CHAPTER 11

The Downstream Impact of Advisory Opinions in the Case Law of Other International Bodies and Domestic Litigation

Lea Main-Klingst and Sophie Marjanac***

Abstract

This chapter discusses the downstream impact of advisory opinions in litigation around the world, first by considering both the legal and political impact of previous advisory opinions. It then looks at the overlapping themes in the three advisory opinions on climate change, before analysing the potential impact of these climate advisory opinions on international and regional bodies, as well as domestic courts. Here it considers the differences in monist and dualist systems. Finally, in demonstrating the impact and utility of advisory opinions, the chapter takes the findings in ITLOS' 2024 climate advisory opinion on environmental impact assessments and demonstrates how these may impact global law and policy in respect of GHG emissions, specifically by taking a look at recent case law from around the world.

Keywords

impact of advisory opinions – climate litigation themes – cross-fertilisation – monist – dualist – ITLOS and EIAs

1 Introduction

Late 2022 and early 2023 marked a significant time for the development of international law in relation to the climate crisis. In December 2022, the

* ClientEarth, LMain-Klingst@clientearth.org, <https://orcid.org/0009-0005-8370-5843>. The opinions expressed in this publication are those of the author. They do not purport to reflect the opinions or views of ClientEarth. Please note that the author was part of the representation in some of the international cases discussed in this article.

** Polluter Pays Project, sophie@polluterpaysproject.org.

 | DOI:10.1163/9789004730618_012

Commission of Small Island States on International Law and Climate Change (COSIS) submitted a request for an advisory opinion on the Law of the Sea and climate change to the International Tribunal for the Law of the Seas (ITLOS). In January 2023, Colombia and Chile submitted a request for an advisory opinion on human rights and the climate emergency to the Inter-American Court of Human Rights (IACtHR). Finally, in March 2023 the UN General Assembly (UNGA) passed a resolution by consensus, asking the International Court of Justice (ICJ) to opine on State obligations to prevent and provide redress for climate harms.[1]

While each of these requests was initiated in a unique manner (the first, by a collective of States who formed a new inter-governmental organisation with the express authority to request advisory opinions; the second at the request of two State signatories to a regional human rights treaty; and the third after a global campaign for a UNGA Resolution, led by Pacific university students and the Republic of Vanuatu), each took place against a backdrop of growing calls on governments to effectively respond to the climate crisis in light of perceived (diplomatic) failures. These movements grew despite the conclusion of the 2015 Paris Agreement and the corresponding annual Conferences of the Parties (COPs) to the United Nations Framework Convention on Climate Change (UNFCCC) rapidly becoming the most well attended UN conferences each year.[2] The political support for these advisory opinions from the UNGA and initiating States shows that there is an acknowledgement among a majority of States, particularly small island and other climate vulnerable States, that general international law (with relevant human rights and marine protection obligations) has an important role to play in responding to what the UN Secretary General has called 'an existential threat to the world as we know it.'[3]

With this almost simultaneous emergence of three climate advisory opinions, discussion has arisen around their scope, effect and application, especially

1 For an overview of the three requests, see Maria Antonia Tigre, 'It Is (Finally) Time for and Advisory Opinion on Climate Change: Challenges and Opportunities on a Trio of Initiatives' (2024) 17 *Charleston Law Review* 623.

2 UNFCCC, 'Observer organizations at COP 28' <https://unfccc.int/process-and-meetings/parties-non-party-stakeholders/non-party-stakeholders/overview/observer-organizations/observer-organizations-at-cop-28#COP-28-Notifications-to-observers> accessed 13 August 2024.

3 United Nations, 'Climate Crisis Past Point of No Return, Secretary General Says, Listing Global Threats at General Assembly Consultation on 'Our Common Agenda' Report' (*United Nations*, 10 March 2022) <https://press.un.org/en/2022/sgsm21173.doc.htm> accessed 13 August 2024.

as advisory opinions by the ICJ and ITLOS do not have legally binding force unless expressly provided for. Nonetheless, their relevance and importance are widely acknowledged. Given the unique nature of climate change as a universal challenge and 'common concern of mankind,'[4] these advisory opinions may prove to be an important tool in advancing global climate action.

The ITLOS delivered the first of the three climate advisory opinions on the obligations of the States on 21 May 2024, which, among other things, emphasises the central role of emissions reductions as part of the State obligation to protect and preserve the marine environment. From this ground-breaking finding alone, it can be seen that this advisory opinion, and the two still to follow, will have legal implications across the globe, including through influence, interpretation and application in other courts at national, regional, and international level. These effects are likely to be context-specific, although we attempt to outline some of those possible impacts in this Chapter.

Due to climate change being of a quintessentially international character and its intersection with and implications for other legal regimes, in particular, those protecting human rights, as well as the contemporaneous nature of the three advisory opinions, their reach and influence is likely to be greater than previous advisory opinions. This holds particularly true, as the law has, in the past decade, just started to grapple with the implications of climate change for existing legal frameworks, with a particularly high degree of cross-pollination and influence across jurisdictions. These three international courts are being given, and in the case of the ITLOS have made use of, an opportunity to offer the legal clarity necessary to break the political deadlock and to allow courts and decision-makers around the world to start to draw on a cohesive body of norms to adjudicate future disputes as between States and the individuals under their protection, as well as, crucially, to elucidate the legal consequences/obligations vis-a-vis those States who may well soon face devastating losses, or even disappear beneath the waves. As the impacts of climate change worsen, international, national, and regional courts, decision-makers, States, and individuals around the world will look to these advisory opinions for guidance on a range of emerging issues. And finally, it is notable that despite some populist backlash against international institutions, international courts and tribunals have been experiencing an uptick in requests for advisory opinions and dispute settlement, underlining that they remain the seminal interpretants of international norms. As this chapter suggests, the impact of these advisory

4 United Nations Framework Convention on Climate Change (adopted 9 May 1992, entry into force 21 March 1994) 1771 UNTS 107, Preamble (UNFCCC).

opinions will therefore extend far beyond the limits of their 'enforceability' or 'binding character' and will be analysed, relied upon, cited and no doubt both celebrated and challenged around the world for years to come.

2 Preliminary Remarks on Advisory Opinions

As explained by Galvão Teles and Guerreiro Teixeira in Chapter 2, an advisory opinion (AO) is a consultative process resulting in a legal pronouncement that expounds the law and is not the settlement of a dispute. In relation to the three advisory opinions on climate change, judicial decision-makers have been asked to clarify what obligations arise for States under different international legal frameworks, customary law and general principles of law – all predating broad awareness of and international agreement to act on climate change – and therefore not explicitly providing for considerations of climate change.

The terminology of 'not legally binding' is frequently used in relation to advisory opinions, including by those wishing to undermine their importance. It is true that as a matter of law, advisory opinions by the ICJ and ITLOS are not legally binding. Nonetheless, such advisory opinions are authoritative statements on the law in question, contributing to the development and concretisation of (general) international and customary law and thereby play an essential role in shaping and advancing the international legal order. They carry significant normative force, with some authors suggesting that advisory opinions formulate 'shared or community expectations.'[5] The legal clarity provided through advisory opinions must also be understood as a contribution towards preventing future disputes.[6] In contrast, the IACtHR has clarified that, in applying the American Convention on Human Rights (ACHR), domestic judges and courts have to 'take into account not only the treaty, but also the interpretation thereof made by the [IACtHR], which is the ultimate interpreter of the [ACHR],'[7] as '[b]oth the non-contentious and the contentious

5 Karin Oellers-Frahm, 'Lawmaking Through Advisory Opinions?' (2011) 12(5) *German LJ* 1033, 1055.

6 Laurence Boisson de Chazournes, 'Advisory Opinions and the Furtherance of the Common Interest of Mankind', in Chazournes, Romano & Mackenzie (eds), *International Organizations and International Dispute Settlement – Trends and Prospects* (Transnational Publishers 2002).

