CHAPTER 13

Finding the 'Rosetta Stone'? Concluding Remarks on the Role of Advisory Opinions in International Law in the Context of the Climate Crisis

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Abstract

As a conclusion, this chapter provides a quick overview of the main findings of the book, presented not chapter by chapter, but rather in a topical manner. First, the chapter looks to the message of hope for concerned States, civil society movements, and individuals, who were able to conduct parallel initiatives that ended up with the submission of three requests for advisory opinions before three of the major international courts and tribunals. Second, the chapter assesses the expected impact of advisory opinions on climate change, namely in international and domestic lawmaking and judicial proceedings. These impacts prove that advisory opinions are taken seriously, as can be noticed in the recent agreement between the United Kingdom, Mauritius, and the United States of America concerning the sovereignty over the Chagos archipelago. Third, and finally, the chapter analyses the critical areas for future research so that these advisory opinions are a first but decisive step for future judicial development of international law – ie, how the advisory opinions may be used as a 'Rosetta Stone' to clarify and develop international climate law.

Keywords

civil society movements – concerned individuals – concerned states – future research agenda – impact on domestic law – impact on international negotiations – impact on litigation

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1 Introduction

International law is a system of hope – hope that States comply with the rules and principles they consented to despite the lack of enforcement mechanisms as sophisticated as within domestic legal systems. The trio of requests for an advisory opinion on climate change embody this idea of hope that States are concerned with the international rule of law and, therefore, that judicial clarification or development of the international law on climate change has the potential to compel recalcitrant States to enhance their mitigation and adaptation laws and policies. Hope, therefore, was a major guiding force behind the trio of requests for an advisory opinion. Ultimately, hope that – by emphasizing the clarity and bindingness of the obligations stemming from the United Nations Framework Agreement on Climate Change (UNFCCC),[1] the Paris Agreement,[2] and other international law rules and principles relevant in the context of climate change – the International Tribunal for the Law of the Sea (ITLOS), the Inter-American Court of Human Rights (IACtHR), and the International Court of justice (ICJ), will also emphasize that international law is *law*, being the stabilization of expectations its central function in our societies (eg under the UNFCCC or the Paris Agreement) despite past frustration.[3]

Hope is an intangible and immaterial value that is hardly protected by any legal system – and much less by international law, where no centralized sovereign or law enforcer exists. However, the experience also shows that States are concerned with the rule of law, be it a genuine concern or only a concern with securing a predictable set of rules applicable to all States. The *Chagos* Advisory Opinion[4] is a prime example of how hope and a concern with the international rule of law can be a guiding force in international law processes. Although Mauritius was deprived of a judicial mechanism to question the continued administration of Chagos by the United Kingdom, it could form a coalition vote in the UN General Assembly (UNGA) to secure the approval of a request for an advisory opinion.[5] This was similar to the coalition vote under the Vanuatu initiative for requesting an advisory opinion from the ICJ on States' obligations regarding climate change. In 2019, the advisory opinion

1 United Nations Framework Convention on Climate Change (adopted 9 May 1992, entry into force 21 March 1994) 1771 UNTS 107.

2 Paris Agreement (adopted 12 December 2015, entry into force 4 November 2016) 3156 UNTS 79.

3 Nikas Luhmann, *Law as a Social System* (Klaus E Ziegert tr, OUP 2004) 142 ff.

4 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95.

5 UNGA Res 71/292 (22 June 2017) UN Doc A/RES/71/292.

rendered by the ICJ concluded that the separation of the Chagos archipelago from Mauritius in 1964 (ie, before the independence of Mauritius) was contrary to States' international obligations' on decolonization,[6] and thus that 'the United Kingdom is under an obligation to bring an end to its administration of the Chagos archipelago as rapidly as possible.'[7] In this light, what incentive did the United Kingdom have to return sovereignty over the Chagos archipelago to Mauritius as a result of a *non-binding* advisory opinion? This question can only be answered by the United Kingdom authorities. Still, it should not pass unnoticed that, on 3 October 2024, the United Kingdom, Mauritius, and the United States of America (which holds a military base in Chagos) announced an agreement to return Chagos to Mauritius' sovereignty.[8]

The *Chagos* opinion brings hope to those awaiting the advisory opinions on climate change. Given recent developments, it seems likely that the IACtHR and the ICJ will adopt a similar approach to ITLOS in the *COSIS Opinion*[9] – a stance that is both cautious and bold. Upon the release of all three advisory opinions, the international community will gain a sort of 'Rosetta Stone' for climate law: a foundational guide to decipher the core principles of international climate law, including (but not limited to) obligations under the UNFCCC and the Paris Agreement, and to clarify the responsibilities of states in addressing climate change.

