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Beyond Climate Change Obligations

Which Lessons from the ITLOS Advisory Opinion on Climate Change and Ocean Acidification for the Progressive Development of the Law of the Sea?

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Abstract

Although scholars largely agree that the United Nations Convention on the Law of the Sea (UNCLOS) is a "living instrument", the case law shows UNCLOS tribunals' reluctance to fully engage with questions other than those strictly speaking regulated under the Convention. Amongst these are questions relating to the protection of marine biodiversity and human rights, which have frequently arisen in the context of UNCLOS disputes but received considerably little attention. This is particularly surprising, given the interconnected nature of the marine environment with biodiversity and ecosystems, and with the rights of the communities thriving on them.

Against this background, the present paper unpacks the principle of systemic integration as discussed by the International Tribunal for the Law of the Sea in its 2024 Advisory Opinion, investigating two mechanisms regulating the relationship between UNCLOS and other international instruments, namely the rule of reference technique and Article 237 UNCLOS. Then, it shifts the focus onto international biodiversity law and international human rights law, critically assessing to what extent the Tribunal's cautious approach to these two regimes was justified in the light of systemic integration. Finally, it offers some remarks on the prospects of litigating the conservation of marine biodiversity and the protection of human rights before UNCLOS international dispute settlement mechanisms.

Keywords

climate change – marine biodiversity – human rights – systemic integration – *ratione materiae* jurisdiction – applicable law

1 Introduction

On May 21st, 2024, the International Tribunal for the Law of the Sea (ITLOS) delivered its Advisory Opinion on State obligations regarding climate change and ocean acidification requested by the Commission on Small Island States on Climate Change and International Law (COSIS).[1] The Opinion marks the year when global efforts to bring climate change issues before international adjudication finally yielded its first results: this is the first of three advisory proceedings on climate change to come to an end,[2] and the second time in less than two months that an international court deliberates on it.[3] Notably, the unprecedented number of States and non-State actors participating in the proceedings[4] reflects not only the importance and urgency to address "one of the greatest challenges of our time",[5] but also the recognition of climate change as a "common concern of humankind".[6]

1 ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion, Case No. 31, 21 May 2024 [hereinafter, *Opinion*].

2 Two more advisory proceedings are currently pending before the International Court of Justice (ICJ) and the Inter-American Court on Human Rights (IACtHR). See respectively International Court of Justice, *Request for Advisory Opinion transmitted to the Court pursuant to General Assembly resolution 77/276 of 29 March 2023, Obligations of States in Respect of Climate Change*, available at https://www.icj-cij.org/sites/default/files/case-related/187/187-20230412-app-01-00-en.pdf, and 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, January 9, 2023, available at https://www.corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf.

3 European Court of Human Rights (ECtHR), *Case of Verein Klimaseniorinnen Schweiz and Others v.* Switzerland, judgment of 9 April 2024, no. 53600/20; ECtHR, *Case of Carême v. France*, judgment of 9 April 2024, no. 7189/21; ECtHR, *Case of Duarte Agostinho and Others v Portugal and 32 Others*, judgment of 9 April 2024, no. 39371/20.

4 More precisely, 34 States, 9 Intergovernmental Organisations, and 10 non-State actors. Further information available at https://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/.

5 UN General Assembly Resolution 67/210 of 21 December 2012 (A/RES/67/210), para. 2.

6 Para. 122 Opinion. See also UN General Assembly Resolution 43/53 of 6 December 1988 (A/RES/43/53), para. 1. See also the first consideranda of the United Nations Framework

In its Request from December 2022 (Request),[7] the COSIS asked the Tribunal to clarify the content of the obligations of State Parties to the United Nations Convention on the Law of the Sea (UNCLOS),[8] including under Part XII, to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change and ocean acidification and are caused by anthropogenic greenhouse gas emissions into the atmosphere (Question a), and to protect and preserve the marine environment in relation to climate change impacts and ocean acidification (Question b).[9] Unsurprisingly, given that climate change and ocean acidification are not explicitly mentioned under UNCLOS, the Tribunal heavily relied on the principle of systemic integration to interpret and apply

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Convention on Climate Change (UNFCCC), adopted in New York on 9 May 1992 and entered into force on 21 March 1994, 1771 *United Nations Treaty Series*, p. 107; and the eleventh considerandа of the Paris Agreement adopted in Paris on 12 December 2015 and entered into force on 4 November 2016, 3156 *United Nations Treaty Series*, p. 79.

7 *Request for Advisory Opinion of 12 December 2022, submitted by the Commission of Small Island States on Climate Change and International Law*, available at https://itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf.

8 United Nations Convention on the Law of the Sea (UNCLOS), adopted in Montego Bay on 10 December 1982 and entered into force on 16 November 1994, 1834 *United Nations Treaty Series*, p. 397.

9 For the full text of the questions, see Request (n 7) 2. On the questions brought before the Tribunal and the scope of its jurisdiction, see *ex multis*, Richard Barnes, "An Advisory Opinion on Climate Change Obligations Under International Law: A Realistic Prospect?" 53 *Ocean Development & International Law* (2022), pp. 180–213; Yoshifumi Tanaka, "The role of an advisory opinion of ITLOS in addressing climate change: Some preliminary considerations on jurisdiction and admissibility" 32 *Review of European, Comparative & International Environmental Law* (2023), pp. 206–216; Pierre Clément Mingozzi, "The Contribution of ITLOS to Fight Climate Change: Prospects and Challenges of the COSIS Request for an Advisory Opinion" 3 *The Italian Review of International and Comparative Law* (2023) pp. 306–324. On ITLOS Advisory jurisdiction, see generally, Tullio Treves, "Advisory Opinions Under the Law of the Sea Convention", in John Norton Moore and Myron H. Nordquist (eds.), *Current Marine Environmental Issues and the International Tribunal for the Law of The Sea* (2001) pp. 81–93; Jesus, "Article 138 of the Rules of the Tribunal: Commentary", in P. Chandrasekhara Rao and Philippe Gautier (eds), *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (2006) pp. 373–394. For a more recent account, see Loris Marotti, "Sulla funzione consultiva del tribunale internazionale del diritto del mare" Anno XCVIII Fasc. 4 *Rivista di Diritto Internazionale* (2015) pp. 1171–1197; Michael Wood, "Understanding the Advisory Jurisdiction of the International Tribunal for the Law of the Sea" in International Tribunal for the Law of the Sea (ed), *The Contribution of the International Tribunal for the Law of the Sea to the Rule of Law: 1996–2016* (2018); Minna Yu, "Advisory Jurisdiction of the International Tribunal for the Law of the Sea as a Full Court: Legal Basis and Limits" in Proshanto K. Mukherjee, Maximo Q. Mejia Jr. and Jingjing Xu (eds.), *Maritime Law in Motion* (2020) pp. 741–760.

the Convention and the relevant climate change treaties through the lens of their "contribution to some generally shared – 'systemic' – objective".[10] Thus, upon establishing that climate change falls under the material scope of the Convention,[11] ITLOS concluded that UNCLOS must be interpreted in the light of State obligations under the existing climate change instruments, in particular the United Nations Framework Convention on Climate Change (UNFCCC)[12] and the Paris Agreement.[13]

Progressive as it is, such a conclusion was very much expected. With very few exceptions,[14] the vast majority of States and non-State actors had found greenhouse gas (GHG) emissions to fall under the definition of "marine pollution" under Article 1(1)(4) UNCLOS,[15] calling upon the Tribunal to accept an interpretation of the Convention in the light of State obligations under the climate change regime.[16] By contrast, ITLOS took a rather cautious approach to the question whether other treaties informed the interpretation and application of UNCLOS obligations with respect to climate change and ocean acidification.