7 *Almonacid-Arellano et al v Chile* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 154 (26 September 2006) §124.

jurisdiction undeniably share the same goal of the Inter-American human rights system,'[8] this being the protection of fundamental rights.[9]

Advisory opinion requests are phrased as questions, emphasising the role of the court in clarifying and interpreting issues of law and frequently also seek clarification on the 'legal consequences' of acts, omissions or violations, as in the current climate change advisory opinion pending before the ICJ.

2.1 *Legal and Political Impact of Previous Advisory Opinions*

Against this background, it is worth looking at the legal and political impacts of previous advisory opinions and the insights these might offer. As has been shown in previous chapters, ICJ advisory opinions have provided conclusive statements on customary international law, interpreted and clarified treaty provisions, made pronouncements on the law in the absence of a generally agreed rule,[10] and were also essential to furthering and supporting public discourse.

For example, the ICJ's *Nuclear Weapons Advisory Opinion* influenced subsequent treaty discussions on the interpretation of the Nuclear Non-Proliferation Treaty.[11] It also played a role in the public discourse around campaigns to ban the use of nuclear weapons and the development of international environmental law principles. This language of non-proliferation has since been mirrored in the Fossil Fuel Non-Proliferation Treaty Initiative, which seeks to create a negotiating mandate for a treaty aimed at halting the expansion of fossil fuels, ensuring an equitable phase-out and a just energy transition.[12]

Advisory opinions of the ICJ have also led to the creation of new UN bodies, as a means to give effect to the opinion and act as a supervisory body,[13] and

8 *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples*, Advisory Opinion OC-24/17, Inter-American Court of Human Rights Series A No 24 (24 November 2017) §26.

9 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 – A Sabin Center Blog*, 17 February 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/> accessed 13 August 2024>.

10 *Reservations to the Convention on Genocide* (Advisory Opinion, 28 May 1951) ICJ Rep 15.

11 United Nations Office for Disarmament Affairs, 'Treaty on the Non-Proliferation of Nuclear Weapons (NPT)' <https://disarmament.unoda.org/wmd/nuclear/npt/> accessed 13 August 2024.

12 Fossil Fuel Treaty < https://fossilfueltreaty.org/> accessed 14 March 2024.

13 Christof Heyns & Magnus Killander, 'South West Africa/Namibia (Advisory Opinions and Judgments)', *Max Planck Encyclopaedia of International Law* (March 2007) <https://opil-ouplaw-com.peacepalace.idm.oclc.org/display/10.1093/law:epil/9780199231690/law-9780199231690-e209> accessed 13 August 2024; *Legal Consequences for States of the*

have spelled out guidance for UN member States and the UNGA on the implementation of the advisory opinions. In situations of non-compliance, UNGA resolutions that reinforced the findings of ICJ opinions have been adopted and frequently called on UN Member States 'to comply with their legal obligations as mentioned in the advisory opinion.'[14]

ICJ advisory opinions have also guided action at the EU level. In at least two decisions, the Court of Justice of the European Union (CJEU) accepted and relied on the ICJ's determinations and findings made in advisory opinions, which necessarily informed subsequent EU action.[15]

Important considerations and determinations on the effect and role of advisory opinions can also be found in the jurisprudence of ITLOS. In a contentious case before a Special Chamber of ITLOS, the Chamber was called upon to determine the legal effect of the previous ICJ advisory opinion on the Chagos Archipelago.[16] The legal status of the archipelago had been at the centre of these advisory opinion proceedings,[17] where the ICJ had determined that the decolonisation process of Mauritius had not been lawfully completed; that the continued presence and administration of the UK of the archipelago was therefore unlawful and had to be brought to an end.

In the subsequent maritime delimitation proceedings before the ITLOS Special Chamber, the Maldives raised preliminary objections submitting that the United Kingdom was an indispensable third party to these proceedings, as, according to the Maldives, a territorial sovereignty dispute existed between the UK and Mauritius over the Chagos Archipelago, in respect to which Mauritius now sought to delimit its maritime entitlements. Mauritius rebutted that the

---

Continued Presence of South Africa in Namibia (*South West Africa*) *notwithstanding Security Council Resolution 276* (*1970*) (Advisory Opinion, 21 June 1971) ICJ Rep 16.

14 See for example UNGA Res No ES-10/15, which acknowledged the advisory opinion, 'demanded' that Israel 'comply with its obligations as mentioned in the advisory opinion' and called on UN Member States 'to comply with their legal obligations as mentioned in the advisory opinion.' UNGA Res No ES-10/15 (10 July 2004) UN Doc A/RES/ES-10/15 ('Advisory Opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, including in and around East Jerusalem').

15 Case C-104/16P *Council of the European Union v Front Polisario* [2016] ECLI:EU:C:2016:973, §§88–89; Case C-363/18 *Organisation juive européenne and Vignoble Psagot Ltd v Ministre de l'Economie et des Finances* [2019] OJ C10/13.

16 *Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean* (*Mauritius v Maldives*) (*Preliminary Objections*) (Judgment, 28 January 2021) ITLOS Case No 28, §236.

17 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in* 1965 (Advisory Opinion) [2019] ICJ Rep 95.

findings in the ICJ's advisory opinion disposed of the issue of sovereignty, 'the conclusions of which carry legal consequences for all UN Member States and international institutions.'[18]

In its determination, the Special Chamber found that: 'judicial determinations made in advisory opinions carry no less weight and authority than those in judgments because they are made with the same rigour and scrutiny by the "principal judicial organ" of the United Nations with competence in matters of international law.'[19] The Special Chamber took note of rulings of the CJEU (as mentioned above), which, while not considering an advisory opinion by the ICJ to be binding, attached 'due importance' to its legal and factual findings.[20] The Special Chamber adopted the view that determinations made in an ICJ advisory opinion could not be disregarded because of their non-binding nature. Instead, the Special Chamber considered these determinations to have legal effect.[21] Ultimately, the Tribunal thus reiterated the findings of the ICJ in relation to the legal status of the Chagos Archipelago, holding that Mauritius' sovereignty was established and no sovereignty issue between Mauritius and the UK existed, as: '[t]he determinations made by the ICJ with respect to the issues of the decolonization of Mauritius in the Chagos advisory opinion have legal effect and clear implications for the legal status of the Chagos Archipelago.' Mauritius' sovereignty over the Archipelago could 'be inferred from the ICJ's determinations.'[22]

In October 2024, the governments of the Republic of Mauritius and the United Kingdom publicly announced that they had reached an agreement which recognised Mauritius sovereignty over the archipelago, meaning that the islands would be returned to Mauritius.

In its jurisprudence, the IACtHR frequently cites the work of other international courts, including the advisory opinions of the ICJ and ITLOS. Out of three courts considered in this chapter, the IACtHR enjoys the broadest advisory jurisdiction.[23] At the same time, it allows for the broadest participation in

18 *Mauritius v Maldives* (Preliminary Objections) (n 16) §142.

19 ibid, §203.

20 ibid, §204.

21 ibid, §205.

22 ibid, §246.

23 Lucas C Lima, 'Should I stay or should I go? The effects of denunciation of the American Convention and the Inter-American Court of Human Rights' Advisory Opinion 26/2020', 30 April 2021, *in QIL – Questions of International Law*, <https://www.qil-qdi.org/should-i-stay-or-should-i-go-the-effects-of-denunciation-of-the-american-convention-and-the-inter-american-court-of-human-rights-advisory-opinion-26-2020/#_ftn1> accessed 18 July 2024.

its advisory proceedings,[24] including from civil society actors, as well as States, or intergovernmental organisations located outside the region. This perhaps also explains why advisory opinions of the IACtHR enjoy reach and consideration far beyond the Inter-American system. This holds particularly true when looking at its 2017 advisory opinion on human rights and the environment.[25] Finally, consistent adherence to advisory opinions by States and other international actors may, over time, contribute to the formation, strengthening, and/or establishing of customary international law.[26]

Taken together, this illustrates that member States of the UN and/or the States bound by the international agreement in question, while not being legally bound by the advisory opinions themselves, are bound by the legal obligations that arise from general international law as well as the treaties, agreements or conventions invoked, interpreted and determined in advisory proceedings. In other words, they are bound by the obligations upon which an advisory opinion relies and an advisory opinion can have 'simply elucidated and confirmed their obligations.'[27] This chapter will, therefore, briefly consider the thematic overlaps between the three different advisory opinions before examining their possible impact in and on other (inter)national legal fora and proceedings.

