CHAPTER 1

The Role of Advisory Opinions in International Law in the Context of the Climate Crisis: An Introduction

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Abstract

This introductory chapter of 'The Role of Advisory Opinions in International Law in the Context of the Climate Crisis' explores the evolving landscape of international climate law at a pivotal moment marked by a surge in climate litigation and the landmark issuance of advisory opinions by international and regional courts and tribunals. Rooted in the context of decades of climate litigation primarily pursued at domestic levels, the shift to international courts and tribunals highlights an urgent need for clear and enforceable obligations on States to mitigate and adapt to climate change. Central to this inquiry are the Paris Agreement and UNFCCC, whose provisions, while vital, remain ambiguous and largely non-binding, prompting individuals, civil society, and States to seek legal clarity. By examining the growing influence of advisory opinions – including those recently delivered or forthcoming from the ITLOS, IACtHR, and ICJ – the book provides a comprehensive analysis of how international courts can clarify States' climate obligations. These non-binding opinions, positioned as 'Rosetta Stones' for interpreting States' responsibilities, illuminate a path forward by translating aspirational climate goals into actionable commitments. This chapter introduces the main topics and themes of the book, setting the stage for a critical conversation on the significance of this moment and the role of international law in addressing one of the world's most urgent challenges.

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1 Introduction

In William Golding's *Lord of the Flies*, a group of children who survived an airplane accident are left alone on a remote island. The book has several lines of interpretation, one being the idea that a core element of a human community – of individuals or States – is the existence of clear and binding rules. When these rules are challenged ('Who cares?'), the answer is clear-cut: 'Because the rules are the only thing we've got!'[1]

The international community of States is also in need of clear and binding rules to reduce global emissions and concentration of greenhouse gas (GHG) emissions, thus avoiding the most hazardous consequences of climate change. To that end, States adopted the 1992 United Nations Framework on Climate Change (UNFCCC),[2] the 1997 Kyoto Protocol,[3] and the 2015 Paris Agreement.[4] The trio of treaties – together with other non-binding decisions adopted by the Conferences of the Parties (COPs) to the UNFCCC – form the 'UNFCCC legal complex,' which pursues the reduction of the concentration of GHG in the atmosphere[5] and, more specifically, to '[hold] 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.'[6] Other norms of international law are also relevant in the context of climate change, although they are not directly concerned with their causes or consequences. Therefore, apart from the UNFCCC legal complex, the international law on climate change includes the principles of general environmental law

1 William Golding, *Lord of the Flies* [1954] (Faber & Faber 1983) 100.

2 1992 United Nations Framework Convention on Climate Change (adopted 9 May 1992, entry into force 21 March 1994) 1771 UNTS 107.

3 1997 Kyoto Protocol to the UNFCCC (adopted 11 December 1997, entry into force 16 February 2005) 2303 UNTS 162.

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

5 UNFCCC, art 2.

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

(eg precaution, no-harm, or cooperation), rules and principles of the law of the sea, human rights law, or the rules and principles stemming from the treaties on the protection of the ozone layer.[7]

However, clarity and enforceability aren't exactly the hallmarks of international climate law. The lack of precision has spurred a shift toward international courts and tribunals to help pin down States' responsibilities for climate change action. In response, concerned individuals, civil society movements, and States have taken 'climate change' straight to the docket of major international and regional courts. In 2020, the first applications on human rights and climate change were filed before the European Court of Human Rights (ECtHR), and eventually decided in 2024.[8] Between December 2022 and March 2023, three requests for an advisory opinion were submitted to 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).[9] Furthermore, a request for an advisory opinion from the African Court on Human and Peoples' Rights (AfCtHPR) is being prepared,[10] as explained by Lupin and Nekura in Chapter 6. This pivot to advisory opinions is largely driven by three key reasons.

First, the UNFCCC and the Paris Agreement (ie the major climate treaties) lay down a set of non-, soft, or insufficiently characterized obligations at best.[11] For

7 1985 Vienna Convention for the Protection of the Ozone Layer (adopted 22 March 1985, entered into force 22 September 1988) 1513 UNTS 293; 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989) 1522 UNTS 3.

8 *Duarte Agostinho and Others v Portugal and 32 Other States* (App No 39371/20) ECtHR [GC] 9 April 2024; *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* (App No 53600/20) ECtHR [GC] 9 April 2024; *Carême v France* (App No 7189/21) ECtHR [GC] 9 April 2024. Although the ECtHR also has an advisory jurisdiction under Article 46 of the ECHR (Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221) and Article 1 of Protocol 16 to the ECHR (adopted 2 October 2013, entered into force 1 August 2018, ETS No 214), it is unlikely that an advisory opinion on human rights and climate change will be requested *in lieu* of an individual application under Article 34 of the ECHR.

9 For a more comprehensive exploration of the trio of advisory opinion requests, see 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. For a discussion on how the three requests interact through competition and dialogue, see Maria Antonia Tigre and Armando Rocha, 'Competition and dialogue between courts in the context of climate change advisory opinions,' (2023) 117 *AJIL Unbound* 289.

10 Tigre (n 14) 626.

11 Eg Lavanya Rajamani, 'The 2015 Paris Agreement: Interplay between Hard, Soft and Non-Obligations' (2016) 28(2) *Journal of Environmental Law* 337.

instance, Article 4 of the Paris Agreement – which is the bedrock of the entire building of the international law on climate change – sets out States' obligation to prepare, communicate and maintain, every five years,[12] a nationally determined contribution (NDC),[13] having in mind that each State's NDC will represent a progression over time and must reflect its highest possible ambition.[14] Apart from relying on a State's self-differentiation and self-assessment of its highest possible ambition, the wording of Article 4 of the Paris Agreement (including the variations in the verbal formulation) is the prime example of lack of clarity on States' obligations to mitigate and adapt to climate change.

