Climate Change Before International Courts and Tribunals: Reflections on the Role of Public Interest in Advisory Proceedings

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Abstract

This article examines the advisory proceedings in relation to climate change before the International Court of Justice, the International Tribunal for the Law of the Sea, and the Inter-American Court of Human Rights

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through the lens of the broader phenomenon of public interest litigation. It focuses on certain substantive, institutional, and procedural dimensions of the advisory proceedings, construed as a form of public interest litigation. First, it argues that international courts and tribunals should innovate by allowing broader participation while considering the constraints of their statutes and rules of procedure. Second, this article examines how prior advisory opinions, even though non-binding, may shape the subsequent practice of States, and considers the impact that the advisory opinions on climate change may have. Ultimately, this article questions whether these advisory opinions may have a catalytic effect on ensuring the protection of other global commons in the future.

Keywords

Public interest litigation – ICJ – ITLOS – IACtHR – climate change

I. Introduction

Climate change is among the most pressing threats to global commons and to the survival of human species and biodiversity. It affects the lives of the present and future generations. The evidence of climate change and the harm that it has already caused, and will continue to cause, to humans, ecosystems, and the stability of international relations is overwhelming.[1] The threat posed by climate change is existential to small island developing States (SIDS) as their very survival is at stake. Despite the efforts of States to develop a legal framework to tackle climate change, including through the United Nations Framework Convention on Climate Change (UNFCCC),[2] the Kyoto Protocol,[3] and the Paris Agreement,[4] which are almost universally ratified, that framework is far from robust or satisfactory. Many obligations contained in those instruments could be described as programmatic at best and vague or

1 See e. g. Intergovernmental Panel on Climate Change (IPCC), 'Climate Change 2023: Synthesis Report' <https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_FullVolume.pdf>, last access 17 February 2025.

2 United Nations Framework Convention on Climate Change of 9 May 1992, 1771 UNTS 107.

3 Kyoto Protocol to the United Nations Framework Convention on Climate Change of 11 December 1997, 2303 UNTS 162.

4 Paris Agreement of 12 December 2015, Decision 1/CP.21, FCCC/CP/2015/L.9, Annex, 3156 UNTS 79.

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ineffective at worst. In particular, the instruments' compliance and enforcement mechanisms are limited.

In the face of the unprecedented threat posed by climate change, individuals and, most recently, States and international organisations, have turned to international courts and tribunals to clarify the content of obligations that States have undertaken in this area. Litigation efforts before domestic courts have been underway for more than two decades, but it is only in recent years that similar actions have been taken on the international plane.[5] Quasi-jurisdictional mechanisms such as the Human Rights Committee or the Committee on the Rights of the Child have now delivered important pronouncements on the scope of obligations of States under the relevant human rights instruments in connection with the effects of climate change.[6] The European Court of Human Rights (ECtHR) has also delivered important decisions in contentious cases on the obligations that States Parties to the European Convention on Human Rights have in respect of the effects and impact of climate change upon the enjoyment of human rights.[7] In our view, it is the advisory proceedings before three different international courts and tribunals, namely the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), and the Inter-American Court of Human Rights (IACtHR) that are most likely to shape the future conduct of States and other stakeholders, thus fostering broader normative change. This is so since the advisory opinions cumulatively cover different areas and legal issues relating to States' obligations in respect of climate change, and are not limited to specific facts of a given contentious case.

This article examines the phenomenon of public interest litigation. It does so through the lens of the three abovementioned advisory proceedings on climate change. While two of the proceedings are still pending at the time of writing this article, certain lessons can already be drawn with respect to the institutional and systemic repercussions of the advisory function in these cases as a form of public interest litigation.

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5 UNEP and Sabin Center for Climate Change Law, 'Global Climate Litigation Report: 2023 Status Review' <https://doi.org/10.59117/20.500.11822/43008>, last access 17 February 2025.

6 See e. g. Committee on the Rights of the Child, *Sacchi and others v. Argentina and others*, Communication No. 104/2019, CRC/C/88/D/104/2019; Human Rights Committee, *Daniel Billy and others v. Australia* (*Torres Strait Islanders)*, Communication No. 3624/2019, CCPR/C/135/D/3624/2019.

7 ECtHR (Grand Chamber), *Duarte Agostinho and others v. Portugal and 32 other States*, decision of 9 April 2024, no. 39371/20; ECtHR (Grand Chamber), *Verein KlimaSeniorinnen Schweiz and others v. Switzerland*, judgment of 9 April 2024, no. 53600/20; ECtHR (Grand Chamber), *Carême v. France*, decision of 9 April 2024, no. 7189/21.

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The article proceeds as follows. Section II. defines and reflects on the notion of public interest litigation. Section III. situates the climate change advisory proceedings within the broader landscape of public interest litigation before international courts and tribunals. Section IV. looks at how international courts and tribunals have adapted their advisory function to the growing public interest dimension thereof. The article concludes that, through the exercise of their advisory function, international courts and tribunals can play an important role in the advancement of the public interest on the international plane, and contribute to safeguarding the global commons, including but not limited to the preservation of our climate.

II. Definition of Public Interest Litigation

There is no agreed definition of public interest litigation in international law.[8] Having its origins in domestic legal systems,[9] 'at the international level, the existence of public interest litigation is in itself contentious'.[10] At the minimum, 'the conception of a public interest in international law entails the existence of a common concern or interest towards compliance with an international obligation'.[11] The notion of public interest is thus closely intertwined with that of community, global commons, shared values, and compliance.

Public interest litigation on the international plane should serve to advance common values of the international community. But what are those common values? For instance, Spijkers states that although 'there might be many fundamental disagreements when it comes to the identification of global values, […] there are nonetheless certain beliefs that all human beings subscribe to. […] The realisation of these common beliefs is in everyone's interest.'[12] In other words, the defining element is the higher sense of unity and common purpose.[13] Although the notion of international community is

8 Justine Bendel and Yusra Suedi, 'Introduction' in: Justine Bendel and Yusra Suedi (eds), *Public Interest Litigation in International Law* (Routledge 2023), 1-6 (3); Marion Esnault, 'On the Pertinence of "Public Interest" for International Litigation', in: Justine Bendel and Yusra Suedi (eds), *Public Interest Litigation in International Law* (Routledge 2023), 9-33 (9).

9 For references see Esnault (n. 8), 9.

10 Bendel and Suedi (n. 8), 3.

11 Carlos Antonio Cruz Carrillo, 'The Role of Advisory Opinions in Addressing Public Interest Issues' in: Justine Bendel and Yusra Suedi (eds), *Public Interest Litigation in International Law* (Routledge 2023), 170-199 (172).

12 Otto Spijkers, 'Global Values in the United Nations Charter', NILR 59 (2012), 361-397 (366).

13 See Bruno Simma, 'From Bilateralism to Community Interest in International Law', RdC 250 (1994), 217-384 (245).

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not new, it has certainly evolved and has been consolidated over the 20th century. This is a testimony to an 'ideological evolution of the international society' of States,[14] but also fundamentally to a profound structural change in the international legal order. Today, the select club of peremptory norms (*jus cogens*), *erga omnes* and *erga omnes partes* obligations facilitates the task of identifying core values of the international community. The core values protected by these norms justify the legal interest that every member of that community has in requiring compliance by others.[15]

Further, who is the 'public' in public interest litigation?[16] Is it necessarily the equivalent of the international community of States, or is it a broader or narrower concept? Bendel and Suedi argue that the 'public' can be a group of individuals within a country (e. g. the Rohingyas in Myanmar), a handful of States parties to a treaty who may wish to uphold their obligations *erga omnes partes*, the international community of States at large, or even the international community that comprises all entities, including international organisations and individuals.[17] Indeed, the idea that 'community' interests stretch well beyond States is implicit not only in the specific categories of norms mentioned above, but also in a broader set of values relating to international peace and security, the protection of the environment or human rights, or fundamental concepts such as the 'heritage of mankind'.[18] To a varying extent, the latter has for instance shaped the framework and global

14 Michel Virally, 'Panorama du droit international contemporain', RdC 183 (1983), 9-382 (28).

15 See Simma (n. 13), 233 (defining community interest as 'a consensus according to which respect for certain fundamental values is not to be left to the free disposition of States individually or inter se but is recognized and sanctioned by international law as a matter of concern to all States'). For the analysis of legal standing before international courts and tribunals see Farid Ahmadov, *The Right of Actio Popularis before International Courts and Tribunals* (Brill 2018); François Voeffray, *L'actio popularis ou la défense de l'intérêt collectif devant les juridictions internationales* (PUF 2004).

