote climate action and the role of the law of the sea mechanisms. Given the inextricable connection between climate change and the oceans, there is a possibility to apply the U.N.C.L.O.S. to explicitly delineate obligations for states to safeguard the marine environment.⁸²

The oceans play a crucial role in emissions from human activities, serving as a “sink” to help reduce the amount of emissions in the atmosphere. However, it is arguable that the oceans cannot absorb unlimited emissions, meaning that the excess would still contribute to global warming. Despite this, the U.N.F.C.C.C. and the Paris Agreement mainly view the oceans as tools for climate regulation, rather than focusing on their protection as vital components of the environment. This limited perspective means that these agreements do not address or replace the comprehensive international laws dedicated to ocean protection, such as the U.N.C.L.O.S.⁸³

The U.N.C.L.O.S. is considered the “constitution for the oceans”,⁸⁴ acting as the core international legal framework for ocean governance and standing as one of the most universally recognised instruments.⁸⁵ The U.N.C.L.O.S. has its broad acceptance and is a comprehensive framework for safeguarding the marine environment, as well as its provision for unilateral access to international courts and tribunals for resolving marine environmental issues.⁸⁶ Despite the universal nature of the U.N.C.L.O.S., the treaty may not fully address emerging issues in maritime law. This raises questions

⁸⁰ See I.P.C.C., *The Ocean and Cryosphere in a Changing Climate* 9 (Hans-Otto Pörtner et al. eds., 2019); see also James Harrison, *Litigation Under the United Nations Convention on the Law of the Sea: Opportunities to Support and Supplement the Climate Change Regime*, in *CLIMATE CHANGE LITIGATION: GLOBAL PERSPECTIVES* 415, 415–16 (Ivana Alogna et al. eds., 2021) (Neth.).

⁸¹ See Rocha, *supra* note 29; see also Harrison, *supra* note 80, at 416–17.

⁸² See generally Rocha, *supra* note 29; see also Korey Silverman-Roati & Maxim Bönnemann, *The ITLOS Advisory Opinion on Climate Change*, VERFASSUNGSBLOG (May 22, 2024), <https://verfassungsblog.de/the-itlos-advisory-opinion-on-climate-change/> (last visited Feb. 28, 2025); Feria-Tinta, *supra* note 28, at 393.

⁸³ See generally Margaretha Wewerinke-Singh & Jorge E. Viñuales, *More than a Sink: The ITLOS Advisory Opinion on Climate Change and State Responsibility*, COLUM. L. SCH.: CLIMATE CHANGE BLOG (June 7, 2024), <https://blogs.law.columbia.edu/climatechange/2024/06/07/more-than-a-sink-the-itlos-advisory-opinion-on-climate-change-and-state-responsibility/#:~:text=By%20shifting%20the%20focus%20on,the%20marine%20environment%20%E2%80%93%20is%20in> (last visited Feb. 28, 2025).

⁸⁴ Feria-Tinta, *supra* note 28, at 393.

⁸⁵ U.N.T.C., *Status of Ratification of the United Nations Convention on the Law of the Sea 1982*, United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en (last visited Feb. 28, 2025).

⁸⁶ See Harrison, *supra* note 80, at 417–18.

about whether the U.N.C.L.O.S. provides sufficient guidance or if new regulations are necessary. Rather than amending the treaty, advisory opinions can be employed to interpret and apply the U.N.C.L.O.S. to contemporary challenges, such as those related to climate change. Legal guidance on such topics as ocean acidification, decreasing oxygen levels, and rising sea levels due to climate change can be clarified through advisory opinions.⁸⁷ Furthermore, international climate change litigation can be informed and strengthened by the factual and legal insights offered by an advisory opinion. For instance, one of the environmental threats, marine litter and plastic pollution, encompasses complex legal considerations under international law. An advisory opinion addressing these issues could facilitate the negotiation of a new global framework.⁸⁸

The distinction between treating the oceans merely as a “sink” and protecting them as an essential part of the environment has significant legal implications. The concern is that focusing on the oceans as sinks might undermine the role of the U.N.C.L.O.S. in dealing with climate change. This could occur if the U.N.F.C.C.C. or the Paris Agreement is wrongly interpreted as overriding the U.N.C.L.O.S. or leading to a “harmonious interpretation” that minimises the U.N.C.L.O.S.’s relevance.

