International Advisory Proceedings on Climate Change

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ABSTRACT

Several island states are expected to be severely harmed by climate change and rising sea levels. In late 2021, Tuvalu, Vanuatu, and other island states launched two legal initiatives aimed at requesting advisory opinions of international courts on the law applicable to climate change. They are planning to ask international courts to clarify the obligations of states to cut greenhouse gas emissions and to pay reparations for the harm already caused, hoping that this would help foster more action against climate change.

This Article provides the first comprehensive assessment of the feasibility and desirability of international advisory proceedings on climate change. It analyzes recent developments and engages critically with the main substantive and procedural aspects of potential advisory proceedings. Contrary to the prevailing view, this Article shows that these initiatives, albeit well intended, are almost certain to fail to achieve their goals, and might be counterproductive.

The likely failure of advisory proceedings on climate change results from several factors, including jurisdictional challenges and questions of judicial propriety. A court would find it difficult to determine the law applicable to key aspects of the questions, such as the modalities of burden-sharing in global efforts on climate change mitigation. And even if a court were to give a meaningful advisory opinion, it is highly uncertain whether powerful states would comply with it. These factors raise the risk that the issuance of advisory opinions might further erode the credibility of international institutions, thus undermining the foundations of any cooperation against climate change.

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INTRODUCTION

States have long expressed their concern for the impact of human activities on the climate system[1] and recognized the "urgency" of mitigating climate change.[2] The Paris Agreement sets a collective objective of reaching "global peaking of greenhouse gas [GHG] emissions as soon as possible" and achieving net zero GHG emissions "in the second half of this century".[3] The parties thus aim at holding global warming "well below" 2°C and as close to 1.5°C as possible.[4] So far, however, states have not agreed on consistent commitments. In particular, the nationally determined contributions (NDCs) and long-term mitigation strategies under the Paris Agreement fall short of what the 1.5 or 2°C goals suggest.[5]

In this context, litigation has increasingly appeared as an alternative way to prompt national action on climate change mitigation.[6] Concerned citizens and NGOs have filed multiple cases before domestic or regional courts. At times, courts have dismissed these cases on preliminary grounds—

[1] *See, e.g.*, United Nations Framework Convention on Climate Change, pmbl. ¶2, May 9, 1992, 1771 U.N.T.S. 107; Paris Agreement, pmbl. ¶12, Dec. 12. 2015, 55 ILM 740 (2016); Decision -/CP.26, Glasgow Climate Pact (advanced unedited version), pmbl. ¶7, Nov. 13, 2021, https://unfccc.int/documents/310475.
[2] *See, e.g.*, Decisions 1/CP.13, Bali Action Plan, pmbl. ¶17, U.N. Doc. FCCC/CP/2007/6/Add.1 (Mar. 14, 2008); 1/CP.21, Adoption of the Paris Agreement, pmbl. ¶7, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016); -/CP.26, *supra* note 1, ¶4. *See also* Paris Agreement, *supra* note 1, pmbl. ¶5.
[3] Paris Agreement, *supra* note 1, art. 4, ¶1.
[4] *Id.* art. 2, ¶1(a).
[5] *See, e.g.*, Decision -/CP.26, *supra* note 1, ¶4; UNEP, Emissions Gap Report 2021 (2021); U.N. Climate Change Secretariat, Message to Parties and Observers (Nov. 4, 2021), https://perma.cc/L8LL-SDPF.
[6] *See, e.g.*, Address by Johnson Toribiong, President of Palau, *in* U.N. GAOR, 66th Sess., 16th plen. mtg. at 26, 27, U.N. Doc. A/66/PV.16 (Sept. 22, 2011).

for lack of standing[7] or by reference to doctrines relating to the separation of powers.[8] In some other cases, domestic courts have applied tort, constitutional, or human rights law, sometimes interpreted in light of international law, as requiring national governments to enhance their efforts on climate change mitigation.[9]

International courts, however, have been lagging behind.[10] Tuvalu once considered claiming compensation against the United States before the International Court of Justice (I.C.J.) for the impacts of climate change, but it has never acted on this idea.[11] The voluntary nature of international adjudication hinders the prospects of such inter-state litigation,[12] as most large GHG emitters do not accept the compulsory jurisdiction of the I.C.J.[13] and show no interest in referring a climate-related case to an international court. Overall, contentious proceedings between two or

[7] *See, e.g.*, Case C-565/19P, Carvalho v. Parliament & Council, ECLI:EU:C:2021:252 (Mar. 25, 2021).

[8] *See, e.g.*, Juliana v. United States, 947 F.3d 1159 (9th Cir 2020).

[9] *See, e.g.*, HR Nederlanden (Supreme Court of the Netherlands), Dec. 20, 2019, ECLI:NL:2019:2006 (Urgenda/Staat der Nederlanden), unofficial English translation 59 ILM 814 (2020) (Neth.); Tribunal de Première Instance francophone de Bruxelles (French-Speaking Tribunal of First Instance of Brussels), June 17, 2021, Case 15/4585/A (Klimaatzaak/Belgium), unofficial English translation https://perma.cc/U3A5-PLTY (Belg.); Bundesverfassungsgericht (Federal Constitutional Court), Mar. 24, 2021, 1 BvR 2656/18 (Neubauer/Germany), unofficial English translation https://perma.cc/YUD7-Z37P (Ger.).

[10] *See* remarks by Lavanya Rajamani, in *Judging the Climate Crisis: The Role of the International Court of Justice in Addressing Environmental Harms*, 20 ASIL PROC. 19, 23 (2021) (noting that "there is much that the ICJ could contribute" on climate law).

[11] *Palau Seeks U.N. World Court Opinion on Damage Caused by Greenhouse Gases*, U.N. NEWS, Sept. 22, 2011.

[12] *See* Statute of the International Court of Justice, art. 36, June 26, 1945, 59 Stat. 1055, 3 Bevans 1179.

[13] Only two of the eight largest GHG-emitting states have accepted the compulsory jurisdiction of the I.C.J. (India and Japan). *See* CAIT data for 2018 historical GHG emissions (total excluding land-use change and forestry), CLIMATEWATCH, https://www.wri.org/data/climate-watch-cait-country-greenhouse-gas-emissions-data (last visited Mar. 9, 2022); *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INTERNATIONAL COURT OF JUSTICE, https://www.icj-cij.org/en/declarations (last visited Mar. 9, 2022).

several states would not adequately comprehend climate change as a global issue interesting every state. An applicant state would not only have to justify its right to invoke another state's obligation to mitigate climate change;[14] it would also need to explain how a court can determine the respondent's obligation to do its fair share in global efforts to mitigate climate change without at the same time deciding on the obligations of other GHG-emitting states not parties to the proceedings.[15]

Advisory proceedings would appear to have two conspicuous advantages over contentious ones. First, advisory proceedings could conceivably bypass the opposition of the largest GHG emitters.[16] Second, advisory proceedings could better reflect the global nature of climate change than contentious proceedings.[17] For instance, advisory proceedings may avoid some of the issues of causation and attribution that would impede a contentious case.[18] And the court could be informed by all interested states,[19] without being constrained by the narrow rules on intervention[20] and

[14] Barcelona Traction, Light & Power Company, Limited (Belg. v. Spain), Judgment (Second Phase), 1970 I.C.J. 3, ¶33 (Feb. 5).

[15] Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K. & U.S.), Judgment on Preliminary Question, 1954 I.C.J. 19, 33 (June 15).

[16] *See* Part I and Section II.A.

[17] *See* David Freestone et al., *Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law (COSIS)*, 37 INT'L J. MARINE & COASTAL L. 166, 168 (2022). *See also* Rüdiger Wolfrum, *Advisory Opinions: An Alternative Means to Avoid the Development of Legal Conflicts?*, *in* INTERNATIONAL LAW AND LITIGATION: A LOOK INTO PROCEDURE 99, 106 (Hélène Ruiz Fabri et al., 2019).

[18] *See* Penelope Ridings, *An I.C.J. Advisory Opinion on Climate Change: Can it Assist in Driving Ambition?*, DR. PENELOPE RIDINGS (Nov. 1, 2021) https://peneloperidings.com/wp48/index.php/2021/11/01/an-icj-advisory-opinion-on-climate-change-can-it-assist-in-driving-ambition/.

[19] *See, e.g.*, I.C.J. Statute, *supra* note 12, art. 66; ITLOS, Rules of the Tribunal, art. 133, ITLOS/8 (adopted Oct. 28, 1997, amended Mar. 15 & Sept. 21, 2001, & Mar. 17, 2009).

[20] *See, e.g.*, I.C.J. Statute, *supra* note 12, arts. 62–63; Statute of the International Tribunal of the Law of the Sea, arts. 31–32, in Annex VII of United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833

amicus curiae[21] applicable in contentious proceedings.[22] On the other hand, the fact that advisory opinions have "no binding force"[23] does not necessarily affect their political pull as authoritative judicial pronouncements.[24] For these reasons, scholars have presented advisory opinions as "particularly suitable to clarify a disputed point of law",[25] in particular one—like climate change—which concerns "[t]he international community at large".[26]

Due to their particular vulnerability to the impacts of climate change,[27] small-island states have been the main proponents of an advisory opinion. They hope that an advisory opinion will provide an authoritative interpretation of states' rights and obligations, which, they believe, will lead states to take more ambitious action on climate change, by changing the "conversation from one of vague,

U.N.T.S. 3 (ITLOS Statute).

[21] *See, e.g.*, I.C.J. Statute, *supra* note 12, art. 34 ¶2; Rules of ITLOS, *supra* note 19, art. 84.

[22] This could also reduce the power imbalance, reflected in the quality of party submissions, which would likely appear in a contentious case between a small developing island state and a major GHG emitter. *See* Maxine Burkett, *Climate Reparations*, 10 MELB. J. INT'L L. 509, 643 (2009).

[23] Interpretation of Peace Treaties, Advisory Opinion (First Phase), 1950 I.C.J. 65, 71 (Mar. 30); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶47 (July 9, 2004); Sub-Regional Fisheries Commission, Case No. 21, Advisory Opinion, 2015 ITLOS Rep. 4, ¶76 (Apr. 2) (*S.R.F.C.*).

[24] *See infra* notes 284–286.

[25] Rüdiger Wolfrum, *Advisory Opinions: Are They a Suitable Alternative for the Settlement of International Disputes?*, *in* INTERNATIONAL DISPUTE SETTLEMENT: ROOM FOR INNOVATIONS? 35, 39 (Rüdiger Wolfrum & Ina Gätzschmann eds., 2013). *See also* Judge Thomas Buergenthal, President of IACHR, Address to a Special Session of the O.A.S. Permanent Council (Dec. 3, 1986), *in* ANN. REP. IACHR 103, 105 (Aug. 30, 1987).

[26] Laurence Boisson de Chazournes, *Advisory Opinions and the Furtherance of the Common Interest of Humankind*, *in* INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL DISPUTE SETTLEMENT: TRENDS AND PROSPECTS 105, 107 (Laurence Boisson de Chazournes et al. eds., 2002)

[27] Michelle Mycoo et al., *Small Islands*, *in* CLIMATE CHANGE 2022: IMPACTS, ADAPTATION AND VULNERABILITY ch. 15 (Hans-Otto Pörtner et al. eds., 2022).

voluntary commitments to legally binding obligations and compensation".[28]

Thus, in 2011, Palau launched a campaign for the General Assembly to request an advisory opinion of the I.C.J.[29] Albeit short-lived, this campaign inspired a similar initiative that Vanuatu announced a decade later, in September 2021.[30] Like Palau, Vanuatu now faces the daunting task of securing a majority decision at the U.N. General Assembly.

Just a month after Vanuatu's announcement, Antigua and Barbuda and Tuvalu adopted a treaty that establishes the Commission of Small Island States on Climate Change and International Law (COSIS) and gives it competence to request an advisory opinion of the International Tribunal on the Law of the Sea (ITLOS).[31] COSIS would rely on a controversial provision of the Rules of ITLOS which permits an international agreement related to the purpose of the U.N. Convention on the Law of the Sea (UNCLOS) to authorize "whatever body" to request an opinion of ITLOS on a legal question.[32] As discussed below, it is dubious that ITLOS can exercise advisory jurisdiction when the request touches chiefly upon the obligations of states not party to the

[28] Payam Akhavan, Remarks at a Press Conference organized by Ant. & Barb. and Tuvalu at COP26 (Nov. 1, 2021). *See also* Margaretha Wewerinke-Singh, Remarks at the Conference of the British Inst. Int'l & Comp. L. (Mar. 11, 2021), *in* BRITISH INST. INT'L & COMP. L., RISING SEA LEVELS: PROMOTING CLIMATE JUSTICE THROUGH INTERNATIONAL LAW ¶12 (2021) https://www.biicl.org/events/11468/webinar-series-rising-sea-levels-promoting-climate-justice-through-international-law [https://perma.cc/ZE52-NDJG].

[29] Toribiong, *supra* note 6, at 27–28.

[30] *See Vanuatu Leading Global Initiative to bring Climate Change to World Court*, DAILY POST, Sept. 25, 2021; Bernadette Carreon, *Vanuatu to Seek International Court Opinion on Climate Change Rights*, THE GUARDIAN, Sept. 26, 2021.

[31] Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law, Oct. 31, 2021, U.N. Registration No. 56940 (COSIS Agreement).

[32] Rules of ITLOS, *supra* note 19, art. 138. *See* below, Section II.B.

agreement authorizing the request.[33]

A third possible tactic—which small-island states do not seem to have explored yet—would seek to initiate advisory proceedings before a regional human rights court. In particular, the treaties establishing the Inter-American Court of Human Rights (IACHR) and the African Court of Human and People's Rights (ACHPR) allow an individual state party to request an advisory opinion.[34] An advisory opinion of the IACHR or the ACHPR, however, would be limited by these courts' subject-matter jurisdiction, which may not allow the court to apply the full gamut of norms relevant to climate change.

Pursuing any of these tactics, an advisory opinion would aim at obtaining an authoritative judicial interpretation of norms of international law on climate change mitigation and, possibly, reparations. The exercise would not be entirely unlike the attempt of the International Law Association to codify the international law applicable to climate change, or the study of the International Law Commission on the "protection of the atmosphere".[35] It is noteworthy, in this regard, that these expert-driven processes only achieved to confirm the existence of overly broad legal principles (*e.g.*, the obligations of prevention and cooperation), without shedding light on how these

[33] *See* below, Section III.A.

[34] American Convention on Human Rights art. 64, Nov. 22, 1969, 1144 U.N.T.S. 123 ("Pact of San José"); Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights art. 4, ¶1, June 19, 1998, https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and (ACHPR Protocol).

[35] Int'l L. Ass'n, Resol. 2/2014, Declaration of Legal Principles Relating to Climate Change, 76 INT'L L. ASS'N REP. CONF. 21, 24–25 (2014); Draft Guidelines on Protection of the Atmosphere, *in* INT'L L. COMM'N REP. 72nd Sess., 9, U.N. Doc. A/76/10 (2021).

principles were to be interpreted or applied in concrete instances.[36] Moreover, the work of the International Law Commission has revealed the full-fledged opposition of many industrialized countries to an authoritative codification of the law applicable to climate change, with some of them voicing concerns that an independent interpretation of climate law would "upset the balance achieved" through climate negotiations.[37] Taking stock of these precedents should raise doubts about the ability of a court to give a useful advisory opinion on the same theme.

By and large, scholars and advocates have painted a rosy picture of international advisory proceedings on climate change. As part of "an epic battle to save planet Earth", [38] they imagine that an advisory opinion would necessarily be "a useful tool [to] clarify legal obligations of States";[39] they presume that international judges "would likely yield 'pro-climate' decisions";[40] and they assert that this opinion would "create political and grassroots pressures to mitigate GHG emissions".[41] But what are really the prospects of, first, a request being made; second, it being accepted by the court; third, the court giving a meaningful response; fourth, this response being "pro-climate"; and, fifth, it being implemented, or influencing state conduct at all?

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[36] Int'l L. Ass'n, , *supra* note 35, Draft Articles 7A, 8. *See also* Protection of the Atmosphere, *supra* note 35, Guideline 3.

[37] Statement by Zabolotskaya (Russia), *in* U.N. GAOR, 69th Sess., 6th Comm., 21st mtg. at 22 ¶135, U.N. Doc. A/C.6/69/SR.21 (Nov. 18, 2014). *See generally* Benoit Mayer, *A Review of the International Law Commission's Guidelines on the Protection of the Atmosphere*, 20 MELB. J. INT'L L. 453, 463 (2019).

[38] U.N. Press Conference on Request for International Court of Justice Advisory Opinion on Climate Chang, Feb. 3, 2012, https://www.un.org/press/en/2012/120203_I.C.J..doc.htm.

[39] Anxhela Mile, *Emerging Legal Doctrines in Climate Change Law: Seeking an Advisory Opinion from the International Court of Justice*, 56 TEX. INT'L L.J. 59, 94 (2021).

[40] Daniel Bodansky, *The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections*, 49 ARIZ. ST. L.J. 689, 694 (2017).

[41] Jesse Cameron Glickenhaus, *Potential ICJ Advisory Opinion Duties to Prevent Transboundary GHG Emissions*, 22, N.Y.U. ENV'T L.J. 117, 154 (2015).

This Article undertakes a reality check through a comprehensive assessment of the feasibility and desirability of international advisory proceedings on climate change. It carries out a thorough doctrinal analysis of the law and practice related to advisory proceedings before the I.C.J., ITLOS, and regional human rights courts. It also maps out the main substantive issues that an advisory opinion would touch upon, thus revealing the challenges of addressing them through advisory proceedings. Lastly, it presents a broader reflection on the political context in which advisory proceedings would take place with the view of determining the prospects of compliance.

Overall, the Article provides a skeptical perspective on the prospects for a successful advisory opinion. In particular, the Article reveals the difficulty of imagining a best-case scenario whereby an advisory opinion would help clarify the relevant law and prompt more effective climate action. States have seldom complied with advisory opinions that went against their vested interests.[42] They are even less likely to comply with an advisory opinion requested and given in spite of widespread protests, or on the basis of questionable procedural grounds, especially when the stakes are particularly large.[43]

A court seeking to interpret states' general obligations on climate change mitigation would almost inevitably fall into one of two opposite pitfalls. On the one hand, the court may content itself with reaffirming the existence of norms that states have expressly agreed upon—for instance, the principles that each state's action must represent its "highest possible ambition" and reflect its

[42] *See* Karin Oellers-Frahm, *Discussion*, *in* INTERNATIONAL DISPUTE SETTLEMENT: ROOM FOR INNOVATIONS?, *supra* note 25, at 116.

[43] *See* Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1825, 1833 (2002).

"common but differentiated responsibilities and respective capabilities, in the light of different national circumstances".[44] As the existence of these norms is undisputed, such an advisory opinion would serve no useful purpose. On the other hand, the court may try to interpret and apply these treaty provisions—for instance, by seeking to determine the requisite level of mitigation action applicable to an individual state. Yet, as soon as it steps beyond carefully worded treaty provisions, the court would be treading into a political minefield; the court's conclusion thus be highly controversial, and almost certainly ignored by the states that disagree with them.

While advisory proceedings are unlikely to yield significant benefits for climate action, they might come at a great cost for international institutions. Practically any treatment a court may give to a request for an advisory opinion would erode its authority and the credibility of international law. If the court finds that it cannot answer the questions (even if this is for good reasons), observers will see a denial of justice. On the other hand, if the court does answer the question, its response will be either obvious (*i.e.*, merely restating well-known but overly general principles) or dubious (*i.e.*, inventing rules on which states have never agreed). To the extent that the court's conclusions are anything else than platitudes, it will rapidly become evident to all that large GHG-emitting states are ignoring them entirely, which will further call into question the relevance of international law to addressing major global issues. This, in turn, will undermine cooperation on climate change mitigation, which rely on international law to tackle climate change as a global collective action problem.

The Article is organized as follows. Part I identifies the various themes that a request for an

[44] Paris Agreement, *supra* note 1, art. 4 ¶3.

advisory opinion could touch upon, the norms it could ask the court to interpret, and the types of outcomes it could seek. Part II explores the three likeliest ways for states to request an advisory opinion on climate change of, respectively, the I.C.J., ITLOS, or regional human rights courts. Part III considers objections that could lead a court to turn down a request for an advisory opinion. It argues in particular that a court cannot exercise advisory jurisdiction without either the consent or the prior authorization of the states directly concerned—a condition that would constitute a fatal flaw to the COSIS initiative. Part IV turns to methodological issues that a court would face when seeking to answer the questions, in particular in relation to the fundamental indeterminacy of the relevant norms. Lastly, Part V envisages the effects an advisory opinion may have on climate law, climate action, and international institutions.

I. THE QUESTIONS

The following identifies the themes that advisory opinions requested by small island states would explore, the norms to which they would relate, and the outcomes that they may seek.

A. Thematic Focus

A request for an advisory opinion could conceivably bear on four themes: (1) climate science, (2) states' obligations on climate change mitigation, (3) states' responsibilities for the impacts of climate change, and (4) the implications of climate change for other aspects of international law. The few indications that small-island states have given so far suggest that their focus would be on the second and third themes.

First, a request for an advisory opinion could seek an assessment of the scientific findings on the reality and severity of the anthropogenic interference with the climate system. Although advisory opinions must answer legal questions,[45] courts may engage in the scientific literature as part of their assessment of the relevant facts. Philippe Sands suggested that "the single most important thing" that an international court could do about climate change "is to settle the scientific dispute", intuiting that an international court's factual conclusions "would be significant and authoritative".[46] However, one may question the existence of genuine disagreement among states on any key aspect of the relevant science—the existence of climate change, its anthropogenic origins, or its widespread consequences.[47] In any case, an international court is not the best authority to assess scientific finding. Under all likelihood, a court's assessment of scientific evidence would only preach to the converted.[48] International courts ought to take note of the best science (as reflected, in particular, in the latest assessment reports of the Intergovernmental Panel on Climate Change)[49] whenever this is needed as part of a process of applying the law to the facts, but they should not act as scientific authorities.