16 See Paula W. Almeida and Miriam Cohen, 'Mapping the "Public" in Public Interest Litigation' in: Justine Bendel and Yusra Suedi (eds), *Public Interest Litigation in International Law* (Routledge 2023), 98-134.

17 Yusra Suedi and Justine Bendel, 'Public Interest Litigation: A Pipe Dream or the Future of International Litigation?' in: Justine Bendel and Yusra Suedi (eds), *Public Interest Litigation in International Law* (Routledge 2023), 34-72 (42-45); see also Sarah Thin, 'Community Interest and the International Public Legal Order', NILR 68 (2021), 35-59.

18 See Christian Tomuschat, 'Enforcing Community Interests Through International Dispute Settlement: Reality or Utopia?', in: Ulrich Fastenrath et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 1132-1146 (1134-1137) (categorising community interests into those that directly concern the community of States (e. g. those pertaining to the international peace and security) and those that aim at the protection of individuals or groups of individuals). See also Giorgio Gaja, 'The Protection of General Interests in the International Community: General Course on Public International Law', RdC 364 (2012), 9-185.

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governance in respect of the deep seabed, climate, the ozone layer, or outer space.[19] Thus, public interest litigation refers to legal proceedings initiated to ensure compliance with certain communitarian obligations or to protect certain interests that concern the international community as a whole or part thereof.

Finally, 'litigation' before international courts and tribunals, which includes contentious and advisory proceedings, may have as its object the compliance of an actor with its international obligations, the legal consequences of a breach of those obligations, or a pronouncement on legal questions that concern the interests of the international community. The purpose of this form of international litigation is to protect the interests of the international community (or part thereof), not the interests of individual members.[20] Cases brought in respect of *erga omnes partes* obligations, where a State is a party to an international convention, or *erga omnes* obligations, i. e. owed to the international community as a whole, are an important category of public interest litigation on the international plane, but certainly do not exhaust that notion.

III. Climate Change Advisory Proceedings as Public Interest Litigation

1. Origins and Growth of Public Interest Litigation in Contentious Cases Before International Courts and Tribunals

Before the end of the 20th century, international dispute settlement was dominated by bilateral disputes between States. These disputes concerned predominantly diplomatic or consular relations, territorial sovereignty, diplomatic protection, and maritime delimitation, leaving ample space for a type of transactional justice (*justice transactionnelle*) to develop, but little space for the public interest.[21] Since the 1990s, there has been an important quantitative and qualitative shift in international dispute settlement. Quanti-

19 Manfred Lachs, 'Quelques réflexions sur la communauté internationale' in: Daniel Bardonnet and others (eds), *Le droit international au service de la paix, de la justice et du développement: Mélanges Michel Virally* (Pedone 1991), 349-357 (356).

20 Jane A. Hofbauer, 'Not Just a Participation Trophy? Advancing Public Interests through Advisory Opinions at the International Court of Justice', The Law & Practice of International Courts and Tribunals 22 (2023), 234-272 (237).

21 Georges Abi-Saab, 'Cours général de droit international public', RdC 207 (1987), 9-463 (269).

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tatively, most disputes before international courts and tribunals today involve individuals or investors, on the one hand, and States, on the other hand, largely attributable to the proliferation of hundreds of bilateral investment treaties, the advent of investor-State dispute settlement, and access to regional human rights courts. Qualitatively, there has been a considerable increase in contentious inter-State cases and requests for advisory opinions that relate to the protection of global commons or concern the interests of the international community. This qualitative shift reflects the emergence and proliferation of the communitarian obligations *erga omnes* and *erga omnes partes* in customary international law and major multilateral instruments, respectively.

In 1951, the ICJ recognised that, in respect of certain obligations, States 'do not have any interests of their own; they merely have, one and all, a common interest'.[22] However, this statement of principle by the Court was not given any practical effect for nearly 40 years. The Court's initial trepidation with respect to the consequences of recognising *erga omnes* obligations is evident in its 1966 *South West Africa* decisions.[23] States, too, treaded carefully, as can be seen from the debates on *erga omnes* obligations at the International Law Commission (ILC) during the codification of State responsibility between 1949 and 2001.[24] An important milestone was reached with the Court's famous *dictum* in the 1970 *Barcelona Traction* judgment explicitly recognising obligations *erga omnes*.[25] However, it was not until much later that States started having recourse to international courts and tribunals to seek compliance with those obligations.[26]

Ultimately, the ICJ has been instrumental in affirming a progressive move away from the 'bilateralism of relationships'[27] and the game of

22 ICJ, *Reservations to the Convention on Genocide*, advisory opinion of 28 May 1951, ICJ Reports 1951, 15 (23).

23 ICJ, *South West Africa* (Ethiopia v. South Africa / Liberia v. South Africa), second phase, judgment of 18 July 1966, ICJ Reports 1966, 6 (para. 99).

24 For an analysis see Tom Ruys, 'Legal Standing and Public Interest Litigation – Are All *Erga Omnes* Breaches Equal?', Chinese Journal of International Law 20 (2021), 457-498 (497) (concluding that '[p]ractice illustrates that public interest litigation remains slow on the uptake and that there is a general reluctance – due to political and economic reasons, or the fear of becoming a target for counter-allegations of wrongful conduct oneself – to invoke international responsibility over *erga omnes* breaches in judicial proceedings').

25 ICJ, *Barcelona Traction, Light and Power Company, Limited (New Application)* (Belgium v. Spain), judgment of 5 February 1970, ICJ Reports 1970, 3 (para. 33).

26 For an analysis of the jurisprudence on the issue of standing in respect of *erga omnes* obligations in proceedings before the Court, see Christian Tams, *Enforcing Obligations* Erga Omnes *in International Law* (Cambridge University Press 2005), 179-197.

27 Andrea Gattini, 'Actio Popularis' in: Helene Ruiz-Fabri (ed.), MPEiPro (online edn, Oxford University Press 2019).

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reciprocities towards the recognition of collective or 'community interests'.[28] This shift has been visible in the expanding variety and complexity of cases brought before the Court in recent years. These include pending cases that arise from armed conflicts or mass atrocities.[29] The Court has also had to settle disputes that dealt with claims of genocide, racial discrimination, and reparations for wide-scale armed conflict related and environmental damage.[30]

While the ICJ had given indications as to the character of *erga omnes* obligations in its earlier jurisprudence going back to the aforementioned advisory opinion of 1951[31] it was not until 2012 that the Court unequivocally recognised the standing and legal interest of every State party to a multilateral convention to bring proceedings against another State party in respect of *erga omnes partes* obligations. In the *Belgium v. Senegal* case, the ICJ recalled that States parties to the Convention against Torture share a collective interest in preventing acts of torture and ensuring that perpetrators do not escape accountability. Accordingly, 'each State party has an interest in compliance with [the obligations *erga omnes partes*] in any given case'.[32]

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28 Simma (n. 13), 235.

29 See e. g. ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar), preliminary objections, judgment of 22 July 2022, ICJ Reports 2022, 477; ICJ, *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Canada and The Netherlands v. Syrian Arab Republic), provisional measures, order of 16 November 2023, ICJ Reports 2023, 587.

30 See respectively ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), merits, judgment of 26 February 2007, ICJ Reports 2007, 43; ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination* (Ukraine v. Russian Federation), preliminary objections, judgment of 8 November 2019, ICJ Reports 2019, 558; ICJ, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), reparations, judgment of 9 February 2022, ICJ Reports 2022, 13; ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua), compensation, judgment of 2 February 2018, ICJ Reports 2018, 15.

31 ICJ, *Reservations to the Convention on Genocide* (n. 22), 23; ICJ, *East Timor* (Portugal v. Australia), judgment of 30 June 1995, ICJ Reports 1995, 90 (para. 29); ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia), preliminary objections, judgment of 11 July 1996, ICJ Reports 1996, 595 (para. 31); ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* advisory opinion of 9 July 2004, ICJ Reports 2004, 136 (paras 155-157); ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002)* (Democratic Republic of the Congo v. Rwanda), jurisdiction and admissibility, judgment of 3 February 2006, ICJ Reports 2006, 6 (para. 64); ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), (n. 30), para. 147.