3 Overlapping Themes in the Three Climate Advisory Opinions and the Risk of Fragmentation

Due to the timeline of the three climate advisory opinions – with ITLOS having rendered its AO and the IACtHR having concluded its hearings in May 2024

24 See Miriam Cohen, Chapter 8 in this book.

25 *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-American Court of Human Rights Series A No 23 (15 November 2017). (OC-23/17).

26 Teresa F Mayr & Jelka Mayer-Singer, 'Keep the Wheels Spinning: The Contributions of Advisory Opinions of the International Court of Justice to the Development of International Law' (2016) 76 *ZaöRV* 425.

27 John Dugard, 'Advisory Opinions and the Secretary-General with Special Reference to the 2004 Advisory Opinion on the Wall', in Kohen & Boisson de Chazournes (eds), *International Law and the Quest for its Implementation | Le droit international et la quête de sa mise en oeuvre – Liber Amicorum Vera Gowland-Debbas* (Brill 2010) 399, 410.

– and the questions put to the ICJ being the broadest in terms of scope and applicable law, this section will start out with taking a look at the questions before the ICJ. WE identify thematic overlaps between the three advisory opinions and the possible impact of developments before the IACtHR and ITLOS on the ICJ advisory proceedings and in domestic litigation.

The questions before the ICJ seek clarification on the international legal obligations that exist on States to protect the climate system from GHG emissions, and what legal consequences arise where the acts or omissions of States have caused significant harm, with a particular view to vulnerable groups and States. While the question also enumerates a number of international agreements and general principles of international law, the list is not phrased in an exhaustive manner and therefore seeks clarification on the international legal regime as a whole. Nonetheless, debates around applicable law are bound to arise as States will or are likely seeking to limit the number of sources from which obligations in relation to climate change arise. However, this has already been addressed by ITLOS in its May 2024 advisory opinion, where it determined that separate sets of obligations pertaining to climate change could arise under separate international legal instruments (in this case, UNCLOS and the Paris Agreement), as these different international legal instruments have and pursue different core aims.[28]

The international legal instruments listed in the question to the ICJ include numerous human rights treaties and conventions. The rights and freedoms protected therein are often mirrored in and/or similar to the human rights protected by the ACHR and, therefore, soon to be interpreted by the IACtHR in its climate advisory opinion. The IACtHR will likely confirm the applicability of the ACHR to climate harms – in line with developments before UN treaty bodies and the ECtHR.[29] Notably, one dissenting opinion before the ITLOS criticised the majority's approach for failing to take into account human rights.[30]

Further to this, in particular the first and sixth questions before the IACtHR are not dissimilar to the questions asked of the ICJ, as they directly raise the issue of the common but differentiated responsibilities and respective capabilities (CBDR-RC) principle and burden-sharing necessary to achieve the temperature limit of the Paris Agreement.[31] The responses to these questions,

28 *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (Advisory Opinion, 21 May 2024) ITLOS Case No 31, §§223–224 (*COSIS Opinion*).

29 *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* (App No 53600/20) ECtHR [GC] 9 April 2024.

30 *COSIS Opinion* (n 28) 'Declaration of Judge Pawlak', §1.

31 The full text of the three separate requests for advisory opinions is included in Annex I.

together with the other four that relate to State duties to protect human rights by the ACHR, will be widely cited and referred to in Latin American jurisprudence, and are likely to also influence international bodies, domestic courts, and human rights bodies across the world. In the oral proceedings before the IACtHR, many of the participants noted the relevance of CBDR-RC, which garnered interest and questions from the judges regarding its practical implications. Clarification on these points from either the IACtHR or the ICJ may therefore offer necessary guidance and assistance to other international, regional, or domestic courts and human rights bodies.

For example, considerations on States' shares in reducing global emissions have already found their way into national jurisprudence. While not explicitly reflecting considerations on CBDR-RC or equity, the finite 'carbon budget' approach adopted, for example, in the Dutch *Urgenda*[32] and the German *Neubauer*[33] cases demonstrates how national courts have tackled the question of apportioning responsibility and the obligation to reduce emissions.

Another important overarching theme is the role of scientific evidence in informing the obligations of States and the potential of these three advisory opinions to make clear findings related to the facts and science of climate change, and in particular, the harms caused by the deterioration of the environment as a result of rising GHG emissions. As mentioned, findings on CBDR-RC and exactly what level of historic and current emissions constitute 'significant harm to the climate system' could be relevant to judges around the world. Findings on scientific evidence of climate harms, the cumulative nature of GHGs, inertia in the climate system, the need for urgent action, the threat of tipping points, the definition of significant impacts, as well as necessary mitigation action such as fossil fuel phase-out, high-risk mitigation methods such as carbon capture and storage or the concept of offsetting, could have global implications.

In its advisory opinion, ITLOS clarified that State measures must be informed by the best available science providing that the margin of appreciation afforded to States is to be objectively assessed and, therefore, amongst other factors, bounded by the scientific evidence. The Tribunal considered all this relevant to the standard of due diligence required of States and determined that, on the basis of the scientific evidence that clearly established the high risk of serious and irreversible harm, is 'stringent.'[34]

---

32 *Urgenda Foundation v Kingdom of the Netherlands* (Supreme Court of the Netherlands, Judgment of 29 December 2019) ECLI:NL:HR:2019:2007.

33 *Neubauer et al v Germany* (Federal Constitutional Court of Germany, Judgment of 24 March 2021) 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20 & 1 BvR 288/20.

34 *COSIS Opinion* (n 28) §§396–399.

In international law, due diligence is understood as a duty of conduct on States, described as 'a threshold, indicating the degree of commitment required of the State in relation to certain primary obligations.'[35] This threshold is understood as one of 'responsible government,' taking all reasonable and necessary steps to comply with its obligations. The exact content of the due diligence duty varies, as it is informed by applicable rules, practices, and norms of international law relevant to the context and the provision(s) from which it emerges.[36] It has been addressed in previous advisory opinions, such as ITLOS' Seabed Disputes Chamber 2011 AO, which found that: '[t]he content of "due diligence" obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that "due diligence" is a variable concept. *It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific* (...)) *knowledge*.'[37] (emphasis added). This was reaffirmed in ITLOS' May 2024 advisory opinion on climate change.[38]

In its frequently cited 2017 advisory opinion on the environment, the IACtHR determined that protection of human rights required that States act diligently, which included adherence to the precautionary principle where 'plausible indications' existed that an activity could cause severe and irreparable harm to the environment, requiring States to take effective measures to address them.[39] According to the IACtHR, the duty to act with due diligence corresponds 'to the State obligation to ensure the free and full exercise of the rights recognized in the [ACHR] to all persons subject to their jurisdiction, according to which States must take all appropriate measures to protect and preserve the rights recognized in the Convention.'[40] By acknowledging that a high level of due diligence may be required of States in light of the severe risks

35 Serena Forlati, 'L'objet des différentes obligations primaires de diligence: Prévention, cessation, répression?', in *Le standard de due diligence et la responsabilité internationale* (*Journée de* étude *franco-italienne du Mans*) (Pédone 2018) 40.

36 Timo Koivurova & Krittika Singh, 'Due Diligence', *Max Planck Encyclopedia of Public International Law* (online edn, August 2022); Irini Papanicolopulu, 'Due Diligence in the Law of the Sea', in Krieger et al (eds), *Due Diligence in the International Legal Order* (Oxford University Press 2020); Lavanya Rajamani, 'Due Diligence in Climate Change Law', in Krieger, Peters & Kreuzer (eds), *Due Diligence in the International Legal Order* (OUP 2021) 163.

37 *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* (Advisory Opinion, 1 February 2011) ITLOS Case No 17, §117.

38 *COSIS Opinion* (n 28) §239.

39 OC-23/17 (n 25) §§125, 180.

40 Ibid.

associated with climate change, the ITLOS AO has provided important findings for the other two courts to consider.