Second, advisory proceedings could seek a clarification of the legal norms requiring states to limit

[45] *See* below, Subsection III.B.1.

[46] Philippe Sands, *Climate Change and the Rule of Law: Adjudicating the Future in International Law*, 28 J. ENV'T L. 19, 29 (2016).

[47] *See* references *supra* notes 1–2. *See also* Richard P. Allan et al., *Summary for Policymakers*, *in* CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS ch. 1, §§A.1, A.2 (Valérie Masson-Delmotte et al. eds., 2021); Hans-Otto Pörtner et al., *Summary for Policymakers*, *in* CLIMATE CHANGE 2022, *supra* note 27, ch. 1, §§B.1.

[48] *See also* Bodansky, *Role of I.C.J.*, *supra* note 40, at 709.

[49] *See* CLIMATE CHANGE 2021, *supra* note 47; CLIMATE CHANGE 2022, *supra* note 27.

or reduce GHG emissions, or to enhance sinks and reservoirs of GHGs, with the view of mitigating climate change. This theme often appears as the main focus of the proponents of advisory proceedings.[50] Thus, a 2013 study prepared under the supervision of Palau's ambassador Stuart Beck assumed that the I.C.J. would be asked to identify state "the obligations under international law of a state for ensuring that activities under its jurisdiction or control that emit greenhouse gases do not cause, or substantially contribute to, serious damage to another State or States".[51] A key question would concern the standard to which a state may be held or, more specifically, the level of mitigation action that it would be required to implement. An advisory opinion would thus touch upon the way states should share the global efforts necessary to mitigate climate change. Yet, as states have never agreed on a burden-sharing formula,[52] and in the absence of any morally obvious solution,[53] a court would find it extremely challenging to reach any meaningful conclusion.

Third, advisory proceedings could consider the legal norms applicable in relation to the impacts of climate change.[54] While climate treaties require every state to promote adaptation to climate change within its own jurisdiction,[55] island states would rather focus a request for an advisory opinion on the remedial obligations of large GHG emitters vis-à-vis the most vulnerable countries.

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[50] *See, e.g.*, Toribiong, *supra* note 6, at 27–28.

[51] YALE CENTER FOR ENV'T L. & POL'Y, CLIMATE CHANGE AND THE INTERNATIONAL COURT OF JUSTICE 8 (2013).

[52] *See* Thomas Leclerc, *The Notion of Common but Differentiated Responsibilities and Respective Capabilities: A Commendable but Failed Effort to Enhance Equity in Climate Law*, *in* DEBATING CLIMATE LAW 76 (Benoit Mayer & Alexander Zahar eds., 2021).

[53] *See generally* STEPHEN M. GARDINER, A PERFECT MORAL STORM: THE ETHICAL TRAGEDY OF CLIMATE CHANGE 213 (2011) (noting "moral and political theories face fundamental and often severe difficulties addressing" the issues raised by climate change, in particular in relation to burden-sharing).

[54] *See, e.g.*, Wewerinke-Singh, *supra* note 28, at ¶13; AOSIS Statement at COP26 World Leaders' Summit, Nov. 1, 2021 (alluding to a plan "to seek justice in the appropriate international bodies" on compensation).

[55] UNFCCC, *supra* note 1, art. 4 ¶1(b); Paris Agreement, *supra* note 1, art. 7 ¶9.

In particular, they could seek to ascertain the existence and content of an obligation of large GHG emitters to make reparation for the impacts of climate change.[56] Thus, Antigua and Barbuda presented international responses to "loss and damage" as "the main focus" of COSIS,[57] while Tuvalu highlighted "the legal responsibility of states for carbon emissions … and rising sea levels".[58] As any mention of climate reparations remains politically divisive,[59] this theme is less likely to be included in a request adopted by a majority of the U.N. General Assembly[60] than in one submitted by a small organization of like-minded states (such as COSIS) or an individual state before ITLOS or a regional human rights court.

Fourth, advisory proceedings could touch upon the implications of climate change for various other aspects of international law. For instance, they could assess the obligations of third states (notwithstanding their responsibility for causing climate change) to assist those affected by climate impacts, for instance in the context of climate-related disasters and international migration.[61] A

[56] *See generally* Burkett, *supra* note 21; Benoit Mayer, *Climate Change Reparations and the Law and Practice of State Responsibility*, 7 ASIAN J. INT'L L. 185 (2017); Christina Voigt, *State Responsibility for Climate Change Damages*, 77 NORDIC J. INT'L L. 1 (2008).

[57] Gaston Browne, Prime Minister of Ant. & Barb., Remarks at a Press Conference, *supra* note 28.

[58] Kausea Natano, Prime Minister of Tuvalu, High-Level Statement at COP26, at 5 (Nov. 2, 2021) https://unfccc.int/documents/309516. *See also* Toribiong, *supra* note 6, at 26 ("innocent victims of transboundary harm"); Margaretha Wewerinke-Singh & Diana Hinge Salili, *Between Negotiations and Litigation: Vanuatu's Perspective on Loss and Damage from Climate Change*, 20 CLIMATE POLICY 681 (2019).

[59] Karen E. McNamara & Guy Jackson, *Loss and Damage: A Review of the Literature and Directions for Future Research*, 10 WIREs CLIMATE CHANGE e564, at 2 (2019).

[60] *See* U.N. Press Conference, *supra* note 38, noting that Palau's intention was not "to focus blame on major emitters".

[61] *See generally* Benoît Mayer, *Climate Change, Migration, and the Law of State Responsibility*, *in* RESEARCH HANDBOOK ON CLIMATE CHANGE, MIGRATION AND THE LAW 238 (Benoît Mayer & François Crépeau eds., 2017).

court could also determine how states' territories and maritime areas are affected by sea-level rise,[62] or explore whether and how low-lying small-island states could maintain their existence when their territory becomes uninhabitable.[63] And a court could assess how norms relating to the management of shared resources apply when these shared resources are affected by climate impacts, for instance when transboundary watercourses and aquifers are affected by drought or flooding, or when straddling and highly migratory fish stocks are impacted by ocean warming and acidification.[64] These more technical questions are less controversial, yet they are of great importance to many states affected by the impacts of climate change. Perhaps regrettably, these questions have not generally been the main focus in discussions of potential requests for an advisory opinion.

B. Normative Focus

Advisory proceedings touching upon climate change mitigation or climate reparations could involve the interpretation of various sources of international law. Among those, climate treaties would be an obvious starting point. Advisory proceedings could seek to clarify, for instance, the

[62] *See* José Luís Jesus, President of ITLOS, Statement to the 6th Committee of the G.A., at 4, Nov. 4, 2009, https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/jesus/sixth_committee_041109_eng.pdf [https://perma.cc/NLX9-LUCU].

[63] *See* Simon Kofe, Foreign Minister of Tuvalu, quoted in Stefica Nicol Bikes, *Tuvalu Looking at Legal Ways to Be a State If It Is Submerged*, REUTERS, Nov. 9, 2021, https://www.reuters.com/business/cop/tuvalu-looking-legal-ways-be-state-if-it-is-submerged-2021-11-09/. *See generally* Ori Sharon, *State Extinction Through Climate Change*, *in* DEBATING CLIMATE LAW, supra note 52.

[64] *See* Martina Angela Caretta et al., *Water*, *in* CLIMATE CHANGE 2022, *supra* note 27, ch. 4, §4.3.6; Sarah Cooley et al., *Oceans and Coastal Ecosystems and their Services*, *in* CLIMATE CHANGE 2022, *supra* note 27, ch. 3, §3.6.3.1.2.

legal force of NDCs[65] or the legal significance of the "expectation"[66] that each party's new NDC "reflect its highest possible ambition" and "represent a progression" beyond its previous NDC.[67] Advisory proceedings could also assess the legal force of the mitigation objectives formulated by the Paris Agreement[68] or the implications of the principle of "common but differentiated responsibilities".[69] Thus, Lavanya Rajamani suggested that an advisory opinion could "concretize … open-textured" obligations.[70] However, courts would face considerable methodological challenges when seeking to make sense of treaty provisions which, truth be told, reflect little more than states' agreement to disagree.[71]

To bypass the gridlock of international climate negotiations, advisory proceedings would focus on another source of international law: customary law. A court would thus call into question the widespread assumption, among climate law specialists, that climate treaties displace the application of other norms of international law.[72] As no climate treaty expressly or impliedly

[65] *See generally* Benoit Mayer, *International Law Obligations Arising in Relation to Nationally Determined Contributions*, 7 TRANSNAT'L ENV'T L. 251 (2018).

[66] Lavanya Rajamani, *The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations*, 28 J. ENV'T L. 337, 343 (2016).

[67] Paris Agreement, *supra* note 1, art. 4 ¶3.

[68] *See supra* notes 3–4.

[69] *See supra* note 52.

[70] Lavanya Rajamani, Presentation at the Climate Law and Governance Day 2021, Nov. 5, 2021, https://youtu.be/JUJ-0pEly3M.

[71] *See generally* Susan Biniaz, *Comma But Differentiated Responsibilities: Punctuation and 30 Other Ways Negotiators Have Resolved Issues in the International Climate Change Regime*, 6 MICH. J. ENV'T & ADMIN. L. 37 (2016).

[72] *See* Bodansky, *Role of I.C.J.*, *supra* note 40, at 698. *See also* Alexander Zahar, *The Contested Core of Climate Law*, 8 CLIMATE LAW 244, 255–56 (2018); Alan Boyle & Navraj Singh Ghaleigh, *Climate Change and International Law Beyond the UNFCCC*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL CLIMATE CHANGE LAW 26, 52 (Cinnamon P. Carlarne et al. eds., 2016).

excludes the application of other relevant norms, these norms should—under the principle of harmonization identified by the International Law Commission—"be interpreted so as to give rise to a single set of compatible obligations."[73] Thus, several small-island states have formally declared their understanding that climate treaties "in no way constitute a renunciation of any rights under international law concerning State responsibility for the adverse effects of climate change" and cannot "be interpreted as derogating from principles of general international law".[74]

With regard to climate change mitigation, President Johnson Toribiong of Palau highlighted that the I.C.J. had identified the principle that states must "ensure that activities within their jurisdiction or under their control respect the environment of other states."[75] Likewise, Daniel Bodansky voiced hope that an international court may elaborate "more specific criteria of due diligence" to determine what precisely each state must do.[76] Yet, this obligation of due diligence has, so far, only been applied in simple cases whereby an activity within a state's jurisdiction harmed directly another state's territory,[77] shared resources,[78] or areas beyond national jurisdiction,[79] rather than

[73] INT'L L. COMM'N, Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, ¶4, A/CN.4/L.682/Add.1 (May 2, 2006).

[74] *See, e.g.*, declarations of Kiribati, Nauru, Papua New Guinea, and Tuvalu on the signature or ratification of the UNFCCC, and the declarations of the Cook Islands, the Marshall Islands, Nauru, Niue, the Solomon Islands, Tuvalu, and Vanuatu on the ratification of the Paris Agreement.

[75] Toribiong, *supra* note 6, at 28.

[76] Bodansky, *Role of I.C.J.*, *supra* note 40, at 709.

[77] *See* Trail Smelter (U.S./Can.), 3 R.I.A.A. 1938, 1965 (1941); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.) & Construction of a Road in Costa Rica Along the San Juan River (Nicar. v. Costa Rica), Judgment on Merits, 2015 I.C.J. 665, ¶104 (Dec. 16).

[78] Pulp Mills on the River Uruguay (Arg. v. Uru.), 2010 I.C.J. 14, ¶¶101, 103 (Apr. 20, 2010).

[79] Responsibilities & Obligations of States with Respect to Activities in the Area, Advisory Opinion, 2011 ITLOS Rep. 10, ¶¶107–16 (Feb. 1) (Seabed Disputes Chamber).

contributing incrementally to a global cumulative issue such as climate change. While the obligation of due diligence is certainly relevant to climate change,[80] a court would find no concrete benchmark to determine what precisely it means in terms of global emission reduction pathways and of sharing the necessary efforts between states.[81] When national courts have sought to determine a state's requisite level of mitigation action, their decision has been ill-motivated and unconvincing.[82]

Customary law would also be central to proceedings bearing on reparations. Despite small-island states' repeated claims for compensation in international climate negotiations,[83] states have only agreed to limited assistance to adaptation in developing countries.[84] The Paris Agreement recognizes the importance of "addressing loss and damage associated with the adverse effects of climate change",[85] but with the caveat, in the accompanying decision of the Conference of the Parties, that this would "not involve or provide a basis for any liability or compensation."[86] This neutrality of climate treaties on the question of reparations does not preclude the application of the customary law on the responsibility of states for internationally wrongful acts.[87]

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[80] *See, e.g.*, Benoit Mayer, *Climate Change Mitigation as an Obligation under Customary International Law* [forthcoming, publication venue TBD by the end of the current U.S. law journal cycle].

[81] *See* discussion below, Section IV.A.1.

[82] Benoit Mayer, *Interpreting States' General Obligations on Climate Change Mitigation: A Methodological Review*, 28 REV. EUR. COMP. & INT'L ENV'T L. 107 (2019).

[83] *See, e.g.*, Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, Proposal by Vanuatu for a Draft Annex Related to Article 23, U.N. Doc. A/AC.237/WG.II/CRP.8, Dec. 17, 1991. *See generally* Wewerinke-Singh & Salili, *supra* note 58.

[84] *See* UNFCCC, *supra* note 1, art. 4 ¶4.

[85] Paris Agreement, *supra* note 1, art. 8 ¶1.

[86] Decision 1/CP.21, *supra* note 2, ¶51.

[87] *See* Florentina Simlinger & Benoit Mayer, *Legal Responses to Climate Change Induced Loss and Damage*, *in* LOSS AND DAMAGE FROM CLIMATE CHANGE: CONCEPTS, METHODS AND POLICY OPTIONS

Like primary rules on climate change mitigation, however, the secondary rules of customary law on state responsibility are difficult to apply to climate change. This is in particular because a state's wrongful GHG emissions do not directly cause any injury to another state. Mitigation obligations can perhaps be understood as obligations owed to the international community as a whole (*erga omnes*),[88] in relation to which the International Law Commission suggested that reparation might be made, without identifying an injured state, "in the interest … of the beneficiaries of the obligation breached."[89] However, a court would have to break new ground to determine the nature, quantum, or modalities of such reparations to the beneficiaries of an *erga omnes* obligation.

Beside climate treaties and customary international law, advisory opinions could focus on treaties that are incidentally relevant to climate change. For instance, in light of the considerable impacts of climate change on the marine environment,[90] a court could construe provisions of UNCLOS on the protection of the marine environment as requiring states to mitigate climate change.[91] Similarly, a court could interpret states' treaty obligations to protect human rights as requiring climate action, on ground of the adverse impact of climate change on the enjoyment of human rights.[92] Identifying

179, 196 (Reinhard Mechler et al. eds., 2019).

[88] *See* Maiko Meguro, *Litigating Climate Change Through International Law: Obligations Strategy and Rights Strategy*, 33 LEIDEN J. INT'L L. 933, 936–38 (2020); Mayer, *A Review of the International Law Commission's Guidelines*, *supra* note 37, 490–92.

[89] Draft Articles on the Responsibility of States for Internationally Wrongful Acts, art. 48 ¶2(b), *in* INT'L L. COMM'N REP. 53rd Sess., at 31, U.N. Doc. A/56/10 (2001). *See also Responsibilities in the Area*, *supra* note 79, ¶180.

[90] *See, e.g.*, Pörtner et al., *supra* note 47, §B.1.1.

[91] *See, e.g.*, Toribiong, *supra* note 6, at 28; Sandrine W. de Herdt & Tafsir Malick Ndiaye, *The International Tribunal for the Law of the Sea and the Protection and Preservation of the Marine Environment: Taking Stock and Prospects*, 57 CAN. Y.B. INT'L L. 353, 370 footnote 120 (2019).

[92] *See* remarks by Solomon Yeo, *in Judging the Climate Crisis*, *supra* note 10, at 21.

incidental obligations would be instrumental to justifying the jurisdiction of specialized courts (regional human rights courts and, perhaps, ITLOS)[93] to give an advisory jurisdiction on climate change. In further analysis, however, action on climate change mitigation appear as an inefficient way to protect the marine environment or, *a fortiori*, the human rights of individuals within the territorial scope of a human rights treaty. In comparison with incidental obligations, customary law allows for a more powerful argument,[94] justifying climate change not only as a way to protect the marine environment[95] *and* human rights (including those of individuals beyond the state's territory),[96] but also as a way to secure a range of other sovereign rights such as the rights of states to survival,[97] to territorial integrity,[98] and to permanent sovereignty over their natural resources.[99]

C. Intended Outcome

See, e.g., MARGARETHA WEWERINKE-SINGH, STATE RESPONSIBILITY, CLIMATE CHANGE AND HUMAN RIGHTS UNDER INTERNATIONAL LAW (2019); John Knox, *Climate Change and Human Rights Law*, 50 VA. J. INT'L L. 163 (2010).

[93] *See* below, Section II.B.

[94] *See* Voigt, *in Judging the Climate Crisis*, *supra* note 10, at 23.

[95] *See, e.g.*, Detlef Czybulka, *Part XII: Protection and Preservation of the Marine Environment*, *in* UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 1277, 1284–86 (Alexander Proelss ed., 2017), on the customary nature of article 192 of UNCLOS.

[96] *See* Mavrommatis Palestine Concessions (Greece v. U.K.), Judgment, 1924 PCIJ (ser. A) No. 2, at 12 (Aug. 30); Draft Articles on Diplomatic Protection, [2006] II-2 YB INT'L L. COMM'N 24, art. 2.

[97] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶96 (July 8).

[98] *See* U.N. Charter art. 2 ¶4; Corfu Channel (U.K. v. Alb.), Merits, 1949 I.C.J. 4, 35 (Apr. 9); Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶80 (July 22).

[99] *See* International Covenant on Economic, Social and Cultural Rights, art. 1 ¶2, Dec. 16, 1966, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, art. 1 ¶2, Dec. 16, 1966, 999 U.N.T.S. 171; Rio Declaration on Environment and Development, Princ. 2, A/CONF.151/26/Rev.1 (Vol. l) (Aug. 12, 1992), *reprinted in* 31 ILM 874 (1992); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment on Merits, 2005 I.C.J. 168, ¶244 (Dec. 19).

Courts have given advisory opinions responding to general and abstract questions,[100] as well as to questions relating more directly to the situation of specific states.[101] Thus, the body requesting an advisory opinion on climate change could seek different outcomes. This Article distinguishes between three types of potential outcomes merely for the purpose of exposition, without claiming that the line between them is always clear. First, an *identificatory* opinion would consist in an inventory of the relevant norms. Second, an *interpretative* opinion would go a step beyond, as the court would seek to determine, in abstract terms, what these norms imply—that is, how they are relevant to climate change. Third, an *applicatory* opinion would determine what these norms mean, concretely, for one, several, or all states.

An identificatory opinion could confirm the existence of customary norms on climate change mitigation and on climate reparations. This, however, would only point out the obvious—in a legal system where states are equal sovereigns, their sovereign rights (*e.g.*, to territorial integrity) imply the existence of a corollary duty (*i.e.*, at least, an obligation of due diligence);[102] and the breach of this obligation must entail some legal consequences.[103] An identificatory opinion, at most, would influence the dominant political discourse by making it more difficult for developed states to approach these questions from a purely self-serving perspective.[104] Yet, this opinion would disappoint many proponents of advisory proceedings on climate change, who would expect the

[100] *See, e.g.*, Vagrancy Laws, Advisory Opinion No. 1/2018, ACHPR (Dec. 4, 2020), 61 I.L.M. 145 (2022).
[101] *See, e.g.*, Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95 (Feb. 25). *See also* Wolfrum, *Advisory Opinions: An Alternative Means*, *supra* note 17, at 102.
[102] Jutta Brunnée, *Sic utere tuo ut alienum non laedas*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ONLINE (2010).
[103] JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 3 (2013).
[104] *See* Akhavan, *supra* note 28.

court to help states make sense of these ill-defined norms, not just to identify them.

At the other extreme, an applicatory opinion would seek to determine precisely what individual states must or must not do. Regarding climate change mitigation, a court could seek to determine the level of ambition that each state must implement in line with its general obligations, for instance under customary law, based on (the court's interpretation of) global mitigation objectives and burden-sharing criteria. Concretely, the court could indicate a precise set of specific rules (*e.g.*, the requirement for a state to implement its NDC), or even provide a list of quantified emission limitation and reduction targets applicable to individual states (in a way akin to Annex B of the Kyoto Protocol);[105] or it could merely determine whether specific states comply with their general mitigation obligations without articulating the rule it is applying.[106] Regarding climate reparations, likewise, the court could define a formula to determine the quantum of compensation due by the states responsible for the largest share of GHG emissions, to those most vulnerable to the impacts of climate change.

In either case, the outcome would be desultory. For one, a court could not realistically weigh all the relevant factors—for instance, all the costs and benefits of mitigation action or the national circumstances relevant to determining states' fair share in global efforts. Overall, a court would lack any legitimacy to make such critical, complex, value-loaded decisions on its own. An applicatory opinion would be a caricature of the genre, as the court would in effect substitute for national negotiators and function as a global legislator. This could considerably erode a court's

[105] Kyoto Protocol to the United Nations Framework Convention on Climate Change Annex B, Dec. 11, 1997, 2303 U.N.T.S. 162.

[106] By analogy, *see Klimaatzaak*, *supra* note 9, §4.

reputation and credibility without, in all likelihood, swaying the conduct of states the least.[107]

Halfway between these two extremes, sponsoring states would likely opt to seek an interpretative opinion. Yet, it is unclear what question they could ask of a court whose response would neither be obvious (as in an identificatory outcome), nor exceed the ability of a court to interpret elusive norms (as in an applicatory outcome). On the one hand, a court could note, as in previous judicial pronouncements, that a due diligence obligation implies the adoption of "appropriate measures" and the exercise of "vigilance in their enforcement",[108] along with the undertaking of "negotiations in good faith for the equitable solution".[109] This, however, would do little to clarify the relevant norms: this would not go far enough to be of assistance to states. On the other hand, assessing the precise criteria relevant to the principle of "common but differentiated responsibilities" and their relative weight would involve political decisions that are not within the ambit of judicial functions: it would go too far to be acceptable to states.