In its recent Advisory Opinion on the 21st of May 2024, following the request from the C.O.S.I.S.,⁸⁹ the I.T.L.O.S. addressed this issue by clarifying that adherence to the Paris Agreement alone does not fulfil the requirements of the U.N.C.L.O.S. and affirmed that GHGs emissions are a form of marine pollution. The Tribunal’s opinion underscores that the marine environment should be protected for its intrinsic value, not just as a tool for climate regulation. By aligning the goals of the U.N.C.L.O.S. with other international laws, the Tribunal has enhanced the U.N.C.L.O.S.’s role as an instrument for climate protection.⁹⁰

This Advisory Opinion, rendered on the 21st of May 2024, marks a significant moment in the evolution of international law, as it is the first advisory opinion considering and addressing state responsibilities about climate change mitigation.⁹¹ The I.T.L.O.S. opinion shifts the perspective from viewing the oceans merely as “sinks” for carbon dioxide to recognising them as crucial components of the environment that require protection and preservation. It suggests that causing significant harm to the climate system and the marine environment is inconsistent with international law. This implies that such harm triggers legal consequences for two groups: states directly

⁸⁷ See Carrillo, *supra* note 32, at 238.

⁸⁸ See *id.* at 239.

⁸⁹ See Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Case No. 31, Advisory Opinion (May 21, 2024).

⁹⁰ See Wewerinke-Singh & Viñuales, *supra* note 83.

⁹¹ See Silverman-Roati & Bönnemann, *supra* note 82.

affected by climate change and its impacts, and people and individuals affected both now and in the future.⁹²

In this Advisory Opinion issued in response to the C.O.S.I.S.'s request, a notable finding by the I.T.L.O.S. is that pollution of the marine environment is attributable to the release of GHGs emissions, according to Article 1(1)(4) of the U.N.C.L.O.S. This finding is based on the I.T.L.O.S.'s interpretation of marine pollution, encompassing three criteria: (i) the presence of a substance or energy; (ii) this substance or energy must be introduced by human activity, either directly or indirectly, into the marine environment; and (iii) this introduction must lead to or likely lead to harmful effects.⁹³ The I.T.L.O.S. determined that GHGs emissions satisfy these requirements since they contribute to ocean acidification and climate change, which are detrimental consequences outlined in the definition of marine pollution.^{94,95}

The I.T.L.O.S. referred to Article 192 of the U.N.C.L.O.S., mandating that states must protect and preserve the marine environment to clarify what duty entails about climate change.⁹⁶ Relying on Article 194(1) of the U.N.C.L.O.S. and referencing the *Pulp Mills* case resolved by the I.C.J., the I.T.L.O.S. emphasised that states have a duty of due diligence to take all necessary measures to prevent, reduce, and control pollution from GHGs emissions by establishing and enforcing regulations to manage pollution effectively.⁹⁷ The I.T.L.O.S. raised the standard for due diligence, marking it as “stringent” due to the high risks associated with GHGs emissions. The standard for due diligence is influenced by factors such as scientific knowledge, relevant international standards, the risk of harm, and the urgency of the situation. While this standard may vary depending on a state's capabilities and resources, this obligation is mandatory for all states. Following the principle of “common but differentiated responsibilities”, states with greater resources are expected to do more than those with fewer resources, although even less developed states must make efforts according to their capabilities.⁹⁸ The I.T.L.O.S. additionally affirmed a due diligence obligation under Article 194 for

⁹² See Wewerinke-Singh & Viñuales, *supra* note 83.

⁹³ See Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Case No. 31, ¶ 161.

⁹⁴ See *id.* at 178.