In Chapter 3, Alice Ollino and Irini Papanicolopulu provide an in-depth analysis of the findings in the ITLOS' *COSIS Opinion*, alongside anticipated insights from the IACtHR and ICJ. Here, in this conclusion, our focus shifts to what lies ahead: the broader message that emerges from the pursuit of these three advisory opinions on climate change and what future directions may be envisioned.

2 A Message of Hope for Concerned States, Civil Society Movements, and Individuals

In Chapter 4, Melissa Stewart explains how the prospects for State-to-State litigation under Article 14 of the UNFCCC and Article 24 of the Paris Agreement

6 ibid §§177–180.

7 ibid §§177–180.

8 See 'Joint statement between the governments of the Republic of Mauritius and the United Kingdom of Great Britain and Northern Ireland concerning the Chagos Archipelago, including Diego Garcia' (3 October 2024) available at <https://www.gov.uk/government/news/joint-statement-between-uk-an-mauritius-3-october-2024> last accessed 8 November 2024.

9 *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (Advisory Opinion, 21 May 2024) ITLOS Case No 31 (*COSIS Opinion*).

are very short. The dispute settlement system established therein, requiring express State consent to the jurisdiction of the ICJ or the arbitral tribunal, is a protective design flaw and a design choice that prevents States from engaging in judicial disputes referring to the interpretation or enforcement of these treaties. Thus, States' obligations regarding climate change seem to be a non-contractible behavior, in the sense that they seem unable to be challenged by other States or verified by a court.

Nonetheless, Stewart, but also Austyn Campbell, Claire Robertson, and Eran Sthoeger in Chapter 9, explain how all design systems have their glitches. Therefore, the fact that the ICJ or the arbitral tribunal do not hold contentious jurisdiction under Articles 14 of the UNFCCC or 24 of the Paris Agreement does not mean that States do not bear international obligations in respect of climate change or that these obligations are immune from any kind of international judicial oversight. In fact, the fragmentation of international law (from a regime and institutional angle) is an opportunity to find new avenues for bringing climate change into the international judiciary's docket. Therefore, one message of hope from this process of requesting advisory opinions on climate change is that creativity and ingeniousness are a powerful tool available to concerned States, civil society movements, and individuals: they can help find glitches in the system and discover new *fora* and new legal arguments to be used before international courts and tribunals.

One cannot ignore that States may fear retaliation or damaging diplomatic relations or that they can be captured by entrenched economic interests (including a genuine concern with economic growth and the well-being of their citizens). Nonetheless, the trio of requests for advisory opinions on climate change shows the opposite. Some States are keen to pursue climate justice by taking the initiative of requesting an advisory opinion (IACtHR), or by creating an international organization as a platform to request such an opinion (ITLOS), or at least by investing and taking the lead in mobilizing other States to request an opinion (ICJ). Moreover, although States are concerned with economic interests that may appear incompatible with reducing greenhouse gas (GHG) emissions, they are also risk-averse as economic agents. Therefore, clarity on the existing law and the resulting obligations is also their core concern. This, hand in hand with a concern for reputation, helps explain why the UNGA request for an advisory opinion from the ICJ was approved by consensus after a formal endorsement by a large number of States.

Even though understanding the reasons behind a State's climate agenda is a complex task, one major factor contributing to the lack or insufficiency of States' climate action is that climate change is one example of a non-cooperative or Nash equilibrium. In such a case, unless States can interfere with other States'

policies to cope with GHG emissions and their negative externalities, they have no incentive to change their domestic climate laws and policies.[10] From their standpoint, the core question is, 'why should States adopt measures that affect their citizens' economic growth and well-being if other States keep emitting GHG and no international court or tribunal holds jurisdiction to assess their behavior'? Other answers could be given, but the message from the trio of requests for an advisory opinion, as well as from the European Court of Human Rights' (ECtHR) ruling in the *Verein KlimaSeniorinnen* case,[11] is that international law and international courts and tribunals may be leveraged successfully to pressure States to reduce GHG emissions from their territory or jurisdiction. According to ITLOS and the ECtHR, even the manner in which these (due diligence) obligations are performed domestically is also a matter of international law.[12] This proves that States' obligations regarding climate change are *legal* obligations subject to judicial scrutiny (although limited).