What remains is peripheral questions of legal interpretation on which judicial debates could shed new light. Some questions could concern treaty provisions that are only mildly ambivalent (*e.g.*, the obligation of the parties to the Paris Agreement to "pursue domestic mitigation measures, with the aim of achieving the objectives of" their NDCs),[110] that a court could interpret in a relatively predictable manner in application of the tenets of treaty interpretation.[111] Other questions could regard specific aspects of states' general obligations on climate change mitigation. For instance, a

[107] *See* discussion below, Part V.

[108] *Pulp Mills*, *supra* note 78, ¶197.

[109] Fisheries Jurisdiction (U.K. v Ice.), Judgment on Merits, 1974 I.C.J. 3, ¶79(3) (July 25).

[110] Paris Agreement, *supra* note 1, art. 4 ¶2.

[111] *See* Mayer, *International Law Obligations Arising in relation to NDCs*, *supra* note 65, at 257–61.

court could pronounce on the legal force of emerging standards regarding phasing out of fossil-fuel subsidies,[112] the phasing down of unabated coal power,[113] or the conduct of environmental impact assessments as a tool for climate change mitigation.[114] None of these questions would seek to change the world by a single stroke of gavel, but they could perhaps have some incremental influence on some national processes. However, such lower-profile cases do not seem to be the main focus of proponents of advisory opinions on climate change.

II. THE REQUESTS

This Part assesses how small-island states could request an advisory opinion of an international court. The likeliest way for small island states to request an advisory opinion of the I.C.J. presupposes a majority decision of the U.N. General Assembly, a condition that small island states may not be able to secure. By contrast, it may be easier for small island states or their allies to request an advisory opinion of ITLOS and regional human rights courts. Yet, specialized courts would approach advisory proceedings in light of their limited subject-matter and territorial jurisdiction.

A. Requests to the I.C.J.

The I.C.J., which succeeded to the Permanent Court of International Justice (P.C.I.J.), is "the

[112] Decision -/CP.26, *supra* note 1, ¶20; Kyoto Protocol, *supra* note 105, art. 2 ¶(1)(a)(v); G20 Rome Summit, Leaders' Declaration, ¶27, Oct. 31, 2021.
[113] Decision -/CP.26, *supra* note 1, ¶20.
[114] Benoit Mayer, *Climate Assessment as an Emerging Obligation under Customary International Law*, 68 INT'L & COMP. L.Q. 271 (2019).

principal judicial organ of the United Nations".[115] Both the P.C.I.J. and the I.C.J. have given dozens of advisory opinions on various aspects of international law. The I.C.J. may appear as a natural choice for the proponents of an advisory opinion on climate change. It is not only the longest-existing international court, and arguably the one with the strongest authority, but also "[t]he only international judicial body with general jurisdiction regarding inter-State disputes on a world-wide scale".[116]

Yet, only a few institutions can request an advisory opinion of the I.C.J. The U.N. Charter gives competence to the General Assembly and the Security Council to request advisory opinions of the I.C.J. "on any legal question".[117] In addition, the General Assembly can authorize other U.N. organs and specialized agencies to request advisory opinions "on legal questions arising within the scope of their activities."[118] The General Assembly has granted competence to several organs, including the U.N. Economic and Social Council[119] (but not to the U.N. Secretary-General),[120] and to specialized agencies.[121]

[115] U.N. Charter art. 92. *See also* I.C.J. Statute, *supra* note 12, art. 37.

[116] Christian Tomuschat, *International Courts and Tribunals* ¶11, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ONLINE (2019). *See also* Bodansky, *Role of I.C.J.*, *supra* note 40, at 701.

[117] U.N. Charter art. 96 ¶(a).

[118] *Id.* ¶(b).

[119] G.A. Res. 89 (I) (Dec. 11, 1946).

[120] *See generally* Stephen M. Schwebel, *Authorizing the Secretary-General of the United Nations to Request Advisory Opinions of the International Court of Justice*, 78 AM. J. INT'L L. 869, 876–78 (1984); ROBERT KOLB & ALAN PERRY, THE INTERNATIONAL COURT OF JUSTICE 1049–50 (2013).

[121] *See, e.g.*, Agreement between the United Nations and the United Nations Educational, Scientific and Cultural Organization art. XI ¶2, Dec. 14, 1946, 1 U.N.T.S. 238; Agreement between the United Nations and the World Health Organization, art. X ¶2, July 10, 1948, 19 U.N.T.S. 193.

The General Assembly has made more requests than all other institutions together,[122] and it would also be the likeliest institution to request an advisory opinion on climate change. It would decide to make a request by the vote of the majority of the members present and voting.[123] Gathering the critical number of votes would be challenging, though perhaps not impossible. In the past, this condition did not prevent the General Assembly from requesting advisory opinions on controversial questions, for instance on the legality of the use of nuclear weapons or the consequences of the construction of a wall in occupied Palestinian territory,[124] though perhaps none touched upon a topic as complex and sensitive as climate change mitigation or climate reparations. A majority of the 193 U.N. Member States could conceivably be carved out of the 134 developing states participating in the Group of 77,[125] including 38 small-island states[126] and 55 members of the Climate Vulnerable Forum.[127]

Other competent institutions are less likely to request an advisory opinion than the General Assembly. In particular, a request from the Security Council would require the affirmative vote of nine of the Council's fifteen members without the opposition of any of its five permanent

[122] *See* Organs and Agencies Authorized to Request Advisory Opinions, INTERNATIONAL COURT OF JUSTICE, https://www.icj-cij.org/en/organs-agencies-authorized (last visited Mar. 6, 2022).

[123] U.N. Charter art. 18. *See generally* Anthony Aust, *Advisory Opinions*, 1 J. INT'L DISPUTE SETTLEMENT 123, 149 (2010); KENNETH JAMES KEITH, THE EXTENT OF THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE 45–46 (1971).

[124] *See Nuclear Weapons*, *supra* note 97; *Construction of a Wall*, *supra* note 23.

[125] The Member States of the Group of 77, GROUP OF 77, https://www.g77.org/doc/members.html (last visited Mar. 6, 2022).

[126] List of SIDS, U.N. OFFICE OF THE HIGH REPRESENTATIVE FOR THE LEAST DEVELOPED COUNTRIES, LANDLOCKED COUNTRIES AND SMALL ISLAND DEVELOPING STATES, https://www.un.org/ohrlls/content/list-sids (last visited Mar. 6, 2022).

[127] About, CLIMATE VULNERABLE FORUM, https://thecvf.org/about/ (last visited Mar. 6, 2022).

members.[128] The prospects of fulfilling this condition are remote considering, in particular, that the five Permanent Members represent about half of global GHG emissions and include the world's two largest GHG emitters (China and the United States).[129] The Permanent Members have generally opposed any attempt at codifying the international law on climate change, whether by a court[130] or a non-judicial body of experts.[131]

Other U.N. organs or specialized agencies offer improbable avenues towards an advisory opinion of the I.C.J. Admittedly, Bodansky suggested that that World Meteorological Organization should be preferred to the General Assembly because it "is a more technical, less politicized forum, in which it might be easier to resist efforts to encumber the request with unhelpful baggage."[132] Yet, a request by the World Meteorological Organization would have to be made or authorized by a two-thirds majority of its Congress,[133] a condition that would be more difficult to fulfil than the simple majority required at the General Assembly. Overall, institutions other than the General Assembly and the Security Council can only be authorized to request an advisory opinion on

[128] U.N. Charter art. 27 ¶3.

[129] Calculations based on CAIT data, *supra* note 13.

[130] *See, e.g.*, Stuart Beck & Elizabeth Burleson, *Inside the System, Outside the Box: Palau's Pursuit of Climate Justice and Security at the United Nations*, 3 TRANSNAT'L ENV'T L. 17–29, 26 (2014); Michael B. Gerrard, *Taking Climate Change to the International Court of Justice: Legal and Procedural Issues*, CLIMATE LAW BLOG, http://blogs.law.columbia.edu/climatechange/2021/09/29/taking-climate-change-to-the-international-court-of-justice-legal-and-procedural-issues/ (last visited Mar. 6, 2022).

[131] *See supra* note 37.

[132] Bodansky, *Role of I.C.J.*, *supra* note 40, at 712.

[133] *See* Agreement Between the United Nations and the World Meteorological Organization, art. VII, Dec. 20, 1951, 123 U.N.T.S. 245; Convention of the World Meteorological Organization art. 11, Oct. 11, 1947, last amended by the Fifteenth Congress of the Organization in 2007, in WORLD METEOR. ORG., BASIC DOCUMENTS NO. 1, at 1 (2019).

questions that are "within the scope of their activities."[134] The I.C.J. has interpreted this condition as precluding compliance with a request from the World Health Organization for an advisory opinion on the legality of the use of nuclear weapons in armed conflict, finding that the link between the request and the activities of the organization was too tenuous.[135] Neither the U.N. Climate Secretariat, nor the U.N. Environment Programme are among the organs authorized to request an advisory opinion, and other organs or specialized agencies do not appear to exercise any functions to which an advisory opinion would be directly relevant.

Consistently, small-island states have focused their efforts on gathering support at the General Assembly. In September 2011, President Toribiong announced that he would "call on the Assembly to seek, on an urgent basis … an advisory opinion from the International Court of Justice on the responsibilities of States under international law to ensure that activities emitting greenhouse gases that are carried under their jurisdiction or control do not damage other States."[136] The announcement captured media attention and contributed to a political debate about Western countries' climate responsibilities.[137] It was later reported that Palau built a coalition of "more than" 30 states that included Bangladesh along with small-island states such as Grenada and the Marshall Islands,[138] though this remains far from a majority of the General Assembly. No draft resolution

[134] *See* U.N. Charter art. 96 ¶2.

[135] Legality of the Use by a State of Nuclear Weapons in Armed Conflict ¶32, Advisory Opinion, 1996 I.C.J. 66 (July 8).

[136] Toribiong, *supra* note 6, at 27–28.

[137] *See, e.g.*, Lawrence Hurley, *Island Nation Girds for Legal Battle Against Industrial Emissions*, NEW YORK TIMES, Sept. 28, 2011; Chris Huhne, *It Won't Be Long Before the Victims of Climate Change Make the West Pay*, THE GUARDIAN, Dec. 29. 2013.

[138] Margaretha Wewerinke-Singh et al., *Binging Climate Change before the International Court of Justice: Prospects for Contentious Cases and Advisory Opinions*, *in* CLIMATE CHANGE LITIGATION: GLOBAL PERSPECTIVES 393, 406 (Ivano Alogna et al. eds., 2021). *See also* Toribiong, *supra* note 6, at 27–28; U.N.

was presented to the General Assembly and, just a year after its announcement, Palau made no mention of a request for an advisory opinion at the next session of the General Assembly.[139]

It has been reported that the abrupt ending of Palau's campaign may have had to do with diplomatic pressure exercised by the United States.[140] Since Palau's independence from the United States in 1994, the United States has granted it economic and financial assistance, while also allowing Palau citizens free access to the U.S. territory.[141] It is noteworthy that this situation of aid-dependency is not unique to Palau: many small island developing states are heavily dependent on international aid[142] and, as such, are vulnerable to external diplomatic pressure from donor countries.

Long after the faltering of Palau's campaign at the General Assembly, the idea of a request for an advisory opinion continued to receive support from civil-society organizations, including the International Union for the Conservation of Nature.[143] In 2019, a Communiqué of the Pacific

Press Conference, *supra* note 38.

[139] *See* U.N. GAOR, 67th Sess., 21th mtg. at 4–7, U.N. Doc. A/67/PV.21 (Oct. 1, 2012).

[140] *See, e.g.*, *Can a Pacific Island Nation Use Old Industrial Law to Stop Climate Change?*, THE ATLANTIC, Aug. 23, 2012; Beck & Burleson, *supra* note 125, at 26.

[141] Compact of Free Association, Title One art. IV, U.S.–Palau, Jan. 10, 1986, https://pw.usembassy.gov/wp-content/uploads/sites/282/2017/05/rop_cofa.pdf.

[142] For instance, Tuvalu received official development flows representing 27 million U.S.$ in 2020, representing 55% of its G.D.P. For Vanuatu, this rate is 8%. *See Total Official Development Flows by Country and Region (ODF)*, OECD.STAT, https://stats.oecd.org/ (last accessed Mar. 9, 2022); *GDP*, WORLD BANK DATA, https://data.worldbank.org/ (last accessed Mar. 9, 2022). *See also* Adam Grydehøj & Ilan Kelmancde, *Reflections on conspicuous sustainability: Creating Small Island Dependent States (SIDS) through Ostentatious Development Assistance (ODA)?* 116 GEOFORUM 90 (2020).

[143] IUCN Resolution, Request for an Advisory Opinion of the International Court of Justice on the Principle of Sustainable Development in View of the Needs of Future Generations §1, Sept. 1–10, 2016, https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC_2016_RES_079_EN.pdf. *See also* Margaretha Wewerinke-Sing et al., *supra* note 138, at 406.

Islands Forum "noted"—without endorsing it—"the proposal for a U.N. General Assembly Resolution seeking an advisory opinion from the [I.C.J.] on the obligations of States under international law to protect the rights and present and future generations against the adverse effects of climate change."[144] Local media reported that some of the eighteen Members of the Pacific Islands Forum (which include Australia and New Zealand) opposed the initiative in light of "their own direct coal and fossil fuel related responsibility for the climate emergency".[145]

In September 2021, the Government of Vanuatu announced its project to campaign for the General Assembly to request an advisory opinion of the I.C.J.[146] It has since assembled a taskforce of experts and practitioners.[147] Yet, it remains to be seen whether Vanuatu will succeed—where Palau did not—in gathering sufficient political support for the adoption of a General Assembly resolution. While states may now better understand the urgency of responses to climate change than a decade ago, there remains little explicit support from states—even, seemingly, from among those most affected by climate change.[148] Even if sufficient political support could be garnered, it would imply constraints on the content of the requests:[149] in particular, the goal of securing a broad coalition

[144] Fiftieth Pacific Islands Forum, 2019 Forum Leaders Communiqué ¶16, Aug. 13–16, 2019, *in* PACIFIC ISLANDS FORUM SECRETARIAT, ANNUAL REPORT 50 (2019).

[145] *Civil Society Is Fighting for Pacific Leaders to Seek Advice from International Court of Justice on Climate Emergency*, DAILY POST, Aug. 10, 2019.

[146] *See Vanuatu to Push International Court for Climate Change Opinion*, REUTERS (Sept. 25, 2021); Kizzy Kalsakau & Anita Roberts, *Vanuatu Leading Pacific on Climate Justice*, DAILY POST, Jul. 23, 2021.

[147] Blue Ocean Law, *Pacific Firm to Lead Global Legal Team Supporting Vanuatu's Pursuit of Advisory Opinion on Climate Change from International Court of Justice*, Oct. 23, 2021, https://www.blueoceanlaw.com/blog/pacific-firm-to-lead-global-legal-team-supporting-vanuatus-pursuit-of-advisory-opinion-on-climate-change-from-international-court-of-justice.

[148] *See, e.g.*, supra note 144. No endorsement seems to have been secured from organizations like the Climate Vulnerable Forums or Alliance of Small Island States.

[149] Freestone et al., *supra* note 16, at 172.

would almost certainly exclude any question on reparations.

B. Requests to ITLOS

Alternatively to the I.C.J., small-island states could seek an advisory opinion of ITLOS, a tribunal established in 1996 in application of Annex VI of UNCLOS (the Statute of the Tribunal).[150] UNCLOS (including Annex VI) does not expressly grant advisory jurisdiction to ITLOS as a full tribunal. It only grants advisory jurisdiction to the Seabed Disputes Chamber of ITLOS,[151] and only on matters related to "the Area"[152] (*i.e.*, the seabed and its subsoil beyond the limits of national jurisdiction).[153] This jurisdictional basis is probably "too limited to engage wider questions of liability for climate change".[154] Rather than any explicit treaty provision, the advisory jurisdiction of ITLOS as a full tribunal relies on a far-fetched interpretation of Article 21 of the Statute of the Tribunal.

Article 21 allows ITLOS to exercise jurisdiction on "all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal."[155] ITLOS has interpreted "all matters" as including not only contentious cases, but also advisory ones.[156] Accordingly, article 138 of the

[150] ITLOS Statute, *supra* note 20.
[151] *See* UNCLOS, *supra* note 20, art. 191; ITLOS Statute, *supra* note 20, art. 40 ¶2.
[152] UNCLOS, *supra* note 20, art. 187.
[153] *Id*. art. 1 ¶1(1).
[154] Freestone et al., *supra* note 16, at 169.
[155] ITLOS Statute, *supra* note 20, art. 21.
[156] *See S.R.F.C.*, *supra* note 23, ¶¶53–59; Rüdiger Wolfrum, President of ITLOS, Statement to the General Assembly, ¶16, Nov. 28, 2005, https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/ga_281105_eng.pdf; Doo-young Kim, *Advisory Proceedings Before the International Tribunal for the Law of the Sea as an*

Rules of the Tribunal provide that it may give an advisory opinion as a full tribunal "on a legal question if an international agreement related to the purpose of [UNCLOS] specifically provides for the submission to the Tribunal of a request for such an opinion."[157] The Tribunal issued its first and, so far, only advisory opinion as a full tribunal in 2015, following a request from the Sub-Regional Fisheries Commission (S.R.F.C.), an organization of seven West-African states, on questions relating to illegal, unreported and unregulated (I.U.U.) fishing activities in the exclusive economic zones (E.E.Z.) of these states.[158] The request for the advisory opinion was made by the Conference of Ministers of the S.R.F.C. authorized under a provision of the M.C.A. Convention, a treaty ratified by the S.R.F.C.'s seven member states.[159]

Scholars and judges have denounced ITLOS's interpretation of Article 21 as being "convoluted"[160] and resulting in a "creeping" exercise of jurisdiction.[161] Observers pointed out that the text of Article 21 is, at best, ambivalent,[162] and that the context does not easily lend support to ITLOS's

Alternative Procedure to Supplement the Dispute-Settlement Mechanism under Part XV of the United Nations Convention on the Law of the Sea, 7 ISSUES IN LEGAL SCHOLARSHIP 3–5 (2010); Budislav Vukas, *The International Tribunal for the Law of the Sea: Some Features of the New International Judicial Institution*, 37 INDIAN J. INT'L L. 372, 381 (1997); José Luis Jesus, *Article 138, in*, THE RULES OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA: A COMMENTARY 393, 394 (P. Chandrasekhara Rao et al. eds., 2006).

[157] Rules of ITLOS, *supra* note 19, art. 138 ¶1.

[158] *S.R.F.C.*, *supra* note 23.

[159] Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission art. 33, June 8, 2012, https://perma.cc/H95P-RFMH.

[160] *S.R.F.C.*, *supra* note 23, 73, ¶2 (Declaration of Judge Cot).

[161] Tom Ruys & Anemoon Soete, *"Creeping" Advisory Jurisdiction of International Courts and Tribunals? The Case of the International Tribunal for the Law of the Sea*, 29 LEIDEN J. INT'L L. 155 (2016).

[162] *See* Massimo Lando, *The Advisory Jurisdiction of the International Tribunal for the Law of the Sea: Comments on the Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, 29 LEIDEN J. INT'L L. 441, 452 (2016).

interpretation: had states really wanted to grant advisory jurisdiction to ITLOS, they would "have done so in express terms and by carefully delimitating" it.[163] Judges defended their interpretation of Article 21 in *S.R.F.C.* by noting that states had not protested to the adoption of the Rules of the Tribunal several years earlier,[164] but the absence of protest to an internal act of a tribunal does not demonstrate agreement.[165] In any case, any suggestion of a "consensus of the parties concerned"[166] became untenable when the S.R.F.C. request triggered "[a] considerable number of states [to] effectively challenge … the advisory competence of the Tribunal head-on."[167] Nor do the negotiations leading to UNCLOS provide any support to ITLOS's interpretation of its Statute: "an advisory function for the Tribunal was not even proposed".[168] And, contrary to an alternative justification of ITLOS's advisory jurisdiction suggested by Judge Jean-Pierre Cot,[169] the mere

[163] Alexander Proelss, *Advisory Opinion: International Tribunal for the Law of the Sea (ITLOS)* ¶19, *in in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ONLINE (2019).

[164] *S.R.F.C.*, *supra* note 23, 73, ¶3 (Declaration of Judge Cot); 88, ¶21 (Separate Opinion of Judge Lucky).

[165] *See* Vienna Convention on the Law of Treaties art. 31 ¶3(a)–(b), May 23, 1969, 1155 U.N.T.S. 331. The International Law Commission found that "silence … may constitute acceptance of subsequent practice when the circumstances call for some reaction", but this relates only to state practice, and the conduct of a tribunal does not constitute state practice. *See* Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, conclusions 5 & 10 ¶2, *in* INT'L L. COMM'N REP. 70th Sess., U.N. Doc. A/73 /10 (2019)

[166] Wolfrum, *Advisory Opinions: Are They a Suitable*, *supra* note 25, at 54.

[167] Ruys & Soete, *supra* note 161, at 159. Protests were also voiced at the Meeting of the Parties to UNCLOS. *See* Rep. 23rd Mtg. States Parties to UNCLOS ¶21, U.N. Doc. SPLOS/263 (July 8, 2013); 24th Mtg. ¶37, SPLOS/277 (July 14, 2014); 25th Mtg. ¶23, SPLOS/287 (July 13, 2015); 26th Mtg. ¶25, SPLOS/303 (Aug. 2, 2016).

[168] Sotirios-Ioannis Lekkas & Christopher Staker, *Article 21*, *in* UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY, *supra* note 95, 2374, at 2379. *See also* MIGUEL GARCIA GARCIA-REVILLO, THE CONTENTIOUS AND ADVISORY JURISDICTION OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA 311 (2015).