⁹⁵ See generally Silverman-Roati & Bönnemann, *supra* note 82; Constantinos Yiallourides & Surya Deva, *A Commentary on ITLOS' Advisory Opinion on Climate Change*, BRIT. INST. INT'L & COMPAR. L. BLOG (May 24, 2024), <https://www.biicl.org/blog/77/a-commentary-on-itlos-advisory-opinion-on-climate-change?cookieset=1&ts=1721470255> (last visited Feb. 28, 2025) (U.K.).

⁹⁶ See Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Case No. 31, ¶¶ 184, 237, 299, and 321.

⁹⁷ See Yiallourides & Deva, *supra* note 95, at 235.

⁹⁸ See Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Case No. 31, ¶¶ 239–43; see also Silverman-Roati & Bönnemann, *supra* note 82; Yiallourides & Deva, *supra* note 95.

States, encompassing specific obligations detailed in Sections 5 and 6 of Part XII (Articles 207 to 222), which address land-based sources of pollution and the adoption and enforcement of laws to prevent atmospheric pollution and mitigate land-based activities that impact the oceans.⁹⁹

The Advisory Opinion rendered by the I.T.L.O.S. recently marks a significant advancement toward holding states accountable for their roles in climate change and its impacts. By defining the scope and requirements of states' climate obligations under the U.N.C.L.O.S., including a rigorous standard of due diligence, the opinion sets a framework for evaluating state behaviour over time. This framework facilitates international accountability for actions and omissions leading to climate change and environmental degradation.¹⁰⁰

2.3 UNDER THE AUSPICES OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

The Inter-Am.Ct.H.R.'s work has substantially contributed to the historical development of international law. Within the initial years of operation, following its establishment in 1979, the Inter-Am.Ct.H.R. issued eight advisory opinions without resolving any contentious cases.¹⁰¹ While the use of advisory opinions diminished in the mid-1980s, their importance was revitalised in 2017 with the Advisory Opinion on the Environment and Human Rights [hereinafter *Advisory Opinion OC-23/17*],¹⁰² which acknowledged extraterritorial jurisdiction for transboundary environmental damage and affirmed the R.2.H.E., and established state responsibility for environmental harm.¹⁰³

The *Advisory Opinion 23/17*¹⁰⁴ issued by the Inter-Am.Ct.H.R. marks a pioneering and highly impactful contribution to environmental law, surpassing any previous rulings by international courts on environmental matters.¹⁰⁵ Before the advent of the *Advisory Opinion 23/17*, environmental rights were unknown as they were absent in the 1948 Universal Declaration of Human Rights.¹⁰⁶ Nevertheless, the Inter-Am.Ct.H.R. has

⁹⁹ See Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Case No. 31, ¶ 190.

¹⁰⁰ See Wewerinke-Singh & Viñuales, *supra* note 83.

¹⁰¹ See Riemer & Scheid, *supra* note 46.

¹⁰² See The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23 (Nov. 15, 2017).

¹⁰³ See Riemer & Scheid, *supra* note 46.

¹⁰⁴ The Environment and Human Rights, Advisory Opinion OC-23/17.

¹⁰⁵ See Monica Feria-Tinta, *Climate Change as a Human Rights Issue: Litigating Climate Change in the Inter-American System of Human Rights and the United Nations Human Rights Committee*, in CLIMATE CHANGE LITIGATION: GLOBAL PERSPECTIVES 310, 319 (Ivano Alogna et al. eds., 2021) (Neth.).

¹⁰⁶

integrated environmental law into the realm of human rights law in the American region through a progressive and systematic interpretation of the American Convention. This marks the first instance where an international tribunal has thoroughly explored the relationship between the environment and human rights, including both substantive and procedural aspects. The Inter-Am.Ct.H.R.'s analysis is meticulously reasoned and well-supported, offering a valuable foundation for future legal arguments and jurisprudential development.¹⁰⁷

