

# The Role of Civil Society in the Climate Change Advisory Proceedings

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## Abstract

This chapter examines the influential role of civil society in the climate change advisory proceedings before the International Court of Justice (ICJ), International Tribunal for the Law of the Sea (ITLOS), and Inter-American Court of Human Rights (IACtHR). While these proceedings primarily engage states and intergovernmental organisations, civil society actors, including NGOs, youth groups, Indigenous communities, and transnational advocacy networks, have been essential catalysts and contributors. The chapter first analyses procedural limitations at each tribunal and contrasts the relatively restrictive policies of the ICJ and ITLOS with the IACtHR's inclusive approach. Despite procedural constraints, civil society has effectively engaged in advisory proceedings, employing strategies like *amicus curiae* submissions, coordinated campaigns, and knowledge-sharing initiatives. We highlight five key ways civil society shapes these proceedings: (1) catalysing the advisory requests, (2) contributing substantive input despite procedural limitations, (3) educating and coordinating participants, (4) promoting advisory opinions' implementation, and (5) leveraging advisory opinions to support broader climate litigation. These actions underscore civil society's pivotal role in advancing climate justice within international law, amplifying diverse voices, and enhancing climate litigation's impact beyond the immediate advisory context.

## Keywords

civil society – advisory proceedings – strategic climate litigation – human rights and climate change – international law – climate justice – rules of procedure

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## 1 Introduction

The advisory opinions on climate change before the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS) and the Inter-American Court of Human Rights (IACtHR) are historic proceedings of great significance to the climate litigation community. Part of the reason for this significance is the involvement and focus on the obligations of States in relation to climate change. This draws attention to the actions and arguments made by States and intergovernmental organisations in these proceedings, which naturally diverts focus away from civil society actors. Our task in this chapter is to turn the focus back upon civil society actors, and to attempt to understand their complex and shifting role in this unique set of proceedings. This chapter proceeds in two substantive sections.

The first section will ‘zoom in,’ by analysing the precise practice and procedure of the ICJ, ITLOS, and the IACtHR, in turn, to identify the ways in which civil society is permitted to engage in advisory proceedings in general. The avenues for formal participation will be shown to be narrow and limited, with the exception of the IACtHR. The second section will ‘zoom out’ to provide observations on how civil society has, in practice, been effective users of the advisory procedures in the context of the climate change advisory proceedings, despite these procedures not being designed for their use. Five observations are advanced: (1) civil society is highly active in climate litigation; (2) civil society has played an essential and strategic role in catalysing the climate change advisory proceedings; (3) despite technical and procedural constraints to its formal participation, civil society has actively contributed to the climate change advisory proceedings, directly and indirectly, by employing various means and strategies; (4) civil society has an important role in championing and supporting the implementation of advisory opinions after they have been furnished; and (5) civil society will use advisory opinions in their broader climate litigation strategies and efforts and, in so doing, can extend the reach of the advisory opinions beyond its most obvious and immediate impacts (namely, to clarify existing international law for States).

For our purposes, we consider ‘civil society’ to at least encompass environmental non-governmental organisations (NGOs), climate change activists and lawyers, scholars and academic or other research institutions. We would also include philanthropic funders,<sup>1</sup> and re-granters,<sup>2</sup> within the scope of civil

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1 Such as, eg, the Gates Foundation or Open Society Foundation.

2 Such as, eg, the Foundation for International Law and the Environment (FILE).

society.<sup>3</sup> It would be remiss of us not to also emphasise specific cohorts or groups which contribute so significantly to climate litigation, in particular, 'the Youth' and Indigenous peoples and communities, as a core part of civil society. Indeed, as will be discussed below, the Youth can be credited with instigating the campaign for an ICJ advisory opinion in the first place.<sup>4</sup> And local and Indigenous peoples have been credited with catalysing the phenomenon of 'climate litigation' to begin with,<sup>5</sup> together with other approaches to ecological and environmental protection.<sup>6</sup> We also include Transnational Advocacy Networks (TANs) in our conception of civil society.<sup>7</sup> TANs are formed by numerous

- 3 The role of funders and re-granters is crucial, but under-studied. For a recent relevant treatment of these actors in climate litigation scholarship, see Jolene Lin & Jacqueline Peel, *Litigating Climate Change in the Global South* (OUP, 2024) 148, 179–180.
- 4 Children and young people have also been plaintiffs in significant climate litigation efforts, at domestic and international levels: see eg Committee on the Rights of the Child, *Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child, concerning Communication Nos. 104–107/2019: Chiara Sacchi et al v Argentina, Brazil, France, and Germany* (CRC/C/88/D/104/2019, CRC/C/88/D/105/2019, CRC/C/88/D/106/2019, CRC/C/88/D/107/2019), 11 November 2021; *Held v. Montana* CDV-2020-307, Montana First Judicial District Court, WL 1997864, decision of 14 August 2023 (USA); *Minister for the Environment v Sharma* [2022] FCAFC 35 (Australia).
- 5 The petition brought by the Inuit people to the Inter-American Commission of Human Rights (IACHR), seeking to compel the United States of America (USA) to join the Kyoto Protocol, is regarded by some as the first instance of climate litigation. In that petition, the Inuit people argued that the US's emissions amounted to a breach of human rights accorded to the Inuit people as it led to the loss of permafrost, and consequently, the loss of the ways of life of the Inuit people, given its adverse effects on housing, communication, safety, and food gathering. See Lin & Peel (n 3) 193. ('[w]hile the IACHR's response was disappointing, this petition can be viewed as the birth of the movement of seeking legal protection of rights accorded by international treaties in domestic and international courts.')
- 6 Lin & Peel (n 3) 189–193. There are several examples of Indigenous peoples who have used litigation to complement other efforts (including protest and advocacy) to protect their lands from environmentally destructive economic activities such as oil drilling and illegal logging. See eg *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Merits, Reparations and Costs, Judgment of 31 August 2001, Inter-American Court of Human Rights 2001 Series C, No. 79; *Maniwa v Malijwi* [2014] PGNC 25 (Papua New Guinea); *The Maya Leaders Alliance v The Attorney General of Belize* [2015] CCJ 15 (AJ), CCJ Appeal No BZCV2014/ 002, BZ Civil Appeal No 27 of 2010, 30 October 2015 (Belize). Note further, that the recognition of legal personhood of natural entities such as rivers is attributable in part to the efforts of Indigenous peoples: eg Whanganui River in NZ: *Te Awa Tupua (Whanganui River Claims Settlement) Act 2016* (New Zealand); Atrato river in Colombia's Chocó region: *Atrato River Decision* T- 622/ 16 of November 10, 2016 (Sentencia T- 622/ 16 de Noviembre 10, 2016) (Colombia).
- 7 Keck and Sikkink define TANs as networks of activists, distinguishable largely by the centrality of principled ideas, causes, and norms in motivating their formation: Margaret E Keck & Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (2nd edn, Cornell University Press 1998) 1.

civil society actors working in concert to achieve a particular systemic outcome.<sup>8</sup> As Lin and Peel explain in the context of the Global South, it is through transnational networks that there can be learning and sharing of information resources and legal strategies, norm diffusion, and flows of financial, legal and material support for climate litigation.<sup>9</sup>

As a final matter of introduction, we make two caveats. First, we are writing in our capacity as legal practitioners. We are intentionally descriptive and observational. While we draw on some scholarship, we do not offer an account of the role of civil society in the climate change advisory proceedings from the perspective of the social or political sciences. We warmly encourage others to engage in sustained scholarly work on this topic from those perspectives. Second, the authors have been and are currently active as counsel and legal advisers in each of the climate change advisory proceedings, as well as in other climate litigation. We have written this piece exclusively in our personal capacities; any views expressed and errors made are entirely our own and are not attributable to any States, organisations, or individuals we are affiliated with or otherwise represent. We acknowledge that any observations we make and conclusions we draw may necessarily be informed by our direct experiences in the field and that this may enhance, in some respects, but also limit in others, the overall authority of this piece.

## 2      **The Technical Explanation: Procedural Rules for Civil Society Organisations at the ICJ, ITLOS and the IACtHR**

To properly consider the role of civil society in the advisory opinions before the ICJ, ITLOS and the IACtHR, it is necessary to explore the procedural rules for each Court, and whether they permit formal or informal civil society participation in the proceedings. This section analyses the practice and procedure of the ICJ, ITLOS and the IACtHR in turn, to identify the ways in which civil society is permitted to engage in advisory proceedings in general. With this grounding, we will explore in Part C how civil society has operated in practice across the advisory proceedings.

