

Climate Change Law and the Law of the Sea: Systemic Impacts of the ICJ and ITLOS Advisory Opinions Read Together

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I. Introduction

From among the rich pickings of the International Court of Justice's ('ICJ') unanimous Advisory Opinion on climate change, this contribution focusses specifically on the relationship between international climate change law and the law of the sea. In doing so, it will reflect on the systemic impacts of the ICJ Advisory Opinion read together with the Advisory Opinion on climate change handed down by the International Tribunal for the Law of the Sea ('ITLOS') on 21 May 2024.¹

The relationship between these parallel proceedings, both requested under the leadership of Small Island Developing States ('SIDS'), has been one of complementarity from the outset.² With both opinions now handed down, we can conclude that this complementarity and mutual supportiveness is reflected in their substantive findings too. It bears emphasis that the ICJ and ITLOS had different mandates and a different jurisdictional scope within which to answer the questions put to them. As a court of general jurisdiction, the ICJ has a broad mandate to interpret obligations of States in respect of climate change arising under any area of international law, with particular regard to those mentioned in the UN General Assembly's request,³ including the Charter of the United Nations, the UN Convention on the Law of the Sea ('UNCLOS'), international human rights law, the

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1 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.

2 Payam Akhavan and Rozemarijn Roland Holst, 'What Are the Legally Binding Obligations of States in Respect of Climate Change?' *IISD SDG Knowledge Hub*, 14 August 2024.

3 UNGA Res. 77/276 of 29 March 2023, 'Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change.'

UN Framework Convention on Climate Change ('UNFCCC'), the Paris Agreement, and customary international environmental law. ITLOS' mandate is limited to interpreting UNCLOS, and the questions submitted to it concerned the obligations of States to protect and preserve the marine environment under Part XII of UNCLOS.⁴ That said, both requests invited the ICJ and ITLOS respectively to clarify the relationship between international climate change law and the law of the sea, as indeed they did.

II. Issues Common to Both Requests

While the questions put to the ICJ were broader than those put to ITLOS, the Court recognises that there are issues common to the two requests.⁵ It explains that '[a]lthough the Court is not obliged, in the exercise of its judicial functions, to model its own interpretation of UNCLOS on that of ITLOS, it considers that, in so far as it is called upon to interpret the Convention, it should ascribe great weight to the interpretation adopted by the Tribunal'.⁶

The ICJ proceeds to affirm ITLOS' main substantive findings, including: that anthropocentric GHG emissions fall under the definition of 'pollution of the marine environment' under UNCLOS Article 1(1)(4); that obligations under Part XII of UNCLOS to prevent, reduce and control pollution of the marine environment are thus applicable;⁷ and that the obligation under UNCLOS Article 192 consists of a positive obligation to take measures to protect and preserve the marine environment and a negative obligation

4 COSIS, Request for an Advisory Opinion of 12 December 2022. See for a discussion i.a. Benoit Mayer, 'Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law' AJIL 119 (2025) 153-160; Joshua Paine, 'The ITLOS Advisory Opinion on Climate Change: Selected Issues of Treaty Interpretation', EJIL: Talk!, 3 June 2024; Diane Desierto, "'Stringent Due Diligence", Duties of Cooperation and Assistance to Climate Vulnerable States, and the Selective Integration of External Rules in the ITLOS Advisory Opinion on Climate Change and International Law', EJIL: Talk!, 3 June 2024.