Returning to Question 2 of the ICJ AO: After the initial assessment on 'significant harm,' the second question is then divided into two parts, addressing the legal consequences of causing significant harm with respect to (i) States and, in particular, vulnerable small island developing States; and (ii) peoples and individuals of present **and** future generations (emphasis added).[41] Although the first sub-section refers to intra-State obligations and duties, the second section is very broad and the answer may have implications for the duties of States to peoples and individuals (including future generations) both within *and* outside their territories. The ICJ's response to this question, therefore, has the potential to influence human rights law at all levels, globally.

The risk of fragmentation, that is, different and potentially contradicting outcomes, has been raised given the thematic overlap briefly outlined above – and is further explained by Susan Ann Samuel and Alejandro Carrillo Bañuelos in Chapter 4 of this book. This may be resolved to some extent due to the timing of the publication of the opinions. At the same time, the rules of treaty interpretation are important in this context. The ITLOS advisory opinion referred to the Vienna Convention on the Law of Treaties as part of the applicable law, which provides that their interpretation of international legal instruments should be taken together with other relevant rules of international law.[42] Article 237 of UNCLOS itself provides that the provisions under Part XII on the protection and preservation of the marine environment are also to be understood in light of other, related, commitments. UNCLOS thereby expressly provides that other applicable rules of international law and specific obligations arising from other international agreements are relevant to the content of the State obligations under Part XII UNCLOS – as then analysed throughout the advisory opinion.

Similarly, Article 29 of the ACHR provides that the Convention should not be interpreted in a manner that excludes or limits the effects of other international acts. Its advisory opinion OC-10/89 confirmed the findings of the ICJ's *South West Africa* advisory opinion, namely that: 'an international instrument must be interpreted and applied within the overall framework of the judicial system in force at the time of the interpretation.'[43] In subsequent case law, the IACtHR has relied on other international instruments to inform obligations

41 See the request in Annex I.

42 Vienna Convention on the Law of Treaties (entered into force 27 January 1980) 1155 UNTS 331 (VCLT), art 31; *COSIS Opinion* (n 28) §§128ff.

43 *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, Inter-American Court of Human Rights Series A No 10 (14 July 1989) §37.

under the Inter-American system, as well as the Vienna Convention on the Law of Treaties (VCLT) to affirm that: 'human rights treaties are live instruments, whose interpretation must go hand in hand with evolving times and current living conditions.'[44] The IACtHR has also made findings that are of particular importance to the considerations in this chapter. Namely, it determined that due to the indivisible nature of human rights and environmental protection, the principles, rights, and obligations of international environmental law 'make a decisive contribution to establishing the scope of the obligations under the [ACHR].'[45] This approach to harmonisation of international law pursued by the different international courts should therefore contribute to limiting fragmentation. It is against this background that we offer the following analysis.

4 Analysis and Potential Impact of the Climate Advisory Opinions in Litigation

4.1 *Influence and Utility for International and Regional Human Rights Decision-Making Bodies*

4.1.1 Human Rights Treaty Bodies

The human rights treaty bodies (HRTB), established under each of the UN's major international human rights treaties, often have both an adjudicative function that receives and issues views on individual communications about alleged violations of treaty obligations, as well as conducting regular cycles of 'periodic review' of State compliance with treaty obligations. These 'compliance committees' established under each treaty also often draft guidance for States on compliance with rights protected by each treaty called 'General Comments.'

HRTBs are likely to rely heavily on the guidance provided by the AOs, although they tend to cite external sources to varying degrees, particularly in decisions related to individual communications. For example, in *Sacchi et al v Argentina et al*,[46] the Committee on the Rights of the Child (CRC) relied on other UN sources, OC-23/17, and ECtHR jurisprudence. In *Billy et al v Australia*,[47]

44 *Case of the 'Mapiripán Massacre' v Colombia* (Merits, Reparations and Costs Judgment) Inter-American Court of Human Rights Series C No 134 (15 September 2005) §106, fn 185.

45 OC-23/17 (n 25) §55.

46 UN Committee on the Rights of the Child 'Decision adopted under the Optional Protocol, concerning Communication No 108/2019' (23 September 2021) UN Doc CRC/C/88/D/108/2019 (*Sacchi Decision*).

47 UN Human Rights Committee 'Views adopted under article 5 (4) of the Optional Protocol, concerning Communication No 3624/2019' (18 September 2023) UN Doc CCPR/C/135/D/3624/2019.

the Human Rights Committee (HRC) relied on its own previous case law and General Comments. General Comments of the HRC take a range of sources into account, including decisions of regional human rights courts and advisory opinions.[48] Considering the overlapping human rights considerations in the different advisory opinions, we are of the view that the trio of climate advisory opinions are likely to be referred to in future General Comments made by HRTBs, as well as individual communications where the theme of climate change arises. In *Sacchi*, the CRC was called upon to assess whether the respondent States, amongst the world's largest emitters of GHGs, were breaching their obligations under the Convention on the Rights of the Child by (amongst others) failing to prevent foreseeable domestic and extraterritorial human rights violations resulting from climate change.[49] Here the CRC looked to the IACtHR's advisory opinion on the environment for clarifications on the scope of extraterritorial jurisdiction, reaffirming and adopting the test established therein.[50] Similarly, considerations on CBDR-RC and the scientific evidence were relevant in informing the Committee's decision.[51] Determinations in the three climate AOs are, therefore, likely to be reflected in the jurisprudence of HRTBs. Further, given that General Comments influence the approach of HRTBs to the process of periodic review under each treaty (and could also influence the Human Rights Council's Universal Periodic Review), the influence of the advisory opinions is likely to permeate throughout the international human rights system.

4.1.2 Regional Human Rights Courts and Tribunals

There is clearly healthy cross-fertilisation between each of the regional human rights courts, although evidence suggests this can be asymmetrical, with judges citing and adopting concepts from other courts in an ad hoc, un-systematic fashion.[52] A minority of judges on the ICJ have also adopted the thinking and decisions of the regional human rights courts, most notably Judge Antônio

48 UN Human Rights Committee, 'General Comment No 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life' (30 October 2018) UN Doc CCPR/C/GC/36, fns. 191, 265.

49 *Sacchi Decision* (n 46) §3.3.

50 ibid §10.5.

51 ibid §10.10.

52 Erik Voeten, 'Borrowing and Nonborrowing among International Courts' (2010) 39(2) *The Journal of Legal Studies* <https://www.jstor.org/stable/10.1086/652460> accessed 14 August 2024.

Augusto Cançado Trindade.[53] The ECtHR has regularly referred to the case law of the IACtHR,[54] although there is some evidence to suggest that this depends on the political context.[55]

Each of the IACtHR, the ECtHR, and the African Court of Human and Peoples' Rights (ACtHPR) have previously also cited advisory opinions of the ICJ, although there is variation in the frequency of these references. The ECtHR has cited the ICJ's advisory opinions in varying contexts,[56] together with advisory opinions of the IACtHR.[57] As the newest of the human rights regional courts,

53 Mia Swart, 'A Move away from Solitude: Judge Cançado Trinidade's Contributions to a More Representative International Law' (*Third World Approaches to International Law Review*, 22 September 2023) <https://twailr.com/a-move-away-from-solitude-judge-cancado-trindades-contributions-to-a-more-representative-international-law/> accessed 14 August 2024.

54 *Mamatkulov and Askarov v Turkey* (App No 46827/99) ECtHR 4 February 2005, cited rules of procedure of IACtHR (§§43–44) and refers to IACtHR system (§49); *Ergin v Turkey* (*No 6*) (App No 47533/99) ECtHR 4 May 2006, cited case law of IACtHR (§25); *Kurt v Turkey* (App No 24276/94) ECtHR 25 May 1998, cited case law of IACtHR (§67); *X v Poland* (App No 20741/10) ECtHR 16 September 2021, cited case law of IACtHR (§45); *Lexa v Slovakia* (App No 54334/00) ECtHR 23 September 2008, cited case law of IACtHR (§§97–98).