10 Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", A/CN.4/L.682 (13 April 2006) [*ILC Report on Fragmentation*], para. 412.

11 An opinion largely accepted in the legal scholarship: see, *inter alia*, Alan Boyle, "Climate Change, Ocean Governance and UNCLOS" in Jill Barrett and Richard Barnes (eds), *Law of the Sea: UNCLOS as a Living Treaty* (2016), pp. 211, 217–218; Detlef Czybulka, "Article 192", in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (2017), p. 1278, para. 2; James Harrison, *Saving the Oceans Through Law* (2017), p. 255; Rozemarijn J. Roland Holst, "Taking the current when it serves: Prospects and challenges for an ITLOS advisory opinion on oceans and climate change" 32 *Review of European, Comparative & International Environmental Law* (2023), p. 217, 221; Douglas Guilfoyle, Oral evidence to the House of Lords International Relations and Defence Committee – Corrected oral evidence: UNCLOS: fit for purpose in the 21st century? (24 Nov 2021), available at https://committees.parliament.uk/oralevidence/3126/html/.

12 UNFCCC (n 6).

13 Paris Agreement (n 6).

14 See the written statements of China, Brazil and Indonesia, available at 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/. Notably, Indonesia expressly denies greenhouse gas emissions to fall under the scope of the Convention. See Section IV of Indonesia's written statement, available at https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-13-Indonesia.pdf, paras. 57–64.

15 Paras. 159–179 Opinion.

16 Ibid., Rozemarijn J. Roland Holst; see also Elisa Morgera and Mitchell Lennan, "Ensuring mutual supportiveness of the Paris Agreement with other multilateral environmental agreements: a focus on ocean-based climate action" in Alexander Zahar (ed), *Research Handbook on the Law of the Paris Agreement* (2024), pp. 362–380.

In particular, references to the Convention on Biological Diversity (CBD)[17] or to other instruments belonging to the corpus of international biodiversity law as broadly defined[18] are rather sparse. Likewise, the Tribunal employs explicit human rights language only once throughout the entire Opinion,[19] refraining from referring to any specific human rights treaties or obligations. Given the considerable number of States and non-State actors expressly invoking a systemic interpretation of UNCLOS obligations in the light of these other treaties, this appears in stark contrast with its findings on climate change treaties.

Against this background, the present paper unpacks the Tribunal's reasoning in respect of State obligations under the climate change regime and explores its applicability to international biodiversity and human rights treaties. After a brief introduction on the principle of systemic integration, I analyse two mechanisms regulating the relationship between the Convention and external instruments on the protection and preservation of the marine environment, namely the rule of reference technique and Article 237 UNCLOS, and how these are applied to enhance harmonisation between UNCLOS and climate change treaties. Then, I shift the focus onto international biodiversity law and international human rights law, critically assessing whether the Tribunal's cautious approach to these two regimes was justified in the light of the systemic integration method employed throughout the entire Opinion. Finally, I offer some concluding remarks on the prospects of litigating the conservation of marine biodiversity and the protection of human rights before UNCLOS tribunals.

2 Systemic Integration and the Mutually Supportive Interpretation of UNCLOS Obligations

The Tribunal's reasoning on the applicable law builds on the principle of systemic integration,[20] enshrined in Article 31(3)(c) of the Vienna Convention on

17 Convention on Biological Diversity (CBD), adopted in Rio de Janeiro on 5 June 1992 and entered into force on 29 December 1993, 1760 *United Nations Treaty Series*, p. 79.

18 *Inter alia*, Sandrine Maljean-Dubois, *International Biodiversity Law – The Hague Academy Special Editions* (2024).

19 Para. 66 Opinion.

20 Para 135 Opinion. On systemic integration, *inter alia*, ILC Report on Fragmentation (n 10), paras. 410–480; Campbell McLachlan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention on the Law of Treaties" 54 *International & Comparative Law Quarterly* (2008), pp. 279–320; Campbell McLachlan, *The Principle of Systemic Integration in International Law* (2024). Specifically on the interpretation of the UNCLOS, *ex multis*, Roberto Virzo, "The 'General Rule of Interpretation' in the

the Law of Treaties (VCLT).[21] Systemic integration is a principle of treaty interpretation according to which international law norms are not to be interpreted and applied in isolation from each other, but rather "within the framework of the entire legal system prevailing at the time of the interpretation".[22] Hence, the wording of Article 31(3)(c) VCLT, which requires that treaty interpretation takes into account "any relevant rules of international law applicable in the relations between parties",[23] including both treaty and customary norms.

Systemic integration is particularly suitable to address complex challenges straddling legal boundaries, thereby requiring that States comply with obligations under multiple regimes in a consistent manner and in such a way as to avoid normative conflicts. Climate change and ocean acidification constitute such challenges: the Tribunal's express reference to systemic integration acknowledges this complexity and anticipates that its process of legal reasoning will be informed by "a sense of coherence and meaningfulness"[24] with a view to ensuring the highest degree of coordination and harmonisation among the different regimes concerned.

UNCLOS contains a specific norm that embodies the principle of systemic integration, namely Article 293. Paragraph 1 reads as follows: "A court or tribunal having jurisdiction under [section XV UNCLOS] shall apply th[e] Convention and other rules of international law not incompatible with th[e] Convention".[25] Starting from ITLOS' first case on the merits,[26] the second part of this paragraph has sparked a heated debate as to the exact scope of the wording "other rules of international law not incompatible with th[e] Convention",

International Jurisprudence Relating to the United Nations Convention on the Law of the Sea" in Angela Del Vecchio and Roberto Virzo (eds.), *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals* (2019) pp. 15–38; Irini Papanicolopulu, *International Law and the Protection of People at Sea* (2018), p. 75. Specifically on the function of the principle in climate change litigation, see Monica Feria-Tinta, "The Master Key to International Law: Systemic Integration in Climate Change Cases" 13 *Cambridge International Law Journal* (2024) pp. 20–40.

21 Vienna Convention on the Law of Treaties (VCLT), adopted in Vienna on 23 May 1969 and entered into force on 27 January 1980, 1155 *United Nations Treaty Series*, p. 331.

22 *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*) *notwithstanding Security Council Resolution 276* (*1970*), Advisory Opinion, I.C.J. Reports 1971, p. 16, para. 53.

23 Article 31(3)(c) VCLT.

24 ILC Report on Fragmentation (n 10), para. 419.

25 Article 293(1) UNCLOS.

26 *M/V "SAIGA"* (*No. 2*) (*Saint Vincent and the Grenadines v. Guinea*), Judgment, ITLOS Reports 1999, p. 62.

with opposing views both on UNCLOS benches[27] and in the literature.[28] While this debate is arguably not fully settled yet, the dominant view considers this to be a reference to "foundational or secondary rules of general international law such as the law of treaties or the rules of State responsibility", or to "primary rules of international law other than the Convention" as necessary to interpret and apply particularly "broadly worded or general provisions [...] of the Convention".[29]

Leaving aside such debate, the Tribunal rests on a progressive interpretation of Article 293(1) UNCLOS. The text of this provision is replicated nearly verbatim in paragraph 127 of the Opinion, where ITLOS concluded that "the Convention, the COSIS Agreement and other relevant rules of international law not incompatible with the Convention constitute the applicable law in this case",[30] thereby anticipating the significant weight that such non-incompatible rules will have in its reasoning. Hence, it observed that three mechanisms regulate the relationship between UNCLOS and other non-incompatible rules, namely the rule of reference, Article 237 UNCLOS, and the principle of systemic integration. Having already described systemic integration above, below I focus on the first two mechanisms.

