



**British Institute of
International and
Comparative Law**

Promoting Climate Justice through International Law: Climate Litigation & Climate Advisory Opinions





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Comparative Law**

Mission Statement

The British Institute of International and Comparative Law exists to advance the understanding of international and comparative law, and to promote the rule of law in international affairs.

Vision

To be a leading research institute of international and comparative law and to promote its practical application by the dissemination of research through publications, conferences and discussion.

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Summary

On 1 February 2023, the British Institute of International and Comparative Law (BIICL) and the Institute of Small and Micro States co-organised a webinar on '[Promoting Climate Justice through International Law: Climate Litigation & Climate Advisory Opinions](#)'. The event was a follow-up to the BIICL web series on '[Rising Sea Levels: Promoting Climate Justice through International Law](#)' (3-24 March 2021). The series explored rising sea levels as a global problem of shared concern and the legal challenges it presents from the perspective of international law and climate justice.

Background

In September 2022, in a landmark decision, the United Nations Human Rights Committee found that Australia's failure to adequately protect indigenous Torres Islanders against adverse impacts of climate change violated their rights to enjoy their culture and be free from arbitrary interferences with their private life, family and home. In December 2022, the Commission of Small Island States on Climate Change and International Law ('the Commission') requested the International Tribunal for the Law of the Sea (ITLOS) to render an advisory opinion on issues pertaining to climate change and environmental protection in the oceans, including ocean warming and sea level rise, and ocean acidification. Meanwhile, a core group of 16 states led by Vanuatu are petitioning the United Nations General Assembly (UNGA) to seek an advisory opinion from the International Court of Justice (ICJ) on climate change as it specifically affects small island developing states and other developing nations particularly exposed to the adverse effects of climate change. A draft question is currently in the process of being finalised for voting.

The event aimed to shed light on recent developments in the field of climate law & justice and discuss their legal ramifications. As such, the event sought to address several key questions: What is the legal significance of recent advisory opinion initiatives to seek redress for the most vulnerable nations? What is the jurisdiction of ITLOS and the ICJ in administering or influencing climate justice through advisory opinions? What interests other states might have in supporting these initiatives? What should we expect going forward?

The event was convened by [Dr Constantinos Yiallourides](#), Research Leader in Law of the Sea and [Kristin Hausler](#), Dorset Senior Fellow and Director of the Centre for International Law.

The present report summarizes the conversation and consolidates some of the key points covered in the webinar held on 1 February 2023. The panel discussion was chaired by Dr Nicole Pierce, Deputy-Director, Institute of Small and Micro-Nations. Speakers: [Dr Margaretha Wewerinke-Singh](#), University of Amsterdam, Faculty of Law; [Monica Feria-Tinta](#), Barrister, Twenty Essex; and, [Nicola Pearn](#), Barrister, Senior Associate, Three Crowns LLP.

BIICL extends its gratitude to all the panellists for their outstanding contribution to the discussion and to all attendees for their support of the event.

This report is issued on the understanding that if any extract is used, BIICL should be credited, preferably with the date of the event.

Suggested Citation:

British Institute of International and Comparative Law, 'Promoting Climate Justice through International Law: Climate Litigation & Climate Advisory Opinions' (1 Feb 2023)

'Vanuatu's Campaign to Seek an Advisory Opinion from the ICJ' – Dr Margaretha Wewerinke-Singh

1. Margaretha Wewerinke-Singh's presentation focused on Vanuatu's initiative to seek an advisory opinion from the ICJ. She noted that this is not the first time that a small island state has taken the initiative to try and seek an advisory opinion from the ICJ. Palau pursued a similar initiative in 2011 when Palau's leaders announced they were going to form a coalition of states to seek a resolution from the UN General Assembly that will request an advisory opinion from the ICJ on state's obligations to prevent transboundary environmental harm.
2. In 2019, a group of law students from the University of the South Pacific investigated how small island states could influence state action on climate change through international law by presenting the issue to a judicial body. After reviewing various legal options, they believed that "bringing climate change, the world's biggest problem to the world's highest court" was both appropriate and timely. They convinced the leaders of Vanuatu to initiate and lead a diplomatic effort on this matter at the UN General Assembly in 2019.¹

According to Wewerinke-Singh:

...the advisory jurisdiction of the ICJ is a particularly powerful mechanism to try and spur progress on climate action, for various reasons...It presents an inclusive mechanism that is also non-confrontational. It can involve and will likely involve much or all of the UN membership. All UN member states can make submissions and put their views before the Court. The opinion, although not binding, does speak to the obligations of all UN member states.