For concerned States, the next step is probably not before courts but rather in climate negotiations. For instance, the message in the *COSIS Opinion* that '[i]n the context of marine pollution from anthropogenic GHG emissions, States with greater means and capabilities must do more to reduce such emissions than States with less means and capabilities'[13] must be consequential. Therefore, it is expected that developing States wish to bring the common but differentiated responsibilities and respective capabilities (CBDR-RC) principle into climate negotiations. This same principle applies to all topics addressed in the trio of advisory opinions. While advisory opinions can clarify the foundational legal framework and delineate States' obligations regarding climate change, international cooperation among States remains essential to reduce GHG emissions effectively.[14] The tool for securing such cooperation and reconciling States' interests is precisely the negotiation of international treaties, namely at the Conferences of the Parties (COPS) to the UNFCCC and the Paris Agreement.

In this context, the trio of advisory opinions on climate change may be the catalyst needed to bring States to the negotiating table. As mentioned before, climate change is an example of a negative externality that creates a Nash equilibrium. This implies that a State is only encouraged to reduce GHG emissions

10 Eric A Posner & Alan O Sykes, *Economic Foundations of International Law* (Harvard University Press 2013) 19.

11 *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* (App No 53600/20) ECtHR [GC] 9 April 2024.

12 ibid §§538 & 550; *COSIS Opinion* (n 9) §§234 ff.

13 *COSIS Opinion* (n 9) §227.

14 ibid §§294–321.

from its territory or jurisdiction (with all the resulting economic implications) if others do the same. If the major international courts and tribunals (including the ECtHR and, eventually, the African Court on Human and Peoples' Rights (AfCtHPR) find that States have an obligation to mitigate and adapt to climate change, namely by reducing GHG emissions and cooperating at the regional and global level, this may be a symbolic encouragement for recalcitrant States.

In this sense, getting the major international courts and tribunals (regional and international, specialized or with a generic subject matter jurisdiction) is a tale of success from the angle of small island and other developing States that broke the glass ceiling. This success, however, is also shared with concerned individuals and civil society. The role of grassroots movements in the trio of climate change advisory opinion requests is explained by Cohen (Chapter 8), Narulla and Nanthakumar (Chapter 10), and analyzed in detail by Maria Antonia Tigre.[15] From the standpoint of these concerned individuals and civil society movements, the message of hope is quite clear: they were able to assist and influence the requesting States (before the IACtHR), organs (before the ICJ), and organizations (before the IACtHR) in all stages, including the shaping and writing of the questions asked to these courts and tribunals. Furthermore, individuals (in their private capacity) and associations (representative of civil society movements) have never been so participative in submitting *amicus curiae* briefs or assisting states and international organizations in their written submissions. Therefore, the narrative espoused before these international courts and tribunals (or the 'story' narrated to them, as De Spiegeleir refers to in Chapter 7) was also crafted by individuals and civil society movements.

The conclusion seems obvious: the trio of requests for an opinion on climate change was probably only possible because of the role of such grassroots movements. As such, it is worth studying in more detail how these concerned civil society movements can be agents of change at the international level, namely through this more informal activity at the fringes of international law. If one can hint at future developments, it is legitimate to assume that these civil society movements will keep working on other initiatives (before courts or at different levels) to pressure States into adopting more stringent mitigation policies and that similar initiatives will be adopted with respect to other environmental causes. In this regard, assisting the initiative before the AfrCtHPR – where the lack of resources is abundant – would be the most laudable initiative from civil society movements. The initiative before the AfrCtHPR is explained in Chapter 6 by Lupin and Nekura, who also refer to

15 Maria Antonia Tigre, 'It is (Finally) Time for an Advisory Opinion on Climate Change: Challenges and Opportunities on a Trio of Initiatives' (2024) 17 *Charleston Law Review* 623.

the pivotal role of civil society movements and the need for knowledge and human and financial resources to assist the initiative.

3 The Impact on Domestic and International Processes

The advisory opinions rendered by ITLOS, the IACtHR, and the ICJ are apt to clarify and develop the international law on climate change. Their findings constitute what before we called the 'Rosetta Stone': a code that can assist States in reading the UNFCCC, the Paris Agreement, and other rules and principles of international law relevant to the climate context. Clarifying the existing States' obligations regarding climate change has a profound impact on processes of international law and domestic law, including lawmaking and judicial litigation.

