



How can we 'Be Nice to the Ocean'?

Ocean Vision Legal: Safeguarding the Ocean through Law¹

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What are the main legal impediments for effective marine protection? *Our answer is two-fold: a lack of judicial enforcement of environmental law and a predominant anthropocentric worldview of the human-Ocean relationship.* Ocean Vision Legal has thus developed two legs: the enforcement of law through Ocean Litigation and the creation of an Oceanic ethic through Ocean Rights (read more about OVL's background [here](#)).

First. No matter how prolifically we create new laws to fortify environmental protection – their efficacy remains elusive if we do not judicially enforce them. Take for example the obligation to protect and preserve the marine environment under UNCLOS Art. 192, which has largely been ignored. The designation of the Weddell Sea and East Antarctic Coastal Region marine protected areas (MPAs) under the Antarctic Treaty System is impeded by the missing consensus of all State parties. Scientific evidence on the necessity of the designation of these areas for the protection and preservation of the Antarctic marine environment is compelling, as it is recognized that these areas would “counter climate change and protect fragile ocean ecosystems.”² What if State parties not only had the right to establish the Weddell Sea and East Antarctic Coastal Regions MPAs, but were legally obligated to do so in order to comply with UNCLOS Art. 192 and other treaty obligations? We think the answer is: they are!

Our founder and CEO, Dr. Anna von Rebay wrote her entire [doctoral thesis](#) on the obligation of States to protect the marine environment, and has therefore researched this topic extensively. She is also an acknowledged expert on Ocean Litigation by ITLOS (her [articles on advisory jurisdiction](#) are published in the leading journals and ITLOS invited her to their Meeting of Parties on the [8th Law of the Sea Conference as keynote speaker](#) on marine protection obligations).

What are the ways that we can hold States accountable? Currently there are three Advisory Opinions with regards to the obligation of States (to protect the marine environment) and

¹ Our contribution is of a general nature, but we highlight its application (and our projects intersection with) related to themes covered in the Let's be Nice to the Ocean e-book, including the protection principle, holistic ecosystemic mandates and visions, reformed governance of migratory biodiversity, deep-sea conservation and Southern Ocean protection.

² Pedro, Schwarze, 'Russia, China block move for new Antarctic marine reserves,' at: <https://phys.org/news/2023-06-russia-china-block-antarctic-marine.html#:~:text=The%20bid%20to%20create%20the,of%20ocean%20from%20human%20activities>.

climate change requested from ITLOS,³ ICJ⁴ and the IACtHR.⁵ Advisory Opinions are interpretations of the law by the Court or Tribunal, to answer a legal question that was brought to it. They thus develop and clarify the law. The one significant limitation of Advisory Opinions is that they are not legally binding - they can't be, as there is no State suing another State, so there is no one who is bound by it. Nonetheless Advisory Opinions will bring upon the paradigm shift in this UN Ocean Decade for *effective* marine protection because:

- Advisory Opinions are the interpretation of the law by the highest international Court or Tribunal; they thus tell us directly what is lawful and what is not, without having to sue anyone.
- Additionally, they can address a key impediment to effective marine protection — a lack of understanding of what the obligation to protect and preserve the marine environment (and others obligations) entails in practice. Thus, Advisory Opinions significantly contribute to the development and consistent application of State's obligations under international law. While treaties, agreements and conventions give the outline of the law, it is upon the judicial bodies to refine this law through their jurisprudence and develop a feasible marine protection framework, which is applicable in practice.
- The interpretation of the law by the highest judicial body develops new law, by creating customary international law (a general practice accepted as law that can have a wider binding effect than the rules of treaties).
- Lastly, in the latest [COSIS-Advisory Opinion](#) proceeding, the ITLOS powerfully emphasised its readiness to accept Advisory Opinions and its role to develop the obligation of States to protect the marine environment by unprecedentedly scheduling the oral hearings only 10 months after the submission of the request in December 2022.

Within only a few years, the number of climate case litigations has grown exponentially: people of all generations are suing their governments all around the world for reducing their CO2 emissions, evidencing that the judicial enforcement is the missing tool to make climate obligations effective. Why do we not have that for the Ocean yet? Like the fresh wind of climate litigation, **our contribution to be Be Nice to the Ocean is to [create a global wave of Ocean Litigation to make marine protection effective in this UN Ocean Decade](#)**. Contact us to learn more about our specific legal actions and to collaborate!