[169] *See S.R.F.C.*, *supra* note 23, 73, ¶4 (Declaration of Judge Cot); Thomas A. Mensah, *The Jurisdiction of the International Tribunal for the Law of the Sea*, 63 RABEL J. COMP. & INT'L PRIVATE L. 330–341, 340 (1999); Budislav Vukas, *supra* note 157, at 381.

absence of a provision prohibiting ITLOS from exercising advisory jurisdiction surely does not empower it to do so:[170] in the absence of evidence of state consent to its advisory jurisdiction, one should rather presume that ITLOS does *not* have such jurisdiction, in light of the *Lotus* principle that "[r]estrictions upon the independence of States cannot … be presumed".[171]

There certainly is no sign that ITLOS would fundamentally reverse its finding, in *S.R.F.C.*, that it can exercise advisory jurisdiction under article 21 of its Statute. Yet, the criticisms that have been made in relation to this case, and those that a new request would inevitably prompt, could lead the Tribunal to adopt a cautious and narrow approach to the scope of this advisory jurisdiction. If not, the questionable basis for the Tribunal to exercise advisory jurisdiction at the first place will further undermine the authority of an advisory opinion that the Tribunal may adopt on climate change.

Article 138 of the Rules of ITLOS imposes few conditions for the exercise of advisory jurisdiction. It permits "whatever body" to request an advisory opinion on a legal question, provided that this body is so authorized in accordance with an "international agreement related to the purposes of [UNCLOS]".[172] This suggests that two or several states could request an advisory opinion of

[170] *See* Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), Judgment on Preliminary Objections, 1925 P.C.I.J. (ser. A) No. 6, at 21 (Aug. 25); Interpretation of the Greco-Bulgarian Agreement of December 9th, 1927, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 45, at 87 (Mar. 8); Application of the Principle of Regional Rotation in the Election of the Bureau of the PAP, Advisory Opinion No. 1/2021 ¶50, ACHPR (July 16, 2021) https://www.african-court.org/cpmt/storage/app/uploads/public/60f/6d3/a4b/60f6d3a4bdbe5862648244.pdf. *See also* Proelss, *supra* note 163, ¶20; Luis Jesus, *supra* note 156, at 393.

[171] S.S. Lotus (Fr./Turk.), 1927 PCIJ (ser. A) No. 10, at 18 (Sept. 7). While the *Lotus* principle may be unhelpful to determine states' reciprocal rights and obligations, it is fully applicable when assessing the relation between a state and a non-sovereign institution, such as a court.

[172] Rules of ITLOS, *supra* note 19, art. 138, ¶2. *See* Wolfrum, Statement to the General Assembly, *supra* note 156, ¶15.

ITLOS without securing the broad political coalition necessary to request an advisory opinion of the I.C.J., possibly bringing "'class actions' or erga omnes advisory proceedings" before ITLOS.[173] Thus, ITLOS President José Luis Jesus highlighted that advisory proceedings could "be a useful tool" when states are facing "new challenges in ocean activities, such as piracy and armed robberies".[174] Accordingly, judges and scholars have pointed out the potential for the request for an advisory opinion of ITLOS on climate change.[175] In particular, De Herdt and Judge Ndiaye suggested that the Tribunal's advisory jurisdiction could be used "to clarify, for instance, the legal environmental obligations of states under Part XII of UNCLOS in the context of climate change, and the legal consequences of sea-level rise for baselines, the outer limits of maritime zones, and coastal states' entitlements to maritime areas."[176]

Small-island states are now considering putting this theory to test. On October 31, 2021, Antigua and Barbuda and Tuvalu adopted a treaty establishing COSIS.[177] The treaty permits accession by

[173] Shabtai Rosenne, *International Tribunal for the Law of the Sea: 1996–97 Survey*, 13 INT'L J. MARINE & COASTAL L. 487, 507 (1998).

[174] José Luis Jesus, President of ITLOS, Statement to the G.A. ¶9, Dec. 5, 2008, https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/jesus/general_assembly_051208_eng.pdf.

[175] *See* Luís Jesus, Statement to the 6th Committee of the G.A., *supra* note 62, at 4; Seokwoo Lee & Lowell Bautista, *Part XII of the United Nations Convention on the Law of the Sea and the Duty to Mitigate Against Climate Change: Making Out a Claim, Causation, and Related Issues Oceans and Climate Change Governance*, ECOLOGY L.Q. 129, 152 (2018); Sands, *supra* note 46, at 28; Roda Verheyen & Cathrin Zengerling, *International Dispute Settlement*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL CLIMATE CHANGE LAW 417, 431–32 (Cinnamon P. Carlarne et al. eds., 2016); Daniel Bodansky, *Adjudication vs. Negotiation in Protecting Environmental Commons Symposium: The Role of International Courts in Protecting Environmental Commons*, 41 U. HAW. L. REV. 260, 269–70 (2018); BENOIT MAYER, THE INTERNATIONAL LAW ON CLIMATE CHANGE 242–43 (2018).

[176] De Herdt & Ndiaye, *supra* note 91, at 370.

[177] COSIS Agreement, *supra* note 31.

any other of the 38 members of the Alliance of Small Island States,[178] and it is reported that Palau acceded to the treaty on November 4, 2021.[179] The mandate of COSIS is "to promote and contribute to the definition, implementation, and progressive development of rules and principles of international law concerning climate change," in particular "the obligations of States relating to the protection and preservation of the marine environment."[180] COSIS may also seek to clarify the "responsibility [of states] for injuries arising from internationally wrongful acts in respect of the breach of such obligations".[181] The Commission is expressly authorized "to request advisory opinions from [ITLOS] on any legal question within the scope of [UNCLOS]".[182]

The prospect of a request of COSIS for an advisory opinion of ITLOS raises two fundamental issues about the scope and nature of ITLOS's advisory jurisdiction. The first issue is whether the questions asked to the court would need to touch upon the interpretation of the law of the sea, or whether it could focus on other legal issues. Scholars have generally approached ITLOS as a specialized court, hence with a subject-matter jurisdiction limited to the law of the sea.[183] Yet, there is no express basis for such limitation under article 138 of the Rules of the Tribunal. The body requesting the advisory opinion must be so authorized by an international agreement "related to the purposes of" UNCLOS,[184] but the condition of a relation with the purposes of

[178] *Id.*, art. 4 ¶4. *See also* About Us, ALLIANCE OF SMALL ISLAND STATES, https://www.aosis.org/about/member-states/ (last visited Mar. 6, 2022).
[179] *See* Freestone et al., *supra* note 16, at 167.
[180] COSIS Agreement, *supra* note 31, art. 1 ¶3.
[181] *Id.*
[182] *Id.*, art. 2 ¶2.
[183] *See, e.g.*, De Herdt & Ndiaye, *supra* note 91, at 359; Bodansky, *Role of I.C.J.*, *supra* note 40, at 701; Tafsir Malick Ndiaye, *The Advisory Function of the International Tribunal for the Law of the Sea*, 9 CHINESE J. INT'L L. 565, 585–86 (2010).
[184] Rules of ITLOS, *supra* note 19, art. 138.

UNCLOS does not apply to the request itself, or to the questions it contains.[185] As such, it is unclear whether an advisory opinion could be given by the tribunal on questions unrelated to UNCLOS, when the request was made by a body so authorized by a treaty which is related to the purposes of UNCLOS.[186] ITLOS did not need to consider this issue in *S.R.F.C.* because the questions asked in the request, on the regulation of I.U.U. fishing activities, related closely to provisions of UNCLOS.[187] By contrast, the issue could arise with regard to a request for an advisory opinion on climate change, if it bears not only on the protection of the marine environment, but also on broader environmental concerns.[188]

A second, perhaps even more critical issue is whether ITLOS could comply with a request for an advisory opinion from a body so authorized under an international agreement, when the request aims at the determination of the obligations of states not parties to this agreement. In *S.R.F.C.*, ITLOS emphasized that it was only interpreting the law relevant to the functions of the requesting body—namely, the regulation of fishing activities within the E.E.Z. of the S.R.F.C. member states.[189] The Tribunal highlighted that its opinion did not "relate to the obligations of flag States in cases of IUU fishing in other maritime areas, including the high seas."[190]

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[185] GARCIA-REVILLO, *supra* note 168, at 313.

[186] Proelss, *supra* note 163, ¶23.

[187] UNCLOS UNCLOS, *supra* note 20, arts. 56, 58, 61–62, 73, 192–93.

[188] This issue of the subject-matter jurisdiction is distinct from that of identifying the law applicable once ITLOS has decided to give an advisory opinion. *See generally* Peter Tzeng, *Jurisdiction and Applicable Law Under UNCLOS*, 126 YALE L.J. 242 (2016). On the law applicable, *see S.R.F.C.*, *supra* note 23, ¶84, finding that the tribunal can apply UNCLOS, the Convention authorizing the request for an advisory opinion, and "other relevant rules of international law not incompatible with" UNCLOS.

[189] *S.R.F.C.*, *supra* note 23, ¶¶87, 200, 214, 219(1).

[190] *Id.* ¶89.

This distinction drawn in *S.R.F.C.* may have appeared somewhat artificial, as the obligations of flag states applicable in the E.E.Z. of the S.R.F.C. member states are presumably the same as in the E.E.Z. of other states and, to some extent, may apply to the high seas as well. However, the distinction could have been effective in another case. It could, for instance, have barred ITLOS from exercising jurisdiction if the request had been made by a hypothetical association of landlocked countries without fishing fleet. COSIS, like this hypothetical association of landlocked countries, would be requesting an advisory opinion chiefly or exclusively with the aim of determining the obligations of states not parties to the COSIS Agreement—that is, states that have not consented to give the competence to COSIS to request an advisory opinion of ITLOS. As suggested below, this lack of consent would almost certainly be a fatal flaw in the COSIS strategy.[191]

C. Requests to Regional Human Rights Courts

Alternatively to the I.C.J. or ITLOS, advisory proceedings on climate change could be brought to a regional human rights court. As the following shows, the comparative advantage of the ACHPC and the IACHR is that they offer favorable conditions of standing. Yet, their drawback is that they are undoubtedly specialized courts: their advisory jurisdiction is limited to the interpretation of human rights treaties. As such, these courts would only be able to give an advisory opinion on climate change mitigation if, and to the extent that, they accept to characterize climate change mitigation as an effective measure for a state to promote the enjoyment of human rights within its territory or jurisdiction.

[191] *See* discussion below, Section III.A.

On the upside, the IACHR and the ACHPR offer advantageous conditions for standing in advisory proceedings. The IACHR accepts requests from the organs listed in the Charter of the Organization of American States. This includes some organs that are a step removed from states' influence, such as the General Secretariat of the Organization of American States and the Inter-American Commission on Human Rights.[192] It also allows such requests from any Organization of American States Member State, notwithstanding whether this state is a party to the Pact of San José.[193]

The ACHPR has an even broader approach to standing, allowing requests from any organs of the African Union (whether a main organ established by the Constitutive Act of the African Union, or another organ established subsequently), any Member State of the African Union, and "any African organization recognized by" the African Union.[194] The ACHPR has interpreted the reference to "any African organization" as including not only international organizations, but also NGOs; and it held that the latter organizations are "recognized" by the African Union when they are granted an observer status by, or are under a Memorandum of Understanding with the African

[192] Pact of San José, *supra* note 34, art. 64 ¶1; Charter of the Organization of American States, Apr. 30, 1948, amended 1967, 1985, 1992 and 1993, art. 53, http://www.oas.org/dil/1948%20charter%20of%20the%20organization%20of%20american%20states.pdf. *See also* JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 42 (2012).

[193] Pact of San José, *supra* note 34, art. 64 ¶1. *See also* PASQUALUCCI, *supra* note 192 at 41.

[194] ACHPR Protocol, *supra* note 34, art. 4 ¶1. *See also* Constitutive Act of the African Union, art. 9 ¶1(d), Nov. 7, 2000, 2158 U.N.T.S. 3 (authorizing the Assembly to establish "any organ of the Union"); Standing of the African Committee of Experts on the Rights and Welfare of the Child Before the African Court on Human and Peoples' Rights, Advisory Opinion No. 2/2013 ¶¶50–57, ACHPR (Dec. 5, 2014), https://www.african-court.org/cpmt/storage/app/uploads/public/5fd/224/240/5fd224240198d507498993.pdf (finding that the Committee had standing to request an advisory opinion).

Union.[195] While these provisions offer multiple ways for small-island states and their allies to request an advisory opinion of either the IACHR or the ACHPR, the most straightforward avenue may be for the request to be filed by a small-island state that is a member of either the Organization of American States (*e.g.*, Antigua and Barbuda) or the African Union (*e.g.*, the Seychelles).

By contrast, the European Court of Human Rights (ECHR) has a narrowly limited jurisdiction to give advisory opinions. The European Convention on Human Rights and its Protocols allow for two types of requests.[196] First, requests under the Convention can be made by a majority vote of the Committee of Ministers, an intergovernmental organ of the Council of Europe.[197] It seems extremely unlikely that the Committee of Ministers would decide to request an advisory opinion of the ECHR on climate change, given that the Council of Europe is composed exclusively of developed states, which are less prone than developing states to support an advisory opinion on climate change. Second, Protocol 16 to the Convention (which entered into force in 2018) allows requests for advisory opinions from any of the "highest courts and tribunals of a High Contracting Party" on questions related to "a case pending before it."[198] In the ten Council of Europe member

[195] Socio-Economic Rights and Accountability Project (SERAP), Advisory Opinion No. 1/2013 ¶64, ACHPR (May 26, 2017), https://www.african-court.org/cpmt/storage/app/uploads/public/5fd/1ed/159/5fd1ed1596472204848898.pdf. *See also* Frans Viljoen, *Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights*, 67 INT'L & COMP. L.Q. 63, 90 (2018).

[196] In addition, the Court has accepted a request based on another human rights treaty adopted by the Council of Europe. *See* Decision on the Competence of the Court to Give an Advisory Opinion under Article 29 of the Oviedo Convention, Request No. A47-2021-001 (Sept. 15, 2021), https://hudoc.echr.coe.int/eng?i=003-7117959-9642022.

[197] Convention for the Protection of Human Rights and Fundamental Freedom, Nov. 4, 1950, as amended by Protocols Nos. 11, 14 & 15, art. 47, https://www.echr.coe.int/Documents/Convention_ENG.pdf.

[198] Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Oct. 2, 2013, C.E.T.S. No. 214. *See generally* Thomas Voland & Britta Schiebel, *Advisory Opinions of*

states that have ratified the Protocol to date,[199] this could represent a realistic way to bring climate change before the ECHR,[200] although only in the context of a specific case against an individual member state. In each of the three opinions that ECHR has adopted under the Protocol so far, the Court has clearly stated its understanding that it cannot answer questions that would be of an "abstract and general nature".[201]

A more general limitation of advisory proceedings before regional human rights courts is that such proceedings would inevitably be confined to the interpretation and application of human rights law. Thus, the ECHR's advisory jurisdiction focuses on the European Convention and its Protocols, along potentially with other human rights treaties adopted by the Council of Europe.[202] The IACHR's advisory opinions can interpret and apply both the Pact of San José and "other treaties concerning the protection of human rights in American states".[203] The Court found that this could include not only specialized human rights treaties adopted by the Organization of American States,

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the European Court of Human Rights: Unbalancing the System of Human Rights Protection in Europe?, 17 HUM. RTS. L.REV. 73 (2017).

[199] *See* Chart of signatures and ratifications of Treaty 214, COUNCIL OF EUROPE, https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=214 (last visited Mar. 6, 2022).

[200] *See* Katharina Franziska Braig & Stoyan Panov, *The Doctrine of Positive Obligations as a Starting Point for Climate Litigation in Strasbourg: The European Court of Human Rights as a Hilfssheriff in Combating Climate Change?*, 35 J. ENV'T L. & LITIG. 261, 297 (2020). *See also Urgenda*, *supra* note 9, ¶5.6.4.

[201] *See*, Use of the "Blanket Reference" or "Legislation by Reference" Technique ¶55, Request No. P16-2019-001 (May 29, 2020), https://hudoc.echr.coe.int/eng?i=003-6708535-9909864; Interpretation of Articles 2, 3, & 6 of the Convention ¶18, Request No. P16-2020-001 (Dec. 14, 2020), https://hudoc.echr.coe.int/eng?i=003-6951456-9350980. *See also* Recognition in Domestic Law of a Legal Parent-Child Relationship ¶26, Request No. P16-2018-001 (Apr. 10, 2019), https://hudoc.echr.coe.int/eng?i=003-6380464-8364383.

[202] Eur. Convention Hum. Rts., *supra* note 197, art. 47, ¶1; Protocol 16, *supra* note 198, art. 1 ¶1; *Oviedo Convention*, *supra* note 196.

[203] Pact of San José, *supra* note 34, art. 64, ¶1.

but also non-regional human rights treaties ratified by American states, provided that the latter are of general interest to American states.[204] Similarly, the ACHPR's advisory opinions can interpret the African Charter on Human and Peoples' Rights or "any other relevant human rights instruments".[205]

As such, questions relating to climate change do not easily fall within the scope of the advisory jurisdiction of regional human rights courts. Some scholars have presented the Paris Agreement as a human rights treaty;[206] if this characterization was accurate, requests for advisory opinions of the IACHR or ACHPR could concern the interpretation of the Paris Agreement. Yet, the Paris Agreement does not define any individual's rights. The Agreement's only reference to human rights, in its Preamble, is merely a safeguard provision confirming that states must comply with "their respective obligations" when implementing action on climate change.[207] Admittedly, the implementation of climate treaties pursues the public interest, thus incidentally benefitting the enjoyment of human rights, but the same could be said of many other treaties (*e.g.*, treaties fighting crime, promoting international trade, or establishing military alliances). One could even ask whether any treaty has ever been adopted without being presented as a way to further the public

[204] "Other Treaties" Subject to the Consultative Jurisdiction of the Court, Advisory Opinion OC-1/82, IACHR (ser. A) No. 1, ¶52 (Sept. 24, 1928); The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, IACHR (ser. A) No. 16, ¶141(8) (Oct. 1, 1999). *See generally* PASQUALUCCI, *supra* note 192 at 54–57.

[205] ACHPR Protocol, *supra* note 34, art. 4 ¶1. *See also Vagrancy Laws*, *supra* note 100, ¶¶27–28; Lilian Chenwi, *The Advisory Proceedings of the African Court on Human and Peoples' Rights*, 38 NORDIC J. HUM. RTS. 61, 64 (2020).

[206] John H. Knox, *The Paris Agreement as a Human Rights Treaty*, *in* HUMAN RIGHTS AND 21ST CENTURY CHALLENGES: POVERTY, CONFLICT, AND THE ENVIRONMENT 323 (Dapo Akande et al. eds., 2020).

[207] Paris Agreement, *supra* note 1, pmbl. ¶12. *See* discussion in Benoit Mayer, *Human Rights in the Paris Agreement*, 6 CLIMATE L. 109 (2016).

interest, hence also, indirectly, to promote the enjoyment of individual rights. It is questionable that regional courts can give advisory opinions on the interpretation or application of treaties that only have a tenuous relation to the protection of human rights.[208] In fact, the ACHPR has already refused to approach the Rome Statute of the International Criminal Court as a treaty relating to the protection of human rights and, thus, to issue an advisory opinion focusing on its interpretation.[209] Likewise, regional human rights court would reject a request for an advisory opinion focusing on climate treaties—or, a fortiori, on the customary law applicable to climate change.

Rather than climate treaties or customary law, a regional human rights court could be invited to give an advisory opinion on climate change based on the interpretation and application of human rights treaties, in particular the provisions of the latter that define states' positive obligation to take "appropriate" measures to protect human rights.[210] As climate change has an adverse impact on the enjoyment of these rights—the argument would go—compliance with this positive obligation requires states to address climate change.[211] This argument is a compelling justification for

[208] *See* Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO, Advisory Opinion, 1956 I.C.J. 77, 89 (Oct. 23) (noting the need for "a substantial and not merely an artificial connection" between the facts and the provision giving jurisdiction to the court). *See generally* Callista Harris, *Incidental Determinations in Proceedings under Compromissory Clauses*, 70 INT'L & COMP. L.Q. 417 (2021).

[209] Coalition for the International Criminal Court, Advisory Opinion No. 1/2015 ¶18, ACHPR (Nov. 29, 2015), https://www.african-court.org/cpmt/storage/app/uploads/public/5fd/21f/378/5fd21f37880b1058244884.pdf. This decision was criticized, though perhaps more for its lack of motivation than for any substantive flaw. *See, e.g.*, *id.*, Dissenting Opinion of Judge Ouguergouz, ¶21; Chenwi, *supra* note 205, at 67–68.

[210] *See, e.g.*, Hum. Rts. Comm., General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant ¶7, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

[211] *See* Hum. Rts. Council, Resolution 47/24, Human Rights and Climate Change ¶2 (July 26, 2021); John H. Knox, Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, Report to the Human Rights Council ¶77, U.N. Doc.

measures promoting adaptation to climate change, for instance measures that a state would take with the view of reducing the vulnerability of the population within its territory to the impacts of climate change.[212] This is in line with a long-standing interpretation of human rights law as requiring states to take measures to protect persons within its territory in the event of a disaster.[213] In this sense, states have the same obligation of protection notwithstanding whether the event threatening the enjoyment of human rights (*e.g.*, a drought or a typhoon) is related to climate change.[214]

By contrast, states' positive human rights obligations are an improbable source of an obligation to mitigate climate change because there is only a tenuous link between a state's action on climate change mitigation and the protection of the rights of individuals within its territory. A state's best efforts would incrementally reduce emissions within its territory, which are a fraction of global emissions. While this may achieve some diffuse global benefits on the long-term, much of these benefits do not fall within the (chiefly) territorial scope of a state's obligation to protect the enjoyment of human rights.[215] All in all, the measures that a state takes to reduce emissions within its territory may affect individuals within its jurisdiction (*e.g.*, by diverting scarce public resources from other priorities) more than it benefits them.[216] While some national courts in continental

A/HRC/31/52 (Feb. 1, 2016).