32 ICJ, *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), judgment of 20 July 2012, ICJ Reports 2012, 422 (para. 68).

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By recognising Belgium's standing, as a State-party to the Convention against Torture,[33] to invoke Senegal's responsibility for breaches thereof, the Court effectively took the position that public order considerations are not alien to international law, and that all States have an interest in the respect and proper performance of certain international obligations. Other cases involving community interests have followed, and the Court has consistently upheld this position.[34] For instance, the Court has recently been seized of two applications that concern community interests under the Genocide Convention as a basis for the Court's jurisdiction. The first case was brought by The Gambia against Myanmar for alleged violations of that Convention in respect of the Rohingya. This case does not directly concern The Gambia, but the latter is acting in pursuit of *erga omnes partes* obligations under the Genocide Convention.[35] In another recent case, South Africa instituted proceedings against Israel in respect of alleged genocide against the Palestinians in the context of an ongoing armed conflict in the Gaza strip.[36] As with the *Gambia v. Myanmar* case, South Africa is not directly affected by the conduct of Israel, but rather acts as a party entitled to seek compliance with the Genocide Convention that it considers to be breached by Israel. Both contentious cases further solidify the tenets of public interest litigation.

At the same time, the ICJ remains an inter-State judicial mechanism, which is the product of a time when the main actors of international law were States. As such, its statute and institutional setting are limited to inter-State cases and highly deferential to sovereign interests, even where individuals or groups of individuals are central to the facts underlying the dispute. Thus, while the standing of States in contentious proceedings involving *erga omnes (partes)* obligations is no longer controversial as such, questions remain as to

33 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, 1465 UNTS 85.

34 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar) (n. 29), paras 106-112. For an analysis of the relevant case law see Priya Urs, 'Obligations Erga Omnes and the Question of Standing before the International Court of Justice', LJIL 34 (2021), 505 (509-516).

35 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar) (n. 29), paras 112-113. For an analysis of this case, see Michael Becker, 'The Plight of the Rohingya: Genocide Allegations and Provisional Measures in The Gambia v. Myanmar at the International Court of Justice', Melbourne Journal of International Law 21 (2020), 428-449. See also, Sarah Thin, '"Proxy States" as Champions of the Common Interest? Implications and Opportunities', HJIL 85 (2025), 69-96.

36 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (South Africa v. Israel), application of 29 December 2023, <https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf>, last access 17 February 2025.

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the effects of breaches of those obligations from the perspective of the rules of treaty law or the content of State responsibility.

The ICJ has not been the only dispute settlement mechanism that has had to adjust to the increasingly multilateral and communitarian dimension of disputes and legal questions relating to global commons. While under-theorised,[37] in recent years, ITLOS has experienced a notable rise in public interest litigation in contentious cases, particularly concerning environmental protection and human rights at sea.[38] Relatedly, the Tribunal has consistently emphasised the importance of considerations of humanity in maritime law enforcement, which reflects a certain conception of public interest in the regime governing maritime spaces and the exercise of jurisdiction within them.[39]

Unsurprisingly, public interest litigation has been a common feature before regional human rights mechanisms. For instance, the IACtHR has been asked to address both individual and collective human rights violations,[40] and its expansive interpretation of the American Convention on Human Rights has allowed it to explicitly consider the notion of public interest.[41] Public interest litigation has been a feature of the Inter-American system since its inception as a consequence of its structural set-up, including the significant role that non-governmental organisations (NGOs) play in the Court's proceedings[42] and the participation of victims.[43] Advisory proceedings, as described in Article 64 of the American Convention on Human Rights,[44] play a critical role in fostering the development of international human rights law and

37 See Miriam Cohen and Nouwagnon Olivier Afogo, 'The Contribution of the International Tribunal for the Law of the Sea to the Protection of Human Rights and the Public Interest at Sea', PKI Global Justice Journal (2023), <https://globaljustice.queenslaw.ca/news/the-contribution-of-the-international-tribunal-for-the-law-of-the-sea-to-the-protection-of-human-rights-and-the-public-interest-at-sea?>, last access 17 February 2025.

38 See ITLOS, *The 'Arctic Sunrise'* (The Netherlands v. Russian Federation), provisional measures, order of 22 November 2013, ITLOS Reports 2013, case no. 22, 230; *M/V 'Louisa' (Saint Vincent and the Grenadines v. Spain),* judgment of 28 May 2013, ITLOS Reports 2013, case no. 18, 4 (para. 155).

39 ITLOS, *M/V 'Saiga' (No. 2)* (Saint Vincent and the Grenadines v. Guinea), judgment of 1 July 1999, ITLOS Reports 1999, case no. 2, para. 155.

40 See Salvador Herencia Carrasco, 'Public Interest Litigation in the Inter-American Court of Human Rights: The Protection of Indigenous Peoples and the Gap between Legal Victories and Social Change', R. Q. D. I. (hors-série) (2015), 199-220 (209).

41 Carrasco (n. 40), 204-205.

42 Bert B. Lockwood, 'Advisory Opinions of the Inter-American Court of Human Rights', Den. J. Int'l L. & Pol'y 13 (1984), 245-267 (247).

43 See Thomas M. Antkowiak, 'An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice', Stan J. Int'l. L. 47 (2011), 279-332.

44 American Convention on Human Rights, 22 November 1969, 1144 UNTS 123, (entered into force 18 July 1978).

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strengthening its application across the Americas. The public interest nature of these proceedings lies in their capacity to clarify, guide, and advance human rights norms transcending the interests of individual litigants or States. By offering legal guidance on abstract or emerging issues, the advisory proceedings can contribute to the prevention of human rights violations and the harmonisation of regional legal standards or norms. For instance, in its 2014 advisory opinion on *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*,[45] the IACtHR examined the rights of children in the context of immigration detention, providing normative guidance to States. Similarly, the advisory opinion OC-24/17,[46] addressing the rights of same-sex couples and gender identity, has had an impact in Latin American countries.[47] While the advisory opinions are not legally binding, their moral and persuasive authority often compels States to adopt reforms, and may generate a ripple effect across the region.[48]

2. Advisory Proceedings as a Form of Public Interest Litigation Before International Courts and Tribunals

International courts and tribunals may be inclined to give greater weight to considerations of public interest in the context of advisory proceedings.[49] This section addresses the ways in which public interest considerations may have played out in the advisory opinion delivered by the ITLOS in May 2024, and the extent to which considerations of public interest may have impacted the proceedings and the opinions to be delivered by the ICJ and the IACtHR.

a) The ITLOS Advisory Opinion on Climate Change

The climate change advisory opinion delivered by ITLOS in May 2024 is a landmark development from the perspective of public interest litigation, both

45 IACtHR, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, advisory opinion of 19 August 2014, OC-21/14.

46 IACtHR, *State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples*, advisory opinion of 24 November 2017, OC-24/17.

47 See e. g. Jorge Contesse, 'Sexual Orientation and Gender Identity in Inter-American Human Rights Law', North Carolina Journal of International Law 44 (2019), 353-386.

48 See e. g. Jo Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge University Press 2012), 37.

49 Brian McGarry, 'Obligations Erga Omnes (Partes) and the Participation of Third States in Inter-State Litigation', The Law & Practice of International Courts and Tribunals 22 (2023), 273-300; Hofbauer (n. 20), 271.

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in terms of its substantive reasoning as well as the procedure that was followed.

First, ITLOS recognised that the anthropogenic greenhouse gas emissions constitute marine pollution, thus placing these emissions firmly within the regulatory framework of the United Nations Convention on the Law of the Sea (UNCLOS).[50] The opinion emphasises the interconnectedness of climate change, marine pollution, and the obligations of States under UNCLOS to protect and preserve the marine environment from the deleterious effects of greenhouse gas emissions. In particular, ITLOS refused to accept that the specific obligations under the United Nations (UN) climate change regime should displace the application of UNCLOS in respect of the deleterious effects of climate change, suggesting that the maxim of '*lex specialis derogat lege generali* has no place in the interpretation of the Convention'.[51] This approach is objectively correct and presents UNCLOS as a critical legal instrument in addressing the global climate crisis. The same approach may also be adopted by the ICJ and the IACtHR in respect of the relationship between the UN climate change regime and customary international law. If this is the case, it would serve the public interest of ensuring that States' obligations in respect of climate change are understood in a comprehensive and holistic manner.