In the *Advisory Opinion 23/17*, the acknowledgement of R.2.H.E. as “a fundamental right for the existence of humanity” is intrinsically connected to the right to life.¹⁰⁸ The Court also asserted that “environmental degradation and the negative impacts of climate change undermine the effective enjoyment of human rights”, with the right to life being particularly affected.¹⁰⁹ The Inter-Am.Ct.H.R. regards the “human right to a healthy environment” as having both collective and individual dimensions. This right is deemed universal by nature, owing to both current and future generations, and affects individuals directly or indirectly due to its ties with other personal rights, such as the right to health, personal integrity, and life.¹¹⁰ The Court acknowledges the inherent interconnection and inseparability between human rights and environmental protection, which leads to obligations for states, and has been recognised in international legal instruments such as the International Covenant on Civil and Political Rights.¹¹¹

Unlike the I.C.J., the advisory opinions of the Inter-Am.Ct.H.R. have considerable legal impact on Member States. The Court has stated that its opinions carry “undeniable legal effects”¹¹², and all Member States are expected to adhere to these interpretations. However, the A.C.H.R. does not explicitly mandate their binding nature. Despite this, Canada and the United States are two major emitters of GHGs. Emitters have not participated in the A.C.H.R. and thus, are not subject to the Court's advisory opinions.¹¹³

See generally John H. Knox, Rep. of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, U.N. Doc. A/HRC/22/43, at 1, 7 (Dec. 30, 2013); see also Feria-Tinta, *supra* note 105, at 319.

¹⁰⁷ See Feria-Tinta, *supra* note 105, at 319–20.

¹⁰⁸ See *The Environment and Human Rights*, Advisory Opinion OC-23/17, ¶ 59.

¹⁰⁹ *Id.* ¶ 47.

¹¹⁰ See *id.* ¶ 59.

¹¹¹ See Feria-Tinta, *supra* note 105, at 322–23.

¹¹² IACTHR, *Advisory Opinion OC-16/99 on The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, ¶ 48, available here; Monica Feria-Tinta, *An Advisory Opinion on Climate Emergency and Human Rights Before the Inter-American Court of Human Rights*, *QUESTIONS OF INTERNATIONAL LAW*, 60 (2023).

¹¹³ See Riemer & Scheid, *supra* note 46.

In line with the principles of the 1972 Stockholm Declaration and the 1992 Rio Declaration, the *Advisory Opinion 23/17* incorporates key concepts from these early non-binding documents – such as preventing environmental harm, the precautionary principle, procedural safeguards, and the obligation to cooperate – as binding under the A.C.H.R. It also specifies several procedural rights, including the right to access information, the right to public participation, and the right to access justice which are enshrined in the 1998 Aarhus Convention.¹¹⁴ The influence of *Advisory Opinion 23/17* extends beyond the Americas, potentially shaping how other international courts, such as the European Court of Human Rights, address transboundary environmental challenges. Its treatment of the right to life is reflected in General Comment 36 by the Human Rights Committee [hereinafter H.R.C.].¹¹⁵ The explanation of the *Advisory Opinion 23/17* could also impact debates on air pollution, chemical hazards, climate change, and the regulation of multinational corporations. Overall, this *Advisory Opinion 23/17* presents a significant development in both Inter-American jurisprudence and international human rights law, offering a more immediate legal tool compared to the often-lengthy resolution times typical in the Inter-American System of Human Rights.¹¹⁶

¹¹⁴ U.N. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, U.N.T.C. vol. 2161.

¹¹⁵ U.N., Int'l Covenant on Civil and Political Rights, H.R.C., General Comment No. 36 - Art. 6: Right to Life (Sept. 3, 2019).

¹¹⁶ See Feria-Tinta, *supra* note 105, at 326–27.