55 Voeten (n 52) 563.

56 *Vasiliauskas v Lithuania* (App No 35343/05) ECtHR 20 October 2015, cited the ICJ's *Advisory Opinion on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* to support the notion that the principles underlying the Genocide Convention were principles which were recognised by civilised nations as binding on States even without any conventional obligation, and to find that the crime of genocide was clearly recognised as a crime under international law in 1953 (see §§80 and 167); *Chiragov and Others v Armenia* (App No 13216/05) ECtHR 16 June 2015, cited the ICJ's *Kosovo Advisory Opinion* in relation to the relevance of the right to self-determination of peoples (eg §§13–14) and on the difference between UNSC resolutions and treaties (1104); *Cyprus v Turkey* (App No 25781/94) ECtHR 10 May 2001, cited the ICJ's Advisory on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* in relation to the availability of domestic remedies; *Kononov v Latvia* (App No 36376/04) ECtHR 24 July 2008, a dissenting opinion cited the ICJ's Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* in relation to the relationship between HR law and IHL, and cited the *Namibia Advisory Opinion* in relation to the interpretation of international legal instruments; *Georgia v Russia* (*II*) (App No 38263/08) ECtHR 21 January 2021, cited the ICJ's Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons* and on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (§§89–90); *Al-Dulimi and Montana Management Inc v Switzerland* (App No 5809/08) ECtHR 21 June 2016, cited the ICJ's *Namibia* Advisory Opinion regarding States' obligations to comply with UNSC resolutions (§42).

57 *Palomo* Sánchez and Others v Spain (App Nos 28955/06, 28957/06, 28959/06 & 28964/06) ECtHR 12 September 2011, cited IACtHR *Advisory Opinion OC-5/85* in relation to 'the fundamental nature of freedom of expression for the existence of a democratic society, stressing among other things that freedom of expression was a sine qua non for the

the ACtHPR has been more cautious, with literature suggesting that only one dissenting judgement has so far referenced the ICJ, citing to its Advisory Opinion on *Reparations for Injuries suffered in Service to the UN*.[58]

Due to recent developments before the ECtHR in relation to climate change (namely with the delivery of the rulings in *Verein KlimaSeniorinnen* and *Duarte Agostinho*), the following paragraphs will focus on this regional court alone.

In a 1998 judgment, the ECtHR considered that the context in which the ICJ operates was distinct from the ECtHR:

> … The subject matter of a dispute may relate to any area of international law … unlike the Convention institutions, the role of the International Court is not exclusively limited to direct supervisory functions in respect of a law-making treaty such as the Convention. Such a fundamental difference in the role and purpose of the respective tribunals, coupled with the existence of a practice of unconditional acceptance under Articles 25 and 46, provides a compelling basis for distinguishing Convention practice from that of the International Court.[59]

In a 2005 decision, the ECtHR referred to the practice of the ICJ, the UN HRC, the UN Committee against Torture, and the IACtHR in its consideration of an application for interim measures. The ECtHR clarified that although all these bodies operated: 'under different treaty provisions to those of the Court, have

development of trade unions' (§§26 & 56); *Savickis and Others v Latvia* (App No 49279/11) ECtHR 9 June 2022, cited IACtHR *Advisory Opinion OC-4/84* (§74) and other IACtHR case law; *Humpert and Others v Germany* (Apps Nos 59433/18, 59477/18, 59481/18 & 59494/18) ECtHR 14 December 2023, cited IACtHR *Advisory Opinion OC-27/21* (para. 62) and other IACtHR case law; *Ramadan v Malta* (App No 76136/12) ECtHR 21 June 2016, cited IACtHR *Advisory Opinion OC-4/84* and other IACtHR case law; *Marguš v Croatia* (App No 4455/10) ECtHR 27 May 2014, cited case law of IACtHR eg §138: 'The Court also notes the jurisprudence of the Inter-American Court of Human Rights, notably the above-cited cases of Barrios Altos, Gomes Lund et al., Gelman and The Massacres of El Mozote and Nearby Places, where that court took a firmer stance and, relying on its previous findings, as well as those of the Inter-American Commission on Human Rights, the organs of the United Nations and other universal and regional organs for the protection of human rights, found that no amnesties were acceptable in connection with grave breaches of fundamental human rights'; *Petropavlovskis v Latvia* (App No 44230/06) ECtHR 13 January 2015, cited IACtHR *Advisory Opinion OC-4/84*, and other case law.

58 *Femi Falana vs The African Union*, Case No 001/2011 (AfrCtHPR, 26 June 2012) Dissenting Opinion of Sophia Akuffo, Bernard Ngoepe & Elsie Thompson cited the ICJ's *Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations* at 18.1.1.

59 *Loizidou v Turkey* (App No 15318/89) ECtHR [GC] 28 July 1998, §§84–85, as discussed in Ian Brownlie, *The Rule of Law in International Affairs* (Kluwer 1998) 76.

confirmed in their reasoning in recent decisions that the preservation of the asserted rights of the parties in the face of the risk of irreparable damage represents an essential objective of interim measures in international law,'[60] thereby drawing on the case law of international legal bodies.

Finally, in *Hassan v UK*, the ECtHR considered that 'the Convention cannot be interpreted in a vacuum and should so far as possible be interpreted in harmony with other rules of international law of which it forms part.'[61] It made findings consistent with ICJ case law and referenced advisory opinion determinations.[62] As stated at the outset, it is our submission that due to the unique character of climate change, and the still limited jurisprudence at the international level, cross-pollination is to be expected. The same may be said about the ECtHR's April 2024 climate change decisions.

In the *KlimaSeniorinnen* ruling, the ECtHR took note of the three climate advisory opinions as part of its overview of relevant international materials and developments.[63] Much of the ECtHR's findings relied on scientific evidence to illustrate the harmful effects of climate change on the full enjoyment and realisation of human rights. In its consideration of whether the State had taken sufficient measures to comply with its obligations under the European Convention on Human Rights (ECHR), the Court also provided for an objective assessment, bounding the margin of appreciation, amongst other factors, with considerations of the best available science. The ECtHR's decision in *KlimaSeniorinnen* was handed down just a few weeks before the ITLOS advisory opinion. One ITLOS judge criticised the ITLOS opinion in his separate declaration for failing to consider recent developments, including the ECtHR's decision. He noted the importance of that decision in dismissing 'the relatively popular argument that courts cannot rule on the protection of persons affected by climate change within the framework of international human rights law.'[64] Further, he considered such developments essential and not occurring in isolation, which underlines the importance of cross-pollination of these different developments.

In its simultaneous decision of *Duarte Agostinho and Others v Portugal and Others*, the ECtHR took note of the developments in IACtHR AO 23/17, General Comments of HRTBs, and the *Sacchi* decision. This underlines the premise of the chapter that the overlap in legal themes and issues relevant to the adjudication of climate change and the important clarifications provided for in the

60 ibid, §124.
61 *Hassan v UK* (App No 29750/09) ECtHR 16 September 2014, §77.
62 ibid, §82.
63 *Verein KlimaSeniorinnen* (n 29) §§187–188, 227.
64 *COSIS Opinion* (n 28) Declaration of Judge Pawlak, §3.

three climate advisory opinions will likely have an important role to play in the climate litigation that may follow – including, but not exclusive of, litigation before human rights bodies. Of course, decisions of the ECtHR have effects outside the Council of Europe. In particular, the tests of States' margin of appreciation and the principle of proportionality when balanced against the need to protect Convention rights, as detailed by the ECtHR, are likely to be directly influenced by any statements made by the ICJ on the theme of due diligence and legal consequences for excessive or 'significant' GHG emissions.

4.2 *Influence and Utility for Domestic Courts*

4.2.1 Monist and Dualist Systems

One of the key factors in determining the influence of the three advisory opinions in national legal systems will also be whether a State adopts a monist or dualist approach to international law. Monist systems may incorporate international law directly into the body of domestic law, whereas dualist systems require explicit ratification or other positive parliamentary action, or reference in domestic statute. The terms monist and dualist are not binary. Still, they are useful in describing the spectrum of approaches and attitudes of domestic courts to the incorporation of international norms and principles into domestic decision making.

