



*[“The Year of Climate in International Courts”](#) by guest contributor Rebecca Hamilton was originally published on *Just Security**

This year promises to be the ‘Year of Climate’ in international courts and tribunals with opinions slated to be coming down from the European Court of Human Rights, the Inter-American Court of Human Rights, the International Tribunal for the Law of the Sea, and the International Court of Justice. The European Court of Human Rights will decide on three contentious cases brought by individual applicants, and the other three courts will issue advisory opinions at the request of different States. But all cases overlap to some degree on the question of the international legal obligations of States in light of the climate emergency.

The temporal and substantive proximity of these cases, across no less than four different international forums, is a reflection of the immense frustration that civil society and State actors who are the most vulnerable to the harms resulting from [climate change](#) feel with the status quo. These actors are turning to international law in the hope that it can provide new

avenues through which to push the most powerful States in the international community to take the actions urgently needed to keep the target of 1.5 degrees Celsius (the stretch goal in the Paris Agreement of keeping the world's average surface temperature to no more than [1.5 degrees Celsius](#) above pre-Industrial levels by 2100) within reach or, at the very least, to reset the parameters within which ongoing political negotiations are conducted. Although three of the four sets of cases will generate opinions that are only advisory in nature, the collective outcome across all the cases promises to generate a much more specific articulation of the international legal obligations of States, in light of their climate commitments, than currently exists.

While most of the mainstream media attention has gone to the [International Court of Justice](#) case, the other cases, which are likely to be decided first, are each important in their own right and will set the stage for the World Court's opinion. Experts have provided [informative commentary](#) on [individual cases](#) and, less commonly, comparisons across [two](#) or [three](#) of the courts as the climate cases have progressed. Here, I provide an overview of the landscape across all four of the courts. What follows is a brief background on how the cases came before these courts, along with a summary of the issues that the different courts have been asked to address, so readers have a one-stop resource to refer back to as these opinions are issued in the weeks and months ahead.

## **European Court of Human Rights (ECtHR)**

The three climate cases before the Grand Chamber have now been fully briefed, and while no date has yet been announced, court watchers expect the ECtHR will be the first of the courts to come out with a decision. The cases were brought by applicants from Switzerland, France, and Portugal, and although the details of the claims differ, the cases are linked by the fact that each asks the Court to consider violations under Article 2 ([right to life](#)) and Article 8 ([right to respect for private and family life](#)) of the European Convention on Human Rights.

### ***Verein Klima Seniorinnen Schweiz and Others v. Switzerland***

Applicants are a Swiss organization representing older women, along with a handful of individual Swiss women over 80 years old, all facing health problems exacerbated by heatwaves. Alleging that domestic courts in Switzerland failed to properly respond to their requests, in November 2022 the applicants turned to the ECtHR. In addition to their claims of violations under Articles 2 and 8, they also complain of an Article 13 (right to an effective remedy) violation by the Swiss government ([in French](#)). The case was [relinquished](#) to the Grand Chamber in April 2022, and the hearing took place in March 2023 ([webcast](#)).

### ***Carême v. France***

The applicant is [Damien Carême](#), a member of the Europe Ecology - Greens Party in France, who is currently serving as a Member of the European Parliament. From 2001 - 2019, Mr. Carême was the Mayor of Grande-Synthe, which lies below sea level along the English Channel in the north of France. In 2018, on behalf of his municipality and in his personal capacity, Mr. Carême had [sought](#) adoption by the French government of measures to curb greenhouse gas emissions in order to meet France's national and international climate obligations. Failure to do so, he claimed, made Grande-Synthe particularly vulnerable to flooding and complicated its water management system. Following litigation that went up to the Conseil d'Etat (France's highest administrative court), Mr. Carême applied to the ECtHR under Articles 2 and 8 of the European Convention on Human Rights. The case was [relinquished](#) to the Grand Chamber in May 2022, and the hearing took place in March 2023 ([webcast](#)).

### ***Duarte Agostinho and Others v. Portugal and 32 Others***

Applicants are Portuguese youth who ranged from 8 - 21 years old when they lodged their case before the Court in 2020. Their primary claim relates to the adverse health effects they have suffered from forest fires in Portugal caused by global warming. The applicants also stress the anxiety caused by the natural disasters they have experienced, coupled with the prospect of living the rest of their lives on a warming planet. Their claim alleges violations of Articles 2 and 8 of the Convention, along with Article 14 (prohibition against discrimination). In addition, they have urged the Court to read these provisions of the European Convention in light of the UN Convention on the Rights of the Child, [Article 3\(1\)](#) (setting "the best interests of the child" as a "primary consideration"). Notably, the claim is brought not just against Portugal, but also against [32 other European States](#) that the applicants allege are contributing to the climate impacts they face on Portuguese territory by failing to uphold their climate obligations. The case was relinquished to the Grand Chamber in June 2022, and the hearing took place in September 2023 ([webcast](#)).