3. REFLECTIONS AND IMPLICATIONS FOR THE DEVELOPMENT OF ADVISORY OPINIONS

Interpretation of various international laws, particularly climate treaties, may be necessary in advisory proceedings on climate change mitigation or reparations. These proceedings could address the legal status of N.D.Cs. and the expectation that each party's new N.D.C. reflects its highest possible ambition and represents a progression beyond previous N.D.Cs. Additionally, they might assess the legal significance of the mitigation objectives established by the Paris Agreement and the implications of the principle of "common but differentiated responsibilities". Thus, an advisory opinion could clarify vague obligations. However, courts would face considerable challenges in interpreting provisions like the principle of common but differentiated responsibilities, which often indicate that countries agree to disagree.¹¹⁷

The I.T.L.O.S. has limited case law on advisory proceedings. The only situation where the issue of whether the full Tribunal, rather than the S.D.C., can issue advisory opinions was addressed was in the *S.R.F.C. Advisory Opinion*. As a result, it remains to be seen whether it would be possible and sufficient for an agreement to solely identify the question for an advisory opinion without further details, if referencing the literal interpretation of Article 138 of the Rules. Additionally, the extent to which the Tribunal might limit its consideration to the jurisdictional scope of the requesting states and how it might address the obligations of states causing transboundary harm, such as emissions, is still vague.¹¹⁸ The appropriateness of using advisory proceedings to interpret or develop the law of the sea about climate change is a topic of considerable debate. Some critics argue that such proceedings undermine the judicial functions of courts and tribunals, particularly when addressing politically sensitive issues. There are concerns that states might exploit the advisory process for strategic gains, potentially leading to biased or unfair outcomes, resulting in the potential misuse of advisory opinions.¹¹⁹ In the *S.R.F.C. Advisory Opinion*, Article 21 of the I.T.L.O.S.'s Statute and Article 138(1) of its Rules are the legal bases for its jurisdiction. The I.T.L.O.S. clarified that when an agreement grants advisory jurisdiction, the Tribunal can address all matters specified in that agreement. This clarification, however, could be problematic as it might lead to an expansion of the I.T.L.O.S.'s advisory jurisdiction, enabling the

¹¹⁷ See Benoit Mayer, *International Advisory Proceedings on Climate Change*, 44 MICH. J. INT'L L. 41, 53 (2023).

¹¹⁸ See Feria-Tinta, *supra* note 28, at 403; see also 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, 209 (2023) (U.K.).

¹¹⁹ See Guo et al., *supra* note 50, at 3.

Tribunal to issue opinions on a broad range of issues if the agreement provides for it and certain conditions are met.¹²⁰

In addition, in the *S.R.F.C. Advisory Opinion*, Judge Cot has highlighted the possibility that states could form entities specifically to pose questions to the Tribunal, thereby seeking an advantage over others.¹²¹ The I.T.L.O.S. has been scrutinised for its advisory jurisdiction, with concerns that the legitimacy of advisory requests might be questioned if the requesting body is not adequately representative or if the questions are perceived as strategically motivated. The validity and applicability of advisory opinions hinge on the legitimacy of the requesting body and the relevance of the issues raised.¹²² This potential broadening of advisory jurisdiction raises concerns. According to Judge Cot, the I.T.L.O.S.'s interpretation is flawed and contrary to the Vienna Convention on the Law of Treaties.¹²³ The expansive application of the I.T.L.O.S.'s advisory jurisdiction could lead to significant consequences, potentially opening the door to misuse by states seeking to exploit the process and circumvent negotiations. The I.T.L.O.S. might also experience an overload of cases, straining its resources.¹²⁴

Concerns about legitimacy primarily focus on the identity of the requesting entity and the appropriateness of its request. The S.R.F.C., a well-established regional organisation, sought legal advice to assist in fulfilling its mandate. This request was framed to fit within the Tribunal's jurisdiction. The I.T.L.O.S., following the precedent set by the I.C.J., interpreted Article 21 of its Statute broadly, accepting that a request merely needed a "sufficient connection" to the relevant agreements. In a similar vein, the C.O.S.I.S. is also entitled to seek advisory opinions, as this function is integral to its role in promoting and evolving international law concerning climate change and marine environmental protection. The C.O.S.I.S. is responsible for supporting small island states and advancing legal frameworks related to climate change, including through international judicial interpretations. The legitimacy of requesting an advisory opinion on climate change to assist the C.O.S.I.S.'s mission, as opposed to serving political objectives, remains a separate issue. The Tribunal's method for evaluating this legitimacy is not fully clear, as it is claimed that the validity of a request is based on the authority granted by the relevant agreement rather than the nature or institutional

¹²⁰ See *id.*

¹²¹ See Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Declaration of Judge Cot (2015).