Secondly, the advisory opinion demonstrates the ITLOS' role as a forum for addressing global environmental concerns that transcend national borders. Climate change disproportionately affects vulnerable States, such as small island nations, which face existential threats due to rising sea levels and ocean acidification. The proceedings before ITLOS involved the participation of a wide range of States and international organisations. By delivering a robust opinion, adopted unanimously by 21 judges, based on views expressed by a considerable variety of participants, ITLOS amplified the voices of vulnerable States, fostering inclusivity in global climate governance.

Thirdly, the proceedings in and of themselves were emblematic of a broader trend in public interest litigation, where international courts and tribunals are increasingly being called upon to interpret and enforce norms that go beyond purely inter-State interests and considerations. Indeed, this was not the first time that ITLOS showed particular openness to integrating considerations of public interest in the exercise of its advisory function. The ITLOS

50 ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, advisory opinion of 21 May 2024, case no. 31, <https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_corr.pdf>, last access 17 February 2025 (hereafter Request by the COSIS), paras 159-179.

51 ITLOS, *Request by the COSIS* (n. 50), para. 224.

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Seabed Disputes Chamber and the full Tribunal had delivered two highly influential advisory opinions over the past decade that have provided considerable service to the governance of the Area and the sustainable use of marine living resources, respectively.[52]

b) The Pending Advisory Proceedings on Climate Change Before the ICJ and the IACtHR

The advisory proceedings before the ICJ, including most prominently those currently pending in respect of climate change, carry an important public interest dimension. First, the entities that can request advisory proceedings before the ICJ are those that are already tasked with realising certain common goals. For instance, the UN organs such as the General Assembly or the Security Council, or specialised agencies, are supposed to represent the collective interest of the UN Member States. In requesting an advisory opinion on legal questions that fall within the purview of their functions, international organisations or organs thereof act as 'the trustees of a community interest'.[53] As such, even if the advisory function, at least in the context of the ICJ, was intended to have a quasi-constitutional dimension, i. e. of elucidating the law for the benefit of other UN organs and agencies,[54] over time the advisory function has increasingly been used to clarify international law in respect of matters of wider community interest. Often, the mandate of the requesting body is focused on a specific interest of the international community or humankind. For instance, when the International Seabed Authority (ISA) requested the advisory opinion from the ITLOS Seabed Disputes Chamber, following the proposal by Nauru, it acted in its capacity as a guardian of the heritage of humankind which are the resources of the Area.[55]

Secondly, the presentation of a request for an advisory opinion from the ICJ reflects a complex set of political, diplomatic, and legal factors, particu-

52 ITLOS, *Responsibilities and Obligations of States with Respect to Activities in the Area*, advisory opinion of 1 February 2011, ITLOS Reports 2011, case no. 17, 10; ITLOS, *Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, advisory opinion of 2 April 2015, ITLOS Reports 2015, case no. 21, 4.

53 Cruz Carrillo (n. 11), 177.

54 See e. g. ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, advisory opinion of 11 April 1949, ICJ Reports 1949, 174; ICJ, *Competence of the General Assembly for the Admission of a State to the United Nations*, advisory opinion of 3 March 1950, ICJ Reports 1950, 4; ICJ, *Effects of Awards of Compensation made by the United Nations Administrative Tribunal*, advisory opinion of 13 July 1954, ICJ Reports 1954, 47.

55 International Seabed Authority, 'Decision of the Council of the International Seabed Authority requesting an advisory opinion pursuant to Article 191 of the United Nations Convention on the Law of the Sea' of 6 May 2010, ISBA/16/C/13.

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larly where it originates in the General Assembly or Security Council. Whether the request in turn has a public interest dimension will thus be determined in part by the negotiating history, the wording of the resolution adopted, and ultimately the way in which the questions have been formulated. The request in respect of climate change is a case in point.[56] The unequal bargaining power of States in multilateral settings such as that of the General Assembly may either increase or diminish the scope for public interest considerations making their way into the text of the questions for the advisory opinion. Moreover, entities other than States, namely individuals or representatives of civil society may play a significant role in shaping the requests for advisory opinions and channelling public interest considerations into questions formulated in those requests. For instance, the role of students from 12 Pacific Island States was instrumental to the very inception of the campaign undertaken by Vanuatu, which led to the adoption by 132 States at the General Assembly of the resolution requesting the advisory opinion from the Court.[57] This was only the second time in history that a resolution requesting an advisory opinion was adopted by consensus, a feat that may in part be explained by lobbying from a global alliance of more than 1800 civil society organisations.[58] The impact of actors other than States in garnering support for a request in public interest cases is significant.[59]

Thirdly, advisory opinions are intended to clarify legal questions posed by requesting bodies, such as the General Assembly in the case of the ICJ, without the need to consider any specific facts. This allows international courts and tribunals greater flexibility to interpret legal principles in abstract terms or to address broader legal questions of international concern.[60] On

56 Margaretha Wewerinke-Singh, Jorge E. Viñuales and Julian Aguon, 'The Role of Advocates in the Conception of Advisory Opinion Requests', AJIL Unbound 117 (2023), 277-281; see also Maria Antonia Tigre and Margaretha Wewerinke-Singh, 'Beyond the North–South Divide: Litigation's Role in Resolving Climate Change Loss and Damage Claims', RECIEL 32 (2023), 439-452.

57 See Wewerinke-Singh, Viñuales and Aguon, 'Role of Advocates' (n. 56), 278. See also, Naveena Sadasivam, '*How a Small Island Nation Is Taking Climate Change to the World's Highest Court*', Grist, 27 June 2023, <https://grist.org/international/vanuatu-ralph-regenvanu-international-court-loss-and-damage/>, last access 17 February 2025.

58 Climate Action Network International, 'Thousands of Civil Society Organisations Call on Countries to Support Vanuatu Climate Justice Initiative', 5 May 2022, <https://climatenetwork.org/2022/05/05/thousands-of-civil-society-organisations-call-on-countries-to-support-vanuatu-climate-justice-initiative>, last access 17 February 2025.

59 See Wewerinke-Singh, Viñuales and Aguon, 'Role of Advocates' (n. 56), 277.

60 See ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, advisory opinion of 19 July 2024, ICJ Reports 2024, Separate Opinion of Judge Nolte, paras 3-6 <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-08-en.pdf>, last access 17 February 2025.

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several occasions, the ICJ has refused to consider an allegedly incomplete factual record as a compelling reason to warrant the exercise of its discretion not to deliver the advisory opinion requested.[61]

Fourth and finally, the extent to which advisory proceedings can serve as a channel for public interest considerations will depend on the openness of those proceedings, the resulting diversity of participants and views expressed, and how States and other stakeholders give effect to the findings made, even if they are formally non-binding. As discussed below, inclusivity and wide participation in advisory proceedings can have a significant impact.[62]

When compared to the ICJ or ITLOS, regional human rights courts have long channelled the public interest in advisory proceedings on questions that transcend the interests of a particular State or constituency. As noted earlier, public interest considerations have played a critical role in several advisory opinions delivered by the IACtHR, and thus may impact how change is effected on a domestic and regional level.[63] For instance, its 2017 Advisory Opinion on the *Environment and Human Rights* provided a groundbreaking analysis on the intersection of the right to a healthy environment, invoking several public interest considerations.[64] Notably, the IACtHR recognised the intrinsic link between environmental protection and the rights of future generations, framing the right to a healthy environment as having both individual and collective connotations.[65] By recognising an autonomous right to a healthy environment and mandating cooperation among states to address global environmental challenges, the opinion reinforced the principle that the right to a healthy environment is not merely a national concern but a shared international responsibility.[66] This opinion contributed to the recognition of

61 See, most recently, ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, advisory opinion of 19 July 2024, <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-00-en.pdf>, last access 17 February 2025, paras 46-47; see also ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, first phase, advisory opinion of 30 March 1950, ICJ Reports 1950, 65 (72); ICJ, *Western Sahara*, advisory opinion of 16 October 1975, ICJ Reports 1975, 12 (para. 46).

62 See generally, Wewerinke-Singh, Viñuales and Aguon, 'Role of Advocates' (n. 56), 277.

63 See e. g. IACtHR, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection* (n. 45); IACtHR, *State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples* (n. 46).