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8 TANS in the climate space include, eg, Climate Action Network (CAN) or the Fossil Fuel Non-Proliferation Treaty Initiative (FFNPT Initiative).

9 Lin & Peel (n 3) 148.

### 2.1 *Rules of Procedure for Civil Society Participation at the ICJ*

The practice and procedure of the ICJ is governed by the Charter of the United Nations,<sup>10</sup> the Statute of the International Court of Justice,<sup>11</sup> the Rules of the Court,<sup>12</sup> and non-binding Practice Directions. The procedure of the Court differs between contentious and advisory proceedings. Compared with contentious cases, the procedure for advisory proceedings is relatively flexible. Unlike other international courts and tribunals, such as the International Criminal Court (ICC), IACtHR, and the European Court of Human Rights (ECtHR), the ICJ has a limited formal role for NGOs and other forms of public participation by civil society.

Article 34(1) of the ICJ Statute makes clear that ‘only States may be parties in cases before the Court.’ Article 34(2) creates a role for public international organisations in contentious proceedings, stating that the Court ‘may request of public international organisations information relevant to cases before it, and shall receive such information presented by such organisations on their own initiative.’ In the context of advisory opinion proceedings, Article 66(2) of the ICJ Statute similarly provides for participation by States and ‘international organisations.’

The Registrar shall also, by means of a special and direct communication, notify *any state entitled to appear before the Court or international organization* considered by the Court, or, should it not be sitting, by the President, *as likely to be able to furnish information on the question*, that the Court will be prepared to receive, within a time-limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question. (Emphasis added).

Therefore, unlike contentious cases, in advisory proceedings the Court must first invite participation from designated international organisations to prepare written statements. In practice, these are generally intergovernmental organisations, with some scope for inviting other international organisations of different kinds. In practice, an international organisation will often first request to participate in the advisory proceeding and the Court will authorise

10 Charter of the United Nations, signed 26 June 1945, 1 UNTS XVI (entered into force 24 October 1945).

11 Statute of the International Court of Justice, signed 26 June 1945, [1945] UKTS 67 (entered into force 24 October 1945).

12 Rules of Court of the International Court of Justice (adopted 14 April 1978) ICJ Rep 1983, 131.

them to do so. This approach has been maintained in the current ICJ proceedings, where, at the time of writing, the Court has (on request) invited and authorised the following 13 organisations to participate, none of which are civil society organisations: the International Union for the Conservation of Nature (IUCN),<sup>13</sup> the Commission of Small Island States on Climate Change and International Law (COSIS),<sup>14</sup> the European Union,<sup>15</sup> the African Union,<sup>16</sup> the Organisation of Petroleum Exporting Countries (OPEC),<sup>17</sup> the Organisation of African, Caribbean and Pacific States,<sup>18</sup> the Melanesian Spearhead Group,<sup>19</sup> the Forum Fisheries Agency,<sup>20</sup> the Pacific Community,<sup>21</sup> the Pacific Islands Forum,<sup>22</sup> the Alliance of Small Island States<sup>23</sup> the Parties to the Nauru Agreement Office,<sup>24</sup> and the World Health Organisation.<sup>25</sup>

The Court's previous practice in relation to NGO and public participation has been to limit its scope, with isolated exceptions. For example, the Court has previously consented to receiving an *amicus curiae* brief from the International League for the Rights of Man in the 1950 *International Status of South-West Africa* advisory opinion.<sup>26</sup> In the current advisory opinion proceedings on the right to strike, the Court has invited six non-state organisations with consultative status at the International Labour Organisation to participate in

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13 International Court of Justice, *Obligations of States in respect of Climate Change (Request for Advisory Opinion)*, Press Release of 25 April 2023, General List No 187.

14 International Court of Justice, *Obligations of States in respect of Climate Change (Request for Advisory Opinion)*, Press Release of 22 June 2023, General List No 187.

15 International Court of Justice, *Obligations of States in respect of Climate Change (Request for Advisory Opinion)*, Press Release of 23 June 2023, General List No 187.

16 International Court of Justice, *Obligations of States in respect of Climate Change (Request for Advisory Opinion)*, Press Release of 18 July 2023, General List No 187.

17 International Court of Justice, *Obligations of States in respect of Climate Change (Request for Advisory Opinion)*, Press Release of 1 September 2023, General List No 187.

18 International Court of Justice, *Obligations of States in respect of Climate Change (Request for Advisory Opinion)*, Press Release of 20 September 2023, General List No 187.

19 *ibid.*

20 *ibid.*

21 International Court of Justice, *Obligations of States in respect of Climate Change (Request for Advisory Opinion)*, Press Release of 24 November 2023, General List No 187.

22 International Court of Justice, *Obligations of States in respect of Climate Change (Request for Advisory Opinion)*, Press Release of 20 December 2023, General List No 187.

23 *ibid.*

24 International Court of Justice, *Obligations of States in respect of Climate Change (Request for Advisory Opinion)*, Press Release of 4 March 2024, General List No 187.

25 International Court of Justice, *Obligations of States in respect of Climate Change (Request for Advisory Opinion)*, Press Release of 26 March 2024, General List No 187.

26 Lance Bartholomeusz, "The Amicus Curiae Before the International Courts and Tribunals" (2005) 5 *Non-State Actors and International Law* 216, p. 231.

the proceedings.<sup>27</sup> The Court is careful to note that such an approach is ‘*in light of the tripartite structure of the International Labour Organisation, which is comprised of representatives of Governments, employers and workers,*’ and therefore a case-specific aberration.<sup>28</sup> The Court has also previously requested an *amicus* brief from Palestine, that is, neither a State nor international organisation at the relevant time.<sup>29</sup> However, based on the Court’s approach to the case to date, it is unlikely that a similar request would be made of an NGO or other civil society group in the present ICJ proceedings on climate change. The Court has adopted a similarly stringent approach in contentious proceedings by regularly rejecting previous petitions by NGOs to participate by way of *amicus curiae* briefs.<sup>30</sup>

In addition to the procedural barriers to formal civil society participation, there have been isolated judicial statements from the Court directly challenging the role played by NGOs and civil society in international law. For example, in the 1996 *Legality of the Threat or Use of Nuclear Weapons* advisory opinion, Judge Guillaume critiqued the influence of the International Association of Lawyers against Nuclear Arms in successfully lobbying States to request an advisory opinion through the UN General Assembly.<sup>31</sup> Nonetheless, following reforms to the European Convention on Human Rights to allow *amicus* participation in 1998, the ICJ adopted Practice Direction XII in 2004 to regulate the submission of *amici curiae* in advisory opinion proceedings. The relevant provisions of the Practice Direction are as follows:

1. Where an *international non-governmental organization* submits a *written statement and/or document* in an advisory opinion case on its own initiative, such statement and/or document *is not to be considered as part of the case file*.
2. Such statements and/or documents *shall be treated as publications readily available* and may accordingly be referred to by States and intergovernmental organizations presenting written and oral statements in the case in the same manner as publications in the public domain.

27 International Court of Justice, *Right to Strike under ILO Convention No. 87 (Request for Advisory Opinion)* Order 16 November 2023, General List No 191.

28 *ibid.*

29 Anna Dolidze, ‘Advisory Opinion on Responsibility and Liability for International Seabed Mining (ITLOS Case No. 17) and the Future of NGO Participation in the International Legal Process’ (2013) 19(2) *ILSA Journal of International and Comparative Law* 379, 393.

30 *ibid.*

31 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, Separate Opinion of Judge Guillaume, 65–66.



3. Written statements and/or documents submitted by international non-governmental organizations *will be placed in a designated location in the Peace Palace*. All States as well as intergovernmental organizations presenting written or oral statements under Article 66 of the Statute will be informed as to the location where statements and/or documents submitted by international non-governmental organizations may be consulted. (Emphasis added).<sup>32</sup>

The Practice Direction is clear in establishing that any *amicus curiae* will not form part of the case file. However, 'international non-governmental organisations' are still able to submit 'written statement[s] and/or document[s]' on their own initiative. The status of those statements and documents is akin to public documents, described as 'publications readily available.' They therefore may be referenced by States and participating intergovernmental organisations in their written or oral submissions. The physical copies of any statements or documents provided by NGOs will be placed in the Peace Palace, with States and intergovernmental organisations notified as to their location.