[212] *See* Leghari v. Pakistan, para. 20 (WP No 25501/2015), Lahore High Court Green Bench, Order (Sept. 4, 2015), available at https://elaw.org/pk_Leghari (Pak.); Hum. Rts. Council, *supra* note 211, ¶6.

[213] *See* Draft Articles on the Protection of Persons in the Even of Disasters, art. 5, *in* INT'L L. COMM'N REP. 68th Sess., 13, U.N. Doc. A/71/10 (2016).

[214] Benoit Mayer, *Climate Change Adaptation and the Law*, 39 VA. ENV'T L.J. 141, 166 (2021).

[215] *See* Benoit Mayer, *Climate Change Mitigation as an Obligation Under Human Rights Treaties?*, 115 AM. J. INT'L L. 409, 426–28 (2021); Eric A. Posner, *Climate Change and International Human Rights Litigation*, 155 UNIV. PA. L. REV. 1925, 1926–27 (2007).

[216] *See* Mayer, *Climate Change Mitigation as an Obligation Under Human Rights Treaties?*, *supra* note

Europe have accepted to interpret human rights law as requiring action on climate change mitigation,[217] it is unclear whether regional human rights courts would be willing to follow suit. The IACHR, for one, insisted that "the purpose of its advisory jurisdiction cannot be diverted to aims other than the protection of the rights and freedoms guaranteed by the Convention."[218]

A regional human rights court is even less likely to give an advisory opinion on climate reparations. For one, while human rights treaties define a right to an effective remedy, this may not necessarily imply a right to reparation—especially not in relation to structural harms such as climate change.[219] Overall, identifying an individual's right to climate reparations would raise intractable problems of causation and attribution. While an individual may suffer as a remote consequence of the failure of a state to take appropriate measures to reduce GHG emissions, she may also benefit as a remote consequence of this wrongful act; in fact, she might even share some of the blame. Climate reparations can more easily be envisaged in the horizontal relation between states—as an obligation of the largest GHG-emitting states to make reparation for the structural harm suffered by the states most vulnerable to the impacts of climate change—than in the vertical relation

215, at 416–19.

[217] *See* in particular *Urgenda*, *supra* note 9, §5.1. *But see* HR-2020-2472-P, Dec. 22, 2020, Case No. 20-051052SIV-HRET (Natur og Ungdom/Norway), 166–68 (Nor.). *See also* Benoit Mayer, *The State of the Netherlands v. Urgenda Foundation: Ruling of the Court of Appeal of The Hague (9 October 2018)*, 8 TRANSNAT'L ENV'T L. 167 (2019).

[218] International Responsibility for the Promulgation and Enforcement of Laws in Violation of the American Convention on Human Rights, Advisory Opinion OC-14/94, IACHR (ser. A) No. 14, ¶21 (Dec. 9, 1994).

[219] *See* Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ¶¶15–23, *in* GA Res. 60/147 (Dec. 16, 2005). *See generally* Luke Moffett, *Transitional Justice and Reparations: Remedying the Past?*, *in* RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE 377 (Cheryl Lawther & Luke Moffett eds., 2019).

between an individual and a state.[220]

III. CONDITIONS OF JURISDICTION AND PROPRIETY

Once a court receives a request for an advisory opinion, its first task is to decide whether to comply with it. A request for an advisory opinion on climate change could face serious objections relating to the political sensitivity of the questions asked, the relation with on-going political processes, the relative indeterminacy of the relevant legal principles, and the lack of consent of the states concerned. A court would have to decide on these objections in application of legal norms defining the conditions for the exercise of its advisory jurisdiction and for the admissibility of requests for advisory opinions. A court could accept or reject the request in its entirety, but it could also decide to answer some questions,[221] possibly after reframing them.[222]

A court's advisory jurisdiction is often based on a treaty provision using the word "may", which seems to permit a court to comply with requests for advisory opinions without requiring it to do so.[223] When interpreting these provisions, courts have drawn a distinction between an assessment of the conditions of jurisdiction and the exercise of judicial discretion. On the one hand, they invoked conditions of jurisdiction to refuse to give an opinion when the requesting body lacked

[220] *See* Benoit Mayer, *Whose "Loss and Damage"? Promoting the Agency of Beneficiary States*, 4 CLIMATE L. 267, 283–87 (2014). *See also* references *supra* note 56.

[221] Wolfrum, *Advisory Opinions: Are They a Suitable*, *supra* note 25, at 46.

[222] *See Construction of a Wall*, *supra* note 23, ¶38.

[223] I.C.J. Statute, *supra* note 12, art. 65 ¶1; Rules of ITLOS, *supra* note 19, art. 138 ¶¶1–2; Eur. Convention Hum. Rts., *supra* note 197, art. 47 ¶2; Pact of San José, *supra* note 34, art. 64 ¶2; ACHPR Protocol, *supra* note 34, art. 4 ¶1. *But see* Protocol 16, *supra* note 198, art. 2 ¶1.

standing (either generally[224] or in relation to the questions contained in the request),[225] when the questions were not within the scope of the court's subject-matter jurisdiction,[226] and when relevant procedural conditions had not been met.[227]

On the other hand, courts have frequently claimed for themselves a "discretionary power to decline to give an advisory opinion",[228] even though admitting that they would only exercise this power based on "compelling reasons".[229] It is noteworthy that no international court, so far, has relied on this would-be discretionary power to decline to give an advisory opinion.[230] And, when they found that conditions of jurisdiction were met, few dissenting judges have ever suggested that courts should have declined to give an opinion based on this judicial power.[231] Thus, at first sight, the

[224] Association Africaine de Défense des Droits de l'Homme, Advisory Opinion No. 2/2016 ¶35, ACHPR (Sep. 28, 2017), https://www.african-court.org/cpmt/storage/app/uploads/public/5fd/0d1/db8/5fd0d1db85648367083702.pdf.

[225] *Nuclear Weapons in Armed Conflict*, *supra* note 135, ¶31; Status of Eastern Carelia, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5, at 27–28 (July 23).

[226] *See, e.g.*, Decision on the Competence of the Court to Give an Advisory Opinion, ¶35, Request No. A47-2004-001 (June 2, 2004), https://hudoc.echr.coe.int/eng?i=003-1339293-1397515; *Coalition for the I.C.C.*, *supra* note 209, ¶18.

[227] Socio-Economic Rights & Accountability Project, Advisory Opinion No. 1/2012 ¶7, ACHPR (Mar. 15, 2013), https://www.african-court.org/cpmt/storage/app/uploads/public/60a/e4d/4f9/60ae4d4f9788b547338397.pdf.

[228] *Chagos*, *supra* note 101, ¶63. *See also S.R.F.C.*, *supra* note 23, ¶71; Exceptions to the Exhaustion of Domestic Remedies, Advisory Opinion OC-11/90, IACHR (ser. A) No. 11, ¶12 (Aug. 10, 1990).

[229] *Chagos*, *supra* note 101, ¶65. *See also S.R.F.C.*, *supra* note 23, ¶71; *"Other Treaties"*, *supra* note 204, ¶30.

[230] *See* 2 MALCOLM N. SHAW, ROSENNE'S LAW AND PRACTICE OF THE INTERNATIONAL COURT: 1920–2015, at ¶246 (5th ed. 2016); ROBERT KOLB, THE ELGAR COMPANION TO THE INTERNATIONAL COURT OF JUSTICE 273 (2016).

[231] *But see Nuclear Weapons*, *supra* note 97, 330, ¶¶47–52 (Dissenting Opinion of Judge Oda); Tullio Treves, *Discussion*, in INTERNATIONAL DISPUTE SETTLEMENT: ROOM FOR INNOVATIONS?, *supra* note 25, 109, at 110.

theory of a discretionary power seems rather ineffective.

The concept of a "discretionary power" in the application of the law is a source of considerable confusion.[232] This confusion is unnecessary when analyzing the circumstances in which a court could decline to give an advisory opinion. If a Court needs to have "compelling reasons" to decline a request, then presumably it has no genuine discretion. As Robert Kolb noted, the identification of these compelling reasons cannot be based on "simple opportunity or political reasons", as weighing such considerations would "plunge [the Court] into a political function that is incompatible with its judicial function".[233] The political opportunity of an advisory opinion is appraised by the political body requesting it; the Court's judicial function does not include a power to "overrule [this] political judgment."[234]

Rather than political opportunity, the "compelling reasons" that a court could identify to decline a request for an advisory opinion must be based on considerations of judicial propriety.[235] Thus, plausible "compelling reasons" that courts have envisaged include the close relation of the request with a dispute between states,[236] the risk of interference with political processes,[237] or the overly abstract nature of the question.[238] While a court's decision in this regard may involve some

[232] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 48–57 (2013).

[233] KOLB, *supra* note 230, at 274. *See generally* KOLB & PERRY, *supra* note 120, at 1083–94.

[234] Sir Franklin Berman, *The Uses and Abuses of Advisory Opinions*, *in* 2 LIBER AMICORUM JUDGE SHIGERU ODA 809 (Nisuke Ando et al. eds., 2002).

[235] Georges Abi-Saab, *On Discretion: Reflections on the nature of the consultative function of the International Court of Justice*, *in* INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 36, 42–45 (Laurence Boisson de Chazournes & Philippe Sands, 1999).

[236] *Chagos*, *supra* note 101, ¶¶83–90.

[237] *Construction of a Wall*, *supra* note 23, ¶¶51–54.

[238] *Nuclear Weapons*, *supra* note 97, ¶15; *S.R.F.C.*, *supra* note 23, ¶72. *See generally* KOLB, *supra* note

appreciation, it must be guided by legal principles about what constitutes the proper exercise of judicial functions, rather than any genuine "power of free decision-making".[239] As such, there is no difference of nature—and, in fact, no clear line—between the court's decision on its jurisdiction and that on the propriety of complying with the request.[240]

Different conditions of jurisdiction and propriety may apply before the I.C.J., ITLOS, and regional human rights courts. Admittedly, the I.C.J.'s case-law has had some influence on ITLOS's advisory opinion in *S.R.F.C.*, and even on regional human rights courts.[241] Yet, the I.C.J. highlighted its status as the U.N.'s "principal judicial organ"[242] and the expectation that it cooperate with other organs of the organization to justify that "[a] reply to a request for an Opinion, in principle, should not be refused."[243] ITLOS does not have the same duty to cooperate with U.N. organs, let alone with "whatever body"[244] authorized by two or several states to request an advisory opinion from it. Likewise, the states or institutions competent to request an advisory opinion of regional human rights courts may not have the same legitimacy as U.N. organs in determining the opportunity or propriety of clarifying a legal question. As such, questions of propriety should be more carefully considered before ITLOS and regional human rights courts than before the I.C.J.

230, at 266–72.

[239] *Discretion*, BLACK'S LAW DICTIONARY (9th ed. 2009).

[240] SHAW, *supra* note 230, ¶244 (suggesting that "the difference … is largely one of formulation and of judicial technique rather than one of substance").

[241] *See* references *supra* note 229. *See also* Wolfrum, *Advisory Opinions: Are They a Suitable*, *supra* note 25, at 54.

[242] U.N. Charter art. 92

[243] *Interpretation of Peace Treaties*, *supra* note 23, at 71; *Chagos*, *supra* note 101, ¶65. *See also* SHAW, *supra* note 230, ¶246; KOLB, *supra* note 230, at 273.

[244] Rules of ITLOS, *supra* note 19, art. 138 ¶2.

The following Sections focus on the likeliest objections against a request for an advisory opinion on climate change. The first Section explores an objection related to the lack of consent or prior authorization by the states concerned. The second Section turns to objections relating to the nature of the questions contained in the request for an advisory opinion.

A. The Consent of the States Concerned

This first Section identifies the principle according to which a court must decline a request for an advisory opinion aimed at interpreting the rights or obligations of states when the request was submitted without their consent or their prior authorization. This principle would not be a problem in advisory proceedings before the I.C.J., as U.N. members have already authorized U.N. organs and agencies to request advisory opinions of the I.C.J. under the U.N. Charter. By contrast, this principle points to a structural flaw in COSIS's strategy for an advisory opinion of ITLOS and a serious obstacle to advisory proceedings on climate change before regional human rights courts.

1. The Requirement of State Consent

The contemporary international legal order is based on the principle that states are sovereign, equal, and independent.[245] When a dispute arises between them, states have an obligation to seek a peaceful settlement;[246] yet, they are free to decide what dispute settlement mechanism they prefer

[245] U.N. Charter art. 2 ¶1.
[246] *Id.* ¶3.

(*e.g.*, negotiation, enquiry, mediation, conciliation, or adjudication).[247] Even in the absence of a dispute, states have a general obligation to cooperate in solving international problems,[248] but the modalities of cooperation is to be negotiated by them, rather than imposed upon them. Accordingly, no state or group of states can seek to determine the rights and obligations of another state or a group of other states, whether they do this by themselves (*e.g.*, by adopting a treaty creating rights or obligations for third states)[249] or with the intermediary of an institution of their choosing. In particular, a group of states cannot request a court to determine the obligations of other states without their consent.

The P.C.I.J. confirmed and applied this principle in its 1923 advisory opinion in *Eastern Carelia*. The case concerned a region that Finland had retroceded to Russia in 1920. A dispute arose between the two states when Finland argued that Russia had assumed an obligation to maintain the autonomous status of this region, a claim that Russia denied. Finland submitted the dispute to the League of Nations, of which Russia was not a member. In turn, the Council of the League of Nations requested an advisory opinion of the P.C.I.J., seeking a clarification of Russia's obligations relating to Eastern Carelia.[250]

The P.C.I.J. found it "impossible" to comply with the request on the ground that Russia had not authorized the League of Nations to settle the dispute and had not consented to the Council's request for an advisory opinion of the P.C.I.J.[251] The Court recalled, in particular, the "principle

[247] *Id.* art. 33. ¶1. *See also* Fisheries Jurisdiction (Spain v. Can), Judgment, 1998 I.C.J. 432, ¶56 (Dec. 4).
[248] U.N. Charter, art. 56.
[249] *See* VCLT, *supra* note 165, art. 34.
[250] *Eastern Carelia*, *supra* note 225, at 7.
[251] *Id.* 28.

of the independence of States" according to which "no State can, without its consent, be compelled to submit its disputes with other States … to any … kind of pacific settlement."[252] Thus, *Eastern Carelia* confirms that the consent of a state is necessary for an institution to request an advisory opinion of an international court aimed to determine the rights or obligations of that state.[253]

In principle, a state's consent can take one of two alternative forms. First, the state can consent to the specific request for an advisory opinion on an ad hoc basis. In *Eastern Carelia*, Russia withheld its consent to do so.[254] Second, a state can also consent to give competence to an institution to request advisory opinions. Thus, by ratifying the Covenant of the League of Nations, Finland had authorized the Council of the League of Nations to request advisory opinions of the P.C.I.J.—but Russia had not.[255] Ad hoc consent is practically unheard of, probably for a simple reason: two states that agree to bring a question to a court would assumably prefer to bring it as a contentious case, which would allow them more control on the procedure.[256] Instead, advisory opinions touching upon the rights or obligation of states have systematically relied on the prior authorization of the states concerned, typically expressed through the ratification of the treaty establishing the court.

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[252] *Id.* 27.

[253] *See, e.g.*, Western Sahara, Advisory Opinion, 1975 I.C.J. 12, ¶30 (Oct. 16); Legal Consequences for States of the Continued Presence of South African in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶31 (June 21); Kenneth Keith, *The Advisory Jurisdiction of the International Court of Justice: Some Comparative Reflections*, 17 AUST. Y.B. INT'L L. 39, 47 (1996); Rosalyn Higgins, *A Comment on the Current Health of Advisory Opinions*, *in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOUR OF SIR ROBERT JENNINGS 567, 571 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996).

[254] *See Eastern Carelia*, *supra* note 225, at 24. *See also* Covenant of the League of Nations, art. 17.

[255] Covenant of the League of Nations, art. 14.

[256] By contrast, third states would be allowed to present their views if the matter was brought to the court in advisory proceedings. *See* references *supra* note 19.

2. Applications to Advisory Opinions on Climate Change

As far as the I.C.J. is concerned, the condition of state consent is no serious obstacle to the exercise of advisory jurisdiction. Almost every state is a U.N. Member and, as such, has consented to the competence of U.N. organs and agencies to request advisory opinions of the I.C.J. under the conditions defined by the U.N. Charter.[257] Thus, even though the I.C.J. reaffirmed that a request for an advisory opinion must not "have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent,"[258] it never had to reject a request for an advisory opinion on the basis of the lack of state consent. Some states have strongly opposed certain requests for advisory opinions (*e.g.*, Israel in relation to the construction of a wall in occupied Palestinian territories),[259] but they did not relinquish their U.N. membership and the consent to the competence of the General Assembly that it involves.[260]

Nonetheless, some states might question whether the competence that U.N. members have conferred to the General Assembly extends to the request for an advisory opinion on climate change.[261] Since 1995, climate negotiations have mainly taken place under the aegis of the

[257] U.N. Charter art. 96. *See also* art. 4 ¶1, art. 10.

[258] *Western Sahara*, *supra* note 253, ¶33; *Chagos*, *supra* note 101, ¶85. *See also Interpretation of Peace Treaties*, *supra* note 23, at 72.

[259] *Construction of a Wall*, *supra* note 23, ¶¶46–50.

[260] It is unclear whether a state can relinquish their U.N. membership. *See* Jochen A. Frowein, *United Nations* ¶40, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ONLINE (2013). At any rate, withdrawal would have no retroactive effect on the validity of a request for an advisory opinion that has already been made.

[261] *Cf. Construction of a Wall*, *supra* note 23, ¶28 (envisaging the possibility that a request from the General Assembly could be declined when acting ultra vires).

Conference of the Parties to the U.N. Framework Convention on Climate Change.[262] However, the U.N. Charter confers broad functions to the General Assembly,[263] and the "[p]rotection of global climate for present and future generations of humankind" is a recurring item on the agenda of the Assembly.[264] More difficult questions would arise if the request was introduced by a specialized agency, as, under the I.C.J.'s precedent in *Nuclear Weapons in Armed Conflict*, the questions should have a "sufficient connection" with the functions of the agency.[265]

By contrast to the I.C.J., the requirement of state consent remains a major obstacle to advisory proceedings before other courts. For one, the states not party to a regional human rights treaty have not authorized any institution to request an advisory opinion under that treaty. As such, a request for an advisory opinion of a regional human rights court cannot relate to the rights and obligations of non-regional states without their (improbable) ad hoc consent.

Regional human rights courts have had few opportunities to confirm this principle because the hypothesis of a request directed at an extra-regional situation has never materialized. Like the I.C.J. in *Construction of a Wall*, the IACHR discarded ill-founded objections to the request for an advisory opinion raised from a state that had previously consented to the competence of the requesting body.[266] On the other hand, regional human rights court may be called upon to interpret treaties that apply also to non-parties, with the potential of an extra-regional reach. In this regard,

[262] UNFCCC, *supra* note 1, art. 7.
[263] U.N. Charter art. 10.
[264] *See, e.g.*, G.A., Agenda 76th Sess., ¶20(d) (Sept. 17, 2021). *See Nuclear Weapons*, *supra* note 97, ¶16; *Construction of a Wall*, *supra* note 23, ¶62; *Chagos*, *supra* note 101, ¶78.
[265] *Nuclear Weapons in Armed Conflict*, *supra* note 135, at 77. *See also supra* section II.A.
[266] *Promulgation of Laws*, *supra* note 218, ¶25. *See also* Pact of San José, *supra* note 34, art. 64.

the IACHR noted that it could interpret human rights treaties not exclusively applicable to American states only in relation to questions "directly related to the protection of human rights in a Member State of the inter-American system".[267] In line with the requirement of state consent, the Court emphasized that it would decline to exercise advisory jurisdiction if "the issues raised deal mainly with international obligations assumed by a non-American State".[268]

Thus, the requirement of state consent could be a serious obstacle to a request for an advisory opinion on climate change before a regional human rights court. To determine whether it can comply with the request, the court would need to assess whether it has jurisdiction over a critical mass of the states concerned—a condition more likely met before IACHR than before ACHPR.[269] Absent this critical mass, the Court could find that complying with the request "would distort [its] advisory jurisdiction."[270]

ITLOS is in a situation comparable to that of regional human rights courts for what concerns the requirement of state consent, even though, as the I.C.J., it is an international court with a broad membership. This is because UNCLOS does not directly give competence to any institution to request an advisory opinion to the full tribunal. At most—in ITLOS's interpretation—UNCLOS merely allows *other* agreements to give competence to bodies of their choosing to request an advisory opinion of ITLOS.[271] In *S.R.F.C.*, ITLOS pointed out that, while article 138 of its Rules

[267] *"Other Treaties"*, *supra* note 204, ¶21.
[268] *Id.* ¶52.
[269] The ten largest GHG emitters include three members of the Organization of American States (the United States, Brazil, and Canada) but no members of the African Union. *See* CAIT, *supra* note 13.
[270] *"Other Treaties"*, *supra* note 204, ¶25
[271] ITLOS Statute, *supra* note 20, art. 21. *See* Rules of ITLOS, *supra* note 19, art. 138.

"furnishes the prerequisites" for the exercise of advisory jurisdiction,[272] it is the M.C.A. Convention (*i.e.*, the agreement giving competence to the Conference of Ministers of the S.R.F.C. to request the advisory opinion)[273] which "confers such jurisdiction on the Tribunal".[274] The agreement conferring jurisdiction could be a broadly ratified multilateral treaty, but it could also be a bilateral or a regional one (as in *S.R.F.C.*),[275] or one limited to like-minded states (*e.g.*, the COSIS Agreement).[276] The requirement of state consent would preclude ITLOS from complying with a request for an advisory opinion directed at a determination of the rights and obligations of states not parties to the agreement authorizing the request.