In Section 2, we mentioned that some States are expected to use the advisory opinions in diplomatic negotiations. At least, it is fair to assume that those who took the lead in the processes that resulted in the requests for advisory opinions will use their findings during the COPs to the UNFCCC and the Paris Agreement. But more than that, because of the institutional authoritativeness of ITLOS, the IACtHR, and the ICJ as knowledgeable and third-party interpreters of the UNFCCC, the Paris Agreement, and other rules and principles of international law related to climate change (as explained by Galvão Telles and Guerreiro Teixeira in Chapter 2), their findings are expected to serve as a guide in enhancing States' obligations and the institutional governance of climate change, as well as a protective talisman against setbacks in climate negotiations. One cannot ignore the role of State consent in the creation of rules and principles of international law. Still, unless there are compelling reasons for States to rule out the findings of ITLOS, the IACtHR, and the ICJ, it would be strange if States concerned with the international rule of law would not take into account the findings of those courts. Furthermore, since climate change results from the concentration of GHG in the atmosphere (ie a common pool shared by all States), 'prevent[ing] dangerous anthropogenic interference with the climate system,'[16] and '[h]olding the increase in the global average temperature to well below 2ºC above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5ºC above pre-industrial levels,'[17] requires coordination of State action under international law. Negotiating and signing

16 UNFCCC, art 2.

17 Paris Agreement, art 2(1)(a).

international treaties is the tool for coordinating States' efforts at the international level.

However, the bulk of the mitigation effort is to be pursued at the level of domestic law and policies. Unsurprisingly, this was highlighted by ITLOS and the ECtHR, who pointed to States' primary obligation to adopt and effectively implement a regulatory framework at the domestic level aimed at reducing GHG emissions from their territory or jurisdiction.[18] Their findings expressly suggested that such a regulatory framework is needed to target private operators whose economic activity is responsible for GHG emissions. Moreover, their findings implied that the topic of liability for climate change-related harm in general, and corporate liability specifically, need greater development. The next frontier in climate change responsibility and liability lies precisely in how domestic laws regulate corporate accountability. In addition, climate mitigation and adaptation are always country-driven, in the sense that the value-based choices and trade-offs require multisectorial, micro-decision making that only the domestic authorities can perform. As a result, an expected impact of the advisory opinions on climate change is on the decision-making processes that implement, at the domestic level, States' climate obligations. Médici-Colombo and Rocha, in Chapter 12, include prior examples of domestic implementation of advisory opinions rendered by ITLOS and the IACtHR. The authors found that since advisory opinions are non-binding and do not require a specific State action or execution process, implementing advisory opinions at the domestic level is often unacknowledged and varies according to the regime of international law in question. The message of hope, however, is that practice hints that States are willing to incorporate the findings developed in advisory opinions in their domestic statutory norms. As such, the advisory opinions on climate change can provide at least a sense of direction for domestic lawmakers.

Finally, perhaps the most apparent impact of the trio of advisory opinions on climate change is on litigation before domestic or international courts and tribunals, as explained by Main-Klingst and Marjanac in Chapter 11. In fact, a common obstacle in climate litigation is identifying a sufficiently characterized legal obligation to reduce GHG emissions. To that end, the obvious starting points are the UNFCCC and the Paris Agreement. Still, their provisions do not seem as detailed as necessary to invoke a *detailed* legal obligation to reduce GHG emissions before a court. This happens concerning domestic and international courts alike.

18 *COSIS Opinion* (n 9) §§265–280; *Verein KlimaSeniorinnen* (n 11) §§544–554.

Nonetheless, a clarification and development of these obligations (including what they imply in terms of States' behavior) means these opinions can be used before courts as an authority to substantiate a climate change-related claim. This is especially important in face of Article 4 of the Paris Agreement, which looks to States' self-differentiation as the *Grundnorm* of the international law on climate change. In this context, the findings of international courts and tribunals, hand in hand with their authority as knowledgeable bodies, can be used in order to challenge a State's climate (in)action.

4 Where Next? A Roadmap for Future Research

The main purpose of this edited volume is to pave the way for future research on the trio of advisory opinions on climate change – together with the ECtHR's ruling in the *Verein KlimaSeniorinnen* case and an eventual opinion rendered by the AfrCtHPR. The opinions are likely to unlock a rich research agenda, as the chapters in this book have highlighted. The *COSIS opinion*, for instance, still needs to be fully explored and analyzed in its complexities. Similarly, once the advisory opinions from the ICJ and the IACtHR are rendered (which is expected to take place in 2025), it will take time for scholars and practitioners to digest and assess their implications.

Looking ahead, a research agenda on climate change advisory opinions should aim to provide a comprehensive analysis of these decisions while also delving into specific aspects in greater detail. The first step will be to offer broad analyses of the advisory opinions of ITLOS, ICJ, and IACtHR. Being a 'Rosetta Stone' means that these advisory opinions will serve as foundational texts for the international law on climate change. Accordingly, although one cannot expect a detailed clarification of what States' obligations are in a facts-detached advisory opinion, still the role of scholarship is to unveil the implications of these advisory opinions and, namely, how they can be used to reveal more detailed States' obligations under international law in addressing climate change.