3. In November 2022, on behalf of a cross-regional group of states, Vanuatu informally shared a draft resolution with the UN Membership and announced their plans to formally present the resolution in the near future. After holding rounds of informal consultations with the UN membership, Vanuatu received feedback on the draft resolution and subsequently incorporated much of it into a revised draft that was publicly presented on 23 January 2023. Further informal consultations with the UN membership will take place before the resolution is open for co-sponsorship. If the resolution is adopted, it will then be sent to the ICJ through the Registrar.
4. Wewerinke-Singh noted: '*...the hope is that there will be wide co-sponsorship from different regional groups. There have been, indeed, significant indications that states from different regional groups are planning to co-sponsor.*'
5. Regarding the draft resolution, there are several important aspects that Vanuatu wants to maintain as it moves towards adoption. These include the inclusion of express references to human rights, which is a crucial aspect of the initiative. The resolution includes a preamble and two sub-questions. The first sub-question asks about states' obligations under different bodies of international law with regard to climate change,

¹ 'The Republic of Vanuatu: Pursuing an Advisory Opinion on Climate Change from the International Court of Justice <<https://www.vanuatuicj.com/>>

and the second sub-question relates to the legal consequences for states that violate these obligations. The resolution addresses two distinct groups. First, ‘small island developing states and other states that are particularly affected or injured by the consequences of climate change’, and second, ‘present and future generations’. This means that the resolution has both an inter-state dimension and a dimension that affects individuals and groups.

6. In response to a question posed by Yiallourides concerning the relationship between the Vanuatu campaign and the advisory request by the Commission of Small Island States on Climate Change and International Law, particularly on whether the initiatives are complementary to each other, Wewerinke-Singh explained:

The word ‘complementary’, captures very well how we would like to see, and also to manage, these initiatives. A bad outcome would be an outcome where there are conflicts or contradictions. That is something that we very much want to avoid. ITLOS will likely come with its advice before the ICJ does. But these two bodies have distinct roles to play in the international legal system. ITLOS is specialized in the Law of the Sea and is particularly well positioned to pronounce on obligations that arise under UNCLOS. The ICJ can also do so, but ITLOS is a specialized tribunal and is well-positioned to come up with an authoritative interpretation of obligations arising from UNCLOS. It is also a body that has significant technical expertise, including expertise in connection with science. Thus, ITLOS may deliver pronouncements that the ICJ could build upon when it interprets obligations that have been highlighted in the resolution adopted by the UNGA. This includes also obligations arising from UNCLOS and related parts of customary international law. If ITLOS has clarified these obligations, it would be natural for the ICJ to take that into account, when it makes its own assessment. The ITLOS advisory opinion could of course have value in many different ways. But in the context of the ICJ advisory opinion, it could be a stepping-stone or a building block.

7. In response to a question ‘whether there is a risk involved, that these two bodies, ITLOS and ICJ, come back with opinions that do not prescribe strong obligations on climate change’, Wewerinke-Singh expressed optimism that both ITLOS and the ICJ will agree to exercise jurisdiction. What remains a possibility, however, ‘is an opinion that is not as helpful as you would want it to be... there is a real risk that must be mitigated by those involved in the initiative.’
8. The potential risks can be reduced by preserving the integrity of the questions posed to the two judicial bodies. One question has already been asked to ITLOS, and now the goal is to maintain the integrity of the question to be asked to the ICJ. The question should not be diluted to a point where it becomes too vague for the ICJ to effectively address it. Such an outcome would be undesirable. It is unlikely that either of these bodies would state that there are no obligations, but a vague outcome that does not provide much clarity is also seen as negative. Wewerinke-Singh noted:

The hopes are so high for so many people, states, movements involved for years in this initiative. The stakes are also so high that if the outcomes would be underwhelming and disappointing, it would really be a blow to our collective faith in these institutions at a critical moment in time. We really cannot afford this.