2.1 *The Rule of Reference*

The rule of reference – or *renvois* – is a legal writing technique consisting of a provision that recalls external substantive rules, technical standards, or non-binding guidelines and procedures – known as Generally Accepted International Rules and Standards, or GAIRS – with a view to informing the

27 The *M/V Saiga No. 2* finding on Article 293(1) UNCLOS was upheld in the *Guyana v Suriname* Award; *Guyana v. Suriname*, PCA Case No. 2004-04, award of 17 September 2007; *contra*, *MOX Plant Case* (*Ireland v. United Kingdom*), PCA Case No. 2002-01, Order no. 3 of 24 June 2003; *The Arctic Sunrise Arbitration* (*Netherlands v. Russia*), PCA, Case No. 2014-02, Award of 14 August 2015; *Duzgit Integrity Arbitration* (*Malta v. Sao Tome and Principe*), PCA, Case No. 2014-07, Award of 24 August 2015.

28 *Inter alia*, Michael Wood, "The International Tribunal for the Law of the Sea and General International Law", 22 *International Journal of Marine and Coastal Law* (2007), pp. 351–367, 357; cfr. Bernard H Oxman, "Courts and Tribunals: the ICJ, ITLOS, and Arbitral Tribunals", in Donald R. Rothwell et al. (eds.), *The Oxford Handbook of the Law of the Sea* (2015), pp. 394–416, 414; see also Peter Tzeng, "Jurisdiction and Applicable Law under UNCLOS", 126 *The Yale Law Journal* (2016), pp. 242–260; James Harrison, "Defining Disputes and Characterizing Claims: Subject-Matter Jurisdiction in Law of the Sea Convention Litigation", 48 *Ocean Development & International Law* (2017), pp. 269–283. See contra, Kate Parlett, "Beyond the Four Corners of the Convention: Expanding the Scope of Jurisdiction of Law of the Sea Tribunals", 48 *Ocean Development & International Law* (2017) pp. 284–299.

29 *The Arctic Sunrise Arbitration* (n 27), paras. 190 and 191.

30 Para. 127 Opinion.

interpretation of the obligations laid out in the referring instrument.[31] As such, it is a mechanism of openness and progressive change,[32] for it exposes the referring instrument to changes occurring under different legal regimes, thus allowing it to stay up-to-date with developments and challenges in the international legal system and, more broadly, within society.[33]

In addition, rules of reference are frequently formulated in different ways, reflecting a fundamental distinction between, on the one hand, *renvois* merely recalling external rules and standards and, on the other, *renvois* incorporating them into the referring instrument. In other words, their effect varies depending on their formulation, ranging from the *de facto* incorporation of a rule into the referring instrument, which may lead to its concrete application in the context of a dispute,[34] to the expansion of the material scope of the obligation set forth in the referring provision in the context of its interpretation and application.

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31 *Ex multis*, Daniel Vignes, "La valeur juridique de certaines règles, normes ou pratiques mentionnées au TNCO comme 'généralement acceptées'", 25 *Annuaire Français de Droit International* (1979) pp. 712–718; Wim Van Reenen, "Rules of Reference in the new Convention on the Law of the Sea in particular connection with pollution of the sea by oil from tankers", XII *Netherlands Yearbook of International Law* (1981), pp. 3–44; Budislav Vukas, "Generally Accepted International Rules and Standards", in William T. Vukowich (ed) *The Law of the Sea – Selected Writings* (2004) pp. 25–37, originally published in Alfred Soons (ed) *The Implementation of the Law of the Sea Convention Through International Institutions* (1990); Bernard H Oxman, "The Duty to Respect Generally Accepted International Standards", 24 *New York University Journal of International Law & Politics* (1991) pp. 109–159; Mathias Forteau, "Les renvois inter-conventionnels", 49 *Annuaire français de droit international* (2003), pp. 71–104; Catherine Redgwell, "Mind the Gap in the GAIRS: The Role of Other Instruments in LOSC Regime Implementation in the Offshore Energy Sector", 29 *The International Journal of Marine and Coastal Law* (2014) pp. 600–621; Lan Ngoc Nguyen, "Expanding the Environmental Regulatory Scope of UNCLOS Through the Rule of Reference: Potentials and Limits", 52 *Ocean Development & International Law* (2022) pp. 419–444; Danae Georgoula, "The LOSC Renvois as a Source of Untapped Jurisdiction", 38 *International Journal of Marine and Coastal Law* (2023), pp. 228–248.

32 Para. 134 Opinion.

33 Alan Khee-Jin Tan, *Vessel Source Marine Pollution: The Law and Politics of International Regulation* (2006), p. 229; Alan O. Sykes and Eric A. Posner, "Economic Foundations of the Law of the Sea", 104 *American Journal of International Law* (2010) pp. 569–596. See also Catherine Redgwell (n 31), 605.

34 By way of example, the Arbitral Tribunal in the *South China Sea* award found China in breach of Article 94 UNCLOS for the violations of multiple Rules set forth in the 1972 Convention on the International Regulations for Preventing Collisions at Sea, incorporated into the Convention via Article 94 UNCLOS rules of reference. *South China Sea* (*Philippines v. China*), PCA Case No. 2013-19, Award of 12 July 2016, para. 1109. The incorporation effect is particularly important also because of the potential finding of international responsibility that may follow from the application of the incorporated rules into the referring instrument.

The rule of reference technique played a significant role in the Tribunal's overall reasoning, giving effect to the systemic integration principle underlying the present Advisory Opinion. As a matter of fact, climate change and ocean acidification are an example of challenges to the marine environment that did not carry the same weight for the international community at the time of the drafting of the Convention as they do today. Part XII of the Convention contains numerous rules of references, thus underscoring the complex and interconnected character of the challenges underpinning the protection and preservation of the marine environment. Differently put, the numerous rules of references across Part XII UNCLOS are evidence for the need of a global and coordinated effort among multiple regimes of international law to ensure the protection and preservation of the marine environment, thus acting beyond the law of the sea silo.

Against this backdrop, climate change treaties – primarily the UNFCCC and the Paris Agreement – contain GAIRS relevant for the interpretation and application of State obligations under UNCLOS.[35] In particular, the Tribunal provided some authoritative guidance in relation to two aspects concerning the "taking into account" *renvoi* in Article 207 UNCLOS. First, the Tribunal upheld that rules of reference may generally recall or incorporate rules and standards from binding instruments as well as standards, procedures, and practices originally set forth in non-binding instruments.[36] While incorporating binding rules into a binding instrument may lead to its concrete application as described above, the exact implication of incorporating non-binding standards is uncertain.[37] Second, the Tribunal observed that the "taking into account" formulation does not require that States "adopt such rules, standards and practices and procedures in their national laws and regulations"; yet, States have a duty to "give due consideration to them" in good faith, and of course to comply with such GAIRS when specifically binding upon them.[38]

35 As evidenced by the expression "in particular" in paragraph 137, the Tribunal is aware that the list of external treaties may be much longer. Other examples mentioned by the Tribunal in the present Opinion are Annex VI to the 1973 International Convention for the Prevention of Pollution from Ships, Annex 16 to the Chicago Convention on International Civil Aviation, and the 1987 Montreal Protocol to the Vienna Convention for the Protection of the Ozone Layer, and specifically its 2016 Kigali Amendment regarding the phase-down of hydrofluorocarbons. Paras. 81–82, and para. 277 Opinion.

36 Para. 270. In this regard, see Wim Van Reenen (n 31), 5. See also Lan Ngoc Nguyen (n 31), 5.

37 Arguing that non-binding norms acquire binding force *ipso iure* as a result of their incorporation into a legally binding instrument might sound overstretched, but there are some authoritative voices in this sense: Bernard H. Oxman (n 31), 144.