¹²² See Barnes, *supra* note 9, at 200–02; 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, 218–19 (2023) (U.K.).

¹²³ See Request for an Advisory Opinion, Declaration of Judge Cot, ¶ 3.

¹²⁴ See Guo et al., *supra* note 50, at 3.

characteristics of the requesting body.¹²⁵ Furthermore, even though Article 138(2) of the I.T.L.O.S.'s Rules permits any international body authorised by the relevant agreement to request an advisory opinion, the simplicity of establishing such bodies raises concerns about their legitimacy and their representation of global interests. C.O.S.I.S. was explicitly established to request advisory opinions from the I.T.L.O.S. on climate change matters, yet it has not previously engaged in climate discussions. This situation casts doubt on whether C.O.S.I.S. is the most appropriate entity for this role.¹²⁶

In addition, Article 138(2) of the I.T.L.O.S.'s Rules could be interpreted in two ways. First, a body explicitly authorised under the relevant agreement requests an advisory opinion. This condition applies when an international organisation's founding treaty designates a specific entity to seek an advisory opinion, as illustrated in the *S.R.F.C. Advisory Opinion*, where the requesting body needed prior identification and authorisation. Second, the request must align with the provisions of the agreement, meaning that any entity – whether a state or an organisation – expressly recognised in the agreement may submit a request. Furthermore, the agreement may establish procedural conditions, such as requiring prior consultations between States or within an organisation, before the advisory jurisdiction can be invoked.¹²⁷ Scholarly discussions continue whether states may directly initiate advisory proceedings. Some academics maintain that a request must be submitted through a properly authorised body, thereby preventing individual states or groups of states from initiating proceedings independently.

In contrast, others argue that neither Article 21 of the I.T.L.O.S. Statute nor Article 138 of the Rules explicitly forbids states from concluding an international agreement to request an advisory opinion. The issue of legal personality in I.T.L.O.S. advisory jurisdiction remains unresolved, leaving open the possibility for participation by states, regional organisations, and international organisations. This expanded range of actors could enhance judicial dialogue and contribute to the development of the U.N.C.L.O.S. legal framework. However, the question of legal personality must be examined in practice and carefully evaluated by the Tribunal to prevent potential misuse that could undermine the fundamental principle of consent to adjudication.¹²⁸

The international legal system is founded on state consensus, grounded in principles of state sovereignty, equality, and independence. Without its express consent, a state is not obligated to assume any rights and obligations set out in a treaty or by an

¹²⁵ See Roland Holst, *supra* note 122, at 219.

¹²⁶ See Guo et al., *supra* note 50, at 3.

¹²⁷ See Carrillo, *supra* note 32, at 246.

¹²⁸ See *id.* at 247.

institution acting as an intermediary. In other words, the rights and duties of states cannot be dictated by others in the absence of the consent of those states.¹²⁹ The requirement for state consent could present a challenge to judicial authorities, such as the I.T.L.O.S. and regional courts like the Inter-Am.Ct.H.R.¹³⁰ Ensuring requests for advisory opinions genuinely reflect global interests rather than serving the agenda of a specific group. Climate change is a concern for the entire international community, not just small island countries. Since the obligation to protect the marine environment is owed universally (*erga omnes*), an important question arises whether the consent of other affected states is required when exercising the I.T.L.O.S.'s jurisdiction.¹³¹ Historically, the I.T.L.O.S. has operated without requiring the consent of affected states, as observed in the *S.R.F.C. Advisory Opinion*, in which the I.T.L.O.S. has maintained that the consent of states not parties to the agreement authorizing S.R.F.C. to request the advisory opinion is irrelevant for advisory opinions since these opinions are not legally binding.