'Issues arising from multiple advisory opinion proceedings' – Nicola Peart

9. Nicola Peart's presentation centred on the various issues that could potentially arise due to multiple advisory opinion proceedings being brought before international courts and tribunals, notably ITLOS and the ICJ.
10. On jurisdiction and admissibility issues, Peart explained that both the ICJ and ITLOS have an advisory jurisdiction, which is distinct from their contentious jurisdiction in which they hear disputes brought by one or more parties against the other. In both the context of the ICJ and ITLOS, the advisory opinion jurisdiction is to provide non-binding clarifications of legal questions. The ICJ's advisory jurisdiction is established under the UN Charter and the ICJ Statute, and there are various ways to seize the advisory jurisdiction of the Court, including through a resolution of the UN General Assembly (which typically must be passed by a majority of UN Member States voting). This is the route through which Vanuatu and other states are seeking to engage the ICJ on questions of climate change law. ITLOS' advisory jurisdiction is established by UN Convention on the Law of the Sea (UNCLOS), the ITLOS Statute and the ITLOS Rules. ITLOS' advisory jurisdiction may be seized by an authorized body established by a treaty that is related to the purpose of UNCLOS. Such an agreement was concluded between Antigua and Barbuda and Tuvalu in October 2021, which formed the Commission of Small Island States on Climate Change and International Law (COSIS).² COSIS is authorised to refer questions to ITLOS for an advisory opinion, which it did in December 2022.³
11. The question was raised: '*If both ITLOS and the ICJ are seized by requests for advisory opinions on climate change law, either concurrently or even one after the other, what if any issues might arise from that?*'. Peart noted that 'in circumstances of parallel, usually contentious, proceedings before different courts, you might hear lawyers raise arguments on *res judicata* (i.e., the matter has already been decided by a competent court and cannot be pursued elsewhere), *lis pendens* (i.e., the matter is already pending before the relevant competent court), or even 'abuse of process' (i.e., the party or the parties making the application are misusing the court procedure or using it in a way that it wasn't intended to be used). Peart noted that neither *res judicata* nor *lis pendens* are applicable in circumstances of multiple non-binding advisory opinions. When it comes to alleged misuse of process, both the ICJ and ITLOS have discretion to decline to exercise their advisory jurisdiction for reasons of judicial propriety, but the threshold for doing so is high. According to Peart:

The ICJ has stated on several occasions that it would only exercise its discretion to decline jurisdiction where there are compelling reasons to do so. ITLOS has also

² Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law <<https://treaties.un.org/Pages/showDetails.aspx?objid=08000002805c2ace>>

³ 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) <<https://www.itlos.org/en/main/cases/list-of-cases/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/>>

adopted a similar approach in the exercise of its discretion on whether to exercise advisory jurisdiction. In practice, neither body has exercised its discretion to decline jurisdiction.⁴ The ICJ has rejected arguments that it should not exercise its advisory jurisdiction, on the grounds that the question was politically motivated,⁵ or because there is a lack of consent by all the interested states to the specific formulation of questions being asked.⁶ The ICJ has also rejected the notion that it should decline to render an advisory opinion on the basis that the opinion could impede bilateral or international negotiations on the issue.⁷

12. One issue that might be raised in both the ICJ and ITLOS context is whether the questions submitted are not questions seeking clarification of what the law is, but questions of what the law should be. In other words, the questions that are being put before the ICJ or ITLOS are placing the Court or the Tribunal in the position of legislating or making law. This objection was raised in a request that was put before ITLOS submitted by the Sub-Regional Fisheries Commission (SRFC).⁸ ITLOS rejected the argument in that case, stating that it wished 'to make it clear that it does not take a position on issues beyond the scope of its judicial functions'.⁹ However some commentators have cautioned that an advisory opinion should avoid highly political and contentious issues addressed directly in the climate change negotiations.¹⁰
13. The SFRC advisory proceedings raised another issue potentially relevant to the advisory opinion proceedings before ITLOS. COSIS is only accessible to a limited group of small island states. This means that only a small group of states were involved in formulating the questions posed to ITLOS on climate change, even though the implications of these questions affect a much wider group of states. In the SFRC proceedings, some states challenged ITLOS' advisory jurisdiction, claiming that they had been excluded from the process of drafting questions, but would still be impacted by the answers. ITLOS rejected this argument. However, Judge Cot, in a separate opinion, warned against using special treaties to request ITLOS to provide advisory opinions on matters that are of wider significance to states.¹¹

⁴ The Permanent Court of International Justice, the predecessor to the ICJ, did exercise its discretion to decline to render an advisory opinion in the Eastern Carelia case. See Status of Eastern Carelia, Advisory Opinion, 1923, PCIJ, Series B, No 5. The ICJ has rejected advisory opinions where the Court found it lacked jurisdiction over the request. See eg, Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, ICJ Reports 1996.