5 ICJ, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025, para. 337.

6 ICJ, *Obligations of States in Respect of Climate Change* (n. 5), para. 338.

7 ICJ, *Obligations of States in Respect of Climate Change* (n. 5), paras. 339-340; ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (n. 1), paras. 161-179.

not to degrade it.⁸ The ICJ also followed ITLOS in stressing that the standard of due diligence required in implementing these obligations under UNCLOS articles 192 and 194 is 'stringent' given the high risk of harm, and more severe for the riskier activities, while taking States' different capabilities into account.⁹

On the relationship between these obligations under UNCLOS and obligations under the climate change treaties, ITLOS – as the first international tribunal to rule on this matter – laid down several important foundations. First of all, ITLOS clarified that while the UNFCCC and Paris Agreement are 'relevant in interpreting and applying the Convention with respect to marine pollution from anthropogenic GHG emissions', the Tribunal does not consider that obligations under UNCLOS 'would be satisfied simply by complying with the obligations and commitments under the Paris Agreement'.¹⁰ Secondly, it categorically rejected the argument put forward by some participants that the Paris Agreement constitutes a *lex specialis* to UNCLOS and that the latter therefore cannot impose more stringent requirements in relation to climate change than those contained in the Paris Agreement.¹¹ The Tribunal stressed that the 'Convention and the Paris Agreement are separate agreements, with separate sets of obligations' and that while the Paris Agreements complements UNCLOS, it 'does not supersede the latter'.¹²

The ICJ echoes this approach and applies it more broadly to the relationship between the climate change treaties and other rules of international law.¹³ The ICJ also categorically rejected a variety of *lex specialis*-based arguments to the effect that the climate change regime would exclude the application of other rules of international law.¹⁴ The Court further specified

8 ICJ, *Obligations in Respect of Climate Change* (n. 5), para. 342; ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (n. 1), paras. 385, 387.

9 ICJ, *Obligations in Respect of Climate Change* (n. 5), paras. 343, 347; ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (n. 1), paras. 239, 241.

10 ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (n. 1), para. 223.

11 ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (n. 1), paras. 220–221, 224.

12 ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (n. 1), para. 223.

13 ICJ, *Obligations in Respect of Climate Change* (n. 5), paras. 309–315; 354.

14 ICJ, *Obligations in Respect of Climate Change* (n. 5), paras. 162–171.

that treaty obligations do not constitute *lex specialis* in relation to rules of customary international law, and that customary obligations are not fulfilled simply by States complying with their obligations under the climate change treaties.¹⁵

III. Issues on Which the ICJ Went Further

There are several points on which the ICJ could go further than ITLOS in spelling out the relationship between the law of the sea and climate change law, given its broader mandate to interpret for example the Paris Agreement in its own right, and not solely for the purposes of interpreting obligations under UNCLOS. For example, ITLOS – noting broad scientific agreement on the need to keep global warming below 1.5°C – identified this lower end of the temperature goal formulated in Article 2(1)(a) of the Paris Agreement as one relevant factor that States need to take into account in adopting the necessary measures to comply with obligations under UNCLOS.¹⁶ The ICJ dealt with this point more elaborately and systematically, identifying not just scientific consensus on the 1.5°C target but also a series of COP decisions that, according to the Court, reflect subsequent agreement of the parties in relation to the interpretation of the Paris Agreement within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties.¹⁷

Similarly, on the legal nature of States' nationally determined contributions ('NDCs') under the Paris Agreement, ITLOS observed briefly that the Paris Agreement 'does not require the Parties to reduce GHG emissions to any specific level according to a mandatory timeline but leaves each Party to determine its own national contributions in this regard'.¹⁸ This

15 ICJ, *Obligations in Respect of Climate Change* (n. 5), para. 314. See also, Joint Declaration of Judges Charlesworth, Brant, Cleveland, and Aureescu as well as Declaration of Judge Nolte, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025, para. 13; and for a discussion Julian Arato and Justina Uriburu, 'Treaty and Custom in the ICJ's Climate Change Opinion', EJIL: Talk!, 24 July 2025.

16 ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (n. 1), para. 243.

17 ICJ, *Obligations in Respect of Climate Change* (n. 5), para. 224; and Declaration by Judge Tladi, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025, paras. 9–13.