In more monist States, domestic courts may consider advisory opinions as persuasive authority when deciding cases that directly involve international or domestic legal issues, including the three climate advisory opinions, and may also refer to the advisory opinions as guidance on interpreting and applying international norms, as relevant to domestic norms. For example, in the 2015 *Urgenda* decision of the Hague District Court, the UNFCCC and decisions made under it, such as the Kyoto Protocol, the Paris Agreement, and principles of general international law were taken into account in setting the threshold for the Dutch State's duty of care under domestic tort law (and later under human rights law by the Court of Appeal and Supreme Court). The Hague Court said:

> [4.42] From an international law perspective, the State is bound to UN Climate Change Convention, the Kyoto Protocol (with the associated Doha Amendment as soon as it enters into force) and the 'no harm' principle … The court – and the Parties – states first and foremost that the stipulations included in the convention, the protocol and the 'no harm' principle do not have a binding force towards citizens (private individuals and legal persons). Urgenda therefore cannot directly rely on this principle, the convention and the protocol …
>
> [4.43] This does not affect the fact that a state can be supposed to want to meet its international law obligations. From this it follows that an

> international law standard – a statutory provision or an unwritten legal standard – may not be explained or applied in a manner which would mean that the state in question has violated an international law obligation, unless no other interpretation or application is possible. This is a generally acknowledged rule in the legal system. This means that when applying and interpreting national law open standards and concepts, including social proprietary, reasonableness and propriety, the general interest or certain legal principles, the court takes account of such international law obligations. This way, these obligations have a 'reflex effect' in national law. [sic][65]

Alternately, the High Court of Australia has been generally recognised as adopting a dualist, ambivalent approach to international law,[66] with the high-water mark for an 'incorporation' approach over a 'transformative' approach occurring in the 1990s.[67] Nevertheless, many Australian federal and state statutes (particularly those related to human rights) both ratify and incorporate or refer to international treaties and conventions. Thus, Australian courts and tribunals do regularly consider and interpret international law, including advisory opinions, in various contexts.[68]

This is shown in a recent decision of a regional court in the State of Queensland. Under local land management legislation, the Queensland Land Court was required to assess whether a proposed new coal mine ought to proceed, taking into account its potential impacts on the local environment and human rights protected by the *Human Rights Act 2019* (Qld). The decision-maker found that the mine should not proceed, given the risks from climate change to present and future generations, and cited various sources of international law, as well as decisions of the ECtHR, in reaching her conclusions.[69] Accordingly,

---

65 *Urgenda v The Netherlands*, The Hague District Court (24 June 2015) ECLI:NL:RBDHA:2015:7196.

66 Alice de Jonge, 'Australia', in Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011) 23.

67 Hilary Charlesworth, 'International Law and the High Court' PrecedentAULA 38 (2005) <https://classic.austlii.edu.au/au/journals/PrecedentAULA/2005/38.pdf > accessed 15 August 2024.

68 Rosemary Grey et al' Cases before Australian Courts and Tribunals concerning Questions of Public International Law 2022' (2022) 41(1) *Australian Year Book of International Law Online* <https://brill.com/view/journals/auso/41/1/article-p377_16.xml?language=en&ebody=article%20details> accessed 15 August 2024.

69 *Waratah Coal Pty Ltd v Youth Verdict Ltd, The Bimblebox Alliance Inc, John and Susan Brinnand & Chief Executive, Department of Environment and Science*, [2020] QLC 33; [2021] QLC 4; [2021] QLC 36; [2022] QLC 3; [2022] QLC 4, Queensland Land Court Judgment of 25 November 2022.

one can see how the advisory opinions and their influence may permeate in local legal contexts, despite a dualist system, and a lack of express ratification or adoption by national legislatures.

In the United States (US), a jurisdiction that has also typically been seen as antithetical to the incorporation of international law into domestic decision-making, there are also statutory routes into national law. For example, the Alien Tort Statute,[70] establishes the right of foreigners to sue in the US for violations of 'the law of nations.' Significantly, the territorial scope of the statute was dramatically cut down by the US Supreme Court decision in *Kiobel v Royal Dutch Petroleum Co*.[71] Nonetheless, findings on climate science and key elements of State obligations in respect of science could even influence courts in the US, currently grappling with a series of constitutional and civil rights claims from young people seeking to protect the due process right to 'a climate system capable of sustaining human life.'[72]

Arguments regarding the United Kingdom (UK)'s alleged non-compliance with the obligations of the Paris Agreement were dismissed in cases challenging the expansion of Heathrow Airport[73] and a decision by the UK's export credit agency (UKEF) to provide finance for an liquified natural gas (LNG) project in Mozambique.[74] In the latter case, the Court of Appeal found that although the UK's international obligations under the Paris Agreement were taken into account in UKEF's decision-making process, as an unincorporated treaty it:

> does not give rise to domestic legal obligations … it is actually an application of the constitutional law principle of dualism: the court cannot and should not second guess the executive's decision-making in the international law arena where there is no domestic legal precedent or guidance. The standard for judicial review may be, and is in this case, less intense where the issue is one that is not properly within the province of the domestic court.'[75]

---

70 28 USC 1350. The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the USA.

71 *Kiobel v Royal Dutch Petroleum Co*, 569 U.S. 108 (2013).

72 See Legal Actions at <https://www.ourchildrenstrust.org/>.

73 [2020] UKSC 52.

74 *R* (*Friends of the Earth Limited*) *v The Secretary of State for International Trade/UK Export Finance* [2023] EWCA Civ 14, §40.

75 ibid, §40.

Nonetheless, despite direct recognition of the dualist constitutional principle, the Court *did* consider the provisions of the Paris Agreement a relevant factor to be taken into account, in applying common law principles of judicial review, deciding that the Executive's decision to provide finance for the project was compliant with the Paris Agreement and not *ultra vires*.[76] This decision shows that even where domestic courts do not consider international law enforceable in domestic courts, the substance, meaning, and effect of international law may still influence a range of decisions on the subject at the national level, under typical administrative law principles. Given the range of issues and economic sectors touched by climate change, from national energy policy to infrastructure financing decisions, to transport and agricultural policy, the scope for impact of the coming advisory opinions from the ICJ, in particular, to influence domestic courts, is potentially very wide.

This demonstrates that the monist/dualist approach does not fully determine how the forthcoming advisory opinions will be relevant to questions related to climate change in national contexts, and that the long arm of their influence could indeed stretch further than expected.

4.2.2 National Climate Change Litigation, Including 'Framework Cases' against States

There is a particularly strong case that the advisory opinions will influence national litigation against States for inadequate climate policy under statutory, constitutional and/or human rights laws. When examining national level action in relation to climate change, research from the Grantham School at the London School of Economics has discerned a clear trend toward the adoption of domestic climate change framework laws, now operational in 60 countries around the world.[77] This legislation frequently establishes long-term emission reduction objectives and goals, enshrines NDCs under the Paris Agreement, and makes various other commitments at the national level. The trend for passing such legislation is matched by the increasing global trend of climate change litigation, of many types.[78]

Where States have national framework laws, developments at the international level can clarify, for example, whether State policies have been designed ambitiously enough and in line with a State's international obligations. The ITLOS, ICJ, and IACtHR advisory opinions will assist in the application of

76 ibid, §55.

77 Joana Setzer & Catherine Higham, Global *Trends in Climate Change Litigation: 2023 Snapshot* (Grantham Research Institute on Climate Change and the Environment 2023) 13.