Beyond this general analysis, other specific doctrinal aspects within these opinions will require in-depth study. In this conclusion chapter, we do not aim to exhaust this matter, but would like to point out the topics that, in our view, deserve in-depth research, following the advisory opinions.

The obligation to mitigate climate change. The first topic needing research is the obligation, at the level of primary norms, to mitigate climate change. Research focuses on the wording of Article 4 of the Paris Agreement, plus other rules and principles stemming from the UNFCCC and general environmental

law. Even an optimistic reading of such instruments has to come to terms with their shortcomings, including the centrality of self-differentiation and the careful writing of verbal formulations that question their legal bindingness. However, the *COSIS Opinion* and the *Verein KlimaSeniorinnen* ruling already indicated other sources of an obligation to mitigate climate change. Together with the IACtHR's and the ICJ's opinions, these pronouncements from international courts and tribunals suggest that (i) such obligation has multiple sources, (ii) entailing that delimiting the exact content of the legal obligation to mitigate climate change implies looking at the requirements flowing from all sources. A joint reading of the multiple sources probably unveils a more detailed legal obligation.

Due diligence obligations. Another critical area for academic research is the advisory opinions' treatment of due diligence obligations, particularly how they define States' *ex ante facto* responsibility to prevent climate harm. As a topic, due diligence obligations have been largely studied in the context of environmental law, and it probably represents the most solid breakthroughs of ITLOS and ICJ in the last decade. Due diligence obligations have also gained the attention of scholarship. Nonetheless, while the ECtHR in *Verein KlimaSeniorinnen* censored a State's complete lack of mitigation measures as an infringement of a due diligence obligation, it remains to be seen how comfortable courts are with assessing and censoring that State's insufficiency of climate measures. The first judgment is absolute and binary, but the insufficiency of measures and the balance with other State policies requires from courts a greater refinement of thought and implies a particular interference with domestic policies. Strict guidelines on how to perform this assessment in the context of climate change require scholars' attention.

Reparations. Even though States have created mechanisms under the umbrella of loss and damage, the topic of reparations is politically explosive. This helps to explain why the subject of reparations for climate harm is understudied. Furthermore, from a technical angle, studying reparations for climate change-related harm implies relating State and non-State actors' responsibility for climate change and how claims under different international law regimes and formulated by different subjects relate to each other.

Vulnerabilities. Scholars should also consider how the advisory opinions safeguard vulnerable groups, including women, children, and Indigenous populations, and how they approach intergenerational equity to protect future generations. The *COSIS Opinion* devoted large sections to the needs of developing States as a whole but did not discuss other sources of vulnerability, while the ECtHR mentioned in the *Verein KlimaSeniorinnen* ruling that '[t]he Court is also aware that the damaging effects of climate change raise an issue

of intergenerational burden-sharing … and impact most heavily on various vulnerable groups in society, who need special care and protection from the authorities.'[19] It is still unclear what the findings of the IACtHR and the ICJ will be on this matter, but one cannot ignore that the law is about one's protection in a situation of vulnerability. Whatever their findings, the advisory opinions on climate change will certainly pressure in-depth studies on how the law aims to protect the most vulnerable against climate change-related risks and hazards.

Competition and coordination. Another critical area of future study is a comparative analysis of the advisory opinions from ITLOS, the ICJ, and the IACtHR, hand in hand with the rulings from the ECtHR and other judicial and para-judicial bodies of international law. In fact, in contrast with domestic law, there is no horizontal or vertical integration among courts in international law. This explains the potential for contradiction between the findings of different courts and tribunals, as well as their need to find informal means of dialogue and cooperation to avoid conflicting views on States' obligations to mitigate and adapt to climate change. The trio of requests for advisory opinions on climate change is a prime example of how international courts and tribunals may be encouraged to compete to render the first, best, or most authoritative advisory opinion. Interdisciplinary studies can shed light on how judges work and thus help create room for a coherent development of the international law on climate change.

The chapters presented in this book open the door to many of these questions, but they also highlight the significant scholarly research that remains to be conducted. Whether through expanding discussions on how States and advocacy groups have engaged with the advisory process or through detailed doctrinal analysis of the decisions themselves, this book sets the stage for more comprehensive and specialized academic inquiry. Ultimately, the extent to which these advisory opinions shape the future of climate litigation, both internationally and domestically, will be a focal point of legal and academic analysis in the years to come. The greatest message of hope resulting from the advisory opinions is perhaps this one: opening the door for future research means that there is a road to be paved, which will ultimately guide our societies into a carbon-neutral future.

19 *Verein KlimaSeniorinnen* (n 11) §410.