The request by S.R.F.C. was potentially problematic, in this regard, as it related in part to the obligations of flag states not parties to the M.C.A. Convention. To assuage these concerns, ITLOS sought to focus exclusively its opinion on the interpretation of the rights and obligations of the S.R.F.C. member states within their E.E.Z.[277] Nonetheless, some of the opinion did concern flag states—in particular, by affirming their obligation to "take the necessary measures … to ensure compliance by vessels flying [their] flag with the laws and regulations enacted by the S.R.F.C. Member States".[278] Yet, ITLOS emphasized that even this aspect of the opinion would "assist the S.R.F.C. in the performance of its activities and contribute to the implementation of the

[272] *S.R.F.C.*, *supra* note 23, ¶59
[273] *See* reference *supra* note 159.
[274] *Id.* ¶58.
[275] Proelss, *supra* note 163, ¶23.
[276] COSIS Agreement, *supra* note 31, art. 4 (limiting participation to the Members of the Alliance of Small Island States).
[277] *S.R.F.C.*, *supra* note 23, at ¶¶69, 200, 214, 219 ¶1. *See generally* Ruys & Soete, *supra* note 161, at 172.
[278] *S.R.F.C.*, *supra* note 23, ¶219(3).

Convention".[279] The Tribunal thus appeared to consider that the determination of the obligations of third states was purely incidental to the proceedings—by contrast with *Eastern Carelia*, where the determination of Russia's obligations was the sole purpose of the request.

The requirement of state consent is a critical obstacle to a request for an advisory opinion of ITLOS brought under an agreement ratified only by a few like-minded states, such as the COSIS Agreement. By contrast to *S.R.F.C.*, the advisory opinion requested by COSIS would not assist the organization or its member states in exercising their functions in any meaningful ways. Rather, it would be an overt attempt at determining the obligations of third states without their consent. Thus, ITLOS would not be able to comply with this request.

3. Counterarguments

Three counterarguments could be made against the idea that the requirement of state consent could constitute an obstacle to advisory proceedings before regional human rights courts and ITLOS. These counterarguments relate to (1) the applicability of the requirement of state consent in the absence of a dispute, (2) the relevance of the non-binding nature of advisory opinions, and (3) the inevitability of normative externality in judicial pronouncements.

The first potential counterargument is that the requirement of state consent identified in *Eastern Carelia* only applies when the request is made in relation to a dispute, whereas climate change may not constitute a dispute. Yet, both terms of this counterargument are unconvincing. On the

[279] *Id.* ¶77.

one hand, the existence of a dispute is not material to the requirement of state consent: respect for the principle of equal sovereignty precludes the determination of the rights and obligations of a state without its consent, whether or not the formal requirement of a dispute is met.[280] On the other hand, there does appear to be a dispute—namely, a "conflict of legal views or of interests"[281]—with regard to many of the issues that could be raised by a request for an advisory opinion, whether with regard to the obligations of states on the mitigation of climate change, or their obligation to pay reparations. Although it may be difficult, in contentious proceedings, to frame this multilateral dispute in bilateral terms (*i.e.*, to prove that the views of an individual state are "positively opposed" by another individual state),[282] the "bilateralization" of the dispute does not appear essential to justifying the application of the principle of state consent.

The second potential counterargument is that state consent to a request for an advisory opinion is unnecessary because, by contrast to a judgment, an advisory opinion is not legally binding. Both ITLOS[283] and, at times, the I.C.J.[284] have suggested as much. Yet, this excessively formal reasoning overstates the relevance of bindingness in international law, a legal system largely devoid of enforcement mechanisms. Although they have no binding force, advisory opinions are an exercise of judicial authority with the potential to affect the prevailing understanding of the

[280] *See supra* note 245 and accompanying text.

[281] *Mavrommatis*, *supra* note 96

[282] *See* Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India), Judgment, 2016 I.C.J. 255, ¶38 (Oct. 5). *See also* Vincent-Joël Proulx, *The World Court's Jurisdictional Formalism and its Lost Market Share: The Marshall Islands Decisions and the Quest for a Suitable Dispute Settlement Forum for Multilateral Disputes*, 30 LEIDEN J. INT'L L. 925, 943 (2017).

[283] *Id.* ¶76

[284] *Interpretation of Peace Treaties*, *supra* note 23, at 71.

rights and obligations of a state.[285] Courts recognize the same authority to advisory opinions and judgments as "judicial decisions" constituting a "subsidiary means for the determination of rules of law".[286] An advisory opinion may thus influence subsequent judicial decisions by other courts, including domestic ones.[287] But even if advisory opinions had no effect whatsoever on states, it would be improper for a court to play a part in a political campaign waged by some states with the aim of imposing on others a certain way of determining their rights and obligations.

The third potential counterargument is that it is practically inevitable for a judicial pronouncement—whether contentious or advisory—to have some diffuse normative effect on states that have not consented to the jurisdiction of the court. Just like judgments, advisory opinions contribute to the development of international law, thus indirectly affecting the rights and obligations of every state, notwithstanding its consent.[288]

Yet, such normative externality can only be tolerated when it is genuinely incidental to the determination of the rights and obligations of the states that have consented to the request for an advisory opinion. States would be committing an abuse of rights (*i.e.*, they would exercise a right

[285] *See* below, text at note 324.

[286] I.C.J. Statute, *supra* note 12, art. 38 ¶1(d). On the inclusion of advisory opinions, *see* Alain Pellet & Daniel Müller, *Article 38*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 819, ¶308 (Andreas Zimmermann et al. eds., 3rd ed. 2019).

[287] *See, e.g.*, *S.R.F.C.*, *supra* note 23, 73, ¶11 (Declaration of Judge Cot); Ruys & Soete, *supra* note 161, at 169. *See also* GEORGES ABI-SAAB, LES EXCEPTIONS PRÉLIMINAIRES DANS LA PROCEDURE DE LA COURT INTERNATIONALE 75–83 (1967); KOLB, *supra* note 230, at 277; HUGH THIRLWAY, THE INTERNATIONAL COURT OF JUSTICE 199 (2016).

[288] *See* Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-24/14, IACHR (ser. A) No. 21, ¶283(14) (Aug. 19, 2014).

"for an end different from that for which the right was created")[289] by conferring jurisdiction to a court with the main or sole intention of determining the rights and obligations of third states without the consent or prior authorization of the latter.[290] An international court should not accept to exercise jurisdiction in such circumstances.

One way for an international court to flag situations that may involve an abuse of rights is to ascertain whether either the requesting body, or else the states giving competence to the requesting body are interested in the response. Thus, the I.C.J. held that it would not give an advisory opinion that would be "devoid of object or purpose",[291] and that the purpose of an advisory opinion ought to be the "enlightenment" of the requesting body "as to the course of action it should take."[292] Regional human rights courts allow requests from bodies unable to act upon the advisory opinion, but only if the opinion can "provide advice and assistance to the Member States and organs of the [relevant organization] in order to enable them to … comply with their international obligations."[293] And ITLOS's opinion in *S.R.F.C.* emphasized that the organization was "seek[ing]

[289] *See* Alexandre Kiss, *Abuse of Rights* ¶1, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ONLINE (2006). *See generally* Immunities and Criminal Proceedings (Eq. Guinea v. Fr.), Judgment on Preliminary Objections, 2018 I.C.J. 292, ¶150 (June 6); Certain Phosphate Lands in Nauru (Nauru v. Austl.), Judgment, 1992 I.C.J. 240, ¶38 (June 26); Certain Iranian Assets (Iran v. U.S.), Judgment on Preliminary Objections, 2019 I.C.J. 7, ¶113 (Feb. 13).

[290] *Cf.* Vaughan Lowe, *Overlapping Jurisdiction in International Tribunals*, 20 AUSTL. Y.B. INT'L. L. 191, 204 (1999).

[291] *Western Sahara*, *supra* note 253, ¶73.

[292] *Interpretation of Peace Treaties*, *supra* note 23, at 71; *Western Sahara*, *supra* note 253, ¶31; *Construction of a Wall*, *supra* note 23, ¶47. This includes informing a subsidiary organ. *See* Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, 1973 I.C.J. 166, ¶22 (July 12).

[293] *Promulgation of Laws*, *supra* note 218, ¶23; *"Other Treaties"*, *supra* note 204, ¶25. *See also* Environment and Human Rights, Advisory Opinion OC-23/17, IACHR (ser. A) No. 23, ¶20 (Nov. 15, 2017) (noting that the advisory procedure should not be used "for abstract speculations with no foreseeable

guidance in respect of its own actions",[294] rather than an authoritative judicial pronouncement to pressure flag states into compliance with *their* obligations.

Admittedly, S.R.F.C. member states might have had other motives in requesting an advisory opinion. Ruis and Soete suggested that their request was "related primarily to the international obligations of non-S.R.F.C. members, rather than to assisting the S.R.F.C. to carry out its functions".[295] Other judges were well aware that the opinion "might well be of value" to other states.[296] At the very least, however, S.R.F.C. member states had managed to maintain the plausible deniability of their intention to obtain a judicial pronouncement against non-consenting states. Even so, Judge Cot expressed concern that, following the Tribunal's approach, "States could, through bilateral or multilateral agreement, seek to gain an advantage over third States and thereby place the Tribunal in an awkward position."[297]

These considerations do not relate to an exercise of a judicial "discretion" particular to the context of advisory proceedings. In fact, similar considerations could apply in contentious cases. This point can be illustrated by considering a hypothetical, suggested by Bodansky, whereby "two similarly-inclined states" (*e.g.,* two island states) would agree to bring a "'contentious' case between themselves" to the I.C.J. on a question relating to the obligations or responsibilities of GHG

application to specific situations"); Judicial Guarantees in States of Emergency, Advisory Opinion OC-9/87 (ser. A) No. 9, ¶16 (Oct. 6, 1987).

[294] *S.R.F.C.*, *supra* note 23, ¶76.

[295] Ruys & Soete, *supra* note 161, at 171.

[296] Rep. 26th Mtg. States Parties to UNCLOS ¶18, U.N. Doc. SPLOS/303 (Aug. 2, 2016) (Vladimir Golitsyn, President of ITLOS).

[297] *S.R.F.C.*, *supra* note 23, 73, ¶9 (Declaration of Judge Cot).

emitters.[298] While one of the two states would present itself as the respondent, it would only offer token defense to the claims of the applicant. In effect, both states would seek to manipulate the court into identifying and interpreting norms applicable to large GHG emitters.

An international court would not accept to decide on Bodansky's hypothetical. The most obvious ground for dismissing the case would be the absence of a genuine dispute between the two states.[299] The I.C.J. suggested that it could not adjudicate on the merits of a dispute when none of the parties is "in a position to take some retroactive or prospective action or avoidance of action, which would constitute a compliance with the Court's judgment or a defiance thereof."[300] As this condition relates to the jurisdiction in the objective sense, a court would be able to raise it *proprio motu*.[301]

Yet, the two states could conceivably avoid this objection through a carefully planned performance whereby they would publicly oppose one another's view, for instance, on the legality of a minor source of GHG emissions under the control of the would-be respondent. Even then, as Kolb noted, an international court should not be "helpless in face of a manifestly abusive attitude against which it feels the need to react, both to safeguard its own prestige, and in the interests of the due administration of justice."[302] More fundamentally than the absence or mootness of the dispute, this hypothetical case would suffer from, and would be dismissed on the same basis as a request for an advisory opinion submitted by COSIS—namely that it would constitute an abuse of rights.

[298] Bodansky, *Role of I.C.J.*, *supra* note 40, at 712.
[299] *See* Nuclear Arms Race, *supra* note 282, ¶56(1) (Oct. 5).
[300] Northern Cameroons (Cameroon v. U.K.), Judgment, 1963 I.C.J. 15, 37–38 (Dec. 2).
[301] SHAW, *supra* note 230, ¶233.
[302] KOLB & PERRY, *supra* note 120, at 795.

B. A Question That the Court Can Answer

Whether a court decides to comply with a request for an advisory opinion could also depend on the questions contained in the request. The following looks first at objections that the question is not purely legal, and then at objections that it is too general and abstract.

1. A Legal Question

It is largely accepted that an international court can exercise advisory jurisdiction only in relation to questions of a "legal" nature.[303] The I.C.J. in *Certain Expenses* noted that, "[i]f the question is not a legal one, the Court has no discretion in the matter; it must decline to give the opinion requested."[304] In *Western Sahara*, the Court clarified that the questions must "have been framed in terms of law and raise problems of international law", thus "by their very nature susceptible of a reply based on law".[305] ITLOS followed the I.C.J. when satisfying itself that S.R.F.C. had asked questions "framed in terms of law", which the Tribunal could answer by interpreting relevant treaty provisions and by identifying "other relevant rules of international law".[306] The Council of Europe explained this requirement as ruling out

> "on the one hand, questions which would go beyond the mere interpretation of the text and tend by additions, improvements or corrections to modify its substance; and, on the other

[303] *See, e.g.*, U.N. Charter, art. 96; I.C.J. Statute, *supra* note 12, art. 65; Rules of ITLOS, *supra* note 19, art. 138 ¶1; Eur. Convention Hum. Rts., *supra* note 197, art. 47; ACHPR Protocol, *supra* note 34, art. 4 ¶1.
[304] Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151, 155 (July 20).
[305] *Western Sahara*, *supra* note 253, ¶15. *See also Construction of a Wall*, *supra* note 23, ¶37; *Kosovo*, *supra* note 98, ¶25; *Chagos*, *supra* note 101, ¶135.
[306] *S.R.F.C.*, *supra* note 23, ¶65

hand, questions whose solution would in any way involve matters of policy."[307]

A first sight, this requirement does not seem to be a problem for current initiatives related to climate change. The request for advisory opinions under consideration would raise distinctively legal questions relating to the obligations of states to mitigate climate change or to make reparations.[308] Nevertheless, the requests may invite legal findings on questions that are not *purely* legal. First, answering a legal question may presuppose the assessment of complex factual evidence. Second, legal questions may have far-reaching political implications.

The first problem is that the question, albeit legal, may invite the assessment of an extensive factual basis. Such would most obviously be the case of questions seeking an applicatory outcome.[309] For instance, the court could be asked to determine a state's fair-share in global mitigation action in light of its current and, plausibly, past levels of emissions, taking national circumstances into account; or it may be asked to assess the quantum of reparations due for the impacts of climate change.

For an international court to assess factual evidence is more problematic in advisory proceedings than in contentious ones. In contentious proceedings, the court can rely on a system of presumption

[307] Council of Europe, Explanatory Report to Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 6, 1963, at 2. *See also* Certain Legal Questions Concerning the Lists of Candidates Submitted with a View to the Election of Judges to the European Court of Human Rights, ¶36, Request No. A47-2008-001 (Feb. 2, 2008), https://hudoc.echr.coe.int/eng?i=003-2268009-2419060; *Oviedo Convention*, *supra* note 196, ¶48.

[308] *See* section I.A.

[309] *See* section I.C.

and other rules determining the burden of proof. As it is in principle for the plaintiff to prove her case,[310] the absence of factual evidence benefits the respondent. By contrast, as there is no plaintiff in advisory proceedings, however, "the ordinary rules concerning the burden of proof can hardly be applied."[311] Moreover, while the court has generally the benefit of a dossier prepared by the organization requesting the advisory opinion[312] and may receive voluntary submissions by states or international organizations,[313] this documentation may not necessarily represent all relevant views or provide all pertinent information.

International courts have been uncertain about the best way to address this issue. The P.C.I.J. excluded the existence of "an absolute rule that the request for an advisory opinion may not involve some enquiry as to the facts", while also acknowledging that it would be "expedient" for the court if "the facts upon which [its] opinion … is desired should not be in controversy".[314] The I.C.J. accepted that it may have to decline to give an opinion in the absence of "sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed question of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character."[315] The proponents of a request for an advisory opinion have often sought to provide as much information as possible to the court, but this has not necessarily helped a court in

[310] *See, e.g.*, *Pulp Mills*, *supra* note 78, ¶162 (*onus probandi incumbit actori*).

[311] *Western Sahara*, *supra* note 253, ¶44, noting that "[i]n advisory proceedings … the ordinary rules concerning the burden of proof can hardly be applied."

[312] *See* I.C.J. Statute, *supra* note 12, art. 65 ¶2; Rules of ITLOS, *supra* note 19, art. 131.

[313] *See* references *supra* note 19.

[314] *Eastern Carelia*, *supra* note 225, at 28.

[315] *Western Sahara*, *supra* note 253, ¶46. *See also Interpretation of Peace Treaties*, *supra* note 23, at 72; *Construction of a Wall*, *supra* note 23, ¶56, at 240, ¶1 (Declaration of Judge Buergenthal); *Chagos*, *supra* note 101, ¶71.

reaching definitive conclusions on contentious facts. Thus, one could view the Court's ambivalent opinion in *Nuclear Weapons* as being "dictated by the absence of factual evidence as to the foreseeable impact of the limited use of tactical nuclear weapons",[316] even though the Court had been informed by voluminous documentation.[317]

In advisory proceedings on climate change, a court would find extensive information (*e.g.*, from the reports of the Intergovernmental Panel on Climate Change)[318] reflected in party submissions and in the dossier. In fact, rather than a lack of information, the court might be overwhelmed by the sheer volume and complexity of the information submitted to it.[319] The requesting body could seek to avoid this issue concerning the treatment of facts by confining the request to more abstract questions. This, however, may eventually affect the relevance of the opinion.

The second problem that may arise is that the questions asked of the court on climate change, albeit legal, would have a strong political dimension. Any question regarding the obligations of states on climate change mitigation, in particular, would almost inevitably overlap with on-going international negotiations under climate treaties.

In principle, international courts attach no importance to the political dimension of questions raised

[316] Hugh Thirlway, *Advisory Opinions* ¶25, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ONLINE (2006).
[317] Including a 576-page dossier compiled by the U.N. Secretariat and 31 written statements by states and international organizations.
[318] *See supra* note 49.
[319] *See generally* Mayer, *Methodological Review*, *supra* note 82.

in requests for advisory opinions, provided that the questions are susceptible to a legal treatment.[320] The I.C.J., in particular, has accepted to give opinions on highly politicized issues such as the Israeli-Palestinian conflict, the legality of nuclear weapons, and the recognition of Kosovo's declaration of independence, emphasizing that the political aspects of a request for an advisory opinion "does not suffice to deprive it of its character as a legal question and to deprive the Court of a competence expressly conferred on it by its Statute."[321] As Kolb pointed out, "authorized organs will seek the Court's opinion only for politically sensitive and controversial questions", as they could otherwise rely on their own legal services.[322] The Court discarded suggestions that it may not be able to give an advisory opinion because of it being subjected to excessive "political pressure".[323] Climate change may well be a *more* controversial issue than any on which a court has ever pronounced, but that would not be a valid justification for a court to decline the request.

A slightly different question, however, is whether a court should consider the predictable political consequences of granting an advisory opinion. For instance, Anthony Aust suggested that the I.C.J.'s Opinion in the *Wall* case "is seen by a large number of Palestinians as confirming their right to use force to make settlers in the occupied territories to leave or even to kill them."[324] Thus, on several occasions, states have objected to the issuance of an advisory opinion which, they argued, would interfere with on-going political negotiations.[325] However, the I.C.J. discarded such

[320] *See, e.g.*, Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/2002, IACHR (ser. A) No. 17, ¶32 (Aug. 28, 2002).

[321] *Nuclear Weapons*, *supra* note 97, ¶13 (citations omitted). *See also Construction of a Wall*, *supra* note 23; *Kosovo*, *supra* note 98.

[322] KOLB, *supra* note 230, at 267.

[323] *Namibia*, *supra* note 253, ¶¶28–29.

[324] Aust, *supra* note 123, at 150.

[325] *Nuclear Weapons*, *supra* note 97, ¶17; *Construction of a Wall*, *supra* note 23, ¶¶51–53; *Kosovo*, *supra*

arguments on two complementary grounds. First, it noted that it "cannot substitute its own assessment for that of the requesting organ … as to whether an opinion would be likely to have an adverse effect."[326] This ground, albeit compelling before the I.C.J., would not easily apply before other courts, when the request originates from less representative bodies (*e.g.*, COSIS). Second, the I.C.J. noted the difficulty of predicting the consequences of giving an opinion.[327] By enhancing the political cost of disregarding international law for Israel, for instance, the *Wall* opinion might just as well have reduced the use of political violence in Palestine and elsewhere, if only on the long-term.

Thus, while some scholars believe that consequentialist objections could theoretically succeed,[328] it may be difficult to persuade international judges—who, after all, are typically selected among the firmest believers in the strength of international legal institutions[329]—that the adoption of an advisory opinion on climate change would cause more harm than good. On the one hand, some scholars hope that an advisory opinion could help "to identify the legal principles which can or could ground … agreed policy positions … and thus promote the common interest of human kind."[330] On the other hand, an advisory opinion could hinder negotiations if it fuels expectations for some states that other states are unwilling to fulfil.[331] And while the adoption of an advisory opinion may have a detrimental effect on international institutions, the same could be said of a

note 98, ¶35.

[326] *Kosovo*, *supra* note 98, ¶35.

[327] *Construction of a Wall*, *supra* note 23, ¶53.

[328] Thirlway, *Advisory Opinions*, *supra* note 316, ¶17.

[329] *See generally* Leigh Swigart & Daniel Terris, *Who Are International Judges?*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 619 (Cesare P.R. Romano et al. eds., 2013).

[330] Boisson de Chazournes, *supra* note 26, at 107.

[331] *See*, by analogy, references *supra* note 37.

decision not to give an advisory opinion. Altogether, one could suggest that the political consequence of granting an advisory opinion is not a question that the I.C.J.—or, indeed, any other international court—is well-equipped to consider.[332]

2. The Degree of Generality and Abstraction

Another potential obstacle to an advisory opinion on climate change relates to the degree of generality and abstraction of the questions. Small island states may be tempted to ask not just a question on the obligation of a particular state at a particular time, but more general questions aimed at determining the obligations applicable to all states in relation to climate change mitigation, and possibly also to climate reparations.