This peripheral formal role for civil society stands in contrast to other courts such as the ICC, the IACtHR and the ECtHR, and may indicate an intention from the Court to circumscribe the substantive influence that civil society has over legal proceedings before the Court. Nonetheless, the current ICJ proceedings on climate change have seen wide participation from civil society organisations that have taken the opportunity to submit *amicus curiae* briefs, presumably with the knowledge that such documents would not form part of the case file, or even be publicly acknowledged by the ICJ. A list of civil society submissions is captured on the Sabin Centre for Climate Change Law's Climate Litigation Database, and includes joint or individual *amici curiae* from over 20 civil society organisations.<sup>33</sup> It remains to be seen what doctrinal influence, if any, these submissions will have in the context of complex proceedings where 91 States and international organisations filed initial written statements,<sup>34</sup> followed by 62 of those same States and international organisations filing a

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32 International Court of Justice, *Practice Direction XII*, adopted 30 July 2004, accessed at: <<https://www.icj-cij.org/practice-directions#fm1>>.

33 Sabin Centre for Climate Change Law, *Request for an advisory opinion on the obligations of States with respect to climate change* (2024) accessed at: <<https://climatecasechart.com/non-us-case/request-for-an-advisory-opinion-on-the-obligations-of-states-with-respect-to-climate-change/>>.

34 International Court of Justice, *Obligations of States in respect of Climate Change (Request for Advisory Opinion)*, Press Release of 12 April 2024, General List No 187.



second round of written comments.<sup>35</sup> Based on the ITLOS advisory opinion and past ICJ advisory opinions, it may also be difficult to ascertain if civil society submissions have had any bearing on the final opinion once it is released, given that both ITLOS and the ICJ do not generally identify arguments made by particular parties in their advisory opinions. A close textual analysis of the opinion, cross-referenced against arguments set out in *amici curiae* and in State and international organisation written submissions will be required to make any empirical claims about the doctrinal impact of civil society submissions. While such an analysis is possible in relation to the recently released ITLOS advisory opinion, it is well beyond the scope of this chapter. We will instead consider the Tribunal's practice and procedure relating to civil society involvement, which largely mirrors the ICJ's regime, before concluding this Part with an analysis of the IACtHR's substantively different approach.

## 2.2 *Rules of Procedure for Civil Society Participation at the ITLOS*

The rules of procedure that apply to ITLOS are set out in the UN Convention on the Law of the Sea (UNCLOS),<sup>36</sup> the Statute of the Tribunal,<sup>37</sup> and the Rules of the Tribunal.<sup>38</sup> ITLOS has a very similar procedure to the ICJ, in limiting formal participation rights to States and intergovernmental organisations. This is set out in Article 133 of the Rules of the Tribunal:

1. The Registrar shall forthwith give notice of the request for an advisory opinion to all States Parties.
2. The Chamber, or its President if the Chamber is not sitting, shall identify the intergovernmental organizations which are likely to be able to furnish information on the question. The Registrar shall give notice of the request to such organizations.
3. States Parties and the organizations referred to in paragraph 2 shall be invited to present written statements on the question within a time-limit fixed by the Chamber or its President if the Chamber is not sitting. Such

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35 International Court of Justice, *Obligations of States in respect of Climate Change (Request for Advisory Opinion)*, Press Release of 16 August 2024, General List No 187.

36 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

37 Statute of the International Tribunal for the Law of the Sea (10 December 1982) UN Doc A/CONF.62/122, Annex VI.

38 International Tribunal for the Law of the Sea, 'Rules of the Tribunal' (adopted 28 October 1997, amended 25 September 2020).

statements shall be communicated to States Parties and organizations which have made written statements.<sup>39</sup>

A notable difference between the ITLOS and ICJ rules is that Article 133(2) of the ITLOS rules refers specifically to ‘intergovernmental organizations,’ whereas the ICJ Rules at Article 66(2) refer to ‘international organizations.’ As we have set out above, this means that in limited circumstances the ICJ has adopted a slightly more flexible approach to involvement of non-state actors who are not intergovernmental organisations. ITLOS has no similar procedural history, based presumably on its unambiguous procedural language, and also its comparative dearth of advisory opinions proceedings, having had only three – the current proceedings before the Tribunal on climate change; the 2013 proceedings on illegal, unreported, and unregulated fishing requested by the Sub-Regional Fisheries Commission;<sup>40</sup> and the 2011 advisory opinion submitted to the Seabed Disputes Chamber, on the responsibilities and obligations of States with respect to activities in the Area.<sup>41</sup> In the 2013 advisory opinion, the Tribunal adopted a more inclusive approach to *amicus curiae* submissions than the ICJ, by noting submissions from Greenpeace International (GPI) and World Wildlife Fund for Nature (WWF), communicating those submissions to the States and intergovernmental organisations participating in the case, uploading them to the Tribunal’s website for the case, and allowing them to submit *amici* for both written stages of the proceedings.<sup>42</sup> They did however deny the request of WWF and GPI to make oral submissions in the case. As Dolidze notes, by approaching civil society in this way, ‘the Tribunal allowed the NGOs to achieve the aims which would have been attained with their official participation in the case.’<sup>43</sup>

In the present proceedings before the Tribunal, it was clear that other members of civil society had taken note of the Tribunal’s practice in 2013, with 10 civil society written statements submitted to the Tribunal on behalf of 13 civil

39 *ibid*, art 133.

40 *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (Advisory Opinion of 2 April 2015), Case No 21, ITLOS Reports 2015, 4 (*SRFC Opinion*).

41 *Responsibilities and obligations of States with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, Advisory Opinion, Case No 17, ITLOS Reports 2011, p. 10.

42 *SRFC Opinion* (n 40) see §§13, 15, 23, and 27.

43 Dolidze (n 30) 381.

society actors.<sup>44</sup> The Tribunal did not modify its procedure from 2013, again uploading written statements to the Tribunal's website, communicating the submissions to parties in the case, and denying the civil society actors the opportunity to make oral submissions. The increase in participation from civil society can presumably be attributed to those organisations seeing value in this level of engagement, which is greater than that afforded under the ICJ rules of procedure. However, both ITLOS and the ICJ stand in stark contrast to the IACtHR, which has the most inclusive and expansive procedure in relation to engagement with civil society organisations.

### 2.3 *Rules of Procedure for Civil Society Participation at the IACtHR*

The IACtHR's rules of procedure are set out in the American Convention on Human Rights (ACHR),<sup>45</sup> the IACtHR Statute,<sup>46</sup> and the Rules of Procedure of the Inter-American Court.<sup>47</sup> As with the ICJ, the procedure for advisory opinions is relatively flexible, with the rules for contentious cases applied by analogy in advisory proceedings where the Court finds them applicable.<sup>48</sup> The Court retains wide discretion to determine when contentious procedures may be compatible.<sup>49</sup> Advisory proceedings generally have a written and an oral

44 See the case page on the ITLO website: <https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/> (visited on 3 October 2024). The civil society actors who contributed to the ITLOS proceeding included the following: United Nations Special Rapporteurs on Human Rights & Climate Change, Toxics & Human Rights and Human Rights & the Environment; High Seas Alliance; ClientEarth; Opportunity Green; Center for International Environmental Law (CIEL) and Greenpeace International; Advisory Committee on Protection of the Sea (ACOPS); World Wide Fund for Nature (WWF); Our Children's Trust and Oxfam International; Observatory for Marine and Coastal Governance; and One Ocean Hub.

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

46 See also Statute of the Inter-American Court of Human Rights, Adopted by the General Assembly of the OAS at its ninth regular session, held in La Paz, Bolivia, October 1979 (Resolution No 448).

47 Rules of Procedure of the Inter-American Court of Human Rights, entered into force 1 January 2010, approved by the Court during its LXXXV Regular Period of Sessions, held from November 16 to November 28, 2009, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System (updated to June 2010), OEA/Ser.L/V/II.4 rev. 13, 30 June 2010, at 185.