All these cases have received numerous written submissions, with *Duarte Agostinho and Others* in particular attracting more than 20 intervenors including international NGOs, academics, and UN Special Rapporteurs. As Ole Pedersen has highlighted over at [EJIL:Talk!](#), issues to watch for in this latter case include whether it will survive the exhaustion of domestic remedies requirement (unlike in the other two cases, *Duarte Agostinho and Others* went directly to the ECtHR), and how the Grand Chamber will handle the question of extraterritorial jurisdiction in relation to the 32 States besides Portugal.

## **Inter-American Court of Human Rights (IACtHR)**

In January 2023, Colombia and Chile requested, under [Article 64\(1\)](#) of the American Convention on Human Rights, an [Advisory Opinion](#) from the IACtHR in order to clarify the scope of States' obligations in responding to the climate emergency within the framework of international human rights. Their application highlighted the particular sensitivity of the Andean region to the effects of climate change, with adverse impacts greatest among already vulnerable populations. The applicants posed 21 specific questions to the court relating to State obligations under the American Convention on Human Rights in the context of climate change, grouped into five basic categories: the duty of prevention, the right to life, children's rights, consultation and judicial remedies, environmental defenders and other vulnerable populations, and common but differentiated responsibilities.

Article 64(1) of the American Convention provides that member States can consult the Court regarding interpretation of not only the Convention, but also "of other treaties concerning the protection of human rights in the American states." Accordingly, the application references a host of other relevant regional treaties, and some international ones - including the Paris Agreement and the UN Convention on the Rights of the Child. (Interestingly, in 2022, Brazil's highest court determined the Paris Agreement to be [a human rights treaty](#), although that finding does not require the IACtHR to treat it as such). This raises the possibility that both the IACtHR and the ECtHR will opine on the human rights obligations of States with respect to climate under these treaties.

## **International Tribunal on the Law of the Sea (ITLOS)**

The applicant in this case is the Commission on Small Island States on Climate Change and International Law ([COSIS](#)), which requested an Advisory Opinion from the Tribunal in December 2022. COSIS was established in 2021, on the eve of COP26, and its membership (currently comprising Antigua and Barbuda, Tuvalu, Palau, Niue, Vanuatu, St. Lucia, St Vincent and the Grenadines and St. Kitts and Nevis) is open to any member of the [Alliance of Small Island States](#). Notably, COSIS includes States that are already facing an [existential threat](#) from climate change.

The Agreement establishing COSIS specifically provides that it shall be authorized to request advisory opinions from ITLOS ([Art 2\(2\)](#)). This is relevant since the ITLOS Statute includes jurisdiction over "all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal." ([Art 21](#)) The COSIS Agreement, therefore, serves as the jurisdictional hook for the case - which was, presumably, a significant part of the motivation behind the establishment of COSIS.

In their [request](#) for an Advisory Opinion, COSIS asked the Tribunal two questions related to the specific obligations of States parties to the UN Convention on the Law of the Sea (UNCLOS). The focus of their request relates to State obligations under [Article 194](#), which pertains to measures to prevent, reduce and control pollution of the marine environment. The applicants frame not only substances (carbon from greenhouse gas emissions), but also energy (excess heat from these emissions) as constituting pollution of the marine environment. Their second question, regarding [Article 192](#), flows from this framing and relates to the general obligation of protecting and preserving the marine environment. The applicable law that the Tribunal will draw on is UNCLOS “and other rules of international law not incompatible with [UNCLOS]” ([Article 293](#)). As such, the Tribunal is likely to consider customary international law on the environment as well as relevant treaties including the UN Framework Convention on Climate Change, and the [Paris Agreement](#).

## **International Court of Justice (ICJ)**

The [request](#) for an Advisory Opinion was made by the UN General Assembly in March 2023, following a huge diplomatic effort spearheaded by Vanuatu and inspired by the vision of [students in the Pacific Islands](#). The UN General Assembly resolution had 130 co-sponsors. (The United States was not among them: “We believe that diplomacy - not an international judicial process - is the most effective path forward for advancing global efforts to tackle the climate crisis,” [Reuters reported](#) a senior Biden administration official explaining at the time).

Applicable law at the ICJ is wide-ranging, and includes all of the international climate and human rights treaties referred to in the other climate cases, as well as customary international law. The [questions presented](#) to the Court are similarly broad in outlook, seeking clarification on “the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations” and the “legal consequences[of]...acts and omissions” by States that have “caused significant harm to the climate system and other parts of the environment.”