64 IACtHR, *The Environment and Human Rights*, advisory opinion of 15 November 2017, OC-23/17.

65 IACtHR, *The Environment and Human Rights* (n. 64), para. 59.

66 IACtHR, *The Environment and Human Rights* (n. 64). See also Maria Antonia Tigre and Natalia Urzola, 'The 2017 Inter-American Court's Advisory Opinion: Changing the Paradigm for International Environmental Law in the Anthropocene', Journal of Human Rights and the Environment 12 (2021), 24-50.

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the human right to a healthy and sustainable environment in certain domestic legal settings and by the General Assembly of the United Nations.[67] A detailed list of questions in the context of the pending advisory proceedings on climate change before the IACtHR presents the Court with a further opportunity to clarify the content of obligations of States, having regard to the needs of most vulnerable groups, including indigenous communities, children, and future generations.[68]

In sum, advisory proceedings before international courts and tribunals are a useful tool for protecting and enforcing the public interest.[69] As noted by Hofbauer, they can be used to clarify and interpret 'public interest obligations without a breach thereof necessarily having already occurred, or in the case of breaches by multiple parties'; they can also assist the international community 'in finding a response to a breach of public interests'.[70] There are of course examples of advisory opinions that have failed to serve the public interest, such as in the *Legality of the Threat or Use of Nuclear Weapons.*[71] However, there are many other positive examples from both the ICJ and ITLOS.[72]

The utility of advisory proceedings as a form of public interest litigation is particularly pronounced in the advisory proceedings on climate change. Climate change involves complex legal issues. It also impacts all States, but in different ways. The opinions requested have the potential to advance public interest by emphasising States' collective responsibility to protect the environment for the benefit of present and future generations.[73] They should clarify certain key obligations of conduct both under the UN climate change regime, but also fundamentally under customary international law, in the case

67 UNGA Res 76/300 of 28 July 2022, A/RES/76/300.

68 IACtHR, *Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile*, 9 January 2023. See also Monica Feria-Tinta, 'An Advisory Opinion on Climate Emergency and Human Rights Before the Inter-American Court of Human Rights', Questions of International Law 102 (2023) 45-60.

69 Hofbauer (n. 20), 236-237.

70 Hofbauer (n. 20), 237.

71 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion of 8 July 1996, ICJ Reports 1996, 226. See Hofbauer (n. 20), 248 ff.

72 See e. g. ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States with Respect to Activities in the Area* (n. 52); ITLOS, *Request for Advisory Opinion Submitted by the SFRC* (n. 52); IACtHR, *The Environment and Human Rights* (n. 64); ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, advisory opinion of 25 February 2019, ICJ Reports 2019, 95.

73 See generally, Maria A. Tigre, 'It Is (Finally) Time for and Advisory Opinion on Climate Change: Challenges and Opportunities on a Trio of Initiatives', Charleston Law Review 17 (2024), 623.

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of the opinion requested of the ICJ. They may also address the extent to which general secondary rules of State responsibility apply in respect of the harm resulting from the failure of States to meet their obligations in respect of climate change. They may further address the interplay of the public interest with the capacity of States to take action, that is the issue of common but differentiated responsibility. Finally, they may link the protection of the environment with the concept of intergenerational equity.[74]

3. Novel Issues for Public Interest Litigation Arising from the Parallel Climate Change Advisory Proceedings

As discussed in Section III. 1. above, public interest litigation before international courts and tribunals has raised discrete issues for these institutions, such as that of standing. However, the climate change advisory proceedings represent the first time that similar questions are being addressed by three different courts in parallel, and as a result, certain novel issues have come to light.

The first issue is that there are significant differences between how the advisory function of ITLOS, the ICJ, and the IACtHR is carried out. They have different procedural and evidentiary rules impacting, for example, who can submit written and oral observations. There are also significant differences in their subject matter jurisdiction: the ICJ is the only mechanism of general competence that may consider any obligations under international law; the ITLOS is competent to interpret UNCLOS and other international agreements relating to the purposes of UNCLOS;[75] and finally, the IACtHR has the competence to interpret the American Convention on Human Rights and other related human rights instruments.[76] For instance, as Tigre and Rocha argue, 'since the wording of human rights law is open-ended and relies on its application to concrete cases, the ICJ and the Inter-American Court of Human Rights may offer competing views on climate

74 See for example, IACtHR, *Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile*, 9 January 2023, 1 and 6 (which refers specifically to the impact of climate change on future generations).

75 Art. 288 United Nations Convention on the Law of the Sea of 12 December 1982, 1833 UNTS 397 (UNCLOS).

76 Art. 64 American Convention on Human Rights of 22 November 1969, 1144 UNTS 123. See also IACtHR, *'Other Treaties' Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights)*, advisory opinion of 24 September 1982, OC-1/82, IACHR Series A No. 1, ILM 22 (1983), 14.

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change and human rights. Moreover, the Inter-American Court of Human Rights must rely on the Framework Convention on Climate Change and the Paris Agreement as an interpretative benchmark, which entails providing its own views on the obligations under these treaties.'[77] As a result, there is potential for contradiction or for convergence in the advisory opinions rendered.[78]

Secondly, the questions posed in the requests to ITLOS, the ICJ, and the IACtHR are very broad when compared to previous examples of requests for advisory opinions involving the public interest. Although the judges at ITLOS did not find it necessary to reformulate the questions, the judges of the ICJ and the IACtHR may do so.[79] Arguably, ITLOS did not need to reformulate the questions posed by the Commission of Small Island States on Climate Change and International Law (COSIS), which by comparison were limited in scope.[80] It will be interesting to see if any such potential reformulation will impact the opinion provided and the extent to which public interest considerations make their way into the judicial reasoning. Similarly, there is a number of inter-related questions in the requests for advisory opinions before the ICJ and the IACtHR, which may in turn lead the international courts and tribunals to focus on some of the issues more prominently than others. Thus, for instance, it is likely that the ICJ will defer to ITLOS' advisory opinion on the proper interpretation of the relevant obligations under UNCLOS concerning the deleterious effects of climate change.

The third novel issue that has arisen in the advisory proceedings on climate change concerns the diversity of participants and the degree of openness of the proceedings to the participation of States and intergovernmental organisations. While some of these mechanisms are particularly open to external participation like the IACtHR, only States and intergovernmental organisations my appear before inter-State mechanisms like the ICJ or ITLOS. Notwithstanding this constraint, the advisory proceedings before ITLOS involved the participation of 32 Contracting Parties and nine organisations at the written stage of the proceedings, and 35 Contracting Parties and three

77 Maria Antonia Tigre and Armando Rocha, 'Competing Perspectives and Dialogue in Climate Change Advisory Opinions', AJIL Unbound 117 (2023), 287-291 (288).

78 Tigre and Rocha (n. 77), 288-290.

79 For instance, the ICJ did so in the past, where the question was unclear or vague, inadequately formulated, or did not reflect the legal question really in issue. See e. g. ICJ, *Application for Review of Judgment No 273 of the United Nations Administrative Tribunal*, advisory opinion of 20 July 1982, ICJ Reports 1982, 325 (paras 46-48); ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, advisory opinion of 20 December 1980, ICJ Reports 1980, 73 (paras 35-37).

80 ITLOS, *Request by the COSIS* (n. 50), paras 138-152.

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organisations in the oral proceedings.[81] Similarly, in the advisory proceedings before the ICJ, the Court received 91 written statements by States and international organisations and 62 written comments on those statements; 96 States and 11 international organisations took part in the oral proceedings.[82] In the advisory proceedings before the IACtHR, nine States presented written views, along with over 200 submissions by *amici curiae*, including law professors and academic institutions, non-governmental organisations and representatives of civil society.[83]

The breadth of participation, certainly before ITLOS and the ICJ, is unprecedented and, while it may have been difficult to manage from an administrative and logistical perspective, it may nonetheless influence how the public interest in respect of climate change will be taken into account. It should also have a positive impact on the legitimacy of the proceedings, particularly if both formal and informal (i. e. observations that are not officially part of the case file) participation is considered. It may further have a substantive impact by contributing to the issuance of opinions that reflect the often-differing perspectives of the participants.