18 ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (n. 1), para. 22.

could be read to imply that States enjoy an almost unfettered discretion in determining the content of their NDCs, as many participants in the ICJ proceedings have indeed argued.¹⁹ Based on a detailed interpretation of Article 4 of the Paris Agreement in its context and in light of the object and purpose of the Agreement, the ICJ concluded that the discretion of parties in the preparation of their NDCs is limited, that NDCs must satisfy certain standards under the Paris Agreement and are thus open to scrutiny. Notably States must exercise due diligence and ensure that, when taken together, NDCs are actually capable of achieving the 1.5°C temperature goal.²⁰

The ICJ also took the opportunity to interpret a number of obligations under UNCLOS in relation to sea level rise and related issues, which the ITLOS opinion has not dealt with. While several participants in the ITLOS proceedings spoke to issues concerning the impacts of sea level rise on existing maritime entitlements, this was not part of the questions put to the Tribunal and thus, according to the Tribunal, outside the scope of the request.²¹ Many participants raised these issues again in the ICJ proceedings, and the Court opted to explicitly address them. Drawing on state practice and with reference to the work of the International Law Commission,²² the ICJ confirms that UNCLOS does not require States to update existing charts showing baselines and outer limits of their maritime zones when these are impacted by sea level rise.²³ The Court also touched on the question of statehood and the loss of territory as a result of sea-level rise and confirmed, for the first time, that ‘once a State is established the disappearance of one of its constituent elements would not necessarily entail the loss of its statehood’.²⁴ It stressed that the duty of States to co-operate in the context of sea level rise is a matter of legal obligation that ‘assumes particular significance in this context’.²⁵

19 See on this point also ICJ, Declaration by Judge Tladi (n. 17), paras. 15–16.

20 ICJ, *Obligations in Respect of Climate Change* (n. 5), paras. 237–249.

21 ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (n. 1), paras. 149–150.

22 Final Report of the Study Group on sea level rise in relation to international law, Official Records of the General Assembly, Eightieth Session, Supplement No. 10 (UN doc. A/80/10, Annex I), Report of the International Law Commission on its work at its Seventy-sixth Session.

23 ICJ, *Obligations in Respect of Climate Change* (n. 5), paras. 355–362.

24 ICJ, *Obligations in Respect of Climate Change* (n. 5), para. 363.

25 ICJ, *Obligations in Respect of Climate Change* (n. 5), para. 364.

Finally, where the ITLOS opinion only made cursory references to the intersections of climate change, the law of the sea, and obligations arising under other areas of international law, including human rights,²⁶ and other multilateral environmental agreements such as the Convention on Biodiversity,²⁷ the ICJ opinion interprets obligations arising under these regimes in the context of climate change in a more systemic manner, repeatedly stressing how such obligations ‘contribute to ensuring the protection of the climate system as a whole’ and are thus mutually supportive.²⁸ The commitment to systemic integration and harmonious interpretation reflected throughout the opinion provides reference points on which state practice and further normative developments can, and hopefully will, build.

IV. Concluding Remarks

The ocean-climate nexus is integral to the health of our global climate system. In legal terms, it is only one, but a very crucial aspect on which both ICJ and ITLOS opinions have had complementary and mutually supportive impacts in terms of recognition, clarification, and systemic integration of obligations arising under different regimes that historically lack coordination. It is also an aspect of particular significance to the SIDS who led both campaigns, and testament to their concerted efforts to seek clarification of existing obligations under international law that correspond to their fundamental demands for justice.

26 ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (n. 1), para. 66; and Declaration of Judge Infante Caffi, *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. See for a discussion also Khaled Elmahmoud, ‘The ITLOS Advisory Opinion: Human Rights as a Withered Branch of International Law?’, *EJIL: Talk!*, 24 June 2024.

27 ITLOS, *Request for an Advisory Opinion Submitted by The Commission of Small Island States on Climate Change and International Law* (n. 1), paras. 388, 439.

28 ICJ, *Obligations in Respect of Climate Change* (n. 5), paras. 316–330; 369–404.