In addition to being asked to consider harm to future generations, the ICJ is also specifically asked to consider harm to small island developing States, which reflects their pivotal role in securing UN General Assembly support for the request.

## **Divergence on specific issues**

The potential for divergent opinions on specific climate obligations of States is a live issue



given the constellation of cases presented above. As one example, consider the issue of extraterritorial obligations for the impact of climate change. To date, the IACtHR has offered the most progressive jurisprudence on extraterritoriality, with its 2017 advisory opinion on climate recognizing that in cases of environmental harm, a State's human rights obligations under the American Convention are not limited to their territorial space ([paras 101-104](#)). The extraterritorial question is explicitly before the ECtHR in *Duarte Agostinho and Others*, but it is there implicitly in the ITLOS and ICJ cases as well. Securing another IACtHR opinion with an expansive approach to extraterritoriality would be welcomed by those seeking to use international law to secure remedies, even (indeed, especially) if the ECtHR rejects the extraterritorial component of the *Duarte Agostinho and Others* case.

Another issue where the risk of divergence is significant is in relation to children's rights. All but the ITLOS Tribunal are being asked to consider the climate obligations of some or all States in relation to the UN Convention on the Rights of the Child. The fact that the ECtHR cases are likely to come out first will make the Court's discussion of the rights of the child in *Duarte Agostinho and Others* particularly important, and one can hope that a strong decision in that case might steer the IACtHR and ICJ judges, who will surely be tracking, in a similar direction. Relatedly the issue of obligations toward future generations is also in play across cases and is not fully captured by dealing with children's rights. It will be interesting to see if any of the courts flesh out this distinction or if, instead, they focus on the more narrow and familiar issue of children's rights and avoid discussing the issue of future generations.

The politically thorny but vital question of common but differentiated responsibilities (CBDR) - a principle within the UN Framework Convention on Climate Change (UNFCCC) that acknowledges differing capabilities and responsibilities of individual countries in addressing climate change, is only put squarely before the IACtHR. Still, the focus in both the ITLOS and ICJ applications on small island developing States (who are in the position of facing some of the most harsh and immediate effects of climate change, despite having made negligible contributions to it), has essentially put CBDR before these courts also, albeit sub silentio. A strong CBDR position from the IACtHR that comes down before the ITLOS or ICJ opinions are finalized could give these two bodies cover to take a more progressive approach to the topic than they otherwise might.

The ICJ is likely to be the last of the courts to hand down its opinion. In many ways its position at the apex of the international system makes its opinion the most important of the set. Yet the ICJ also tends to be deferential to specialist bodies on overlapping issues that fall squarely within the specialist body's jurisdiction (see, e.g. deference to the International Criminal Tribunal for the former Yugoslavia on the issue of [genocide in Bosnia](#)). At a

minimum, on any such issue where the other three courts have aligned, it would be striking for the ICJ to chart a different course.

## **The big issue**

The common thread linking all of these cases is where the question of divergence becomes the most significant: Broadly, in what ways will the courts see the Paris Agreement as relevant to the different international law obligations of States that they are being asked to consider? More specifically, will courts use the substantive goals set in Paris (i.e. the 1.5 degrees C target) to help determine the content of States' other obligations under international human rights law, or the law of the sea? Or will they sideline this target as a political commitment, focus instead on the procedural obligations under the Agreement (i.e. submission of [National Determined Contributions](#) (NDCs)), and conclude that as long as States are following those procedures then they will be in compliance with the climate-facing aspects of their other international law obligations? Of course, somewhere between these extremes is plenty of middle ground for various levels of scrutiny regarding the substantive details of a State's NDC, rather than merely accepting the fact of its submission as the relevant metric.

As noted above, the ICJ tends to defer to specialist bodies when it comes to the specialist body's remit. But on the question of how the Paris Agreement relates to international law in general, the ICJ may well conclude that this is an issue on which it has core competence. One of the most troubling potential scenarios here is the possibility that following progressive opinions from the other three courts that work to integrate the substantive goals of Paris into other areas of international law, the ICJ moves in a different direction, concluding instead that States need only meet the procedural obligations of the Paris Agreement and thereby undercutting the progressive development of the law being advanced in the other courts.

Regardless of how these opinions come out in the weeks and months ahead, the one certainty is that collectively they will help determine whether the international legal obligations of States create tangible steps towards achieving the goal of 1.5 degrees C. As always, the law will not enforce itself. Citizens around the globe, and especially those in highly industrialized nations and those who are yet to feel the harm of climate change in any personal or direct way, must push their governments to live up to the obligations that the courts announce.

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