⁵ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ Reports 2010, para 33.

⁶ Western Sahara, Advisory Opinion, ICJ Reports 1975, para 30.

⁷ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, para 51.

⁸ Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal) <<https://www.itlos.org/index.php?id=252>>

⁹ ITLOS SRFC Advisory Opinion of 2 April 2015 para 74.

¹⁰ See eg Daniel Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections' (2017) 49 Arizona State Law Journal 689, 708.

¹¹ In Judge Cot's view:

The request was written by the states of the SRFC, representing the interests, clearly legitimate interests, of coastal states. On the other hand, flag states did not take part in drafting the questions. ...The dangers of abuse and manipulation, if the Tribunal does not provide a procedural framework by exercising its discretionary power, are evident. States could, through bilateral or multilateral agreements, seek to gain an advantage over third States and thereby place the Tribunal in an awkward position, see ITLOS SRFC Advisory Opinion of 2 April 2015 (Sep Op Judge Cot) paras 8-9.

14. Turning to substantive issues, Peart noted principles of international environmental law could be raised by both the draft question set out in Vanuatu's resolution, as well as the questions that have been put to ITLOS. One example might be the principle of prevention that was summarised by the ICJ in its *Nuclear Weapons Advisory Opinion*:

... the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or areas beyond national control is now part of the corpus of international law relating to the environment.¹²

Does this principle inform the obligations of States to address the causes and consequences of climate change? Does it have any relationship to Article 2 of the Paris Agreement, which sets out the objective of 'holding the increase in the global average temperature to well below two degrees Celsius above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 degrees Celsius above pre-industrial levels'?

15. Also potentially relevant might be the duty of due diligence under international law. In the *Pulp Mills* case before the ICJ, the Court described the duty in the following terms:

A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or any area under its jurisdiction, causing significant damage to the environment of another State. This Court has established that this obligation is now part of the corpus of international law relating to the environment.¹³

How does this due diligence duty inform other obligations on states to address the causes and consequences of climate change? Is due diligence relevant to States putting in place climate policies and regulations in line with scientific consensus on climate change?

16. A wide range of other principles may be engaged in the proceedings, including human rights principles. As at the time of this event, Vanuatu's draft question also engages other general principles of customary international law, such as customary rules on state responsibility, reparation, questions of causation etc.

17. Both requests for advisory opinions may lead to interpretations of the same treaties, such as UNCLOS, the UN Framework Convention on Climate Change and the Paris Agreement, as well as other relevant treaties that govern the questions that have been put to ITLOS, and that might potentially be put to the ICJ. So, 'what are the implications of this overlap in substantive issues?' Peart explained:

There is a possibility in principle that different courts reach different conclusions. There is precedent for the ICJ reaching a conclusion that differs from that of another

¹² Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p. 226 <<https://www.icj-cij.org/en/case/95/advisory-opinions>> para 29.

¹³ Pulp Mills on the River Uruguay (Argentina v Uruguay), Judgment, ICJ Reports 2010, p.14 <<https://www.icj-cij.org/en/case/135>>

international tribunal.¹⁴ ... One possible area where the ICJ could potentially reach different conclusions is in the treatment of the precautionary approach and its status under international law. The ICJ has never recognised the precautionary approach as a general principle. But ITLOS has referred to it on occasion, particularly in the context of rendering provisional measures under Article 290 of the Law of the Sea Convention.