78 ibid.

principles such as due diligence, reliance on the best available science, best efforts and highest possible ambition under the Paris Agreement. They may also clarify the interpretation of national statutory provisions referring to these principles, such as those in the Climate Change Response Act 2002 of New Zealand,[79] for example. Any clarifications from these international courts on the content of due diligence and on the criteria States ought to adopt when designing climate policy, even at a high level, will greatly influence the national level adjudication of disputes under national framework laws.[80]

Where States do not have national framework laws, but have adopted international human rights obligations into domestic law (such as in Australia) the advisory opinions will provide guidance on the way that human rights obligations require States to take climate action, and the manner in which human rights courts can assess the adequacy of action. They are likely to be influential in the decision making of the ECtHR and at the national level, for example, in a national case on foot against the State of Poland.[81] This case seeks stricter emission reduction targets for the State of Poland based on alleged violations of Polish personal rights (which protect the rights to life, property, and health) under the Polish Civil Code. The Polish courts are likely to be impacted by the advisory opinions, if not directly, then indirectly, through ECtHR law and subsequent European Union law.[82] In a clear illustration of cross-jurisdictional fertilisation in human rights claims, in a framework climate case brought by the association *Klimaatzaak* against the Belgian State and Governments of Wallonia and Flanders, the Brussels Court of Appeal examined the complex relationship between national, European Union, and ECHR law and found that:

> The Court also considers that the clear and precise nature of norms such as Articles 2 and 8 of the ECHR should not be assessed *in abstracto*, by examining the text alone, but by taking into account both the

79 Climate Change Response Act 2002, Public Act 2002 No 40, Date of assent: 18 November 2002.

80 For criteria that could/ought be taken into account as part of national due diligence, see Sophie Marjanac & Sam Hunter Jones, 'Staying within Atmospheric and Judicial Limits: Core Principles for Assessing whether State Action on Climate Change Complies with Human Rights' in Rodriguez-Garavito (ed) *Litigating the Climate Emergency* (CUP 2022) 157–176.

81 Sophie Marjanac & Janusz Buszkowski, 'The Polish Climate Case – Legal Briefing' (*ClientEarth*, June 2021) <https://www.clientearth.org/media/ilnjfico/clientearth-legal-briefing-on-polish-climate-case.pdf> accessed 15 August 2024.

82 ibid.

> interpretation given to it by its authorized interpreters (notably the European Court of Human Rights) and the context (national but not exclusively) in which the provision finds application. On the national level, the question is to determine whether the 'reception structures' of the Belgian legal system allow the judge to give effect to the norm concerned 'without profound normative modification' …
>
> Indeed, as indicated above, the ECHR is a living instrument that must be interpreted in the light of current conditions, which may involve taking into account non-binding sources of law …, or even factual elements such as scientific studies on which there is unanimous agreement, or political consensus at international, European or national level. This is particularly true in a matter as complex as global warming: it is impossible to determine whether the public authority knew or ought to have known of the existence of a risk, and whether it took sufficient measures to mitigate that risk, without referring to knowledge of experts in the field. In this sense, the fact can inform the law, without, as the Walloon Region fears, creating or abolishing it. Only such an approach can guarantee the effectiveness of the rights enshrined in the ECHR. To deprive these rights of any direct effect in all circumstances, in their 'positive obligations' aspect, would be tantamount to preventing their holders from gaining access to the courts and would run counter to the 'effectiveness' aspect of the subsidiarity principle referred to above.[83]

The Court then went on to assess the national policy context and found that the three Belgian governments had not done enough with respect to emission reductions, ordering that they must reduce national emissions by 55% by 2030.

In contrast, the above 'harmonised' approach has not been followed by the courts of the UK in recent years, which have rejected several climate cases brought on similar grounds by both individuals and non-governmental organisations. In the *Plan B Earth* case,[84] the claimants also alleged a violation of their Article 2 and 8 ECHR rights through the UK's inadequate emissions reduction target, together with various direct breaches of the Paris Agreement. The High Court of England and Wales found that insofar as the claimants relied on the UK's alleged non-compliance with the Agreement,

---

83 *VZW Klimaatzaak v Kingdom of Belgium, the Walloon Region, the Flemish Region, and the Brussels-Capital Region*, Process No 2021/AR/15gs, 2022/AR/737 & 2022/AR/891, Judgment of the Court of Appeals of 30 November 2023, §152.

84 *R* (*Plan B Earth & Others*) *v The Prime Minister & Others* [2021] EWHC 3469 (Admin).

> [u]nincorporated treaties such as the Paris Agreement do not form part of domestic law, and domestic courts cannot determine whether the UK has violated its obligations under an international treaty … The problem is that the Claimants are using compliance with the Paris Temperature Limit as a test for compliance with Article 2 (and Article 8). The effect is that the Court is being asked to enforce the Paris Agreement, contrary to the guidance in SC.[85]

It should be noted that the UK government agreed to adopt a net zero by 2050 target before the above decision was made.[86]

4.2.3 The ITLOS and Environmental Impact Assessment

Most of the previous subsections in this part have focused on how findings from the ICJ and the IACtHR could influence domestic systems, particularly related to human rights and other public law principles. However, the advisory opinion of the ITLOS has already made a significant contribution to the development of international environmental law, related to pollution of the marine environment. The detailed and clear guidance issued by the Tribunal is likely to have global implications on the law governing environmental impact assessments (EIAs) in respect of GHG emissions at both the international and national levels and is accordingly also relevant to business conduct and operations.

The ITLOS advisory opinion concluded that Article 194(1) UNCLOS requires States to 'take all necessary measures to prevent, reduce and control' the emissions of GHGS into the atmosphere, taking into account the best available science, and adopting a precautionary approach.[87] They found that States should apply a 'stringent' due diligence standard, taking into account 'scientific and technical information, relevant international rules and standards, the risk of harm and the urgency involved.'[88] The Tribunal's interpretation of the obligations under Article 194(2) is 'even more stringent'[89] requiring States to 'take all measures necessary' to control emissions of GHGS from activities within their jurisdiction or under their control, including both 'damages that actually occurred but also damage that is likely to occur.'[90]

---

85 Relying on *R (SC) v SSWP* [2021] UKSC 26, [2021] 3 WLR 428 per Lord Reed at 77, 84 and 91. See §§25 and 53 of the judgement.

86 *The Climate Change Act 2008* (2050 Target Amendment) Order 2019.

87 *COSIS Opinion* (n 28) §§212–213.

88 ibid, §239.

89 ibid, §258.

90 ibid, §248.

Applying these findings to the detailed procedural obligations to adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources (Article 207) and from or through the atmosphere (Article 212),[91] as well as the obligation to monitor the risks or effects of pollution (Article 204), to publish reports (Article 205) and to assess the potential effects of activities (Article 206), the ITLOS found that 'the obligation to conduct environmental impact assessments is crucial to ensure that activities do not harm the marine environment' and that 'the duty of due diligence would not be considered to have been fulfilled if an environmental impact assessment was not undertaken for activities at risk of affecting the environment' (consistent with international law and other findings of the ICJ).[92]

Applying these principles to GHGs, they then found that the articles of UNCLOS 'impose specific obligations on State Parties to … conduct environmental impact assessments as a means to address marine pollution from anthropogenic GHG emissions,' from all land and sea-based sources. Most importantly, they also found that the cumulative impacts of GHG emissions from a particular project or activity must be taken into account and 'evaluated in interaction with other activities.'[93]

EIAs are the most commonly used, and globally accepted, environmental planning and management tools.[94] However there is wide variation across States in the integration of climate change into EIA processes.[95] The findings of the ITLOS clarify and crystalise the obligation of States to pass laws requiring EIAs for all land and sea-based activities that lead to GHG emissions above a certain threshold, and for the effects of those emissions to be assessed on a cumulative basis.

The ITLOS also issued a clear repudiation of the 'drop in the ocean argument' often deployed by developers and proponents of fossil fuel projects,

---

91 The Tribunal found that jurisdiction or control applies to activities undertaken by public or private actors on the States' territory, but also within its exclusive economic zone and continental shelf, or on-board ships carrying their flag.

92 ibid, §§354, 356.

93 ibid, §365: 'In the context of pollution of the marine environment from anthropogenic GHG emissions, planned activities may not be environmentally significant when taken in isolation whereas they may produce significant effects if evaluated in interaction with other activities.'

94 UNEP, 'Assessing Environmental Impacts: A Global Review of Legislation' (3 January 2018) <https://www.unep.org/resources/assessment/assessing-environmental-impacts-global-review-legislation> accessed 15 August 2024.