Nevertheless, the I.C.J. has observed that although the consent of interested states is not essential for establishing the court's jurisdiction, it becomes significant when evaluating whether issuing an opinion is appropriate. This is because, despite being non-binding, an advisory opinion can have legal implications by affecting how states conduct themselves.¹³² To determine its competence to address a request, the court needs to ascertain whether it has jurisdiction over a sufficient number of relevant states and obtain express consent from those concerned states. Without such consent, the court cannot issue an advisory opinion. In particular, the Inter-Am.Ct.H.R. has assertively narrowed its interpretation of human rights standards to issues that directly pertain to the protection of human rights within Member States of the inter-American system. It has also refrained from exercising advisory jurisdiction on matters that primarily involve the international obligations of non-American states. Although Chile and Colombia requested an advisory opinion concerning the rights and obligations of American states, there is ambiguity regarding whether the Inter-Am.Ct.H.R. would consider climate change issues appropriate for its regional framework. The Court could experience difficulties if it were to issue an opinion that specifies climate action duties or contributions of American states to global climate efforts without the involvement or consent of non-American states.¹³³

¹²⁹ See Mayer, *supra* note 117, at 81–82.

¹³⁰ See *id.* at 84–85.

¹³¹ See Guo et al., *supra* note 50, at 3.

¹³² See Barnes, *supra* note 9, at 198–200; Guo et al., *supra* note 50, at 3–4; Mayer, *supra* note 117, at 85–86.

¹³³ See Mayer, *supra* note 117, at 84–85.

Climate change is not only a legal issue but also a highly political one. Although the I.C.J. has dismissed the arguments suggesting that jurisdiction should be denied based on a state's "motives", emphasising that such factors are not legally relevant,¹³⁴ advisory opinions addressing climate change encompass both aspects of the absence of consent from affected states and the substantial political implications.¹³⁵ An advisory opinion on climate change is particularly complex due to the combination of the lack of consent and the political nature of the issue. Advisory opinions are not considered judgments in contentious cases, as they do not involve specific parties and are not legally binding on states. Although such opinions are not legally binding, they carry significant weight because of their authoritative status, and states and other stakeholders often use them in political and legal ways to support their positions.¹³⁶ States' responses to advisory opinions are determined on a case-by-case basis, usually reflecting their alignment with the opinion's conclusions. When an advisory opinion conflicts with its position, states are likely to emphasise its non-binding nature. For instance, the I.C.J.'s *Wall* Advisory Opinion¹³⁷ remains unimplemented nearly two decades after its issuance. Similarly, the U.K. has not relinquished control over the territory of the Chagos Archipelago despite the passage of almost five years since the issuance of the Chagos Archipelago Advisory Opinion.¹³⁸ Critics argue that the advisory opinion mechanism enables states to circumvent the requirement of consent in contentious legal disputes.¹³⁹ Past instances of state non-compliance suggest that nations tend not to effectively respond to advisory opinions on climate change, especially if these opinions contradict their interests. While climate change is a global issue, most governments do not acknowledge a duty to prevent environmental harm beyond their borders.¹⁴⁰

For major GHGs emitters, the absence of consent could be crucial, as the opinion might influence the legality of their climate policies. Some countries could use the advisory opinion to gain an upper hand in negotiations or to pursue litigation over responsibilities. This raises key questions: Could such an opinion compel major emitters

¹³⁴ See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 2010 I.C.J. 403 (July 22).

¹³⁵ See Guo et al., *supra* note 50, at 4.

¹³⁶ See Eran Stoecker, *How Do States React to Advisory Opinions? Rejection, Implementation, and What Lies in Between*, 117 AM. J. INT'L L. UNBOUND 292, 292-293, 295 (2023).

¹³⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (July 9), <https://www.icj-cij.org/sites/default/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>.

¹³⁸ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 2019 I.C.J. 95, (Feb. 25).

¹³⁹ See Stoecker, *supra* note 136, at 296; Philippa Webb, *The United Kingdom and the Chagos Archipelago Advisory Opinion: Engagement and Resistance*, MELB. J. INT'L L., 2021, at 1, 20-21 (Austl.).