48 IACtHR Rules of Procedure, art 74.

49 *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, IACtHR Advisory Opinion OC-4/84 of 19 January 1984, Ser.A, No 4, §17.

phase, although the Court may decide to dispense with the oral phase.<sup>50</sup> Unlike the ICJ and ITLOS, the IACtHR has very broad standing provisions as set out in Article 73 of the IACtHR Rules of Procedure. Civil society and non-State and non-intergovernmental actors play an important role in all stages of the proceedings. When the Court receives a request for an advisory opinion, the Court must transmit the request to all OAS Member States, the OAS Secretary General and Permanent Council, the Inter-American Commission and OAS organs who may be implicated in the substance of the case.<sup>51</sup> The Court also publishes a request on its website and puts out press releases, so as to ensure that civil society and other relevant actors are well aware of the proceedings.

During the written proceedings, the President is authorised to invite any 'interested party' to submit a written brief on the relevant issues. There is no requirement, as there is before the ICJ, that interested parties are 'likely able to furnish information on the question.'<sup>52</sup> Instead, where the Presidency exercises its discretion to include interested parties, the right to participate is essentially without qualification: 'The Presidency may invite or authorize any interested party to submit a written opinion on the issues covered by the request.'<sup>53</sup> The only exception to the general right to participate is if a State is seeking an advisory opinion on the compatibility of its laws under Article 64(2), in which case the President must first consult with the State concerned before inviting participation from interested parties.<sup>54</sup>

The expansive approach to interested parties is consistent across advisory and contentious proceedings, with Article 44 of the Rules of Procedure allowing for the submission of *amicus curiae* briefs in contentious cases. The Court's Rules of Procedure define *amicus curiae* as being a:

person or institution who is unrelated to the case and to the proceeding and submits to the Court reasoned arguments on the facts contained in the presentation of the case or legal considerations on the subject-matter of the proceeding by means of a document or argument presented at a hearing.<sup>55</sup>

50 IACtHR Rules of Procedure, art 74(4): 'At the conclusion of the written proceedings, the Court shall decide whether oral proceedings should take place and shall establish the date for a hearing, unless it delegates the latter task to the Presidency.'

51 IACtHR Rules of Procedure, art 73(1).

52 ICJ Statute, art 66(2).

53 IACtHR Rules of Procedure, art 73(3).

54 *ibid.*

55 IACtHR Rules of Procedure, art 2(3).

This inclusive approach also extends to oral proceedings. Over time the Court has evolved its practice to hear oral arguments from interested parties, based on a rule used in the context of contentious proceedings, stating that the Court ‘may hear as an alleged victim, witness, expert witness, or in any other capacity, any person whose evidence, statement, testimony or opinion it deems to be relevant.’<sup>56</sup> In recent advisory proceedings, the Court’s practice has consisted of inviting all parties that have submitted written comments to present oral arguments.<sup>57</sup> That approach was followed in the current advisory proceedings on climate change, with the Court receiving a record number of written submissions from over 300 parties.<sup>58</sup>

All of these parties were invited to make oral submissions at three sets of hearings, held in Barbados, a small island developing State, and in Brasilia and Manaus, Brazil, where the intent seemed to be proximity to the Amazon region as a means of signifying the Court’s appreciation of the significance of these proceedings for key ecosystems and Indigenous communities. Many interested parties accepted the opportunity to make oral submissions, which appeared to be grouped according to areas of thematic focus. Most English-speaking, Global North civil society actors were invited to make oral submissions in Barbados,<sup>59</sup> while the remaining parties appeared at the hearings in Brasilia and Manaus. From our observations, this gave each set of proceedings a distinct character, which altered to some extent the role played by civil society. In Barbados, the high concentration of climate legal professionals, invariably but not exclusively from the Global North, meant a more legalistic and technical set of exchanges between the Court and interested parties. This stood in clear contrast to the tenor and substance of oral submissions made in Manaus, where Indigenous groups, Afro-descendant groups, and individuals and organisations representing other vulnerable communities provided oral submissions akin to witness

<sup>56</sup> *ibid*, art 58(a) (emphasis added).

<sup>57</sup> See for example *The Right to Information on Consular Assistance Within the Framework of the Guarantees of Legal Due Process*. Advisory Opinion OC-16/99, Inter-American Court of Human Rights Series A No 16 (1 October 1999) §8; *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*, Advisory Opinion OC-14/94, Inter-American Court of Human Rights Series A No 14 (9 December 1994) §20.

<sup>58</sup> Inter-American Court of Human Rights, *Observations on the Request for Advisory Opinion* (2024), accessed at: [https://www.corteidh.or.cr/observaciones\\_oc\\_new.cfm?nId\\_oc=2634](https://www.corteidh.or.cr/observaciones_oc_new.cfm?nId_oc=2634) (visited on 3 October 2024).

<sup>59</sup> Inter-American Court of Human Rights, *Observations on the Request for Advisory Opinion* (2024), accessed at: <https://www.corteidh.or.cr/tablas/166POS-Barbados/index.html> (visited on 3 October 2024).

testimony, focusing on the impacts of climate change on their lives. Apparent thematic grouping of interested parties allowed the Court to focus on discrete topics in each session. For example, during the hearings in Manaus on 29 May 2024, the Court heard from the International Organisation for Migration, the Office of the United Nations High Commissioner for Refugees, Open Society Justice Initiative, and the Legal Clinic on Cross-border Human Mobility, which allowed a detailed and focused inquiry into the topic of climate migration and displacement.<sup>60</sup> While it is unclear to what extent interested parties collaborated in preparation for these oral hearings, the Court's approach to case management certainly allowed for civil society alignment and cross-fertilisation through the mechanism of the hearing itself. In this way, the Court's proactive approach to civil society seemed to complement the diversity and depth of expertise across the many interested parties participating in the proceedings. This stands in contrast to civil society engagement before ITLOS and the ICJ, but, as we explore in the next Part, that is not necessarily an impediment to their effective utilisation of those proceedings to pursue their goals.

### 3 A More Holistic Account: Observations from the Field

The earlier section demonstrated the formal role of civil society in advisory proceedings, particularly from a technical and procedural vantage point. Of course, the story does not end there. The authors contend that the role of civil society in the advisory opinion (AO) proceedings takes on great significance if one is to 'zoom out' and adopt a more holistic view. The bigger picture reveals that civil society has been an effective user of the AO procedures despite these procedures not being designed for their use. We advance five observations to illuminate that bigger picture.

#### 3.1 *Civil Society is Highly Active in the Field of Climate Litigation*

Climate litigation started with – and is sustained by – the efforts of civil society. Different actors take on different functions and perform different tasks in the field. These actors are often operating synergistically. They are responsible for bringing the lion's share of climate litigation. As Lin and Peel note, such

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60 Inter-American Court of Human Rights, *Observations on the Request for Advisory Opinion* (2024), accessed at: [https://www.corteidh.or.cr/observaciones\\_oc\\_new.cfm?nId\\_oc=2634](https://www.corteidh.or.cr/observaciones_oc_new.cfm?nId_oc=2634) (visited on 3 October 2024).

environmental NGOs have filed (either on their own or as part of a coalition) about 70% of the climate litigation cases in the Global South.<sup>61</sup>

The roles played by civil society actors are many and varied. Some are focused on devising litigation strategies and then investigating and building up cases to sue governments and corporate polluters as parties to the litigation in their own name and right (either separately or in concert with others). Some act on behalf of litigants they have retained as clients, including on pro bono bases. Some may depart from traditional public interest lawyering methods and approach climate litigation as ‘movement lawyers.’<sup>62</sup> Some do not bring litigation directly, but seek to intervene in proceedings as friends of the court or *amicus curiae*. Some do not engage in climate litigation ‘on the record,’ but give support to those who are engaged in such litigation, ranging from advocacy and strategy, legal research, funding and communications. Beyond this, many actors in civil society play an important role in reporting on climate litigation and updating the general public on developments in climate litigation. Many civil society actors can engage in any or all of these strategies at any given time, choosing the most appropriate strategy for the specific circumstances of a given case or desired policy objective.<sup>63</sup>

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61 Lin & Peel (n 3) 149.

62 As to ‘movement lawyering’: see <https://www.movementlawlab.org/about/movement-lawyering>, visited on 3 October 2024 (‘Movement lawyers work in deep collaboration with social movements, leveraging every legal hook possible to build the collective power needed to transform our political and economic systems towards human dignity, multiracial democracy, and ecological harmony.’) The authors note that some practitioners regard the term ‘*movement lawyering*’ as simply a modern term to describe an existing and deeply established approach to strategic litigation carried out for decades by public interest lawyers working in the fields of civil liberties, human rights and environmental law.