Finally, several novel substantive issues have arisen in the context of the climate change advisory opinions that are likely to feature in other international public interest litigation. For instance, the proceedings have to tackle the relationship between science and law. In its advisory opinion, ITLOS relied heavily on scientific evidence of the effects of climate change when opining on legal obligations of States under UNCLOS.[84] The ICJ is likely to follow suit.[85] Further, in light of the questions before the ICJ and the IACtHR, it is unclear whether and, if so, to what extent, international courts and tribunals can opine upon the rights of future generations. Finally, a crucial question at the heart of these advisory proceedings is whether general rules on State responsibility can be adapted to the type(s) of harm resulting

81 Statements not submitted pursuant to articles 138, para. 3, and 133, para. 3, of the Rules of the Tribunal, albeit not part of the case file, are made available on the ITLOS website: <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/>, last access 17 February 2025.

82 ICJ, *Obligations of States in respect of Climate Change*, <https://icj-cij.org/case/187/written-proceedings>, last access 17 February 2025. This article was completed before the opening of the oral proceedings in this case on 2 December 2024, and thus did not take into account any written or oral observations.

83 IACtHR, *Climate Emergency and Human Rights,* Observations on the Request for an Advisory Opinion <https://www.corteidh.or.cr/observaciones_oc_new.cfm?nId_oc=2634>, last access 17 February 2025.

84 ITLOS, *Request by the COSIS* (n. 50), paras 46-66.

85 See e. g. ICJ, 'The Court Meets with Scientists of the Intergovernmental Panel on Climate Change (IPCC)', Press Release no. 2024/75 of 26 November 2024.

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from climate change, which does not affect States equally and, in fact, disproportionately affects certain vulnerable communities. These peculiar features of climate change international proceedings introduce novel questions that may have a lasting impact on public interest litigation in other areas of law, as well as on the advisory function of the international courts and tribunals more generally.

IV. Climate Change Advisory Proceedings: Paving the Way to New Institutional Developments and Enhancing the Role of Courts as Guardians of International Law

1. Openness of International Courts and Tribunals to More Diverse Participation

As noted above, the level of participation in the climate change advisory proceedings was unprecedented. This issue is critical in the context of public interest litigation of this kind. Broad participation should enrich the submissions made and have a positive impact on the legitimacy of the proceedings.[86] As a result, it may also support the implementation of the findings made.

Given the importance of this issue, it is essential to consider potential avenues for development and improvement. One such avenue could be the adaptation of the procedural rules of the ICJ and ITLOS, two inter-State mechanisms, to accommodate the formal participation of actors other than States and intergovernmental organisations in certain advisory proceedings. As Wewerinke-Singh, Garg and Hartmann argue, '[t]he participation of a diverse array of States and international organisations in the advisory proceedings underscores that addressing the climate crisis is of global concern. Broad participation and contributions will enrich the Court's understanding of the complex legal dimensions of climate change and add extra legitimacy to proceedings'.[87] However, in light of the existing statutory constraints, the participation of other actors is limited.

In its rules and practice, the ICJ has construed narrowly the term 'international organization' in Article 66(2) of its Statute, thus excluding entities, such as non-governmental organisations, from the possibility to formally partici-

86 Margaretha Wewerinke-Singh, Ayan Garg and Jacques Hartmann, 'The Advisory Proceedings on Climate Change before the International Court of Justice', Questions of International Law, 30 November 2023, <http://www.qil-qdi.org/the-advisory-proceedings-on-climate-change-before-the-international-court-of-justice/>, last access 17 February 2025, 23-43.

87 Wewerinke-Singh, Garg and Hartmann, 'Advisory Proceedings on Climate Change' (n. 86), 42.

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pate in advisory proceedings.[88] In accordance with the Court's Practice Direction XII, adopted in 2004, any written statement or document submitted by such entities to the Court on their own initiative is 'not to be considered part of the case file' but 'will be placed in a designated location in the Peace Palace' and may be consulted by States and intergovernmental organisations presenting written or oral statements.[89] States and intergovernmental organisations have at times referred to the briefs of non-governmental organisations submitted in this way; they have also used statements of individuals in their arguments. However, little is known as to whether such submissions are considered by the Court, aside from where they are incorporated into the submissions of participants.[90] Thus, while the Court has demonstrated some openness through its Practice Direction XII, participation is still fundamentally limited to States and intergovernmental organisations.

ITLOS has shown some innovation in this regard. Like the ICJ, ITLOS does not consider such unsolicited written observations as part of the case file. However, it has gone a step further than the ICJ by making them available on its website, thus fostering transparency and participation, even if indirect. This was the case, for instance, of written statements submitted by the World Wildlife Fund for Nature (WWF) and Greenpeace in the context of advisory proceedings before ITLOS.[91] The ICJ could adopt a similar practice. At the IACtHR, there is much greater openness to participation, as '[a]ny person or institution' may submit written observations.[92] Submissions

88 Art. 69(4) ICJ Rules of Court, which interprets the term 'public international organization' in Article 34(3) of the ICJ Statute as denoting 'an international organization of States'. This interpretation should not necessarily be applied *mutatis mutandis* to the interpretation of the term 'international organization' in Art. 66(2) of the ICJ's Statute. But see also ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), Correspondence, ICJ Reports 1970, 636-639, 644 and 647.

89 ICJ, Practice Direction XII.

90 See e. g. ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius* (n. 72). Written Comments of the Republic of Mauritius of 1 March 2018, <https://www.icj-cij.org/sites/default/files/case-related/169/169-20180301-WRI-05-00-EN.pdf>, last access 17 February 2025, para. 4.114.

91 See e. g. ITLOS, *Request for an Advisory Opinion submitted by the SRFC* (n. 52), Amicus Curiae brief from WWF International, <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/written_statements_round1/C21_Written_Statement_1_WWF.pdf> and <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/written_statements_round2/C21_Written_Statement_2_WWF.pdf>, last access 17 February 2025; ITLOS Seabed Disputes Chamber, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* (n. 52), Statement of Stichting Greenpeace Council (Greenpeace International) and the World Wide Fund for Nature, <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/C17_Written_Statement_Greenpeace.pdf>, last access 17 February 2025.

92 Art. 44 Rules of Procedure of the IACtHR of 16 November 2009.

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by an *amicus curiae* are thus considered by the IACtHR, whereas the unsolicited written observations submitted to the ICJ and ITLOS are not, absent their incorporation into the submissions of the participants. In our view, in the context of advisory opinions of a public interest nature, it would be beneficial for the inter-State mechanisms to develop means for broader formal participation in the proceedings, as the IACtHR and other regional mechanisms have done, where it would serve the mandate of the institution in question and assist it in providing the opinion requested.[93]

In proceedings with a public interest component, the participation of a diversity of voices (e. g. academia and civil society) should increase the chances that an opinion has been prepared on the basis of all relevant information, both legal and factual. This statement is a logical extension of the effect of the broad participation of intergovernmental organisations in the climate change advisory proceedings before the ICJ and ITLOS. The ICJ, for its part, authorised the participation of 11 international organisations in the climate change advisory proceedings, comprising the European Union, the African Union, the Pacific Community, the Organisation of African, Caribbean and Pacific States, the Melanesian Spearhead Group and the Forum Fisheries Agency, the Commission of Small Island States on Climate Change and International Law (COSIS), the International Union for Conservation of Nature (IUCN), and the Organization of the Petroleum Exporting Countries (OPEC).[94] As may be expected, the submissions by these intergovernmental organisations were diverse as a result of their differing mandates and technical expertise (e. g. IUCN and OPEC).

Interestingly, in relation to IUCN, ITLOS has consistently authorizsed it to participate in advisory proceedings under Article 133(3) of the Rules of Tribunal, including in the proceedings on climate change, even though the IUCN is not exclusively composed of States, making its status as an intergovernmental organisation open to question.[95] By allowing IUCN to partici-

93 For a brief overview of the relevant legal framework governing participation in regional and sub-regional jurisdictional mechanisms see Cruz Carrillo (n. 11), 181.

94 ICJ, Press Releases 2023/29, 2023/32, 2023/33, 2023/42, 2023/46, 2023/48, 2023/70, <https://www.icj-cij.org/case/187/press-releases>, last access 17 February 2025.