Overly broad questions can be challenging for a court to answer within a reasonable timeframe. The authority attached to judicial pronouncements stems largely from the slow, tedious process of deliberation which, as Sir Franklin Berman notes, is designed to address narrowly defined questions in relation to which states—whether they are parties to a dispute or presenting their views in advisory proceedings—can be "divided in legal terms into a *pro* and a *contra* camp".[333] When states "maintain a varied spectrum of views", and absent "any compulsion on States to appear and argue their legal viewpoints", Berman points out that a court "cannot be confident that all of the necessary legal elements would be fully, effectively and equally argued before it."[334] Among the subsidiary means for the determination of rules of law, a comprehensive analysis of

[332] YALE CENTER FOR ENV'T L. & POL'Y, *supra* note 51, at 14.
[333] Berman, *supra* note 234, at 819.
[334] *Id.*

broad questions—*in extremis*, the analysis of an entire legal field—would be better served by legal scholarship, or perhaps by the work of the International Law Commission, than by judicial proceedings.

Nonetheless, international courts have generally complied with requests for advisory opinions not only on concrete questions relating to actual or potential disputes, but also on more abstract ones.[335] Both the I.C.J. and ITLOS expressly held that they could "give an advisory opinion on any legal question, abstract or otherwise."[336] And if the ECHR refused to answer questions that were "abstract and general in nature" when exercising advisory jurisdiction under Protocol No. 16,[337] this was solely because this Protocol required the question asked by a national court to relate to "a case pending before it".[338]

At times, however, judges have voiced concerns with excessively general and abstract questions, in ways that partly echoed Berman's critique. For instance, Judge Shigeru Oda disagreed to the giving of an advisory opinion in *Nuclear Weapons* on the ground that the question did not relate to any "issues of a practical nature",[339] such as "a concrete dispute or … a concrete problem awaiting a practical solution".[340] Answering such general questions in full, Oda submitted, would

[335] *See, e.g.*, *Nuclear Weapons*, *supra* note 97; *Responsibilities in the Area*, *supra* note 79; *Vagrancy Laws*, *supra* note 100. *But see* Eur. Convention Hum. Rts., *supra* note 197, art. 47, ¶1.
[336] *Construction of a Wall*, *supra* note 23, ¶40; *S.R.F.C.*, *supra* note 23, ¶72. *See also* KOLB, *supra* note 230, at 268; P. CHANDRASEKHARA RAO & PHILIPPE GAUTIER, THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA: LAW, PRACTICE AND PROCEDURE 165 (2018).
[337] *Interpretation of Articles 2, 3 & 6 of the Convention*, *supra* note 201, ¶18.
[338] Protocol 16, *supra* note 198, art. 1 ¶2.
[339] *Nuclear Weapons*, *supra* note 97, 330, ¶50 (Dissenting Opinion of Judge Oda).
[340] *Id.* ¶51.

betray the court's judicial function, transforming it into "a consultative or even a legislative organ".[341]

Similar concerns for judicial propriety led the ECHR to reject a request for an advisory opinion on the determination of the "protective conditions" which must exist, in application of the European Convention on Human rights and Biomedicine (Oviedo Convention), before a person with mental disorder can be treated without his or her consent.[342] The Court found that the drafters of the treaty had made "the deliberate choice … to leave it to the Parties to determine" what protective conditions would be appropriate and, therefore, that this treaty provision could not "be further specified by a process of abstract judicial interpretation".[343] In support of its conclusion, the Court highlighted that the Oviedo Convention "is a framework treaty setting out the most important … principles … to be further elaborated and specified through additional protocols".[344] The specification of the open-ended provisions of this treaty, the Court submitted, should be the object of "a legislative exercise, rooted in policymaking at the international level, aiming at the adoption of new international legal standards"[345]—a process in which the court refrained to interfere.[346] Four of the seventeen judges dissented, arguing that the court should not have refrained from giving an opinion "merely because the Court's answer to the question could be a source of

[341] *Id.* ¶53.

[342] Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine art. 7, Apr. 4, 1997, ETS No. 164.

[343] *Oviedo Convention*, *supra* note 196, ¶65.

[344] *Id.* ¶67.

[345] *Id.*

[346] *Id.* ¶66.

interpretation for a possible future draft protocol to the Oviedo Convention."[347]

An advisory opinion on climate change could raise issues similar to those in the *Oviedo* opinion, all the more given the close relation of the questions on climate change mitigation with on-going political negotiations. The ECHR's approach, if it is followed by other courts, would constitute a serious obstacle to advisory opinions aimed at the interpretation of the general mitigation obligations, especially those contained in climate treaties where, not unlike the Oviedo Convention, vague provisions conceal deep differences of views to be addressed through subsequent negotiations.[348] Critics could question the judicial propriety of a judicial "interpretation" of indeterminate, open-ended norms of international law, when this would involve long strides in unknown legal territory.

IV. THE ANSWERS

This Part discusses how an international court may respond to the questions asked of it if it decides that it has jurisdiction and that the request is admissible. The aim here is not to provide a comprehensive treatment of the law applicable to climate change, but rather to shed light on the limited ability of a court to interpret ill-defined principles in an authoritative and persuasive way. The first Section highlights the challenge involved by the application of ill-defined norms to climate change. The second Section shows how a court could evade difficult questions, either by expressly deciding not to answer them, or else by providing incomplete or evasive answers.

[347] *Id.*, Joint Dissenting Opinion of Judges Lemmens, Grozev, Eicke & Schembri Orland, ¶8.

[348] *See* Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 YALE J. INT'L L. 451, 511–23 (1993); Biniaz, *supra* note 71.

A. Normative Indeterminacy

A request for an advisory opinion on climate change might call for an interpretation of states' general obligations on climate change mitigation and, possibly, on climate reparations.[349] To give its advisory opinion, a court would thus need to interpret norms whose content is both fundamentally indeterminate and fiercely disputed. A court would have no useful benchmark to determine, in any relatively specific and convincing manner, what a state must do concerning climate change mitigation and, *a fortiori*, climate reparations.

1. Climate Change Mitigation

An advisory opinion on climate change would first need to identify the norms applicable to climate change mitigation—in particular the general norms applicable beyond the scope of specific treaty provisions. Some states might deny that they have obligations to mitigate climate change beyond what they have specifically committed to do under climate treaties (*e.g.*, in relation to their NDCs).[350] Already, scholars have presented inconsistent views about the significance of the UNFCCC's open-ended "commitment" for every party to "[f]ormulate [and] implement … programmes containing measures to mitigate climate change".[351] Beyond climate treaties, the

[349] *See* above, Section I.

[350] *See* Paris Agreement, *supra* note 1, art. 4 ¶2.

[351] UNFCCC, *supra* note 1, art. 4, heading & ¶1(b). *Compare* Jutta Brunnée, *Procedure and Substance in International Environmental Law, in* 450 COLLECTED COURSES HAGUE ACAD. INT'L L. 75, 190 (2019) ("non-binding"); with DANIEL BODANSKY ET AL., INTERNATIONAL CLIMATE CHANGE LAW 131 (2017) ("only a general obligation"); & Benoit Mayer, *Obligations of Conduct in the International Law on Climate*

customary obligation of due diligence will certainly be front and center in arguments made by the most vulnerable states.[352] Some may question the relevance of precedents, adopted in relation to direct transboundary harm, to the far more complex—multicausal, global, and cumulative—case of climate change.[353] Despite these challenges, however, the odds are certainly that a court will find a legal basis to identify a general obligation of states to mitigate climate change.[354]

The identification of a general obligation on climate change mitigation would confirm that states "do not have unfettered discretion in addressing climate change".[355] While this may be symbolically relevant,[356] this would largely miss the issue. Most, perhaps all states are already implementing some action on climate change mitigation. As such, the crux of the matter is not the existence of an obligation to mitigate climate change, but rather its content, in particular the applicable standard of conduct.[357] As such, the proponents of a request for an advisory opinion might seek not only an identificatory outcome, but also a judicial assessment of the methodology that one can use to determine a state's requisite level of mitigation action, or perhaps even a judicial application of this methodology.[358]

Change: A Defence, 27 REV. EUR. COMP. & INT'L ENV'T L. 130, 134 (2018) ("obligations of conduct").

[352] *See, e.g.*, Toribiong, *supra* note 6, at 28.

[353] *See* Alexander Zahar, *Mediated versus Cumulative Environmental Damage and the International Law Association's Legal Principles on Climate Change*, 3 CLIMATE L. 217, 224–34 (2014).

[354] *See, e.g.*, Bodansky, *Role of I.C.J.*, *supra* note 40, at 694; Protection of the Atmosphere, *supra* note 35, Guideline 3; Int'l L. Ass'n, *supra* note 35; BENOIT MAYER, INTERNATIONAL LAW OBLIGATIONS ON CLIMATE CHANGE MITIGATION, ch. 3 (2022)

[355] Wewerinke-Singh, *supra* note 28, at ¶14.

[356] Akhavan, *supra* note 28.

[357] *See* Christina Voigt, *The Potential Roles of the I.C.J. in Climate Change-Related Claims*, *in* ELGAR ENCYCLOPEDIA OF ENVIRONMENTAL LAW 152, 159–61 (Michael Faure ed., 2016).

[358] *See* Section I.C.

Judicial debates, in this regard, would certainly refer extensively to the 2019 decision of the Supreme Court of the Netherlands in *Urgenda v. the Netherlands*. The court upheld that, to comply with a general mitigation obligation inferred from the European Convention on Human Rights interpreted in light of customary international law, the Netherlands had to achieve at least 25 percent reduction in GHG emissions by 2020, compared with 1990.[359] The court identified this target mainly by relying on scientific estimates for the estimated least-cost way of achieving the 2°C temperature goal.[360] Several subsequent cases have emulated this method of identifying a state's (or a corporation's) requisite level of mitigation action by inference from global temperature goals.[361] In turn, advocates hope that an advisory opinion will play "a role in raising [national] pledges to truly ambitious targets that would allow us to meet the 1.5°C … target".[362]

However, the *Urgenda* method relies on the questionable assumption that a court can determine with sufficient precision the level of mitigation action that a state would be required to achieve in order to act consistently with the temperature goals. A difficulty with this assumption is that the temperature goals are ambivalent and unspecific: states have not agreed, for instance, on which temperature goal should prevail (1.5 *or* 2°C?),[363] on the time at which they must be achieved (*e.g.*, continuously during the 21st century, by 2100, or on a long-term equilibrium?), or on the level of

[359] *Urgenda*, *supra* note 9, §7.

[360] *Id.* ¶7.2.7 *et passim*.

[361] *See, e.g.*, *Klimaatzaak*, *supra* note 9, §4 (holding that Belgium's mitigation action is insufficient); Milieudefensie v. Royal Dutch Shell, ECLI:NL:RBDHA:2021:5337 (D.C. Hague, May 26, 2021) (holding that Shell must reduce CO2 emissions resulting from its global operations by 45% by 2030 compared with 2019).

[362] Wewerinke-Singh, *supra* note 28, at ¶16.

[363] The difference between 1.5 and 2°C is particularly significant when one considers that the global average temperature has already increased by around 1.1°C. *See* Allan et al., *supra* note 47, §A.1.2.

confidence one should have of achieving these goals (*e.g.*, a 50, 66, or 90% chance?).[364]

But even if a court could translate the temperature goals into a global emission-reduction pathway, it would then need to determine what this global goal means for an individual state. Contrary to the Court's holding in *Urgenda*, there is no "principle" according to which every developed state should reduce its emissions at the same pace.[365] To the contrary, states have agreed that individual mitigation commitments depend on their national circumstances, in light of the principle of common but differentiated responsibilities.[366] Even among countries with a similar level of development, different rates of emission reduction are necessary to reflect different capacity to reduce emissions: reductions may be easier to achieve in a country with high emissions mainly from coal power, than in a country with low emissions mostly from agriculture. Beyond this general idea, however, states have been unable to define a comprehensive burden-sharing formula.

More fundamentally, the *Urgenda* method relies on the premise that states have an obligation to act consistently with these temperature goals.[367] In fact, the temperature goals were consistently defined as mere objectives.[368] Thus, as the U.K. Supreme Court noted, the Paris Agreement "did not impose on any state to adopt a binding domestic target to ensure that those objectives were

[364] *See* Reto Knutti et al., *A Scientific Critique of the Two-Degree Climate Change Target*, 9 NATURE GEOSCIENCE 13 (2016).
[365] *Urgenda*, *supra* note 9, ¶7.3.2.
[366] UNFCCC, *supra* note 1, art. 3 ¶1; Paris Agreement, *supra* note 1, art. 4 ¶2.
[367] *See* Mayer, *Methodological Review*, *supra* note 82.
[368] *See* Copenhagen Accord ¶¶1–2, *in* Decision 2/CP.15, U.N. Doc. FCCC/CP/2009/11/Add.1 (Dec. 18–19, 2009); Paris Agreement, *supra* note 1, art. 2, ¶1(a); Decision 10/CP.21, The 2013–2015 Review ¶4, U.N. Doc. FCCC/CP/2015/10/Add.2 (Dec. 13, 2015).

met."[369] One could seek to argue that an obligation of states to act consistently with these objectives has emerged under customary law, or through subsequent treaty practice.[370] However, this line of argument would face seemingly insuperable evidentiary issues, as it is largely understood that states—both in aggregate[371] and individually[372]—are, in general, failing to act consistently with even the most permissive readings of these temperature goals.

All in all, an advisory opinion would find that most states are legally required to do something that few, if any of them is actually doing (*e.g.*, to enhance their mitigation action in line with more stringent standards). Rather than the purely deductive approach of *Urgenda*, an international court would probably rely, at least in part, on an inductive reasoning based on empirical evidence of state practice.[373] Thus, a court would not interpret the standard of conduct applicable to general mitigation obligations solely on the basis of an objective that states have declared without even living up to it, but also in light of the level of efforts that states have managed to implement. Even then, in the absence of an agreed-upon burden-sharing formula, a court could not easily induce this standard or determine which states have or have not complied with it.

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[369] R. v. Heathrow Airport, [2020] UKSC 52, ¶71 (U.K.). *See generally* Benoit Mayer, *Temperature Targets and State Obligations on the Mitigation of Climate Change*, 33 J. ENV'T L. 585 (2021).

[370] VCLT, *supra* note 165, art. 31 ¶3(a)–(b).

[371] *See* references *supra* note 5.

[372] *See, e.g.*, *Countries*, CLIMATE ACTION TRACKER, https://climateactiontracker.org/countries/ (last visited Mar. 6, 2022), suggesting that no country is "1.5°C Paris Agreement Compatible". These assessments necessarily involve a range of questionable assumptions, for instance on burden-sharing.

[373] *See* Benoit Mayer, *The Duty of Care of Fossil-Fuel Producers for Climate Change Mitigation: Milieudefensie v. Royal Dutch Shell*, TRANSNAT'L ENV'T LAW (forthcoming); Daniel Bodansky, *Non Liquet and the Incompleteness of International Law*, *in* INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS, *supra* note 235, 153, at 169–70.

Rather than striving to assess states' requisite level of mitigation action, a court could content itself with the identification of some of the implications of general mitigation obligations. In other words, it could merely single out some of the "appropriate" and "necessary measures" that a state must take in order to fulfil its due diligence obligation. In line with their decisions on the management or preservation of shared resources, courts might recognize environmental assessment[374] and negotiations in good faith[375] as some of the measures that a state would normally implement as part of their due diligence obligation. This outcome, however, would fall short of what the proponents of advisory opinions hope for.

2. Climate Reparations

Beside general mitigation obligations, a court could be requested to pronounce on states' obligations to make reparation for the impacts of climate change. In the absence of special rules under climate treaties,[376] argument for reparations would naturally rely on the general international law on state responsibility. The P.C.I.J. in *Factory at Chorzów* identified "[t]he essential principle … that reparation must, as far as possible, wipe out all the consequences of the illegal act".[377] The International Law Commission codified this principle as requiring a state responsible for an internationally wrongful act "to make full reparation for the injury caused" by this act.[378]

[374] *Pulp Mills*, *supra* note 78, ¶204; *Certain Activities*, *supra* note 77, ¶104.
[375] Lac Lanoux (Spain v. Fr.), Award, 12 R.I.A.A. 281, ¶11 (Nov. 16, 1957); *Fisheries Jurisdiction*, *supra* note 109, ¶79(3).
[376] *See* Decision 1/CP.21, *supra* note 2, ¶51.
[377] Factory at Chorzów (Germ. v. Pol.), Judgment on Merits, 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13).
[378] DARSIWA, *supra* note 89, art. 31 ¶1.

The notion of climate reparations is morally attractive considering both developed states' greater contribution to climate change and the greater impact of climate change on developing states.[379] Here again, however, judges would encounter serious difficulties when seeking to apply this principle to climate change. For one, a state is only responsible for the consequences of wrongful acts, and surely not all GHG emissions are unlawful. Thus, to determine a state's responsibility, a court would need to rely on patchy data on historical emissions[380] before engaging with thorny historical-doctrinal questions about the time at which these obligations emerged and the subsequent evolution of their content, including the standard of conduct they implied at any given time.[381]

Overall, climate reparations would involve intractable issues of causation and attribution. Courts have generally applied a state's obligation to make reparation in situations where there was a proximate causal link between the state's wrongful act and the harm suffered by another state.[382] By contrast, the breach of an obligation to mitigate climate change by a state does not directly cause any damage to another state. Rather, this wrongful act contributes incrementally to the increase of GHG concentrations in the atmosphere, which causes a slight acceleration of slow-onset phenomena (e.g., sea-level rise) and a slight increase in the likelihood of adverse sudden

[379] *See* Simon Caney, *Cosmopolitan Justice, Responsibility, and Global Climate Change*, 18 LEIDEN J. INT'L L 747 (2005).

[380] Alexander Zahar, *Historical Responsibility for Climate Change Is Political Propaganda*, *in* DEBATING CLIMATE LAW, supra note 52, 190.

[381] Sarah Mason-Case & Julia Dehm, *Redressing Historical Responsibility for the Unjust Precarities of Climate Change in the Present*, *in* DEBATING CLIMATE LAW, supra note 52, 170.

[382] *See, e.g.*, Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment on Reparations ¶93 (Feb. 9, 2022), https://www.icj-cij.org/public/files/case-related/116/116-20220209-JUD-01-00-EN.pdf. *See also* DARSIWA, *supra* note 378, commentary on art. 31, ¶10.

events (*e.g.*, typhoon) on the long-term. In such circumstances, it is unclear whether reparation would have to be paid to states or rather to other entities representing "the interest of … the beneficiaries of the obligation breached".[383] And, due to the difficulty of attributing climate impacts to a state's wrongful act, it would be particularly challenging for a court to justify the determination of a quantum of reparation, even if it was to rely on a lump sum rather than detailed calculation of damages.[384]

Another series of question regards the scope of climate reparations. Climate change causes far-reaching impacts that will unfold over century and millennia.[385] Even if only a small portion of these damages can be attributed to wrongful acts, and even if a high discount rate is applied to the value of future harms, the quantum of climate reparations would be enormous.[386] Despite the insistence of the International Law Commission on "full" reparation, state practice and judicial decisions reflect the need for injured states to accept less-than-full reparation when doing otherwise would cripple the ability of the responsible state to operate, for instance in the context of war damages.[387] Yet, recognizing an obligation to pay less-than-full reparation would raise more questions about the quantum of reparation than it would answer.

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[383] DARSIWA, *supra* note 378, art. 48 ¶2(b). *See also Responsibilities in the Area*, *supra* note 79, ¶180.

[384] *See, e.g.*, Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Judgment on Compensation, 2018 I.C.J. 15, ¶35 (Feb. 2); Armed Activities (Reparations), *supra* note 382, ¶106

[385] *See* Allan et al., *supra* note 47, §B.5. On the difficulties facing an economic valuation of climate change, *see* Delavane Diaz & Frances Moore, *Quantifying the Economic Risks of Climate Change*, 7 NATURE CLIMATE CHANGE 774 (2017).

[386] *See* William D. Nordhaus, *A Review of the Stern Review on the Economics of Climate Change*, 45 J. ECON. LITERATURE 686 (2007).

[387] *See, e.g.*, Eritrea-Ethiopia Claims Commission, Final Award, (2003) 26 R.I.A.A. 505, ¶22 (Aug. 17). *See generally* Benoit Mayer, *Less-Than-Full Reparations in International Law*, 56 INDIAN J. INT'L L. 463 (2016).

B. Plausible Judicial Treatments

This section identifies three ways a court may address the indeterminacy of the relevant norms. First, the court may make a finding that it cannot answer the question because the law is unclear. Second, the members of the court may find themselves unable to reach an agreement on any finding at all. Third, the court may provide an opinion that is incomplete, narrow, or evasive.

1. Finding That the Court Cannot Answer the Question

An advisory opinion on climate change would put a court in a difficult situation, especially if the outcome sought is not merely the identification of norms, but also their interpretation and application. International courts generally conceive their function as one of interpreting and applying the law, not of writing it.[388] Yet, when the content of law is fundamentally indeterminate—and, as the previous section has shown, such is the case with most of the norms that would be invoked in advisory proceedings on climate change—it may appear impossible for a court to merely interpret the law without, at the same time, inventing it. As such, advisory proceedings on climate change will reignite the jurisprudential debate on the possibility for a court to decline to make a substantive decision on the ground that the applicable law is not clear (*non liquet*).

Both Hersch Lauterpacht and Hans Kelsen have argued that, from a theoretical perspective, a legal

[388] *See, e.g.*, *Nuclear Weapons*, *supra* note 97, ¶18.

system is necessarily complete.[389] Admittedly, if one accepts the positivist tenet that norms emanate only from states' "free will",[390] it is conceivable that no norm applies specifically to a given question when states have not agreed on a specific rule. Even then, however, one should be able to rely on general principles passively accepted by states to make up for the absence of applicable rules expressly agreed upon by states.[391] Thus, courts and scholars accept that "a decision must be made"[392] when a court has jurisdiction over an admissible claim. No international court has ever made an express finding of *non liquet* in a contentious case.