38 Para. 271 Opinion.

2.2 *Article 237 UNCLOS*

Finally, the present Advisory proceedings provided the opportunity for ITLOS to deal with Article 237 UNCLOS. This provision closes Part XII UNCLOS and regulates its relationship with other treaties on the protection and preservation of the marine environment, thus ensuring coordination and harmonisation among multiple environmental instruments. Despite its fundamental role and the significant number of environmental cases adjudicated by UNCLOS tribunals, this was the first time that ITLOS referred to it in its adjudicative function.[39]

Article 237 UNCLOS has a binary structure: paragraph 1 contains the classic "without prejudice" clause designed to avoid normative conflicts, which would seem *prima facie* to give uncontested prominence to specific obligations undertaken "under special conventions and agreements concluded previously" and "agreements which may be concluded in furtherance of the general principles set forth in this Convention".[40] The very last part of the sentence is particularly important, for it expressly refers to agreements not yet existing at the time of the UNCLOS drafting process, thereby opening UNCLOS to future legislative instruments on the protection and preservation of the marine environment. By contrast, the second paragraph clarifies that the specific obligations assumed under special conventions should be implemented "in a manner consistent with the general principles and objectives of this Convention".[41] In other words, whilst obligations undertaken by States under other regimes on the protection and preservation of the marine environment cannot be prejudiced by the provisions in Part XII UNCLOS, their implementation cannot contradict the general principles and the objectives of the Convention.

The present Opinion might have put an end to the lengthy scholarship debate on the relevance of this article for climate change regimes.[42] The

39 So far, ITLOS had never resorted to Article 237 UNCLOS. To the best knowledge of the author, only the Arbitral Tribunal in the *South China Sea* award referred to it briefly. *South China Sea Arbitration* (n 34), para. 942.

40 Article 237(1) UNCLOS.

41 Article 237(2) UNCLOS.

42 See, generally, Detlef Czybulka, "Article 237", in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (2017), pp. 1596–1604. Notably, Redgwell and Roland Holst excluded the applicability of Article 237 to climate change instruments. Catherine Redgwell, "Treaty Evolution, Adaptation and Change: Is the LOSC 'Enough' to Address Climate Change Impacts on the Marine Environment?" 34 *International Journal of Marine and Coastal Law* (2019), pp. 440–457, 454, and Rozemarijn J. Roland Holst, *Change in the Law of the Sea – Context, Mechanisms and Practice* (2022), p. 261.

Tribunal endorsed the arguments of COSIS[43] as well as of some States[44] and non-State actors,[45] and upheld the applicability of Article 237 UNCLOS to climate change agreements. In particular, in its written statement, Italy emphasised the "double relationship of compatibility"[46] arising from this provision, clarifying that Article 237 provides "a constant opening of UNCLOS to any special convention and agreement that is likely to better protect and preserve the marine environment",[47] regardless of its status as agreement implementing the Convention.[48] Instead, the UNFCCC and the Paris Agreement bind nearly all States Parties to UNCLOS[49] and qualify as agreements concluded in furtherance of the general principles set forth in the Convention.[50] This justifies the application of Article 237 UNCLOS to climate change treaties and the coordination mechanisms therein provided.

Against this backdrop, the Tribunal observed that Article 237 UNCLOS reflects the need for "consistency and mutual supportiveness between the applicable rules".[51] To the best knowledge of the author, this marks the first time that an international court or tribunal employs the notion of "mutual supportiveness". COSIS referred to it both in its written and oral submissions,[52] and so did a State[53] and a non-State actors too in the written proceedings.[54] In a nutshell, mutual supportiveness is enshrined in the principle of systemic integration[55] and may be considered an application of the VCLT interpretative criteria meant to prevent and solve normative conflicts while ensuring synergy – hence "mutual support" – amongst the multiple regimes in question.[56] In this regard,

43 COSIS' Written Statement, paras. 49 and 395.

44 Italy's Written Statement, paras. 12–13; United Kingdom's Written Statement, para. 51.

45 *Inter alia*, the joint Written Statement by Our Children's Trust and Oxfam International, p. 31; see also Client Earth's Written Statement, para. 66.

46 Italy WS (n 44), para 13.

47 Oral statement, 25 September 2023: ITLOS/PV.23/C31/18/Rev.1, p. 20, lines 19–20 (Virzo).

48 Ibid., p. 20, lines 42–46, and p. 21, lines 1–2.

49 Ibid., p. 21, lines 22–24.

50 Ibid., p. 21, lines 26–28.

51 Para. 133 Opinion.

52 COSIS' WS (n 43), para. 394, and COSIS' Oral Statement: Oral Statement, 11 September 2023: ITLOS/PV.23/C31/2/Rev.1, pp. 30, line, and 36 (Mbengue) and p. 35, line 34 (Mbengue).

53 France's Written Statement, paras. 38, 45, 97 and, with reference to the BBNJ Agreement, para. 137.

54 One Ocean Hub's Written Statement, paras. 3–4.

55 Riccardo Pavoni "Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the 'WTO-and-Competing-Regimes' Debate?" 21 *European Journal of International Law* (2010) pp. 649–679, 650; see generally ILC Report on Fragmentation (n 10), para. 412.

56 In this regard, see also Nele Matz-Lück, "Harmonization, Systemic Integration and 'Mutual Supportiveness' as Conflict-Solution Techniques". 17 *Finnish Yearbook of International Law*

and specifically in responding to Question a), the Tribunal upheld the need for a mutually supportive interpretation of UNCLOS obligations and climate change treaties: according to its interpretation, complying with the obligations assumed under the Paris Agreement would not be sufficient to comply with Article 194 UNCLOS, for the former "complements the Convention" and does not qualify as *lex specialis*.[57]

3 Beyond Climate Change: Lessons for the Conservation of Marine Biodiversity and the Protection of Human Rights

The UNFCCC and the Paris Agreement are not the only instruments expressly invoked in the Opinion, but clearly appear most prominently in the Tribunal's legal reasoning compared to others mentioned. In particular, two regimes of international law are inadequately accounted for, namely international biodiversity law and international human rights law. The following subsections explore the extent to which the Tribunal has acknowledged their significance in respect of State obligations regarding climate change and ocean acidification.

3.1 *International Biodiversity Law*

International biodiversity law comprises a wealth of instruments and principles aimed at conserving biological diversity, defined as "the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part".[58] The specific reference to climate change *and* ocean acidification in COSIS' Request for an Advisory Opinion reflected the interconnections between State obligations to address climate change and those addressing threats to marine ecosystems and biodiversity. The Tribunal seems to acknowledge such interconnections, but its reasoning lacks a systemic account of international biodiversity law and of its relevance for the questions before it. Whilst ocean acidification is rightly defined as separate phenomenon from climate change impacts,[59] the judges chose to not write a specific section on international instruments on ocean acidification as they did for climate

(2008), pp. 39–53, 43; Pierre-Marie Dupuy and Jeorge E. Viñuales, International Environmental Law (2nd ed., 2018), p. 393; specifically on the mutually supportive interpretation of climate change treaties and UNCLOS, see generally Elisa Morgera and Mitchell Lennan (n 16).