95 See e. g. ITLOS, *Request by the COSIS* (n. 50), Written Statement of the IUCN, 13 June 2023 and ITLOS/PV.23/C31/16, 32 ff.; ITLOS, *Responsibilities and Obligations of States with Respect to Activities in the Area* (n. 52) (Written Statement of the IUCN and ITLOS/PV.2010/4/Rev.2, at 14 ff); Philippe Gautier, 'Standing of NGOs and Third-Party Intervention before the International Tribunal for the Law of the Sea', Revue Belge de droit international 47 (2014), 205 (213); Vladyslav Lanovoy, 'Access to and Participation in Proceedings Before International Courts and Tribunals' in: Edgardo Sobenes, Sarah Mead and Benjamin Samson (eds), *The Environment Through the Lens of International Courts and Tribunals* (Springer 2022), 428-429.

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pate in the proceedings, the ICJ might also be giving first signs of an incremental openness or departure from its strict interpretation of Article 66 (2) of its own Statute. There is no reason of principle why Article 66(2) of the Statute, which employs the term 'international organizations' rather than 'public international organizations' as found elsewhere in the Statute, could not be interpreted in a broader manner, i. e. not being limited to intergovernmental organisations. The object and purpose of that provision is precisely to allow the Court to obtain all the information it considers necessary in order to form its views on questions before it.[96]

It is also true that broader participation does not come without challenges and risks. It could present significant administrative and logistical challenges for these institutions given their limited resources. A balance must thus be struck between breadth of participation and the good administration of justice. Broader participation also raises concerns about the potential politicisation of the proceedings, abuse, and the usual floodgates arguments. These concerns have prompted calls to revisit whether a better approach may be to expand the pool of bodies entitled to request advisory opinions.[97] Inspiration could be drawn from the African regional system of human rights, where non-governmental organisations are entitled to request an advisory opinion from the African Court of Human and People's Rights.[98] However, any such substantive reforms would require major structural changes for these institutions and would be difficult to achieve. Smaller procedural changes could be achieved quite easily. In the case of the ICJ, the Court could, through its procedural rules, reinterpret the notion of 'international organization' in Article 66(2) to include entities other than intergovernmental organisations. Perhaps, even more realistically, Practice Direction XII could be easily modified by the Court in order to broaden the scope of organisations that can submit 'written statements and/or documents' outside of the formal case record, which is currently restricted to 'international non-governmental organizations', and to provide participants, and the public at large, with easier access to those submissions through publication on their website, as ITLOS has done in its practice.

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96 Andreas Paulus, 'Article 66', in: Andreas Zimmermann and Christian Tams (eds), *The Statute of the International Court of Justice* (3rd edn, Oxford University Press 2019), 1812-1834 (1821 and 1833).

97 Hofbauer (n. 20), 262-266.

98 Art. 4 para. 1 Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights of 10 June 1998 (Protocol AfChHPR). See eg ACtHPR, *Advisory Opinion on the Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project* (SERAP), advisory opinion of 26 May 2017, no. 001/2013.

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2. The Potential Effect(s) of the Advisory Opinions on Climate Change: Beyond the Binding/Non-Binding Dichotomy

The three advisory opinions will undoubtedly serve to consolidate the legal framework on climate change and further its implementation by States in their conduct. The conduct of States can be affected by intrinsic and extrinsic factors inherent to advisory opinions, as outlined below.

Taking the intrinsic factors that may affect the conduct of States first, while advisory opinions are not binding, they are still an authoritative statement of the law. The weight given to the advisory opinions can be seen both in the practice of States and that of international courts and tribunals. For example, in its decision on preliminary objections in the *Mauritius/Maldives* case, an ITLOS Special Chamber ascribed great weight to the ICJ's reasoning and determinations in the *Chagos* advisory opinion. It held that:

> 'An advisory opinion is not binding because even the requesting entity is not obligated to comply with it in the same way as parties to contentious proceedings are obligated to comply with a judgment. However, 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.'[99]

The Special Chamber of the ITLOS relied on the ICJ's finding in the *Chagos* advisory opinion that the decolonisation of Mauritius was not lawfully completed and affirmed, on this basis, that the United Kingdom cannot 'have any legal interests in permanently disposing of maritime zones around the Chagos Archipelago by delimitation'.[100] In relying on the finding of the ICJ that the continued administration of the Chagos Archipelago by the United Kingdom was illegal, the Special Chamber of ITLOS went on to conclude that the United Kingdom was not an indispensable party to the proceedings between Mauritius and the Maldives.[101] The Special Chamber justified its approach by emphasising that the *Chagos* opinion addressed broader obligations *erga omnes partes*, rather than solely a bilateral dispute, such that its findings could be relied upon in related cases.[102] The recently concluded agreement between Mauritius and the United Kingdom on the

99 ITLOS Special Chamber, *Dispute Concerning Delimitation of the Maritime Boundary in the Indian Ocean (Mauritius/Maldives)*, preliminary objections, judgment of 28 January 2021, ITLOS Reports 2021, 7 (para. 203).

100 ITLOS Special Chamber, *Mauritius/Maldives* (n. 99), para. 247.

101 ITLOS Special Chamber, *Mauritius/Maldives* (n. 99), para. 248.

102 ITLOS Special Chamber, *Mauritius/Maldives* (n. 99), paras 166, 188-189.

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return of the Chagos Archipelago[103] underscores the practical and political significance of the *Chagos* advisory opinion, as it not only strengthened Mauritius's claims but also catalysed negotiations for resolving the long-standing dispute between the two States.[104] Furthermore, domestic cases have engaged with the ICJ's opinion,[105] demonstrating the rippling public interest effect an advisory opinion can have beyond the court or tribunal initially concerned.

Similarly, other past advisory opinions in respect of global commons have resonated widely in the subsequent practice of States and case law. That has been the case, for instance, of the ITLOS Seabed Disputes Chamber's advisory opinion, the reasoning of which has been relied on in other areas of international law[106] as well as by domestic courts.[107] Advisory opinions on climate change are likely to generate a similar effect on future litigation, both international and domestic.[108] For instance, the IACtHR 2017 advisory opinion on *Human Rights and the Environment* (OC-23/17), '[a]rguably, […] opened the door for rights-based climate litigation through the recognition of States' responsibilities for transboundary harms (including climate change-related harms) and the precautionary principle'.[109] In a similar vein, if the ICJ provides specific guidance on issues such as the content and modalities of certain primary obligations in respect of climate change or the availability of reparations for breaches of those obligations, that reasoning may well be

103 UK and Mauritius Joint Statement, 3 October 2024, <https://www.gov.uk/government/news/joint-statement-between-uk-and-mauritius-3-october-2024>, last access 17 February 2025.

104 See generally Massimo Lando, 'Advisory Opinions of the International Court of Justice in Respect of Disputes', Colum. J. Transnat'l L. 61 (2023), 67-132; Jorge Contesse, 'The Rule of Advice in International Human Rights Law', AJIL 115 (2021), 367-408.

105 See Philippa Webb, 'The United Kingdom and the Chagos Archipelago Advisory Opinion: Engagement and Resistance', Melbourne Journal of International Law 21 (2021), 726-748 (742-744).

106 IACtHR, *The Environment and Human Rights* (n. 64), paras 103, 142, 158. See also ICJ, *Whaling in the Antarctic (Australia v. Japan; New Zealand intervening)*, Written Observations of New Zealand of 4 April 2013, para. 104; ICSID, *Aven and others v. Costa Rica*, ICSID case no. UNCT/15/3, Respondent's Post-Hearing Brief of 13 March 2017, para. 540.

107 See e. g. Supreme Court of New Zealand, *Trans-Tasman Resources Limited v. The Taranaki – Whanganui Conservation Board*, judgment of 30 September 2021, [2021] NZSC 127, para. 94.

108 See e. g. Annalisa Savaresi, 'Inter-State Climate Change Litigation: "Neither a Chimera nor a Panacea"' in: Ivano Alogna, Christine Bakker and Jean-Pierre Gaucci (eds), *Climate Change Litigation: Global Perspectives* (Brill Nijhoff 2021), 366-392.

109 Maria Antonia Tigre, Natalia Urzola and Juan Sebastián Castellanos, 'A Request for an Advisory Opinion at the Inter-American Court of Human Rights: Initial Reactions', Climate Law, 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/>, last access 17 February 2025.