In advisory proceedings, however, it may not always be conceivable for a court to explore all remote aspects of a broad question. In such proceedings, Prosper Weil suggested, a court "may … choose to limit itself in advisory opinions to stating the law as it is, with the prescriptive, prohibitive, or permissive rules, but also with its gaps and incompleteness."[393] Such was the was the I.C.J.'s Advisory Opinion on *Nuclear Weapons*, where an equally divided bench declared, by the president's casting vote, that it could not "conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a state would be at stake".[394] Thus, the court appeared unable to "give a complete answer to the question asked of it".[395] Yet, this was arguably not due to the

[389] *See* HERSCH LAUTERPACHT, FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 64 (1933); HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 305 (1952).

[390] *Lotus*, *supra* note 171, at 18.

[391] *See, e.g.*, OPPENHEIM'S INTERNATIONAL LAW 12–13 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); Vaughan Lowe, *The Role of Equity in International Law*, 12 AUSTL. YB INT'L L. 54 (1992).

[392] Indus Waters Kishenganga (Pakistan/India), Partial Award, 31 R.I.A.A. 55, ¶437 (Perm. Ct. Arb. 2013).

[393] Prosper Weil, *The Court Cannot Conclude Definitively… Non Liquet Revisited*, 36 COLUM. J. TRANSNAT'L L. 109, 117 (1998).

[394] *Nuclear Weapons*, *supra* note 97, ¶¶97, 105(E).

[395] *Id.* ¶19. *See generally* HUGH THIRLWAY, THE SOURCES OF INTERNATIONAL LAW 125–30 (2nd ed. 2019).

incompleteness of the law, but to the limited ability of the court to answer a broad and overly abstract question. In particular, the diversity of nuclear weapons (including low-yield weapons)[396] and the infinite number of scenarios in which states could use or threaten to use them made it particularly challenging for the Court to arrive at a definitive and categorical answer.

If a court accepts to consider the merits of an advisory opinion containing broad questions on the interpretation or application of general mitigation obligations, it may make a finding similar to that in *Nuclear Weapons*, namely, of its inability to provide a complete answer. Like in *Nuclear Weapons*, its finding would not be a formal finding of an ontological *non liquet*—the court would not deny that, in principle, if given enough time, and being informed by extensive debates, it could interpret and apply all the relevant norms. Rather, this would be an epistemological *non liquet*: a finding that the question is too broad and too complex, involving for instance too many potential scenarios, to allow, realistically, a comprehensive treatment within an advisory opinion of a reasonable length, adopted within an acceptable time frame.[397]

2. Inability of the Members of the Court to Agree on a Response

Another scenario is that the members of the courts may be unable to agree on how to answer the question. This is different from a finding of *non liquet*, whether ontological or epistemological, which would involve a positive decision of the court. By contrast, in the present scenario, the members of the courts would agree that the law is clear, even while they would not agree on its

[396] *See supra* note 316.

[397] *See* Daniel Bodansky, *Non Liquet*, *supra* note 373, 154–55.

interpretation.

International courts generally adopt their decisions by an absolute majority of the members present (or, in case of an equal division, with the president's casting vote),[398] in a process where abstention is precluded.[399] Achieving an absolute majority on a decision is not a problem as long as there are only two possible solutions. In contentious proceedings, the submissions of the parties define default polar questions that judges can vote on. Judges must eventually decide *either* to uphold, *or* to reject each claim or counterclaim (unless an absolute majority of the judges is in favor of a more nuanced decision).[400]

By contrast, the questions raised by a request for an advisory opinion may not immediately be amenable to a binary vote.[401] Advisory opinions on climate change could involve yes–no questions, for instance about the existence of a putative norm, but they could also include open questions on the interpretation and application of that norm. When a question admits more than two responses, it is conceivable that no absolute majority appears among the judges in support of any given response. Successive answers proposed by the court's president, a drafting committee, or individual judges may all fail to attract the approval of the absolute majority of the members of

[398] I.C.J. Statute, *supra* note 12, art. 55.

[399] *See* I.C.J., Resolution Concerning the Internal Judicial Practice of the Court, art. 8(v), Apr. 12, 1976, *reproduced in* 70 AM. J. INT'L L. 905 (1976); SHAW, *supra* note 230, ¶369; ITLOS, Resolution of the International Judicial Practice of the Tribunal, art. 9 ¶1 (Oct. 31, 1997); IACHR Rules of Procedure art. 16 ¶1, Nov. 16–28, 2009, https://www.corteidh.or.cr/reglamento.cfm?lang=en; ACHPR, Rules of Court, rule 69 ¶2, Sept. 1, 2020, https://www.african-court.org/en/images/Basic%20Documents/Rules_of_Court_-_25_September_2020.pdf.

[400] I.C.J., Resolution, *supra* note 399, art. 8; SHAW, *supra* note 230, ¶369.

[401] *See, e.g.*, *Responsibilities in the Area*, *supra* note 79, ¶1; *Construction of a Wall*, *supra* note 23, ¶1.

the court. If no judge is willing to make any concessions, the advisory proceedings could come to a dead-end—an embarrassing situation where the court would fail in its duty to adopt a formal decision *at all*.

The requesting body could seek to avoid this situation by requesting an opinion on polar questions rather than open-ended questions. For instance, instead of asking the court to identify the standard applicable to states' general mitigation obligations, the request could ask the court to determine whether states have an obligation to act consistently with the 2°C goal. Yet, the adoption of a request containing such polar questions may face political difficulties on its own, especially when the request is made by a political organ such as the General Assembly, as states may disagree on the putative theory to propose to the court: some states may only want to ask the court to confirm the legal force of the 2°C goal, while others may insist that the question should exclusively refer to the 1.5°C goal. Moreover, a request containing closed-ended questions runs the risk of a simple, adverse finding whereby the court would reject the proposed theory without providing an alternative interpretation of the relevant law.

3. Evasive Answer

Several advisory opinions on highly politicized issues have fallen short of the expectations of their proponents as the court appeared to give only an incomplete, narrow, or evasive treatment of the issue brought before it. For instance, in *Western Sahara,* the General Assembly invited the I.C.J. to determine "what were the legal ties" between Western Sahara on the one hand, and Morocco

and Mauritania on the other hand, at the time of the colonization of Western Sahara by Spain.[402] The question was asked with the view of clarifying the validity of territorial claims over Western Sahara.[403] Therefore, some observers were rather disappointed with the Court's evasive response that there were "ties of allegiance", but no evidence of any "tie of territorial sovereignty", between Western Sahara and either of these two countries.[404] Likewise, in a subsequent opinion in *Kosovo*, the Court avoided carefully the gist of the question—whether Kosovo had achieved independence—when focusing narrowly on the question that was formally asked of it: the legality of the declaration of independence.[405]

Admittedly, if these opinions were unhelpful, it was in large part because the General Assembly had not asked the right questions. As Marc Weller noted, "it is unfair to criticize [a court] for failing to address the very issues the drafters of the question carefully and deliberately did not ask."[406] One needs however to be aware of the political difficulty of requesting an advisory opinion of the I.C.J. through the General Assembly. Efforts to gather a majority of the Assembly might result in some twisting of the questions contained in the request. Thus, one cannot assume that the General Assembly will succeed in adopting a request containing clear and useful questions on climate change when it failed to do so on other, less politically sensitive occasions. On this aspect, advisory opinions of ITLOS or regional human rights courts could fare better—if they can

[402] *Western Sahara*, *supra* note 253, ¶1.
[403] B.O. Okere, *The Western Sahara Case*, 28 Int'l & Comp. L.Q. 296, 304 (1979).
[404] *Western Sahara*, *supra* note 253, ¶162. *See, e.g.*, Okere, *supra* note 403, at 311; Yoram Dinstein, *Discussion*, in INTERNATIONAL DISPUTE SETTLEMENT: ROOM FOR INNOVATIONS?, *supra* note 25, 110, at 112.
[405] *Kosovo*, *supra* note 98, ¶51.
[406] Marc Weller, *Modesty Can Be a Virtue: Judicial Economy in the I.C.J. Kosovo Opinion?*, 24 LEIDEN J. INT'L L. 127, 127 (2011).

overcome preliminary objections.

V. EFFECTS

This last Part considers how an advisory opinion could affect states and international institutions. The proponents of an advisory opinion conceive it as a tool in a political campaign for enhanced climate action.[407] The first two Sections cast doubts on their assumptions: first, that an advisory opinion would clarify and develop the law applicable to climate change; and second, that it would thus promote more ambitious climate action. The last Section submits that any treatment of a request for an advisory opinion on climate change might tarnish international courts' reputation and undermine the credibility of international institutions. As such, while an advisory opinion on climate change would achieve few if any benefits, it might cause considerable hardship on a fragile international legal order.

A. Effects on International Climate Law?

A widespread assumption is that an international court's pronouncement on climate change would provide "an authoritative clarification"[408] of the general obligations on climate change mitigation. Yet, the proponents of an advisory opinion are yet to identify a concrete, best-case scenario, whereby a court would be able to reach conclusions that are neither obvious, nor dubious, and thus would effectively clarify international climate law. Margaretha Wewerinke-Singh has suggested

[407] *See, e.g.*, Wewerinke-Singh, *supra* note 28, ¶15.

[408] Voigt, *in Judging the Climate Crisis*, *supra* note 94, at 22.

that an advisory opinion could make "a valuable contribution" by "[d]emonstrat[ing] that states do not have unfettered discretion in addressing climate change … and that they are bound by existing obligations that require certain action."[409] This, however, would only point out the obvious: virtually every state has expressly committed to take action on climate change mitigation, in particular in line with successive NDCs that represent "progression" and its "highest possible ambition".[410] The finding that current commitments are insufficient, likewise, would only reaffirm what states have agreed upon emphatically at numerous occasions.[411]

The real legal issue regarding climate change mitigation is not that states ignore the existence of their obligation or that they are unaware of the lack of collective ambition, but that states disagree on what, precisely, the obligation implies for each of them—or, to put it in another way, on which of them is to be blamed for the lack of collective ambition.[412] Yet, requesting a court to address this issue, for instance by determining the "fair share" of states in global efforts on climate change mitigation, would throw it in inextricable political controversies. Likewise, the historical application of mitigation obligations is highly uncertain, and states could defend various conceptions of whether and how climate reparations should be paid.[413] The intensity of the political controversies and the lack of unambiguous legal or moral basis to overcome them could preclude a court from answering questions in a convincing way. The opinion of the court on these matters—

[409] Wewerinke-Singh, *supra* note 28, at 14.

[410] Paris Agreement, *supra* note 1, art. 4 ¶3. *See also id.*, ¶2 (second sentence); UNFCCC, *supra* note 1, art. 4 ¶¶1(b), 2(a).

[411] *See, e.g.*, Decision -/CP.26, *supra* note 1, ¶4; G.A. Res. 76/205, ¶6 (Dec. 17, 2021).

[412] *See* text at note 357.

[413] *See* text above at notes 380–381.

if its members were even able to agree on one[414]—would not be obvious, but it would be of dubious quality. As such, it would fail to preach beyond the converted.

Moreover, while it is largely expected that an advisory opinion on climate change would "yield 'pro-climate' decisions",[415] Penelope Ridings points out the risk of "an adverse opinion that settles a legal question contrary to the outcome desired."[416] Past opinions, most obviously in *Nuclear Weapons*, show that an international court may fail to confirm the views of a majority of states—in that case, their assessment that the threat or use of nuclear weapons are necessarily unlawful.[417] Likewise, an advisory opinion on climate change might reject some prevailing yet doctrinally dubious interpretations of general mitigation obligations, for instance the view that states are required to act consistently with the 1.5 or 2°C goals.[418] Alternatively, a finding that the request does not bear on a "legal question" could affect the prospects of contentious cases raising similar issues to overcome procedural objections before other courts, including domestic courts.

B. Effects on Climate Action?

That advisory opinions have no binding force does not necessarily mean that they are entirely inconsequential.[419] The proponents of advisory opinions on climate change hope that they would

[414] *See* above, Section IV.B.2.
[415] Bodansky, *Role of I.C.J.*, *supra* note 40, at 694.
[416] Ridings, *supra* note 18.
[417] *See* G.A. Res. 49/75K, pmbl. ¶4 (Dec. 15, 1994), recalling its declaration that the use of nuclear weapons "would be a violation of the Charter and a crime against humanity", before asking the Court's opinion on the same question.
[418] *See* above notes 368–372.
[419] *See supra* notes 283–285 and accompanying text.

galvanize action on the mitigation of climate change and, possibly, reparations for the impacts of climate change.[420] Thus, campaigns for advisory procedures rely on the tacit assumption that an authoritative judicial pronouncement on the law applicable to climate change would foster climate action.

At first sight, this assumption seems reasonable: a clarification of the law should increase the reputational cost of non-compliance.[421] Thus, Hugh Thirlway notes that "the advisory procedure may be used to bring pressure to bear on a State that is out of step with the general view of States on a legal question that particularly concerns that State".[422] Yet, skeptics point out that states—especially powerful ones—do not necessarily comply with the law, even when non-compliance is clear to any reasonable observer, having been established by a judicial decision.[423] Thus, it is common for states simply to ignore the conclusions of an unwanted advisory opinion.[424] This may even be easier when states can discredit the advisory opinion by highlighting its questionable jurisdictional bases, as would no doubt be the case of an advisory opinion of ITLOS.[425]

Overall, the elephant in the room is the extraordinary scope of an advisory opinion on climate change. Any meaningful conclusions regarding states' obligations on climate change mitigation would require states to transform their economic system, while the quantum of climate reparations

[420] *See, e.g.*, Yeo, *supra* note 92, at 21 .
[421] *See generally* Guzman, *supra* note 43, at 1863.
[422] THIRLWAY, I.C.J., *supra* note 287, at 139 (references omitted).
[423] Bodansky, *Role of I.C.J.*, *supra* note 40, at 705.
[424] *See, e.g.*, Dinstein, *supra* note 404, at 112. *See also* DHARMA PRATAP, ADVISORY JURISDICTION OF THE INTERNATIONAL COURT 249–254 (1972).
[425] *See generally* Ruys & Soete, *supra* note 161, at 174.

would be orders-of-magnitude larger than what courts have granted in previous cases.[426] Reputational costs can persuade states to comply with international law when the stakes are small—when the costs of non-compliance exceed the costs of compliance—but, as Andrew Guzman notes, "it is reasonable to expect that the compliance pull of international law will be the weakest when the stakes at issue are large".[427] As such, one can entertain little hope that states will comply with an advisory opinion on climate change.

The proponents of advisory opinions affirm that opinions would facilitate or "complement" international negotiations by "providing guidance".[428] Wewerinke-Singh, for instance, asserted that an advisory opinion "could provide important benchmarks and yardsticks that could inform" the preparation of more ambitious NDCs.[429] However, it is doubtful that a court could determine such benchmarks, which states have never been able to identify despite protracted negotiations, in a sufficiently compelling way to convince states to comply. On the other hand, scholars fear that advisory proceedings "may complicate and stall"[430] international climate negotiations by "distracting from and even interfering with"[431] political processes. Bodansky suggested that an opinion on climate change could "cause parties to retrench in an effort to limit their legal exposure."[432] A risk is that an advisory opinion would only reinforce the preexisting views of some

[426] *See generally* Nordhaus, *supra* note 386.

[427] Guzman, *supra* note 43, at 1883. *See generally* Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT'L ORG. 175, 177 (1993); Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401, 413 (2000).

[428] U.N. Press Conference, *supra* note 38.

[429] Wewerinke-Singh, *supra* note 28, at 16.

[430] Ridings, *supra* note 18.

[431] Bodansky, *Role of I.C.J.*, *supra* note 40, at 692.

[432] Bodansky, *supra* note 177, at 268. *See also* Ridings, *supra* note 18.

states (those with which the court agrees) without convincing others, thus only making it more difficult for states to reach an agreement.

Admittedly, the audience of international judicial pronouncements is not limited to national governments.[433] An advisory opinion could help to shape public opinion and national politics, inform companies and investors about the legal risks associated with emission-intensive activities, and influence the legal analysis of domestic courts.[434] On the latter point, André Nollkaemper has pointed out that national courts could sometimes "recognize the interpretation of an international court as an authoritative formation of an international norm."[435] The influence of an advisory opinion on climate change, however, could be inhibited by the limited ability of the international court to assess its factual bases.[436] Already, the Supreme court of Israel held that, while giving "the full appropriate weight to the norms of international law, as developed and interpreted by the I.C.J." in the *Wall* opinion, the factual findings of the I.C.J. are "not *res judiciata*".[437] This approach would limit the influence of an advisory opinion on national courts to the extent that the opinion is not confined to a restatement of overly abstract principles, but seeks to reach concrete, fact-specific conclusions. If these facts are again for debate before national courts—or, by analogy, in the court of political opinion—there is not much guidance that that the I.C.J. would be able to provide as to the application of general principles to climate change.

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[433] *See generally* André Nollkaemper, *The Court and its Multiple Constituencies*, *in* THE LAW AND POLITICS OF THE KOSOVO ADVISORY OPINION 219 (Marko Milanovic & Michael Wood eds., 2015).
[434] Ridings, *supra* note 18.
[435] André Nollkaemper, *Conversations Among Courts: Domestic and International Adjudicators*, *in* OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 523, 539 (Cesare P.R. Romano et al. eds., 2013).
[436] *See supra* notes 312–316.
[437] Mara'abe v. The Prime Minister of Israel, HCJ 7957/04, ¶74 (Sep. 15, 2005).

C. Effects on International Institutions

Advisory proceedings on climate change might erode the court's reputation and the authority of international law. In fact, it is difficult to see how a court, receiving a request for an advisory opinion, could avoid considerable embarrassment. If the court declines to give an opinion, observers will question its political motivation.[438] Observers would also criticize the court for losing an opportunity to show its relevance and ability to address, beyond the minor diplomatic incidents that often land on international dockets, one of the most structural global issues of our time.

On the other hand, the court would not avoid embarrassment by giving an advisory opinion. If the court could achieve an absolute majority at all, this would be on a convoluted text providing only a delphic treatment of anything the court was asked to clarify. As Judge Oda noted in *Nuclear Weapons*, such "unimpressive" opinion "may cause some damage to the [c]ourt's credibility."[439] The opinion would certainly be accompanied by multiple, strongly worded dissenting opinions that would further discredit it. Overall, an advisory opinion overtly ignored by most or all states concerned would affect the court's authority and, along with it, the credibility of international law.[440] This, in turn, would limit further the capacity of international institutions to foster international cooperation, albeit incrementally, on issues such as climate change.

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[438] *See generally* Oellers-Frahm, *supra* note 42, at 116.

[439] *Nuclear Weapons*, *supra* note 97, 330, ¶52 (Dissenting Opinion of Judge Oda).

[440] Bodansky, *Role of I.C.J.*, *supra* note 40, at 708. *See also, e.g.*, KOLB, *supra* note 230, at 277; Dinstein, *supra* note 404, at 112.

One can only speculate about how a court would navigate its way through such pitfalls. The I.C.J. once suggested that "it would be a compelling reason, making it inappropriate for the Court to entertain a request, that its judicial role would be endangered or discredited".[441] This, however, would expose the court to the (albeit unfair) criticism that it is putting its own interests above those of humankind as a whole. Alternatively, Judge Tullio Treves suggested that a court should use the doctrine of judicial "discretion" to exercise "judicial restraint" by deciding not to take cases where "it knows that the result can be dangerous or perhaps insignificant".[442] Yet, any reference to the questionable doctrine of judicial discretion[443] would only fuel the suspicion that the court's decision not to answer the question is politically motivated. Other judges may prefer to reframe the questions in order to answer it formally while confining themselves to evasive conclusions. This might be a reasonable way to minimize the harm of the advisory proceedings to international institutions. Ultimately, many judges will agree with Aust that "long-standing problems … will not be resolved by any Advisory Opinion … but only by lengthy political negotiations".[444]

VI. CONCLUSION

This Article has shown that, while small island states can request an advisory opinion on climate change, a court might refuse to answer the questions; or else, it will certainly fail to provide a useful response. Four key findings are highlighted in the following.

[441] Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, 1982 I.C.J. 325, ¶45 (July 20).
[442] Treves, *supra* note 231, at 110.
[443] *See* text at note 228.
[444] Aust, *supra* note 123, at 147.

Firstly, as the request for an advisory opinion of the I.C.J. would require the improbable political support of a majority of the U.N. members, small-island states may resolve to request the advisory opinion of another court. Proceedings before specialized or regional courts, however, will face additional legal hurdles, and the opinion given (if any) will be less authoritative.

Secondly, a treaty cannot authorize the request for an advisory opinion aimed at determining the rights or obligations of third states without their consent or prior authorization. This requirement will hinder or preclude advisory proceedings before ITLOS and regional human rights courts. In particular, COSIS cannot validly request an advisory opinion of ITLOS on the obligations of large GHG-emitting states without their consent or prior authorization.

Thirdly, the indeterminacy of the relevant norms will make it difficult, perhaps even impossible, for a court to adopt an insightful advisory opinion. If the members of a court can reach an agreement at all, it will almost inevitably be on conclusions that are either obvious or dubious. No useful purpose will be served by an advisory opinion merely restating the content of climate treaties or the well-known need for more climate action; and states will not be persuaded by an international judicial pronouncement seeking to impose norms on which they have never agreed.

Fourthly, compliance can certainly not be taken for granted. The odds that an advisory opinion could influence state conduct are lower when the stakes are higher, and they will be further reduced if the opinion is adopted despite the strong protests or without the consent or prior authorization of the largest GHG-emitting states. Without compliance, an advisory opinion will achieve no

tangible benefits, while it might erode the credibility of international institutions.

Thus, the foremost issue that this article has revealed is the absence of a realistic best-case scenario through which an advisory opinion could achieve positive change. If international courts are going to be the field for "an epic battle to save planet Earth",[445] advocates need to determine not only how to start the battle, but how to win it—and how to use this victory to win the war. In engaging in that reflection, they should be open to the idea that, after all, international advisory proceedings might not the best battle to fight.

[445] U.N. Press Conference, *supra* note 38.