57 Paras. 223–224 Opinion.

58 Article 1 CBD.

59 Para. 60 Opinion.

change.[60] This seems obvious in terms of black-letter law, given the absence of an international instrument expressly addressing ocean acidification; yet, the systemic integration method characterising the whole Opinion arguably called for a more thorough investigation of the existing instruments related to this phenomenon. As a result, the Tribunal's arguments in respect of ocean acidification appear ancillary to those regarding climate change impacts, as evidenced from the fact that the term "ocean acidification" is mentioned separately from climate change only a few times, mostly in the background section of the Opinion related to scientific evidence.[61]

In particular, references to the CBD are rather sparse and mostly confined to definitional matters. For instance, in responding to Question a), the Tribunal recalls the definition of "ecosystem" laid down in Article 2 CBD and already endorsed by the Arbitral Tribunal in the *South China Sea* award[62] to inform the interpretation of Article 194(5) UNCLOS.[63] Also, ITLOS observes that the CBD may provide guidance to interpret the obligation under Article 192 UNCLOS,[64] further recalling the definitions of "habitat"[65] and "protected areas"[66] under Article 2 CBD and acknowledging their importance as "generally accepted".[67] By the same token, the Tribunal made a few important observations about some environmental law principles, approaches and duties, such as the principle of the common but differentiated responsibilities and respective capabilities,[68] the duty of cooperation,[69] the precautionary approach,[70] and the ecosystem approach.[71] However, while these are particularly relevant for both international climate change law and international biodiversity law, the Tribunal

60 See Section II.B Opinion, titled "International instruments on climate change".

61 Section II.A Opinion. In particular, see paras. 57, 60 and 61. On ocean acidification and UNCLOS, inter alia, Karen N. Scott, "Ocean Acidification: A Due Diligence Obligation under the LOSC" 35 *International Journal of Marine and Coastal* Law (2020), pp. 382–408; Ellycia Harrould-Kolieb, "The UN Convention on the Law of the Sea: A Governing Framework for Ocean Acidification?" 29 *Review of European, Comparative and International Environmental Law* (2020), pp. 257–270.

62 *South China Sea Arbitration* (n 34), para. 945.

63 Para. 169 Opinion.

64 Para. 388 Opinion.

65 Para. 404 Opinion.

66 Para. 439 Opinion.

67 Para. 404 Opinion. The Tribunal notes this only in relation to the definition of "habitat", but its generally accepted character stems from the fact that the CBD is nearly universally ratified, so it must be understood as extending to the whole instrument.

68 Paras. 227–229, and 325–326 Opinion.

69 Section F.1., paras. 294–321 Opinion.

70 Paras. 213, 242, 353, 361, 418, 425, 434 Opinion.

71 Paras. 418 and 425 Opinion.

seemed to consider them primarily as falling under the purview of the former. For instance, as far as it concerns the duty of cooperation and the precautionary approach, ITLOS rightly observed that they may be read in the provisions of both the UNFCCC and the Paris Agreement,[72] but failed to acknowledge that these are also enshrined in the CBD.[73]

This is not to say that the Tribunal failed to consider the international biodiversity law regime as a whole. By way of example, in responding to Question b) the Tribunal recalled the inherent link between the protection of the marine environment and the conservation of marine living resources developed in its case law.[74] Accordingly, it concluded that the United Nations Fish Stocks Agreement (UNFSA)[75] and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[76] – two of the primary international instruments on the conservation and management of marine species, hence related to the protection of biodiversity[77] – must inform the interpretation and application of State obligations under Articles 192 and 194 UNCLOS in respect of climate change impacts and ocean acidification.[78]

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72 Respectively in paras. 298 and 69 Opinion.

73 As to the precautionary approach, see CBD preamble, ninth consideranda; as to the duty of cooperation, *inter alia*, Article 5 CBD.

74 See para. 169 Opinion, recalling *Southern Bluefin Tuna* (*New Zealand v. Japan; Australia v. Japan*), *Provisional Measures*, Order of 27 August 1999, ITLOS Reports 1999, p. 280, at p. 295, para. 70; *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion*, 2 April 2015, ITLOS Reports 2015, p. 4, at p. 61, para. 216; see also *Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland*, PCA Case No. 2011-03, Award of 18 March 2015, para. 538.

75 United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, adopted on the occasion of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA), adopted in New York on 4 December 1995 and entered into force on 11 December 2001, 2167 *United Nations Treaty Series*, p. 3.

76 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), adopted in Washington, D.C., on 3 March 1974 and entered into force on 1 July 1975, 993 *United Nations Treaty Series*, p. 243.

77 *Inter alia*, Daniel Bodansky, "International Law and the Protection of Biological Diversity" 28 Vanderbilt Journal of Transnational Law (1995), pp. 623–634.

78 As for the reference to the UNFSA, the Tribunal observes that Articles 5 and 7 UNFSA provide guidance to States in responding to distributional changes and range shifts of stocks caused by climate change and ocean acidification, thus informing the interpretation and application of the relevant provisions in Parts V and VII UNCLOS. See paras. 425–426 Opinion. As for CITES, the Tribunal noted that this treaty provides guidance informing the interpretation of Article 194(5) UNCLOS, specifically with regard to the wording

Likewise, the Tribunal also drew attention to the newly adopted Agreement on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction (BBNJ Agreement).[79] Though not yet in force,[80] ITLOS took the opportunity to *drop* a few important observations, thereby underscoring the future significance of this international biodiversity law treaty in relation to climate change and ocean acidification. For instance, the Tribunal noted[81] the provisions on Environmental Impact Assessments (EIAs) under the BBNJ Agreement,[82] which will give effect to State obligations under Article 206 UNCLOS in respect of EIAs for activities in areas beyond national jurisdictions. Likewise, the Tribunal cautiously referred to area-based management tools such as Marine Protected Areas (MPAs), highlighting yet another tool under the BBNJ Agreement relevant for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction.[83]

Thus, international biodiversity law instruments are generally accounted for in the Tribunal's reasoning; yet the overall weight given to the CBD throughout the Opinion is surprisingly low, in stark contrast with the opposite attitude

"depleted, threatened or endangered species". References to CITES are not new in UNCLOS tribunals' case law, as the Arbitral Tribunal in the *South China Sea Arbitration* also invoked it in respect of the interpretation of Article 194(5) UNCLOS. See *South China Sea Arbitration* (n 34), para 956.

79 Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction [BBNJ Agreement], UN Doc A/CONF.232/2023/4 (19 June 2023, not yet in force).

80 At the time of writing, only 9 States have ratified the agreement.

81 Para. 366 Opinion.

82 See Articles under Part IV BBNJ Agreement, entirely dedicated to EIAs. Arguably, the reference to the socio-economic impacts in the previous paragraph of the Opinion might hint at the provisions on the EIA scoping (Article 31(1)(b) BBNJ Agreement) and on the monitoring of the authorised activity (Article 35 BBNJ Agreement), especially in light of the definition of "cumulative impact" provided in Article 1(6) BBNJ Agreement and functional to the conduct of EIAs under the Agreement. See also the provisions on Strategic Impact Assessments laid down in Article 39 BBNJ Agreement.

83 Para. 440 Opinion. A further important reference to the BBNJ Agreement concerns the possibility for the future Conference of the Parties regulating its implementation to request the Tribunal to give an advisory opinion. Unpacking this statement in detail goes beyond the scope of the present paper; yet, suffices it to mention that such a view may run contrary to the textual reading of the relevant BBNJ provision, namely Article 47(7) BBNJ Agreement. For an in-depth analysis of this provision, see Millicent McCreath, "Are Advisory Opinions Fair? ITLOS Advisory Opinions and the Furtherance of the Community Interest in the Protection of Marine Biodiversity Beyond National Jurisdiction", paper presented at the European Society of International Law Annual Conference, Law of the Sea Interest Group Workshop, Aix-en-Provence, France, 30/08/2023.

towards both climate change treaties[84] and the above-recalled biodiversity law instruments and principles. While several States and non-State actors had submitted that the CBD and the CBD Decisions contain rules and standards informing the interpretation and application of UNCLOS obligations,[85] the Tribunal endorsed this view only partially, merely through sparse references to definitions under Article 2 CBD. Instead, recalling the multiple rules, standards and procedures unanimously agreed by 196 Parties to the CBD Conference of the Parties (COP) might have given more strength to its reasoning and provided the opportunity to develop further its jurisprudence on fundamental aspects of the protection of the marine environment.[86] This is particularly true for, e.g., EIAs and MPAs, largely discussed by the CBD COP in the past decades,[87] whereas the references to such tools as featuring in the BBNJ Agreement are, for the time being, deprived of any legal effect.