63 For example, take ClientEarth, whose many functions are detailed by Lin and Peel in these terms (p. 189): ‘ClientEarth is well-known in the Global North for bringing some of the most ground-breaking climate lawsuits against governments and companies. ClientEarth describes itself as ‘a charity that uses the power of the law to protect people and the planet ... we work on laws throughout their lifetime, from the earliest stages to implementation. And when those laws are broken, we go to court to enforce them. ClientEarth’s work in the Global North has a strong focus on litigation alongside other legal interventions. In contrast, ClientEarth’s work in the Global South focuses on the earlier phases of the lifecycle of the law. This includes stakeholder engagement to support effective implementation of climate change laws, and training lawyers, public prosecutors, and judges. In some instances, ClientEarth lawyers provide legal support to local communities and lawyers in their climate litigation efforts.’



### 3.2 *Civil Society Has Played a Role in Catalysing the Climate Change Advisory Proceedings*

Civil society has long played a role in the development of international law,<sup>64</sup> including by seeking to persuade governments or international agencies to seek authoritative judgments.<sup>65</sup> As Becker has observed in the context of ICJ proceedings, although the Statute of the ICJ provides that only States may appear as parties before the Court, 'other types of actors (non-governmental organizations, corporations, international organizations) can play a key role in persuading States to initiate ICJ proceedings, whether in the form of a contentious case or by supporting an advisory opinion request.'<sup>66</sup> As Becker puts it, civil society can 'play a critical role in creating the conditions that make it feasible to pursue justice at the ICJ, including by shaping how States define their interests and by promoting "the rule of law from below"'.<sup>67</sup>

This has occurred in previous requests for advisory opinions. In the 1990s, a coalition of NGOs led a campaign to have the ICJ furnish an advisory opinion on the question of the legality of nuclear weapons.<sup>68</sup> While two judges expressed concerns about the role of civil society lurking behind the advisory opinion request,<sup>69</sup> most members of the Court raised no concerns over the role of civil society. Civil society has also catalysed the circumstances under which contentious cases are brought.<sup>70</sup>

64 See, eg, Arnold Pronto, 'Some Thoughts on the Making of International Law' (2008) 19 *EJIL* 601, 603.

65 Michael A Becker, 'Pay No Attention to that Man behind the Curtain: The Role of Civil Society and Other Actors in Decisions to Litigate at the International Court of Justice', in *Max Planck Yearbook of United Nations Law* (Brill 2023) 91 (citing, see S Charnovitz, 'Two Centuries of Participation: NGOs and International Governance' (1997) 18 *Michigan JIL* 183, 272–273).

66 *ibid.*, 90 [abstract].

67 *ibid.*, 107.

68 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226.

69 Judge Guillaume noted the intensive work of advocacy groups to secure the resolution and 'to induce States hostile to nuclear weapons' to appear in the proceedings. Judge Guillaume considered that the Court might 'pierc[e] the veil' and find the request inadmissible because it came from 'powerful pressure groups' rather than the UN General Assembly itself: *Legality of the Threat or Use of Nuclear Weapons* (n 69) Separate Opinion of Judge Guillaume, 287–288. Judge Oda considered that the campaign, as led by NGOs, was an improper attempt to short-circuit the political process of negotiation on the subject matter and that civil society involvement had contributed to the very inadequacy of the question put to the Court, which 'did not reflect a meaningful consensus': *Legality of the Threat or Use of Nuclear Weapons* (n 69) Separate Opinion of Judge Oda, 341.

70 Becker (n 65) 99. For instance, this happened in the Whaling Case. Becker recalls the story in the following terms: '[T]he International Fund for Animal Welfare (IFAW) played

Civil society catalysed the ICJ climate change advisory proceedings. A group of law students from the University of the South Pacific are credited with instigating the campaign for an advisory opinion, which was embraced by the Republic of Vanuatu, who then spearheaded the diplomatic campaign for a UNGA resolution requesting an advisory opinion from the Court.<sup>71</sup>

The story is well-known and set out elsewhere.<sup>72</sup> However, it is worth recounting again for the explicit purpose of singling out and appreciating the role that was played by civil society. In a short piece on the role of advocates in the conception of advisory opinion requests,<sup>73</sup> Wewerinke-Singh, Viñuales and Aguon – colleagues, who have together been advising the Republic of Vanuatu in relation to an ICJ climate change advisory opinion from its inception – recount the early phases of work. This recount offers a helpful vignette of the important, catalysing role, that civil society plays. For instance, they recall that:

It all began on the Vanuatu campus of the University of the South Pacific, where students from twelve Pacific Island countries (Cook Islands, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu, and Vanuatu) were tasked with identifying legal strategies for addressing climate change. This group acted as the initial advocates. They conceived the ambitious idea of seeking an advisory opinion from

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a more direct role in laying the foundation for ICJ litigation. After Japan launched a new 'scientific whaling' program in 2005 involving higher catch limits, IFAW convened a series of high-level expert panels to study potential legal strategies to challenge Japan's actions, including an ICJ case. The effort to draw upon professional expertise (rather than IFAW simply proposing that Australia take Japan to the ICJ) gave the idea enhanced credibility. IFAW also found itself in the right place at the right time. Japanese whaling became an issue in the 2007 Australian election as the opposition Labor Party made a pledge to pursue litigation if elected. When the Labor Party then prevailed, Australia, after some delay, took the weighty decision in 2010 to bring the case against Japan, a close ally and trading partner.'

71 V Volvovici, 'Pacific Islands Students Target UN Court as Key Weapon to Fight Climate Change' (16 September 2022) Reuters, available at: <https://www.reuters.com/world/asia-pacific/pacific-islands-students-target-un-court-key-weapon-fight-climate-change-2022-09-16/> (visited 3 October 2024). An alliance of over 1,500 civil society organizations also pledged support for the campaign. Climate Action Network International, 'Thousands of Civil Society Organisations Call on Countries to Support Vanuatu Climate Justice Initiative' (5 May 2022), available at: <https://climatenetwork.org/2022/05/05/thousands-of-civil-society-organisations-call-on-countries-to-support-vanuatu-climate-justice-initiative/> (last visited 3 October 2024).

72 Margaretha Wewerinke-Singh, Jorge E. Viñuales & Julian Aguon, 'The Role of Advocates in the Conception of Advisory Opinion Requests' (2023) 117 *AJIL Unbound* 277–281.

73 *ibid.*

the ICJ on climate change and human rights. They formed an organization, the Pacific Islands Students Fighting Climate Change, and embarked on a campaign to rally support for the idea, emphasizing ‘the obligations of States to protect the rights of present and future generations from the adverse effects of climate change.’

A second track of advocacy emerged when the government of Vanuatu decided to embrace the students’ idea and launched a diplomatic campaign toward its realization. In navigating the legal complexities of the diplomatic process, Vanuatu sought the counsel of Blue Ocean Law, a boutique international law firm from Guam known for its grassroots orientation and commitment to advancing the rights of Indigenous peoples.

Guided by the vision of the Pacific Island youth and Vanuatu leaders, the diverse team at Blue Ocean Law – comprised of both in-house and external counsel – added a third track of advocacy, crafting a legal strategy aimed at generating the legal change that could begin to deliver on the hitherto elusive promise of climate justice for the peoples of the Pacific and the world at large.

While these tracks of advocacy were distinct, the various advocates involved made efforts to ensure that they were mutually reinforcing. The government of Vanuatu and its legal team liaised with the youth leaders to turn their demands into a carefully crafted legal strategy capable of securing the necessary support of UN members while retaining the integrity of the legal question being asked of the ICJ. Dozens of public events featuring youth leaders, Vanuatu officials and members of the legal team, along with other speakers, were held to communicate the various dimensions of the initiative to different audiences.

The youth leaders themselves campaigned with vigor and sophistication, as illustrated by the ‘climate justice flotilla’ sailing past UN headquarters in September 2022. The *vaka*, or traditional canoe, symbolized the journey from the Pacific to the United Nations, its arrival coinciding with Vanuatu’s first official announcement of the initiative at the General Assembly. Banners with ‘Our Survival Is Our Human Right,’ ‘Vote Yes for Climate Justice,’ and ‘Ao Let’s Go’ bolstered the visibility and appeal of the campaign at this critical juncture.