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taken up in future international and domestic public interest litigation efforts, including before the ICJ.[110] The three opinions are bound to have an impact if they clarify the scope of the obligations to mitigate and adapt to the effects of climate change, the scope and degree of due diligence required, or the regime on loss and damage, which are particularly controversial under the existing climate change legal regime. Thus, the non-binding nature of the advisory opinions does not hinder their potential impact on the advancement of climate justice.

While advisory opinions can offer significant advantages for addressing climate change cases, particularly in clarifying States' obligations under international law and fostering normative development, there are potential pitfalls. For instance, the *Kosovo* advisory opinion[111] was criticised for its narrow interpretation of the question presented to it and limited engagement with broader legal implications, leading to controversy over its utility and precedential value.[112] Careful attention must be thus paid to the formulation of the questions put to the Court, ensuring they address key legal uncertainties without becoming overly abstract or disconnected from practical realities. Unlike the *Kosovo* opinion, climate change advisory opinions have the potential to clarify both the specific obligations under the relevant treaty regimes and under customary international law, as well as the linkages that may exist with other branches of international law and the general secondary obligations on State responsibility, while fostering participation of particularly vulnerable States and non-State actors.

Turning now to extrinsic factors that may affect the conduct of States, i. e. those unrelated to the non-binding character of advisory opinions and the quality of their reasoning, at least three can be singled out. First, advisory opinions may be used by States to streamline or even bypass certain aspects of climate negotiations, enabling States to focus on implementing measures.[113] For instance, as noted earlier, the *Chagos* advisory opinion revitalised negotiations between the United Kingdom and Mauritius in respect of the return by the former to the latter of the Chagos archipelago. Further, by setting out and clarifying the law applicable to a given issue, international

110 Daniel Bodansky, 'Advisory Opinions on Climate Change: Some Preliminary Questions', RECIEL 32 (2023), 185-192, (186) (suggesting that the 'advisory opinion requests seek to effectuate a paradigm shift in international climate change law, from a system of exclusively negotiated law to one that involved adjudicated law').

111 ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, advisory opinion of 22 July 2010, ICJ Reports 2010, 403.

112 See generally Hurst Hannum, 'The Advisory Opinion on Kosovo: An Opportunity Lost, or a Poisoned Chalice Refused?', LJIL 24 (2011), 155-161.

113 For the possible impact on climate change negotiations specifically see Bodansky (n. 110), 191.

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courts and tribunals may contribute to preventing bilateral disputes between States from arising.[114]

Secondly, the submissions made by States in the context of advisory proceedings may have a knock-on effect on the development of international law and thus serve to shape future State behaviour. These statements may be considered subsequent practice in connection with specific treaty obligations or, alternatively, contribute to the development of relevant practice and *opinio juris* in connection with certain rules or principles of general international law.[115] In the context of climate change, they may also empower domestic constituencies to exert pressure on the State and other stakeholders from within and to keep them to account in terms of further implementation measures to combat and mitigate the effects of climate change. Bodansky helpfully provides reflections as to a 'range of diffuse effects' that advisory opinions on climate change might have. These include bolstering domestic climate litigation, giving greater prominence to certain issues in the international policymaking on climate change, bolstering arguments of some States and undermining those of others, further clarifying procedural issues such as that of standing or technical aspects of the required causal link for climate change reparations.[116] Most importantly, the significance of opinions to be delivered by the ICJ and the IACtHR, as well as that recently delivered by ITLOS, 'might depend as much on [their] ability to shape public consciousness and define normative expectations for a broad variety of actors as on [their] direct influence on states'.[117] As Wewerinke-Singh and others posit, advisory opinions by the three international courts and tribunals 'could spur and (re)invigorate climate action by various groups, especially youth groups, by providing a tangible example of local activism turning into global action for climate justice'.[118]

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114 Laurence Boisson de Chazournes, 'Advisory Opinions and the Furtherance of the Common Interest of Humankind', in: Laurence Boisson de Chazournes, Cesare Romano and Ruth Mackenzie (eds), *International Organizations and International Dispute Settlement: Trends and Prospects* (Transnational Publishers 2002), 107. On the authority of the ICJ advisory opinions see generally Vahid Rezadoost, 'Unveiling the "Author" of International Law – The "Legal Effect" of ICJ's Advisory Opinions', Journal of International Dispute Settlement 15 (2024), 506-533.

115 See ILC, '*Draft Conclusions on Identification of Customary International Law*, With Commentaries', in: ILC, *Report of the International Law Commission on the Work of Its Seventieth Session* (30 April-1 June and 2 July-10 August 2018), UN Doc. A/73/10, 2018, 118-155 (135) (Commentary to Conclusion 7(2)), noting that whenever 'a State's practice as a whole is found to be inconsistent, that State's contribution to a "general practice" may be reduced').

116 Bodansky (n. 110), 190.

117 Bodansky (n. 110), 190; see also Daniel Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections', Ariz. St. L. J. 49 (2017), 689-712 (707).

118 Wewerinke-Singh, Garg and Hartmann, 'Advisory Proceedings on Climate Change' (n. 86), 41.

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Thirdly, several risks are inherent to a greater use of the advisory function of international courts and tribunals as a form of public interest litigation. While the first two risks are not necessarily related to climate change advisory proceedings only, they are worth mentioning as potential drawbacks of overuse of the advisory function and its impact on public interest litigation more broadly. On the one hand, the making of a request for an advisory opinion involves a challenging negotiating process and, as a result of political, economic, and other compromises made, the outcome may not necessarily reflect best the public interests in question. On the other hand, there is a risk that advisory opinions may be used as a tool to create law where it simply does not exist. International courts and tribunals tend to tread carefully when it comes to pronouncements that may be regarded as pushing the boundaries of the existing law.[119] At the same time, they are naturally reluctant to make a declaration of *non liquet*.[120] Last but not least, there is a risk of fragmentary opinions by different international courts and tribunals on the overlapping aspects of climate change.[121] Having regard to the context and scope of questions in the climate change advisory proceedings, that risk is not to be underestimated in the decentralised legal order which knows of no hierarchy or any formal coordination among international courts and tribunals.

V. Conclusion

Conceived in a straitjacket of synallagmatic bilateralism,[122] the international legal order has come a long way to recognise and, most importantly, allow for an enforcement of collective or community interests. International courts and tribunals are busier than ever before and are, today, frequently called to adjudicate upon disputes or provide guidance on legal questions that

119 ICJ, *Legality of the Threat or Use of Nuclear Weapons* (n. 71), para. 18 (the Court 'states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend').

120 ICJ, *Legality of the Threat or Use of Nuclear Weapons* (n. 71), para. 105(2) E; see also ICJ, *Legality of the Threat or Use of Nuclear Weapons* (n. 71), Dissenting Opinion of Judge Higgins, paras 29-30.

121 Concerning the question of fragmentation see generally ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the ILC, finalized by Mr. Martti Koskenniemi, UN Doc. A/CN.4/L.682 and Add. 1 (13 April 2006). See also Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015).

122 Voeffray (n. 15), xx (Préface by Georges Abi-Saab) (the author's translation from the original in French: 'dans le carcan du bilatéralisme synallagmatique').

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concern the protection of shared values and interests of the international community. Over the past two decades, international courts and tribunals have pronounced on a number of issues that concern the global commons, both as part of their contentious and advisory functions. The incremental increase of public interest litigation before international courts and tribunals raises the question as to whether and, if so, how to revisit the function(s) of dispute settlement mechanisms and the impact they may have on affording greater protection to global commons.

This article has addressed the concept of public interest litigation through the lens of advisory proceedings on climate change before the ICJ, ITLOS and IACtHR. The main argument of the article is that advisory proceedings in general, and the climate change advisory proceedings specifically, have the potential to contribute to the protection of global commons and may have a positive effect on fostering further public interest litigation on the international plane. This argument was developed by analysing how the climate change advisory proceedings could pave the way for new institutional developments, and to what extent they may enhance the role of international courts and tribunals as guardians of international law. The article examined the potential effects of advisory opinions on the behaviour of States. While the three opinions hold great promise as to their impact, the advisory function of international courts and tribunals is still subject to several institutional constraints. These constraints could be tempered with a view to advancing the public interest, for example by making even small changes that would allow greater participation by entities other than States and intergovernmental organisations. Breadth of participation in public interest litigation of this kind is particularly important where the questions put before international courts and tribunals concern the global commons and require the treatment of diverse scientific, socio-economic, and legal considerations, which may not necessarily be fully addressed by States participating in the proceedings.

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