3.2 *International Human Rights Law*

Finally, the Tribunal refrained itself from expressly invoking human rights instruments or obligations. From the institutional point of view, ITLOS' approach in this regard should not surprise: COSIS' Request did not mention human rights at all, and any thorough account of human rights law might have resulted in *ultra vires* arguments, thereby severely undermining the Tribunal's legitimacy and the overall strength of the Opinion. However, the very same principle of systemic integration underpinning its approach to climate change

84 This is particularly evident if one considers that the CBD is mentioned only five times throughout the entire Opinion, compared to the over fifty mentions of the UNFCCC and the over sixty mentions of the Paris Agreement.

85 As to States, *ex multis*, Egypt's Written Statement, para. 32; Mozambique's Written Statement, para. 3.44; the United Kingdom's WS (n 44), para. 38; the European Union's Written Statement, para. 62. As to non-State Actors, *ex multis*, the COSIS' WS (n 43), para. 415; International Maritime Organisation's Written Statement, para. 82; International Union for the Conservation of Nature's Written Statement, para. 177; One Ocean Hub's WS (n 54), paras. 25–32.

86 On the mutually supportive interpretation of the CBD and the CBD Decisions with UNCLOS obligations, see Elisa Morgera, Graham Hamley and Mitchell Lennan, "Climate Change and Biodiversity" in Fred Perron-Welch, Jorge Cabrera Medaglia and Alex Goodman (eds), *Legal Aspects of Implementing the Convention on Biological Diversity* (2024 *forthcoming*, available on SSRN at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4480824).

87 *Inter alia*, see CBD Decision VI/7, "Identification, monitoring, indicators and assessments", UNEP/CBD/COP/6/20 (7–19 April 2002), and CBD Decision VIII/28, "Impact assessment: voluntary guidelines on biodiversity-inclusive impact assessment", UNEP/CBD/COP/DEC/VIII/28 (15 June 2006); CBD Decision X/29, "Marine and Coastal Biodiversity", UNEP/CBD/COP/DEC/X/29 (29 October 2010).

and international biodiversity law treaties might have offered the opportunity for the Tribunal to take a more careful look at international human rights law.

Human rights are mentioned explicitly only on one occasion throughout the entire Opinion. After a rather succinct overview of the negative impacts of climate change on human rights-related aspects such as human health, food security and cultural rights, the Tribunal eventually observed "that climate change represents an existential threat and raises *human rights concerns*".[88] This is the second time that the Tribunal employs the term "human rights" in its case law[89] and the first that it ties it to "concerns", adding yet another different wording to the already long list of phrases recalling the applicability of "considerations of humanity" at sea.[90] As a matter of fact, following its finding in the *M/V Saiga No 2* case where it first employed such notion,[91] the Tribunal has been quite creative in addressing a number of human rights issues arising in the context of UNCLOS disputes. Notably, in addition to considerations of humanity, it employed multiple phrases such as "*elementary* considerations of humanity",[92] "due process of law",[93] "human rights",[94] "humanitarian

88 Para. 66 Opinion, emphasis added.

89 The first being in the Louisa case, where the Tribunal took "note of the issues of human rights" and further added that "States are required to fulfil their obligations under international law, in particular human rights law". *M/V "Louisa"* (*Saint Vincent and the Grenadines v. Kingdom of Spain*), Judgment, ITLOS Reports 2013, p. 4, paras. 154–155. For the sake of completeness, it is worth mentioning that the Tribunal employed the phrase "human rights" also in the Norstar case, though only with reference to Panama's human rights claim, which was later abandoned in the State's final submission and, therefore, not dealt with by the Tribunal. *M/V "Norstar"* (*Panama v. Italy*), Judgment, ITLOS Reports 2018–2019, p. 10, para. 146.

90 On consideration of humanity, *ex multis*, Francesca Delfino, "'Considerations of Humanity' in the Jurisprudence of ITLOS and UNCLOS Arbitral Tribunals" in Angela Del Vecchio and Roberto Virzo (n 20), pp. 421–444. See also Irini Papanicolopulu (n 20), pp. 162–166. This notion was first employed by the ICJ in its *Corfu Channel case*, Judgment of April 9th, 1949: I.C.J. Reports 1949, p. 4. See, *inter alia*, Pierre-Marie Dupuy, "Les considérations élémentaires d'humanité dans la jurisprudence de la Cour internationale de justice", in René-Jean Dupuy (ed.), *Mélanges en l'honneur de Nicolas Valticos* (1999), pp. 117–130.

91 *M/V "SAIGA"* (*No. 2*) case (n 26), para. 155. The Tribunal referred to 'considerations of humanity' in other cases: *ex multis, The "Enrica Lexie" Incident* (*Italy v. India*), Order of 24 August 2015, ITLOS Reports 2015, p. 204, para. 133. In this regard, Irini Papanicolopulu, "Considerations of humanity in the Enrica Lexie Case", 22 *Questions of International Law* (2015) pp. 25–37.

92 *Inter alia*, *"Juno Trader"* (*Saint Vincent and the Grenadines v. Guinea-Bissau*), Prompt Release, Judgment, ITLOS Reports 2004, pp. 38–39, para. 77.

93 Ibid., para. 77; *M/V "Louisa"* case (n 89) para. 155.

94 *M/V "Louisa"* case (n 89) para. 155.

concerns";[95] yet, it has always been reluctant to develop more thorough arguments on human rights law or to directly invoke human rights law, instead taking a conservative approach adhering to a textual interpretation of the Convention.

In this regard, two distinct but interrelated aspects are at stake, namely the Tribunal's *ratione materiae* jurisdiction and the applicable law. As far as it concerns the former, Article 288(1) UNCLOS is crystal-clear in providing that an UNCLOS tribunal "shall have jurisdiction over any dispute concerning the interpretation or application of this Convention".[96] This means that, when presented with a human rights claim, the Tribunal will have to necessarily assess whether it falls under the Convention before being able to entertain it. Put differently, ITLOS may adjudicate on the protection of people only in the context of an UNCLOS dispute – i.e. a dispute anchored on a provision of the Convention. However, although the Tribunal may only have jurisdiction in relation to the Convention, "it must always *interpret* and *apply* [it] in its relationship to its environment – that is to say, 'other' international law".[97] Alternatively, the subsequent paragraph provides that the Tribunal may have jurisdiction over a "dispute concerning the interpretation or application of an international agreement", provided that this is "related to the purposes of th[e] Convention" and as long as such dispute "is submitted to it in accordance with the agreement".[98] Thus, should any international human rights instrument, or any other international agreement providing a degree of protection to the individual, qualify as "related to the purpose of the Convention", the Tribunal shall have jurisdiction to entertain claims arising under such an agreement.