There are at least four intersection points with civil society. The first is at the very outset, with the idea emerging from the collective imagination and dedication of a group of law students from the University of South Pacific. The second is at the commencement of the formal campaign, spearheaded by Vanuatu, where counsel affiliated with Blue Ocean Law were retained to work

with the Republic of Vanuatu in devising a legal strategy for ushering a request for an ICJ advisory opinion through the UNGA. The third intersection is the broader advocacy and campaigning work undertaken by the Youth, which seek to enhance awareness-raising and consensus-building. A fourth intersection point came later, at the various stages of consultation around the negotiation and drafting of the legal question to be referred to the Court, which involved working with youth leaders and grassroots movements.<sup>74</sup> Overall, these efforts helped to create the political and social conditions under which a request for a climate change advisory opinion could be made by the UNGA, by consensus, to the ICJ.

### 3.3 *Civil Society Has Actively Contributed to the Climate Change Advisory Proceedings, Directly and Indirectly, by Employing Various Means and Strategies*

In the context of the climate change advisory proceedings, we have observed various techniques and strategies being deployed by civil society actors, both separately and in concert. We discuss these below.

#### 3.3.1 Making Submissions, as Party or *Amicus Curiae*

We have observed civil society make submissions across each of the three advisory proceedings on climate change, in different ways. The high watermark is the IACtHR advisory opinion proceeding, which attracted civil society submissions from more than 300 organisations, as noted above. These submissions came from a large suite of civil society actors, including local communities and Indigenous peoples, NGOs, individuals with academic or organisational affiliations, academic institutions, individuals in their private capacities, and even an energy company. These submissions are official and on the case file.<sup>75</sup> A large proportion of these civil society actors also made oral submissions at the public hearings in Barbados and Brazil.

Civil society actors also made submissions to both ITLOS and the ICJ in their respective advisory opinion processes, as we set out above. For these proceedings, the written statements submitted by civil society actors are not included as part of the case file. In the ITLOS context, the Tribunal's Registry still added

<sup>74</sup> *ibid.*, 278–279.

<sup>75</sup> Inter-American Court of Human Rights, *Observations on the Request for Advisory Opinion* (2024), accessed at: [https://www.corteidh.or.cr/observaciones\\_oc\\_new.cfm?nId\\_oc=2634](https://www.corteidh.or.cr/observaciones_oc_new.cfm?nId_oc=2634) (visited on 3 October 2024).

civil society submissions to the online case page of the website, consistently with past practice of the Tribunal in an earlier 2013 advisory proceeding.<sup>76</sup>

Whether on the case file or not, civil society submissions play an important role in advisory opinion proceedings. They helpfully add to the suite of materials made available to the Court and to the parties in advance of the hearing. As Judge MacGregor of the IACtHR has recognised in his separate opinion furnished in *Lhaka Honhat*,<sup>77</sup> the active participation of civil society in the procedures and proceedings of the Court, including the *amicus curiae* mechanism, is 'one of the fundamental pillars' of the Court's work and ultimately 'strengthens the multidimensional dialogue in favour of inter-American public order in the region.'<sup>78</sup> Although civil society submissions are less formally authoritative than State and international organisations' submissions, 'they allow the Court to benefit from greater insight regarding domestic and international law and, by drawing on valuable contributions from civil society, [the Court] can gain a panoramic view of the implications of its decision.'<sup>79</sup>

Consistent with these remarks, the authors have observed – in the context of the climate change advisory proceedings – the unique and important contribution that civil society submissions can make. Civil society submissions can be broad and bold. Civil society actors have different stakeholders to States and intergovernmental organisations and this means they may be less constrained (or have different types of constraints) on what they can or cannot say. Of crucial importance, civil society submissions can more readily adopt diverse and distinctive perspectives and inject new and fresh voices into the proceeding. They can act as a bridge between courts and particular people and groups who are affected by and thus have an interest in the advisory proceeding, and who possess knowledge and perspectives that would be of assistance to the Court, but who – by reason of procedural rules and technical constraints – may have no (or limited) formal avenues to intervene in the proceedings. In the context of the climate change advisory opinions, this would encompass groups such as Indigenous peoples and young people, who have contributed least to climate change and are disproportionately affected by its impacts; and who bring distinctive and important perspectives that may be of assistance to a court or tribunal in the exercise of its advisory jurisdiction. In our view, the contributions

76 *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (Advisory Opinion of 2 April 2015), Case No 21, ITLOS Reports 2015, 4.

77 *Case of Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina* (Merits, Reparations and Costs). Inter-American Court of Human Rights Series C No 400 (6 February 2020) §§70–82.

78 *ibid.*, §79.

79 *ibid.*, §79.

of such cohorts have been profound and powerful.<sup>80</sup> The quality of any advisory opinion process on climate change would be diminished if these critical perspectives were entirely absent. Civil society performs a helpful function in bridging the gap and finding pathways for these important contributions.

### 3.3.2 Building Knowledge in Participants to Advisory Opinion Processes and Creating Opportunities for Productive Coordination

Civil society actors are often subject-matter experts. A key function they perform is to impart knowledge on participants to advisory opinion processes who do not necessarily possess specialised knowledge or require some further building of capacity. One way in which civil society does this is by developing and sharing briefing materials. Other ways include facilitating opportunities for knowledge production, information-sharing and coordination. Such strategies have been employed in the context of the climate change advisory proceedings. There have been many resources developed and shared by numerous civil society actors in connection with each of the climate change advisory proceedings.<sup>81</sup> *Amicus curiae* submissions can also be understood as a type of

80 By way of example, the UN Special Rapporteur on the human right to a clean, healthy & sustainable environment said in a Tweet dated 27 March 2024: '[t]he Greenpeace International submission to the International Court of Justice for its advisory opinion on the climate crisis is one of the most powerful legal documents that I have ever read, weaving stories and law into an unorthodox but compelling brief' Available at: <https://twitter.com/Greenpeace/status/1773377611726512135> (visited on 3 October 2024).

81 For example: (1) the Pacific Islands Students Fighting Climate Change released a '*Youth Climate Justice Handbook*', which sought to provide key briefing materials and information for an advisory opinion on climate change and human rights, from the perspective of the youth. The Youth Climate Justice Handbook comprised of three parts: (a) Summary for Policymakers, designed to assist policymakers' decisions regarding whether, and how, their governments should contribute to the ICJ climate advisory proceedings; (b) Legal Memorandum, containing legal analysis on the questions asked of the ICJ in UNGA Resolution 77/276; and (c) a Status Report on the principles of international human rights law relevant to climate change: see <https://www.pisfcc.org/handbook> (visited on 3 October 2024). (2) The Institute for Governance & Sustainable Development prepared several background documents on scientific and legal considerations at the nexus of climate change and human rights to support the efforts of civil society in submitting arguments to the IACtHR in connection with its advisory opinion on *The Climate Emergency and Human Rights*. These briefing materials included a climate science brief; a compendium of climate change and human rights jurisprudence; a collection and summary of secondary sources on climate change and human rights; perspectives on 'fair share' for the purposes of CBDR-RC; analysis of legal remedies to address climate change and protect human rights; and background note on the need for fast near-term climate mitigation to slow feedbacks and tipping points; ad a primer on cutting methane as the best strategy for slowing warming in the decade leading up to 2030:

shared resource, regardless of their status as being formally included in the case file or not. This is particularly true in the unique scenario of three parallel sets of advisory proceedings on climate change with substantial doctrinal overlap, where publicly released submissions by civil society can also be used as a resource to inform written and oral submissions being made before the other courts. It is also reasonable to assume that the vast collective corpus of publicly available legal submissions made before the IACtHR in particular, but also ITLOS and the ICJ, will inform and catalyse future climate litigation at the international, regional and domestic level. The simultaneous public production of such varied legal analyses on almost all dimensions of climate litigation is unprecedented and will be an important resource for the climate litigation and research community for years to come.

Moreover, in our capacities as counsel and legal advisers to various players across the climate change advisory proceedings, we have been involved in events organised by civil society actors which were directed towards sharing knowledge and experience and supporting coordination efforts amongst like-minded participants. This was in part to strengthen common positions and ensure they are put in mutually reinforcing ways; to better understand areas of divergence; and workshop approaches and responses to any contrary arguments or positions. Such opportunities took various forms, be it online or in-person, and in both open and closed environments. These opportunities are particularly important as they help to improve the quality of argumentation in the advisory opinion process, before arguments are put to the relevant court or tribunal.