Two. What if, in addition to States having the right to exploit the marine environment (UNCLOS Art. 56 and others), the Ocean had a Right to maintain and regenerate its cycles, structures, functions and evolutionary processes (among others)? Eco-centric laws, such as Rights of Nature (RoN) and Ecocide, are emerging [worldwide](#); with over 200 RoN laws, policies and judicial decisions in almost 40 countries; and the EU recently agreed to enshrine into law a new offence aimed at punishing cases comparable to Ecocide (for more [see here](#)).

³ ITLOS, Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, <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/>.

⁴ ICJ, *Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change*, UNGA GA/12497, 29.03.2023, <https://press.un.org/en/2023/ga12497.doc.htm>.

⁵ IACtHR, *Request for an advisory opinion on the scope of the state obligations for responding to the climate emergency*, https://www.corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf.

Rights of Nature is an ethical, relational and legal framework, as well as a growing movement, where Nature is recognized as a legal entity with inherent rights and intrinsic values. Rights of Nature also affirms that humans have responsibilities to steward Nature in a way which respects humanity's interconnected and interdependent relationships. Laws are created by societies based on their ethical values – vice versa, laws can fundamentally reshape the underpinning values and principles that guide societies and decision makers. Using the same system that fuels and encourages overexploitation of the Ocean, will only get us so far; business as usual and the status quo will prevail. We must collectively shift away from valuing and treating the Ocean as a resource with value primarily derived from human utility and benefit, while respecting and amplifying [Indigenous](#) and [coastal communities'](#) worldviews and knowledge. Acknowledging the Ocean as a living entity with inherent rights and intrinsic value, or Ocean Rights, is one such framework, and necessary tool in order to achieve the paradigm shift we need.

[Ocean Rights](#) is the moral and ethical recognition of the Ocean as a living being with inherent rights and intrinsic value. The framework involves developing and implementing legal frameworks that recognize these rights and allow for legal action to be taken on behalf of the Ocean. Michelle Bender created the Ocean Rights framework in 2017 and is leading the development of its legal thought.

Rights are transversal, meaning that the Ocean's rights would need to be taken into account along with other rights that may be impacted due to the nature of human activity. The recognition of the Ocean before the law through codification of legal personality, guarantees that the Ocean's interests are given serious consideration in decisions and disputes affecting its health, thus producing an effect in our legal and governance systems: the incorporate "higher standards of environmental protection."⁶ For example, under an Ocean Rights paradigm, States would have the obligation to apply precautionary and restrictive measures when there is risk of serious or irreversible damage due to the development of an activity. Such activity has been defined as one that *might* lead to the extinction of marine species, the destruction of marine ecosystems and the permanent alteration of Oceanic cycles. Therefore, the Ocean is not intangible, but broadening our moral community to include the Ocean would require the prevention or prohibition of such activities, including bottom trawling and deep-seabed mining.

Additionally, via the Stop Ecocide Foundation, an international independent expert panel agreed on a definition of Ecocide in 2021 to mean "the unlawful or wanton acts committed with the knowledge that there is substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts." The goal is to introduce Ecocide as the fifth crime of the international Rome Statute of the International Criminal Court (ICC). The legal recognition of "Ecocide" as a crime at the international level could guide behaviour with regard to the polluter demonstrating their actions do not cause severe or irreversible harm. Criminal law is first meant to be a protective law, and thus, provides another mechanism to operationalize the protection principle and shift the burden of proof.

There are multiple ways to put Ocean Rights and Ecocide Law into practice, including:

- Amending existing international law or programmes or developing new international law that recognises the Ocean's inherent rights and intrinsic values, such as through a

⁶ Ecuador, *Constitutional Court for the Transition Period*, Sentence No. 017-12-SIN-CC, 26.04.2012, p. 6.

Universal Declaration of Ocean Rights, or creates criminal penalties for those who violate the rights of the Ocean.

- Legislating Ocean Rights and Ecocide Law at the national level, including through constitutional law, national law and marine protected areas.
- Building principles of Ocean Rights, including a mandate to ensure the Ocean's intrinsic values in decision making processes, such as Environmental Impact Assessments; and
- Ensuring the meaningful engagement and respect of Indigenous and Oceanic community worldviews, traditional knowledge and rights in global decision making.

In order to be Nice to the Ocean, we must recognise the Ocean's inherent Rights and intrinsic value, and create new laws to enforce our obligation to ensure the Ocean is thriving on behalf of future generations of all life.

The Ocean is not a resource; the Ocean is our source of Life.