As far as it concerns the applicable law – which logically follows the finding of jurisdiction – suffices to briefly recall what mentioned above with regard to Article 293 UNCLOS. In adjudicating an UNCLOS dispute, the Tribunal must interpret and apply the Convention as well as "other rules of international law not incompatible with th[e] Convention",[99] a wording that has given rise to an oscillating jurisprudence by UNCLOS tribunals in the past decades. Eventually, the Arbitral Tribunal in the *Arctic Sunrise* Award interpreted this provision as

95 *Inter alia*, *M/T "San Padre Pio" Case* (*Switzerland v. Nigeria*), Provisional Measures, Order of 6 July 2019, ITLOS Reports 2018–2019, p. 405, para. 130; *Detention of three Ukrainian naval vessels* (*Ukraine v. Russian Federation*), Provisional Measures, Order of 25 May 2019, ITLOS Reports 2018–2019, p. 309, para. 112.

96 Article 288(1) UNCLOS.

97 ILC Report on Fragmentation (n 10), para. 423. Emphasis in the original text.

98 Article 288(2) UNCLOS.

99 Article 293(1) UNCLOS.

referring to "secondary rules of general international law" or to "primary rules of international law" necessary to inform the meaning of "broadly worded or general provisions" under the Convention.[100] Arguably, the latter does not rule out the possibility for the Tribunal to invoke and apply human rights norms with a view to interpreting UNCLOS provisions, but clearly limits the circumstances where this could happen.

In the present Advisory Opinion, the Tribunal took a rather cautious approach and avoided any discussion on the possible construction of the material scope of certain UNCLOS rules as incorporating human rights, despite a growing literature on human rights at sea[101] uncovering the numerous "traditional human rights preoccupations" addressed by the Convention.[102] With specific reference to UNCLOS obligations on climate change and ocean acidification, the Convention, and especially Part XII, "can raise the question of whether human rights concerns fall under its purview".[103] For instance, Article 1(1)(4) UNCLOS makes an express reference to human health, particularly relevant in the context of climate change and ocean acidification due to the potential harm caused to it by pollution of the marine environment.[104] Likewise, the reference to the "nutritional needs" of the populations of land-locked States and of geographically disadvantaged ones[105] further reflects human rights concerns under the Convention such as the impairment of the right to food or of cultural rights linked to fishing activities, which risk being negatively impacted by climate change and ocean acidification.[106] All the above is further supported by a growing literature on the benefits of ecosystem services for human life[107]

100 *Arctic Sunrise Award* (n 27), paras. 190–191. See also *Duzgit Integrity Arbitration* (n 27), para. 207.

101 In this regard, *ex multis*, Bernard H. Oxman, "Human Rights and the United Nations Convention on the Law of the Sea", 36 *Columbia Journal of Transnational Law* (1997), pp. 399–429; Tullio Treves, "Human Rights and the Law of the Sea", 28 *Berkeley Journal of International Law* (2010), 1–14; Irini Papanicolopulu (n 20), Tafsir Malick Ndiaye, "Human Rights at Sea and the Law of the Sea", 10 *Beijing Law Review* (2019), pp. 261–277; Steven Haines, "Developing Human Rights at Sea", 35 *Ocean yearbook* (2021), pp. 18–51.

102 Ibid., Bernard H. Oxman, pp. 401–402.

103 Separate Declaration by Judge Infante Caffi attached to the Opinion, para. 1.

104 Ibid., para. 2.

105 Respectively mentioned in Articles 69(2) and 70(3) UNCLOS.

106 *Inter alia*, Amicus brief submitted to the International Tribunal for the Law of the Sea by the UN Special Rapporteurs on Human Rights & Climate Change (Ian Fry), Toxics & Human Rights (Marcos Orellana), and Human Rights & the Environment (David Boyd) – joint Written Statement by three Special Rapporteurs, paras. 53–55 and 60–63.

107 Daniel Bodansky (n 77), p. 626; Jeffrey McNeely et al., "Conserving the World Biological Diversity", International Union for Conservation of Nature and Natural Resources, World Bank Document (1990), pp. 25–35. See, more recently, Holly J. Niner et al., "Connecting

and on the interdependences between the enjoyment of human rights and the protection of the climate system and of a healthy environment, including the marine environment.[108]

However, ITLOS chose to avoid any reference to human rights as falling under the Convention and, as a consequence, it "sidestep[ped] the need to construe article 293 (applicable law) of the Convention to cover human rights issues in order to answer the questions posed by the Request".[109] Similarly to its selective approach to marine biodiversity instruments, the Tribunal overlooked the suggestion from numerous States[110] and non-State actors[111] to interpret UNCLOS obligations not only consistently with climate change and biodiversity law, but also with international human rights law. For instance, Nauru expressly considered international human rights law to inform the content of State obligation under Article 192 UNCLOS,[112] especially having regard to the right of self-determination[113] and in the light of the UNCLOS preamble.[114] Likewise, the joint submission by three UN Special Rapporteurs

ecosystem services research and human rights to revamp the application of the precautionary principle" 3:35 *npj Ocean Sustainability* (2024).

108 In particular, see the contributions to International Journal of Marine and Coastal Law special issue on Ocean-based Climate Action and Human Rights, edited by Mitchell Lennan and Elisa Morgera, vol. 38(3) 2023. See also UNCLOS preamble, and specifically the third consideranda. As to the case law: at the national level, ex multis, Supreme Court of the Netherlands, *State of the Netherlands v. Urgenda Foundation*, ECLI:NL:HR:2019:2007, Judgment (20 December 2019); German Constitutional Court, 1 BvR 2656/18, Order (24 March 2021), §36; at the international or regional level, *ex multis*, IACtHR, *Advisory Opinion on the Environment and Human Rights* of 15 November 2017, OC-23/17; Human Rights Committee (HRCttee), Views adopted under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019, UN Doc CCPR/C/135/D/3624/2019 (2022); see also the cases recently adjudicated by the ECtHR (n 3).

109 Judge Kittichaisaree's Separate Declaration attached to the Opinion, para. 28.

110 *Ex multis*, the Federated States of Micronesia's Written Statement, para. 64; New Zealand's Written Statement paras. 41–42; Nauru's Written Statement, paras. 53–58; the United Kingdom's WS (n 44) para. 41.

111 *Ex multis*, joint submission by the UN Special Rapporteurs (n 105) paras. 15–26 and paras. 30–64; African Union's Written Statement, paras. 47; United Nations Environment Programme's Written Statement, paras. 71–76; Pacific Community's Written Statement, paras. 31–33; One Ocean Hub's WS (n 54) paras. 33–38.

112 Nauru's WS (n 109) para. 53.

113 Common Article 1 of the International Covenant on Civil and Political Rights (ICCPR), adopted in New York on 16 December 1966 and entered into force on 23 May 1976, 999 *United Nations Treaty Series*, p. 171, and of the International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted in New York on 16 December 1966 and entered into force on 23 May 1976, 993 *United Nations Treaty Series*, p. 3.