18. Peart observed that there is also considerable scope for cross-fertilisation of findings between the two institutions. In the Chagos Advisory Opinion, the ICJ confirmed that '[w]hen answering a question submitted for an opinion, the Court will consider any relevant judicial or arbitral decision'.¹⁵ According to Peart,

The prospect of one, let alone two, possibly even three advisory opinions, raises the profile of the key issues that are engaged, and it speaks to the interest of the international community in gaining clarity on these issues. ... There is also considerable scope for cross fertilisation of submissions. The specific issues but also the statements, the opinions and materials that are used in one proceeding, will be a reservoir of information for lawyers to use in other proceedings. Relevant to this is the multiple inter-governmental organisations that have been invited already to participate in the ITLOS advisory opinion proceedings. The existence of multiple proceedings also allows for there to be more questions asked, and potentially more questions answered.

¹⁴ See, e.g., the difference between the Tadić Case decision rendered by the International Criminal Tribunal for the Former Yugoslavia and the judgment by the ICJ in the Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America).

¹⁵ Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, ICJ Reports 2019, p. 95 para 81 <<https://www.icj-cij.org/en/case/169/advisory-opinions>>

'Advancing climate justice through courts and tribunals: A View in Perspective – Monica Feria Tinta

19. Monica Feria Tinta began her presentation by emphasising the need to contextualise recent legal developments against the broader context in the climate change domain, in light of the following questions:

'Where do these recent climate advisory initiatives originating from and how do they build upon existing legal progress both domestically and internationally? What insights have been gained so far and how will they potentially factor into any future advisory opinions?'

20. Feria Tinta noted that not too long ago there was a strong belief among prominent academics that only courts with broad jurisdiction like the ICJ could make a substantial impact in the field of climate change law. But this view is now outdated. It is now clear that even courts with limited jurisdiction, such as those with jurisdiction based on a specific treaty, can play a significant role in advancing climate justice by taking up cases in this area. Notably, the UN Human Rights Committee has a role in addressing climate-related claims under the International Covenant on Civil and Political Rights (ICCPR).¹⁶ This is how the *Torres Strait* case came about.¹⁷

21. Feria Tinta highlighted the significance of the recent initiatives in international climate change litigation and advisory opinions. One significant example is the Advisory Opinion No. 23 of the Inter-American Court of Human Rights, which was a major milestone in the American region in terms of how environmental law affects other obligations, particularly human rights.¹⁸ Additionally, the Inter-American Court of Human Rights is now set to address the issue of climate change under the American Convention on Human Rights, thus, using a human rights treaty as the main substantive law to be interpreted. This is particularly important for the Latin American region as many of these States are also parties to UNCLOS and are significantly impacted by climate change. It's worth mentioning that the advisory request before the Inter-American Court of Human Rights was initiated by Chile and Colombia, where Chile has islands at high risk of sea-level rise. Feria Tinta explained that the route of limited jurisdiction remains crucial in the realm of climate justice.

¹⁶ International Covenant on Civil and Political Rights (adopted 6 December 1966, entered into force 23 March 1976) United Nations Treaty Series, Vol. 999, p. 171 <<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>>

¹⁷ Monica Feria Tinta, 'Torres Strait Islanders: United Nations Human Rights Committee Delivers Ground-Breaking Decision on Climate Change Impacts on Human Rights' EJIL-Talk! Blog of the European Journal of International Law (27 Sept 2022) <<https://www.ejiltalk.org/torres-strait-islanders-united-nations-human-rights-committee-delivers-ground-breaking-decision-on-climate-change-impacts-on-human-rights/>>.

¹⁸ Advisory Opinion OC-23/17 of November 15, 2017, Requested by the Republic of Colombia: The Environment and Human Rights, Inter-American Court of Human Rights (IACtHR) (15 November 2017) <<http://climatecasechart.com/non-us-case/request-advisory-opinion-inter-american-court-human-rights-concerning-interpretation-article-11-41-51-american-convention-human-rights/>>; for a background, see Maria L. Banda, 'Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights' (ASIL Insights, 10 May 2018) <<https://www.asil.org/insights/volume/22/issue/6/inter-american-court-human-rights-advisory-opinion-environment-and-human>>.