¹⁴⁰ See Christopher Campbell-Durufle & Sumudu Anopama Atapattu, *The Inter-American Court's Environment and Human Rights Advisory Opinion: Implications for International Climate Law*, 8 CLIMATE L. 321, 326 (2018).

to reduce GHGs? Alternatively, can it provide meaningful solutions to the environmental damage caused by climate change?¹⁴¹ Additionally, considering that major emitters, often developed countries, have a history of non-compliance with international rulings, the advisory opinion might fail to effectively address climate issues or enforce emission reductions.¹⁴² For instance, if the I.T.L.O.S. issues an advisory opinion on climate change without the consent of affected states, it could set a precedent that encourages other countries to seek advisory opinions on politically charged issues they cannot resolve through diplomatic means. This could worsen problems related to jurisdictional overreach and the potential for judicial exploitation.¹⁴³ Furthermore, tribunals should exercise caution when issuing advisory opinions to avoid creating obligations for parties that have not been agreed upon. Consequently, the courts' examination should be confined to agreements with broad or inclusive state participation, such as multilateral or regional treaties. Although consent is critical in contentious cases, the I.C.J. has also shown similar caution in its advisory functions. Courts should refrain from issuing advisory opinions that could be treated as resolving issues related to ongoing disputes between states. Instead, advisory questions should be carefully designed to focus on the matters governed by the conventions under which the courts or tribunals operate, such as the U.N.C.L.O.S. in case of referring to the I.T.L.O.S., rather than issues that fall under other legal frameworks, like the U.N.F.C.C.C.¹⁴⁴

¹⁴¹ See Guo et al., *supra* note 50, at 4.

¹⁴² See *id.*

¹⁴³ See *id.*

¹⁴⁴ See Barnes, *supra* note 9, at 209.

4. CONCLUSION

As emphasised by Phillippe Sands, the judicial authorities play an important role in raising global awareness,¹⁴⁵ particularly in the ongoing climate crisis. Requests for advisory opinions on climate change have been submitted to judicial bodies like I.T.O.S., the Inter-Am.Ct.H.R., and the I.C.J., highlighting the essential function these institutions serve in the development of international law and the clarification of state responsibilities, especially in areas where environmental and climate change regulations are often broadly defined and lack specificity.

These advisory opinions lay the groundwork for the relationship between environmental rights and human rights. Although no advisory opinion can fully resolve the climate crisis, and while such opinions are not legally binding, they create a foundational framework that can guide future decisions by other courts and tribunals. Additionally, they encourage ongoing academic and legal discourse at the global, regional, and national levels. Despite their non-binding nature, advisory opinions have an undeniable influence on the development of international law, particularly in relation to jurisdictional rules and the due diligence obligations of states to protect the environment in the context of climate change. However, judicial authorities face significant challenges in their role and jurisdiction, particularly in determining whether they should confine themselves to the interpretation and application of existing laws, or expand their role in developing legal norms and shaping global public consciousness in the context of climate change. They should specify and navigate the role they plan to assume in addressing climate change.¹⁴⁶ Moreover, as the international legal system is fundamentally based on state consensus, an advisory opinion issued by a judicial authority cannot define rights or impose any obligations on states without their express consent. This limitation is evident in the advisory proceedings of the I.T.L.O.S. and regional human rights courts like the Inter-Am.Ct.H.R.

Nevertheless, advisory opinions are considered valuable legal references. They establish a framework for evaluating state actions over time and for holding states accountable for actions or omissions that contribute to climate change and environmental degradation. As for climate action intensifies, these advisory opinions represent valuable contributions from judicial authorities in meeting the high expectations of the international community for establishing and reforming legal and

¹⁴⁵ Phillippe Sands, *Climate Change and the Rule of Law: Adjudicating the Future in International Law*, 28 J. ENV'T L. 19, 26 (2016) (U.K.).

¹⁴⁶ See *id.* at 25–26; see also Guo et al., *supra* note 50, at 6.

policy frameworks in response to the climate crisis. Their advisory opinions will continue to inspire improvements in climate-related legal frameworks.

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