114 First, fifth and seventh consideranda, UNCLOS preamble.

underlined the negative impact of climate change-related pollution of the marine environment on a long list of human rights, including vulnerable coastal communities' right to food.[115]

Nevertheless, whilst refraining from developing human rights arguments any further, the Tribunal arguably offered some entry points for future more progressive interpretations of State obligations under the Convention. For instance, in dealing with the State obligations to monitor and assess activities, ITLOS observed that the broad wording of Article 206 UNCLOS does not rule out the possibility for the assessment to integrate considerations of the socio-economic impacts of the activities concerned.[116] One logical implication of such a finding would be that States have a duty to take into account the impact of their ocean activities on human rights,[117] including the right to health[118] and the right of indigenous people.[119] Yet, the Tribunal preferred to avoid any explicit human rights language on this occasion, let alone to invoke specific human rights obligations at stake. By the same token, the ICJ's definition of "environment" – i.e. as representing "the living space, the quality of life and the *very health of human beings*, including *generations unborn*"[120] – might well trigger future arguments to bridge UNCLOS obligations with the protection of the human right to health and of children's and future generations' rights, particularly relevant in the context of the protection of the marine environment from climate change impacts and ocean acidification. Arguably, it is only a matter of time, as future contentious cases or advisory proceedings might soon provide concrete opportunities for further developments in this sense.[121]

115 Joint submission by the UN Special Rapporteurs (n 105), paras. 15–26 and paras. 30–64.

116 Para. 365 Opinion.

117 Client Earth's WS (n 45), para. 95; One Ocean Hub's WS (n 54), paras. 33–38.

118 Joint submission by the UN Special Rapporteurs (n 105) para. 87.

119 Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Hunan Rights System* (IACHR 2009) OEA/Ser.L/V/II. Doc. 56/09, paras. 252–259; IACtHR, *Case of the Saramaka People v. Suriname* (Judgment) [2007j] IACHR Series C No. 172, para. 129; IACtHR, *Case of the Saramaka People v. Suriname* (Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs) [20081] IACHR Series C No. 185 paras. 40–41.

120 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, at p. 241, para. 29 (emphasis added), recalled in para. 166 Opinion.

121 The Tribunal's in passing invitation in paragraph 92 to submit requests for advisory opinions in respect of State obligations under the BBNJ Agreement might provide concrete opportunities to this end, given the multiple entry points for human rights under this Agreement. In this regard, Elisa Morgera, "Addressing the Ocean-Climate Nexus in the BBNJ Agreement: Strategic Environmental Assessments, Human Rights and Equity in Ocean Science" 38 *International Journal of Marine and Coastal Law* (2023) pp. 447–479.

4 Concluding Remarks

The foregoing reflections have shed some light on the content of the 2024 ITLOS Advisory Opinion, especially focusing on the enhanced coordination and harmonisation between the Convention and other instruments related to the protection and preservation of the marine environment. The Tribunal has certainly met the expectations with regard to one of the primary legal issues at stake, namely the link between climate change and UNCLOS, until now never ascertained before an international court or tribunal. The outcome is a finely crafted piece of legal writing, imbued in systemic integration and grounded in key mechanisms under the Convention – i.e. the rule of reference, Article 237 UNCLOS and Article 293 UNCLOS – through which the Tribunal finally bridged the gap between the law of the sea and climate change law. Under this perspective, the Tribunal struck a perfect balance between the need to respect the institutional bounds of the Convention, and the urgency to adapt to new global challenges not foreseen at the time of its inception, demonstrating a progressive attitude in addressing the problem of fragmentation in international law. In particular, the Opinion is set to play a fundamental role in future climate change negotiations, especially in respect of oceans, which have so far received surprisingly little attention.

However, the Opinion falls short of fully unpacking the interconnections between, on the one hand, the protection and preservation of the marine environment and, on the other, the conservation of marine biodiversity and the enjoyment of human rights. As to the conservation of marine biodiversity, the Tribunal did not account for the specificities of ocean acidification, treating it almost as a subordinate challenge to that of climate change. In particular, a clear and uncontroversial statement on the extent to which the conservation of marine biodiversity falls under the material scope of the Convention is perhaps missing, which might have enhanced the Tribunal's adjudicative function without upsetting the institutional balance underlying the Convention. As a result, the Tribunal gave little attention to the CBD as applicable law in the present Opinion, thus missing the opportunity to rely on the multiple rules, standards and procedures unanimously agreed by the 196 Parties to the CBD.

The Tribunal also missed the chance to develop further its jurisprudence regarding the enjoyment of human rights. The judges refrained themselves from construing certain UNCLOS provisions as addressing human rights, fearing to upset the institutional balance underlying the Convention and lose credibility and support. By doing so, they overlooked the interconnections between the climate change crisis, the protection of the environment – including the marine environment – and the enjoyment of human rights, thus falling short

of establishing the Tribunal's jurisdiction to entertain human rights claims arising in the context of marine pollution caused by GHG emissions and ocean acidification. The judges surely discussed the judicial propriety of such arguments, as evidenced by the three separate declarations attached to the Opinion and offering some reflections on human rights in the context of the present case.[122] However, they eventually assessed this was not the right time or the right place to endorse them.

Overall, this is not a negative choice for the future of marine biodiversity and human rights protection in the context of climate change mitigation and adaptation measures. First and foremost, the Tribunal confirmed that UNCLOS is a living instrument and, as such, is open to change.[123] The Convention is in principle equipped to sustain radical and abrupt change,[124] which falls outside of the Tribunal's remit as one of its interpreters. By contrast, changes in the interpretation and application of an international law instrument may be slower than developments within society. ITLOS demonstrated to be willing to use the institutional mechanisms for change under the Convention to contribute to the progressive development of the law of the sea, but a more proactive approach in the present Opinion might have hindered its possibility to do so also in the future, undermining its role at the forefront of the protection of the marine environment. Instead, the in passing references to certain human rights aspects scattered throughout the Opinion show its openness to do so in future cases.

In addition, ITLOS was certainly aware of the concrete possibility for both the IACtHR and the ICJ to take on this work. The ITLOS Opinion marked only the first round out of three, and the pending proceedings are complementary to it.[125] While these two courts have a very different *ratione materiae* jurisdiction than ITLOS' one, it is very likely that they will address aspects related to the conservation of marine biodiversity and the protection of human rights, thereby potentially contributing to the progressive development of the law of the sea. As a matter of fact, the request for advisory opinion to the IACtHR makes express references to the sea in the background information

122 In addition to Judge Infante Caffi's Separate Declaration, also the ones by Judge Pawlack and by Judge Kittichaisaree draw interesting arguments on human rights, supporting the statement in the text.

123 Richard Barnes, "The Continuing Vitality of UNCLOS", in Jill Barrett and Richard Barnes (eds), *Law of the Sea: UNCLOS as a Living Treaty* (2016), pp. 459–489.

124 In this regard, see the amendment procedure set forth in Article 312 UNCLOS.

125 Rozemarijn J. Roland Holst (n 11), 18.

anticipating the set of questions,[126] with the Court already demonstrating its openness to the CBD and the CBD Decisions in the past.[127] Likewise, the request to the ICJ includes express references to UNCLOS,[128] to some human rights law instruments,[129] and to the CBD,[130] thus calling upon the Court to provide further clarifications on certain aspects of the law of the sea and, more broadly, on the above-mentioned interconnections.

Hence, the relay for the full recognition of the interconnections between climate change law, international biodiversity law and international human rights law has just started: the gap between the law of the sea and climate change has finally been closed, leaving some further hope for the next steps to be undertaken.

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126 See the references to sea level and sea surface temperature, pp. 3 and 4 of the Request to the IACtHR (n 2).

127 *Ex multis*, IACtHR, *Case of Kaliña and Lokono Peoples v Suriname*, Judgment (Merits, Reparations and Costs), 25 November 2015, paras. 173, 177, 181 and 197). In this regard, see generally Elisa Morgera, "Under the Radar: Fair and Equitable Benefit-sharing and the Human Rights of Indigenous Peoples and Local Communities connected to Natural Resources" 23 *International Journal of Human Rights* (2019), pp. 1098–1139.

128 UNCLOS is referenced in the very text of the questions submitted to the Court. See the respective request (n 2), 8.

129 These are the ICCPR, the ICESCR, the Universal Declaration of Human Rights, which are referenced in the very text of the questions submitted to the Court. In addition, also the UN Convention on the Rights of the Child is recalled in the fifth consideranda of the UN Resolution containing the Request (n 2), 4.

130 Ibid., fifth consideranda.