22. Feria Tinta explained two distinctive types of claims that come about in climate litigation cases. Some of them are of a so-called 'diagonal nature', and others are 'non-diagonal'. The non-diagonal are when climate change impacts fall specifically within the territorial jurisdiction of the state that has been involved in their particular case. A key example in that regard is the *Torres Strait Islanders* case. Another example is the *Portuguese Youth Case* which is currently before the European Court of Human Rights.¹⁹

23. Currently, the issue of climate change is coming to the attention of ITLOS and the ICJ via a non-contentious procedure. This has certain advantages, according to Feria Tinta. One of those is that 'it offers the opportunity for a very broad deliberative process free from artificial bilateralism'. In Feria Tinta's view:

Bilateralism in a contentious case can often shape the questions in a way that may be relevant for the dispute at hand, but not necessarily for the broader, wider community of States that may be part of a treaty. Unlike in a contentious case, an advisory opinion is not limited to a strict analysis of facts, but rather offers a much greater potential to develop the law. This is quite important in the climate change law context.

24. Feria Tinta then turned to the key benefits of the *Torres Strait* case and the Human Rights Committee's assessment in the context of the ongoing advisory opinion initiatives. One of the key points addressed in the *Torres Strait* case is the definition of environmental harm. Until the *Torres Strait* case was heard, the international community had not assessed whether environmental harm caused by climate change constituted harm under a particular treaty. The *Torres Strait* case dealt directly with international environmental law, making this a landmark moment. The questions posed in the case concern two different types of obligations. The first is to prevent and reduce uncontrolled pollution from climate change, while the second is to protect and preserve the marine environment in relation to the impacts of climate change. These questions already acknowledge climate change as a form of pollution. Thus, it will be a good question for ITLOS to assess and determine whether indeed, climate change effects fall within the meaning of 'pollution' under Article 1(1)(4) of UNCLOS. It is noteworthy that this question has already been directly dealt with by a domestic court, in a completely different type of case, in connection to a private company, Shell.²⁰ The Court construed the term 'environmental harm' to encompass climate change deleterious effects. The InterAmerican Court made the same type of finding in its Advisory Opinion Number 23.

25. The second issue that was prominent in the *Torres Strait* case, and which will be of relevance to other climate change cases, is the issue of state responsibility concerning climate change. In the *Torres Strait* case, Australia argued that climate change is a global phenomenon, and it would not be possible to attribute responsibility for climate change to any particular state. Feria Tinta noted that the International Law Commission (ILC) has acknowledged that 'while...sea level rise phenomenon was not directly attributable to any particular state', states 'still have human rights obligations towards

¹⁹ <<https://www.ecchr.eu/en/case/klimawandel-vor-dem-europaeischen-gerichtshof-fuer-menschenrechte/>>

²⁰ For a background, Benoit Mayer, 'Milieudefensie v Shell: Do oil corporations hold a duty to mitigate climate change?' EJIL:Talk! Blog of the European Journal of International Law (3 June 2021) <<https://www.ejiltalk.org/milieudefensie-v-shell-do-oil-corporations-hold-a-duty-to-mitigate-climate-change/>>.

individuals'.²¹ Thus, human rights rules could apply and hold a state accountable for not fulfilling its obligations, including those obligations relating to climate change-related impacts. This viewpoint was accepted by the Human Rights Committee, which upheld the general principles of state responsibility and the ability to hold a state accountable for its actions related to climate change.

26. A further aspect indicated by Feria Tinta was the notion of a 'differentiated approach'. The *Torres Strait Islanders* case offers insights in this regard, as it highlights the unique position of Australia as a major CO₂ emitter. This will be relevant when considering states' obligations on climate change. The *Torres Strait* case also sheds light on the specific interpretation of the terms 'protect' and 'preserve' in relation to environmental harm, including under Article 192 of UNCLOS. The *Torres Strait* case was notable for addressing the impacts of climate change on land, but also the erosion of the coastal terrestrial sphere, which the islanders consider their ancestral land, and the disappearance of marine species and flora and fauna that are part of their cultural heritage. The protection of the marine environment encompasses all these aspects. Thus, the *Torres Strait* case represents an important development as it is the first international decision to acknowledge the negative effects of climate change on the marine environment.
27. Concerning the issue of treaty interpretation by courts and tribunals in the climate change domain, Feria Tinta noted that '*some believe this issue remains unresolved. However, the Torres Strait case provides a resolution to this problem by upholding the principle of systemic treaty interpretation.*' The principle states that it is possible to interpret a treaty within its normative context. For example, Australia argued that the Paris Agreement and other environmental treaties could not be relevant for the interpretation of human rights treaties such as the ICCPR. This position was rejected. The Paris Agreement may well provide the environmental context for interpreting UNCLOS. These considerations will be relevant in the advisory case brought before ITLOS. According to Feria Tinta, ITLOS has a significant advantage as it has already dealt with various environmental protection issues. UNCLOS is a 'living treaty' and there is no restriction on ITLOS interpreting the treaty 'in light of current global challenges'. ITLOS's advisory jurisdiction is comprehensive and covers 'all matters' under UNCLOS. If the Tribunal was only meant to resolve disputes, the word 'matters' would not have been used, but rather 'disputes'. The use of 'matters' indicates that the Tribunal has the jurisdiction to address any legal questions in the form of advisory opinion requests. It is also important to recall that while ITLOS is focused on interpreting UNCLOS, the questions intended to be posed to the ICJ primarily concern human rights which is not a topic that has previously come within the jurisdiction of ITLOS in the manner the questions have been put forward.
28. Feria Tinta then emphasised the important role of state participation in advisory opinion proceedings as the outcome will significantly impact how obligations under UNCLOS are understood. All states with a stake in the matter must present their views to better inform the Tribunal's opinion and the proceedings.