95 Rose Mayembe et al, 'Integrating climate change in Environmental Impact Assessment: A review of requirements across 19 EIA regimes' (2023) 869 *The Science of the Total Environment.*

who claim that the effects of a single project on global climate change are not significant enough to justify assessment, refusal of permission, or additional measures to control fossil fuel extraction or single point source of GHGs.[96] This has been a particularly controversial legal issue in environmental law in many jurisdictions. For example, in Australia, which has a rich jurisprudence on the assessment of cumulative impacts,[97] a state-level court adopted a carbon budget approach[98] to cumulative GHG in *Gloucester Resources Limited v Minister for Planning,* relating to the approval of a new coal mine.[99] In that case, the court accepted expert scientific evidence that:

> … global [GHG] emissions are made up of millions, and probably hundreds of millions, of individual emissions around the globe. All emissions are important because cumulatively they constitute the global total of [GHG] emissions, which are destabilising the global climate system at a rapid rate. Just as many emitters are contributing to the problem, so many emission reduction activities are required to solve the problem.[100]

However, in another case decided on 16 May 2024, the Federal Court of Australia was asked to interpret the national legislative regime for protecting 'matters

96 Brian J Preston, 'Contemporary issues in Environmental Impact Assessment – Are Climate Impacts Impacts? Climate Science in the EIA and Judicial Review' *Climate Impact Seminar* (27 February 2020) <https://lec.nsw.gov.au/documents/speeches-and-papers/Preston_CJ_-_Contemporary_Issues_in_Environmental_Impact_Assessment_27.02.20.pdf> accessed 15 August 2024.

97 *Tarkine National Coalition Inc v Minister for the Environment and Others* [2015] FCAFC 89.

98 Per the decision at 441, the carbon budget approach is 'A commonly used approach to determine whether the NDCs of the parties to the Paris Agreement cumulatively will be sufficient to meet the long term temperature goal of keeping the global temperature rise to between 1.5ºC and 2ºC is the carbon budget approach. The carbon budget approach is based on the well-proven relationship between the cumulative anthropogenic emissions of GHGs and the increase in global average surface temperature.' The carbon budget approach 'is a conceptually simple, yet scientifically robust, approach to estimating the level of [GHG] emission reductions required to meet a desired temperature target,' such as the Paris Agreement targets of 1.5ºC or 2ºC (Steffen report [38]). The approach is based on the approximately linear relationship between the cumulative amount of CO_2 emitted from all human sources since the beginning of industrialisation (often taken as 1870) and the increase in global average surface temperature (Figure 2 in IPCC (2013) Summary for Policy-Makers, cited in Steffen report, [39]). Once the carbon budget has been spent (emitted), emissions need to become 'net zero' to avoid exceeding the temperature target.

99 Preston (n 96).

100 *Gloucester Resources Limited v Minister for Planning and Environment* (*No 2*) [2018] NSWLEC 1200.

of national environmental significance,' and found that the decision-maker need not take the climate change effects of coal and gas projects into account, because it accepted that if the project did not proceed, the market would respond by increasing supply of fuel from other sources, which would mean that the emissions from the project would be replaced by emissions from other projects.

This is known as the 'market substitution' argument, which allowed the decision-maker to conclude that the effects of the project would not be 'a substantial cause of adverse impacts on the environment' in light of global emissions in other parts of the world. In that case, the judges commented that:

> Notwithstanding [the] conclusions on the grounds of appeal, the arguments on this appeal do underscore the ill-suitedness of the present legislative scheme of the EPBC Act to the assessment of environmental threats such as climate change and global warming and their impacts on [matters of national environmental significance] in Australia … This proceeding, and the merits decision-making underlying it, might be said to raise the question whether the legislative scheme is fit for purpose in this respect.[101]

The Court's extraordinary *obiter dicta* arguably suggests that Australia's legislative approach would not meet the 'stringent' due diligence standard set out by the ITLOS, which as explained, must be targeted to contribute to the global reduction of GHGS, and must incorporate the precautionary approach.

The extent of indirect or downstream impacts from a project subject to an EIA is another controversial question in national law that is directly addressed by the ITLOS AO. In a UK case decided on 20 June 2024, the Supreme Court of England and Wales found by 3 to 2 votes that the EU's EIA Directive[102] and UK's implementing regulations did require the GHG emissions from the burning of the oil product to be included and considered in the public EIA process for a proposed new onshore oil drilling facility in southern England.[103]

---

101 *Environment Council of Central Queensland Inc v Minister for the Environment and Water* [2024] FCAFC 56 (16 May 2024).

102 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, implemented through Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/571).

103 *R* (*on the application of Finch on behalf of the Weald Action Group*) (*Appellant*) *v Surrey County Council and others* (*Respondents*) [2024] UKSC 20.

The court concluded that, as it was common ground that all the oil from the project would be eventually refined and combusted, there was a causal link between the project and those emissions, which would have an 'inevitable' significant effect on the environment.[104] The court concurred with another recent decision of the Oslo District Court,[105] following the conclusions of the Norwegian Supreme Court, which decided the same issue of interpretation of the EIA Directive, finding that:

> combustion emissions from petroleum extraction are such a significant and particularly characteristic consequence of these kinds of projects that they must clearly be considered indirect climate effects within the meaning of the EIA Directive. The whole purpose of petroleum extraction is to make geologically stored carbon available in the form of oil or gas. [GHG] emissions from the carbon are thus both an inevitable and intentional effect from the project. … If combustion emissions are not included, this will mean that the provisions of the EIA Directive on the assessment of indirect climate impacts from petroleum operations will in practice have no real content.[106]

Overall, and finally, one of the key challenges discussed by scholars[107] in respect of EIAs for GHGs is the ultimate failure of legislative schemes to require decision-makers to impose sufficient controls on the extraction of fossil fuel products[108] and the subsequent failure of these regimes to regulate and sufficiently reduce overall emissions. Arguably, the ITLOS Advisory Opinion means that EIA laws and regulations that do not include cumulative and indirect or downstream (also known as scope 3) assessments and subsequent directions to decision-makers to control or reduce those emissions from all fossil fuel projects, are insufficient and may 'fail to meet this new and higher stringent' standards that must now be part of each State's international legal obligations to protect the marine environment under UNCLOS. States that fail to meet this new and higher threshold may be found to have breached their international

104 ibid, 79–82.

105 *Nature & Youth Norway & Ors v The State represented by the Ministry of Petroleum and Energy,* HR-2020-2472-P (Case No 20–051052SIV-HRET).

106 *Greenpeace Nordic v The State of Norway* (*represented by the Ministry of Petroleum and Energy*), Case No 23–099330TVI-TOSL/05, 53–54.

107 Lindsay Luke & Bram Noble, 'Consideration and influence of climate change in environmental assessment: an analysis of British Columbia's liquid natural gas sector' (2018) 37(5) Impact Assessment and Project Appraisal 37(5).

108 According to Preston (n 98), such EIAs can become 'tick the box' exercises.

legal duties to other States, and could potentially face international responsibility (with the relevant consequences at the international level), such as under the dispute resolution provisions of UNCLOS. In monist systems, it could also be argued that, at the national level, an administrative resolution (such as an environmental permit) could be challenged as unlawful for being in violation of an international legal obligation that is directly applicable in the legal order and, therefore, binding on a public authority in the decision-making process. The above demonstrates the importance of the ITLOS advisory opinion for the law of EIAs and their assessment of climate change impacts. Time will tell how this opinion is used by creative litigants seeking to improve climate protection laws and regulations.

5 Conclusion

Advisory opinions rendered by international courts and tribunals can have downstream impacts on the case law of other international bodies and in domestic litigation. While advisory opinions of ITLOS and the ICJ do not have binding legal effect, it is evident that they carry significant persuasive weight and influence. Downstream impacts can include treaty interpretation, development of customary international law, coherence of international law, and guidance for domestic/national courts, including sub-national courts. The impact and role of advisory opinions will be strengthened through the findings of other courts, tribunals, and judicial bodies, be it at the international, regional, or national level. Finally, a certain level of divergence is to be expected and, we say, likely unavoidable. While fragmentation is, of course, an undesirable outcome, a healthy level of divergence and ambiguity may be a good thing, to allow courts to build on each other's findings, and strengthen legal protection, while at the same time allowing for context-specific flexibility.

Acknowledgments

The authors would like to thank Emma O'Brien and Francesco Maletto for their input and assistance.