### 3.3.3 Campaigning

A byproduct of litigation is that it can pave the way for other campaigning, advocacy and awareness-raising pursuits. And the reverse is also true: such pursuits can identify legal issues on which litigation strategies can be

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see <https://www.igsd.org/contributions-to-the-inter-american-court-of-human-rights-advisory/> (visited on 3 October 2024). (3) ClientEarth published a legal analysis on the legal issues raised by the request for an ITLOS advisory opinion in March 2023, ahead of the deadline for Written Statements in June 2023 and the hearing in September 2023: see [https://www.clientearth.org/media/cispsafh/itlosao\\_legal-briefing\\_final.pdf](https://www.clientearth.org/media/cispsafh/itlosao_legal-briefing_final.pdf) (viewed 3 October 2024). (4) CIEL, ClientEarth, the Pacific Islands Students Fighting Climate Change, and World Youth for Climate Justice published a joint legal memorandum following the release of the ITLOS Advisory Opinion, identifying key matters which they jointly consider '*could – and should – be taken into consideration*' for the purposes of the ICJ AO process: see <https://www.ciel.org/reports/legal-memorandum-advisory-opinion-on-climate-change-itlos/> (visited on 3 October 2024).



developed and implemented. In the context of climate change, the synergies are well-understood and many civil society actors operate at the intersection point. From the perspective of the climate change advisory proceedings, two observations can be made. First, some civil society actors have leveraged the opportunity presented by the climate change advisory opinions to advance related campaigns. One illustration of this is provided by the attention given to fossil fuels. For example, the Fossil Fuel Non-Proliferation Treaty Initiative – a TAN dedicated to a global campaign calling for a multilateral process to phase out fossil fuel production and use – advanced an argument in the IACtHR AO proceeding that sought to develop the critical link between fossil fuel production, the climate crisis and existing obligations under human rights law.<sup>82</sup> Second, as we have already mentioned, the ICJ advisory opinion process itself emerged out of a campaigning effort which commenced with students from the University of South Pacific, and increased momentum from the efforts of other civil society actors,<sup>83</sup> which ran parallel and complementary to the diplomatic campaign spearheaded by Vanuatu.

### 3.3.4 Reporting and Public Education

Civil society reports on and provides an educative function in relation to the climate change advisory proceedings (and other developments in climate litigation). This includes publishing explanations of the advisory opinions,<sup>84</sup> publishing summaries of submissions made to the advisory proceedings,<sup>85</sup>

82 *Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile*, Amicus Brief of the Fossil Fuel Non-Proliferation Treaty Initiative, available at: [https://corteidh.or.cr/sitios/observaciones/OC-32/8\\_fossil\\_fuel.pdf](https://corteidh.or.cr/sitios/observaciones/OC-32/8_fossil_fuel.pdf) (visited on 3 October 2024).

83 For example, Greenpeace's vessel – the Rainbow Warrior – did a tour around various island nations as part of their campaign for an ICJ advisory opinion: see Kate O'Callaghan, 'Groundbreaking Climate Campaign sets sail for International Court of Justice' (Greenpeace News, 29 March 2023), available at <https://www.greenpeace.org.au/news/groundbreaking-climate-campaign-sets-sail-for-international-court-of-justice/> (visited on 3 October 2024).

84 Client Earth put out explainers on each of the three climate change advisory opinions: see <https://www.clientearth.org/campaigns/international-court-actions/> (visited on 3 October 2024).

85 For example, CIEL has set out on its website key arguments ventilated within the ITLOS process: see <https://www.ciel.org/at-historic-itlos-hearings-states-stake-out-positions-on-climate-duties-and-ocean-protection/> (visited on 3 October 2024); and supplied links and summaries of key amicus briefs submitted to the ICJ and the Inter-American Court of Human Rights in relation to their respective climate change advisory processes: see <https://www.ciel.org/issue/amicus-briefs/> (visited on 3 October 2024).

providing updates in real-time on the proceedings as they are being carried out,<sup>86</sup> and publishing analyses and commentaries on the advisory opinions once they have been furnished.<sup>87</sup> These contributions are important; by shining a spotlight on the procedure and increasing the general knowledge and awareness of the public, these efforts help to set a culture of expectation and accountability around the advisory procedures, which promotes bona fide engagement with the advisory procedure by its participants and safeguards against abuse of process and bad faith.

### 3.4 *Civil Society Has an Important Role in Supporting the Implementation of Advisory Opinions*

Civil society plays a critical role in promoting the outcomes of the advisory opinions and in pursuing efforts to ensure their implementation. Civil society organisations may pursue other avenues, both political and legal – including further litigation – as a means of implementing an advisory opinion.

For instance, it has been observed that the judgments of the IACtHR constitute a ‘crucial tool’ for those in the human rights community when pushing for state compliance on the international plane and challenging laws and practices before domestic courts. In this way, the decision of the court plays a salient role in ‘empowering domestic actors to advocate legal or policy changes in order to improve the living conditions for people in the region.’<sup>88</sup> This rings true when tracking the influence of the 2017 advisory opinion of the IACtHR on the relationship between human rights and the environment, in which the court articulated an autonomous right to a healthy environment and a vision of extraterritoriality for human rights obligations under the American

86 For example, on 29 March 2023, Greenpeace tweeted: ‘*BREAKING The UN just unanimously passed a resolution calling for an advisory opinion from the highest court in the world on climate change and human rights*’: available at <https://x.com/Greenpeace/status/1641102618217914370> (visited on 3 October 2024). Greenpeace gave live updates to the IACtHR AO hearings in April, see <https://x.com/Greenpeace/status/1783189301775204415> (visited on 3 October 2024).

87 See, eg, CIEL, ClientEarth, the Pacific Islands Students Fighting Climate Change, and World Youth for Climate Justice published a joint legal memorandum following the release of the ITLOS Advisory Opinion, identifying key matters which they jointly consider ‘*could – and should – be taken into consideration*’ for the purposes of the ICJ AO process: see <https://www.ciel.org/reports/legal-memorandum-advisory-opinion-on-climate-change-itlos/> (visited on 3 October 2024).

88 Lisa Mardikian, ‘The Right to a Healthy Environment before the IACtHR’ (2023) 72 *ICLQ* 945, 952.

Convention.<sup>89</sup> This 2017 advisory opinion has been relied upon routinely in climate litigation brought by civil society at the international, regional and national levels respectively.<sup>90</sup>

In the context of the climate change advisory proceedings, at the time of writing, only the ITLOS advisory opinion has been handed down. Civil society has championed that advisory opinion, both for the purpose of trying to ensure further gains (and avoid backsliding) in the upcoming ICJ advisory opinion proceedings, but also for the purpose of transposing the guidance provided by ITLOS to improve prospects in other contentious climate litigation efforts at the local, regional and global levels. They have done so in numerous forms, from blog posts,<sup>91</sup> through to academic discussion papers,<sup>92</sup> and joint legal briefings.<sup>93</sup>

89 *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)* Advisory Opinion OC-23/17, Inter-American Court of Human Rights Series A No 23 (15 November 2017).

90 See, eg, Committee on the Rights of the Child, *Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child, concerning Communication Nos 104–107/2019: Chiara Sacchi et al v Argentina, Brazil, France, and Germany* (CRC/C/88/D/104/2019, CRC/C/88/D/105/2019, CRC/C/88/D/106/2019, CRC/C/88/D/107/2019), 11 November 2021, §§10.5, 10.7, 10.12; UN Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No 3624/2019: Daniel Billy et al v Australia*, CCPR/C/135/D/3624/2019, 22 September 2022, para. 3.4; *Verein Klimasenioren Schweiz and Others v Switzerland* (App No 53600/20) ECtHR [GC] 9 April 2024, §225; *Duarte Agostinho and Others v Portugal and 32 Other States* (App No 39371/20) ECtHR [GC] 9 April 2024, §§59, 63; *Ranjitsinh v Union of India* (2024) INSC 280, §32 (India); *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* (No 6) [2022] QLC 21, §1431 (Australia).

91 See, eg, Dr Constantinos Yiallourides, Professor Surya Deva, “A Commentary on ITLOS’ Advisory Opinion on Climate Change (24 May 2024) *British Institute of International and Comparative Law Blog*, available here: <https://www.biicl.org/blog/77/a-commentary-on-itlos-advisory-opinion-on-climate-change?cookieconsent=1&ts=1728009659>.