²¹ Report of the ILC Study Group on Sea-level rise in relation to international law (15 July 2022) paras 64-65. <<https://documents-dds-ny.un.org/doc/UNDOC/LTD/G22/408/39/PDF/G2240839.pdf?OpenElement>>

29. As a final note, Feria Tinta emphasised the importance of presenting questions in a precise manner to avoid misunderstandings and to ensure that the Court or Tribunal can provide a clear answer. For instance, the notion of 'future generations' as a victim of climate change recently emerged in domestic climate litigation cases but was dismissed. Instead, cases often proceed based on those already affected by climate change. Another example is the concept of 'foreseeability', which needs to be framed clearly to ensure that the court can understand and answer it correctly, taking into consideration the issue of imminence and how it is defined.

Q & A

30. Several questions were posed to the panel in relation to the potential of the advisory route to promote climate justice, whether through ITLOS, the ICJ, or another body, versus the contentious route. And this is a question that quite a few participants have posed, for instance, about the prospect of contentious cases before the ICJ on the basis of human rights treaties, including the protection of cultural human rights, given the importance of culture for small island states, and the connection of culture to ecosystems, including the Convention of the Rights of the Child, which one participant noted ‘is completely absent from the Vanuatu draft resolution’. Another participant noted there are several climate change litigation cases pending before the European Court of Human Rights. The outcomes of those cases are expected to be ground-breaking. All in all, why take the advisory route when we may have other routes that are available?
31. Peart responded that while there may be certain risks associated with the approach that could impact adversarial proceedings in other courts, that is a balance one has to strike. Although these advisory opinions are non-binding, they are highly influential and are likely to have an impact on other contentious proceedings. This has already been demonstrated, for example, with the Inter-American Court of Human Rights advisory opinion on the rights of the environment and its influence on litigation, human rights applications, and UN General Assembly resolutions.
32. Peart noted that, on a related note, in terms of differences between the questions drafted for the ICJ and those submitted to ITLOS, the ICJ questions include a question on the consequences of failing to comply with obligations, while ITLOS questions do not. However, the mandate of the Commission is broad enough to include additional requests or clarifications on consequences or to use the advisory opinion in a litigious or adversarial context. There is certainly room for using the advisory opinion in various ways.
33. Feria Tina recalled that Sir Ian Brownlie once said during a class that “advisory opinions shouldn’t be like taxis one takes”. Advisory opinions should not be taken lightly. There is a lot of participation and effort required from the international legal community to put forth a question in the form of an advisory opinion request. It is also true that the Paris Agreement’s lack of an enforcement mechanism has led to frustration among states and populations affected by the impacts of climate change, and this may result in disputes being brought before the courts. However, it is important to note that resolving disputes through the courts is a slow process and may not necessarily be resolved within a year or more. At any rate, both types of jurisdiction by courts, be it advisory or contentious, are meant to seek clarity on legal questions or resolving specific disputes and should, thus, be accessible to interested parties. ITLOS may render an advisory opinion within record time, as it is known for being expedient in such matters. Thus, it is possible that a request for an advisory opinion could be dealt with in a more expedient manner in this area.

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