92 See, eg, Margaret Young, Jacqueline Peel, Ellycia Harrould-Kolieb & Janine Felson, ‘ITLOS’ Climate Opinion: What’s its significance?’ (July 2024) *Melbourne Climate Futures* (Discussion Paper), available at: [https://www.unimelb.edu.au/\\_data/assets/pdf\\_file/0010/4999627/MCF-Discussion-Paper\\_ITLOS-opinion\\_v.2.pdf](https://www.unimelb.edu.au/_data/assets/pdf_file/0010/4999627/MCF-Discussion-Paper_ITLOS-opinion_v.2.pdf).

93 See, eg, CIEL, ClientEarth, Pacific Islands Students Fighting Climate Change, World’s Youth for Climate Change, *Legal Memorandum: Advisory Opinion on Climate Change Delivered by the International Tribunal for the Law of the Sea: Relevance for the International Court of Justice Climate Advisory Proceedings* (July 2024), available at: [https://www.clientearth.org/media/wfhckdoq/final\\_legal-memorandum\\_relevance-of-itlos-climate-ao-for-the-icj-ao-2.pdf](https://www.clientearth.org/media/wfhckdoq/final_legal-memorandum_relevance-of-itlos-climate-ao-for-the-icj-ao-2.pdf) (viewed 3 October 2024).

### 3.5 *Civil Society's Use of the Advisory Procedures Has Improved the Prospects for Climate Litigation*

Some may assume that, at first blush, an advisory opinion does not assist the efforts of climate litigation at the domestic level. An advisory opinion seeks to clarify the state of existing law, *for States*, so they can manage their relations and conduct with *other States* within a framework of cooperation. Yet, we observe that civil society actors are using the advisory procedure – a procedure that is not designed for their use – to improve prospects of climate litigation efforts at local, domestic and transnational levels.

To explain this further, it is helpful to draw on and adapt a concept developed by Lin and Peel to describe multi-scalar activities carried out by civil society in the context of TANs.<sup>94</sup> Drawing on Keck and Sikkink,<sup>95</sup> Lin and Peel describe a process by which domestic NGOs bypass their state and seek support from international allies to bring pressure to bear on the State from outside their system. International actors in turn pressure key state actors, corporations and intergovernmental bodies, providing key legitimacy and impetus to the efforts of domestic NGOs.<sup>96</sup>

Adapted to our context, the various actors engaging collaboratively in climate litigation efforts – at local, regional and global levels – can be viewed as a TAN. Given that most strategic litigation is brought by civil society actors and that these same actors have had a hand in catalysing the climate change advisory opinion processes, we can see that these actors are operating in a multi-scalar capacity. Civil society has therefore used the advisory processes as an opportunity to engage international courts and tribunals in their advisory capacities, bypassing domestic courts and other dispute settlement mechanisms at local and transnational levels, so as to induce international and external pressure on domestic courts and other actors.

By engaging with ITLOS, the IACtHR and the ICJ respectively, these civil society actors are hoping that favourable advisory opinions will make contentious climate litigation become more reasonable and enjoy increased prospects of success. This relies on the Courts clarifying the state of law in such a way as to alleviate some of the prevailing difficulties in climate litigation at present, thereby ushering in a new and better era of climate litigation.

At the time of writing, we are only partway through this multi-scalar process. Based on the ITLOS advisory opinion, there are already opportunities for civil society to leverage in their contentious climate litigation efforts. For

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94 Lin & Peel (n 3) 153–154.

95 Keck & Sikkink (n 7) 20.

96 Lin & Peel (n 3) 153–154.

example, ITLOS advised that the UN climate regime is not *lex specialis*. While the Paris Agreement is relevant, State obligations under the Convention are distinct and are not satisfied simply by complying with obligations and commitments under Paris.<sup>97</sup> This is significant for the efforts of civil society in pursuing climate litigation in a contentious arena where domestic courts can be reticent to enter the fray on the polycentric issues of policy which are raised by climate change, particularly in circumstances where States have entered into a framework of cooperation on these issues at the international level through the UNFCCC Conference of the Parties (COP) process. The understanding of that regime as not *lex specialis*, but as applying concurrently with UNCLOS, is helpful in that it shows how climate change is not a discrete area to be substantively regulated by a single instrument or regime. This reduces the legitimacy risks associated with ‘cutting across’ the COP-negotiation processes. Once it is accepted that the COP process is but one mechanism by which States can cooperate around climate change, which does not have a feature of exclusivity (or primacy), it becomes much more palatable for a court to apply the applicable law to quell disputes that arise in the context of climate change and its impacts.

Further, the ITLOS advisory opinion clarified that the standard of conduct applicable to relevant obligations under the Convention is ‘stringent’ due diligence.<sup>98</sup> All necessary measures must be taken to discharge that standard, where necessary measures must be determined objectively, considering the best available science, relevant international rules and standards, and State capabilities.<sup>99</sup> Moreover, the standard of due diligence is especially stringent in the context of transboundary harm.<sup>100</sup> As part of exercising due diligence in taking necessary measures to protect and preserve the marine environment, States must ensure non-state actors (eg fossil fuel companies) under their jurisdiction or control comply with such measures.<sup>101</sup> Civil society has therefore secured the benefit of the first judicial pronouncement of a burdensome due diligence standard in the context of climate change, involving a requirement that corporate emitting conduct must be regulated. These are positions which are familiar to numerous civil society actors engaged in or working on climate litigation, but now – with the clarifications of ITLOS (and possibly also

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97 *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (Advisory Opinion, 21 May 2024) ITLOS Case No 31, §§222–224.

98 *ibid* §§241–243, 256, 258, 398–400.

99 *ibid* §§207–229, 243.

100 *ibid* §§256, 258.

101 *ibid* §396.

the IACtHR and the ICJ) – these arguments will land with more force in future climate litigation.

The full gamut of opportunities (and risks) this multi-scalar approach will bring to future climate litigation efforts remains to be seen. We expect the IACtHR to provide a helpful clarification of the role of human rights law in this regard; and the International Court of Justice to deliver a careful and nuanced articulation of existing international law obligations across the whole corpus of international law for states who have, by their GHG emissions over time, contributed to causing significant harm to the climate system and other parts of the environment. With this, the authors are hopeful that the advisory opinions will bring about a recalibration of how climate litigation (and climate law generally) is handled and will yield more ambitious climate action as a result. Of immediate relevance, such a recalibration would empower civil society to pull more levers in their climate litigation strategies moving forward.

#### 4 Conclusion

Civil society has played a significant role in catalysing, supporting and participating in the climate change advisory proceedings before the IACtHR, ITLOS and the ICJ. With the exception of the IACtHR, which has adapted its procedure over time to recognise civil society as a ‘fundamental pillar’ of the Court’s work,<sup>102</sup> civil society actors have traditionally had a limited formal role before ITLOS and the ICJ. This lack of a formal role has not been an impediment to comparatively high levels of civil society participation by way of *amici curiae* before ITLOS and the ICJ, notwithstanding the fact that such submissions do not form part of the case file. Many of the same civil society actors have been active across the three advisory opinions, which goes some way to explaining this level of engagement despite natural questions about its strategic utility for resource-constrained public interest organisations.

Despite these restrictions, this chapter has sketched a bigger picture in which civil society can be seen in practice as effective and highly strategic users of advisory procedures. We have explored the way in which civil society has been active in climate litigation at the domestic, regional and now international level; its role as a key catalyst for the advisory opinions, particularly in the proceedings before the ICJ; the manner in which civil society has creatively used the advisory opinion processes to directly and indirectly influence the

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<sup>102</sup> *Case of Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina* (n 78) Separate Opinion of Judge Ferrer Mac-Gregor Poisot, §79.

proceedings and build capacity; civil society's key role as a champion supporting the implementation of advisory opinions after they are handed down; and finally have offered some reflections on the manner in which civil society is likely to leverage the advisory opinions to further their domestic, regional and international litigation strategies.

As practitioners in the field, we consider that civil society has enhanced the quality of the advisory proceedings and improved prospects for more meaningful climate action. This is perhaps unsurprising; the various actors within civil society are highly motivated, perform myriad functions, and have sophisticated strategies which all coalesce around a shared goal to address the climate crisis. Any court that is confronted with a case concerning climate change would in our view be well assisted by the work carried out by civil society in the climate litigation field.