Second, other rules and principles may be relevant in the context of, but were not devised for coping with the causes or consequences of climate change. As such, it is also unclear to what extent these rules and principles can be used as a source and tool to flesh out States' obligations in relation to climate change. This lack of clarity can ultimately lead to non-compliance – or, at the very least, under-compliance – with the overall goal of 'well below 2°C.' In fact, as we were finalizing this edited book in November 2024, data from the European Copernicus Climate Change Service confirmed that 2024 was set to be the hottest year on record.[15] The prediction is that we will surpass the 1.5°C temperature threshold – after 2023 had also set a record temperature rise of 1.48°C.

A *third* and final factor is the unlikelihood of a State-to-State dispute under the UNFCCC or the Paris Agreement in the coming years. Fear of retaliation or damaging diplomatic relations, and legal obstacles such as the unclarity of the legal background, the difficulty of establishing causation, or the lack of consent to jurisdiction pursuant to Articles 14 and 24 of the UNFCCC and the Paris Agreement, explain why States refrain from initiating judicial proceedings related to the causes or consequences of climate change. In this context, international courts' advisory jurisdiction is perceived as an opportunity for clarifying and developing the international law on climate change, without the risks and difficulties of contentious cases.

This background explains why international climate law is fertile ground for, and in need of, judicial development, as explored by Guerreiro Teixeira and Galvão Teles in Chapter 2. In other words, courts play a role in shaping international climate law when resolving disputes or issuing opinions on States' climate obligations. Choosing relevant rules and principles, interpreting them,

12 Paris Agreement, art 4(9).

13 ibid art 4(2).

14 ibid art 4(3).

15 Mark Poynting, *This year set to be first to breach 1.5C global warming limit*, BBC News (Nov. 7, 2024), https://www.bbc.com/news/articles/c1dpnxnvv2go/.

and defining the precise scope of States' duties help bring the law into sharper focus. As such, advisory opinions, though non-binding, can serve as a 'Rosetta Stone' for decoding and clarifying States' obligations to tackle climate change, helping us translate lofty ambitions into actionable commitments for mitigation and adaptation.

As such, 2024–2025 marks an unprecedented moment in global climate litigation: as of November 2024, we are on the verge of having four of the world's most important international and regional courts and tribunals answering crucial legal questions on the (*ex ante* and *ex post facto*) responsibility of States for climate change. Whilst the ITLOS and the ECtHR have already made their pronouncements on international climate law – respectively, by means of an advisory opinion on climate-related obligations under the United Nations Convention on the Law of the Sea (UNCLOS)[16] and a ruling on States' obligation

16 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3. For short analyses of the ITLOS advisory opinion, see Korey Silverman-Roati and Maxim Bönnemann, *The ITLOS Advisory Opinion on Climate Change: An introduction into the joint blog symposium*, Climate Law Blog (May 22, 2024), https://blogs.law.columbia.edu/climatechange/2024/05/22/the-itlos-advisory-opinion-on-climate-change-an-introduction-into-the-joint-blog-symposium/; Jacqueline Peel, *Unlocking UNCLOS: How the ITLOS Advisory Opinion Delivers a Holistic Vision of Climate-relevant International Law*, Climate Law Blog (May 24, 2024), https://blogs.law.columbia.edu/climatechange/2024/05/24/unlocking-unclos-how-the-itlos-advisory-opinion-delivers-a-holistic-vision-of-climate-relevant-international-law/; Romany Webb, *The ITLOS Advisory Opinion and Marine Geoengineering: More Questions, Few Answers*, Climate Law Blog (May 24, 2024), https://blogs.law.columbia.edu/climatechange/2024/05/24/the-itlos-advisory-opinion-and-marine-geoengineering-more-questions-few-answers/; Armando Rocha, *A Small but Important Step: A Bird's-Eye View of the ITLOS' Advisory Opinion on Climate Change and International Law*, Climate Law Blog (May 27, 2024), https://blogs.law.columbia.edu/climatechange/2024/05/27/a-small-but-important-step-a-birds-eye-view-of-the-itlos-advisory-opinion-on-climate-change-and-international-law/; Christina Voigt, *ITLOS and the importance of (getting) external rules (right) in interpreting UNCLOS*, Climate Law Blog (May 29, 2024), https://blogs.law.columbia.edu/climatechange/2024/05/29/itlos-and-the-importance-of-getting-external-rules-right-in-interpreting-unclos/; Cymie Payne, *Finding Light in Dark Places: Specific Obligations for Climate Change and Ocean Acidification Mitigation*, Climate Law Blog (Jun. 4, 2024), https://blogs.law.columbia.edu/climatechange/2024/06/04/finding-light-in-dark-places-specific-obligations-for-climate-change-and-ocean-acidification-mitigation/; Marta Torre-Schaub, *Why Climate Science Matters for International Law*, Climate Law Blog (Jun. 6, 2024), https://blogs.law.columbia.edu/climatechange/2024/06/06/why-climate-science-matters-for-international-law/; Margaretha Wewerinke-Singh and Jorge E. Viñuales, *More than a Sink: The ITLOS Advisory Opinion on Climate Change and State Responsibility*, Climate Law Blog (Jun. 7, 2024), https://blogs.law.columbia.edu/climatechange/2024/06/07/more-than-a-sink-the-itlos-advisory-opinion-on-climate-change-and-state-responsibility/; Panos Merkouris, *'Relevant Rules' as Normative Environment:*

to protect the stability of the climate system pursuant to Articles 6 and 8 of the ECHR[17] – the IACtHR and the ICJ are expected to render their advisory opinions on climate change in 2025.

This moment in time marks a pivotal shift in international climate law. One advisory opinion has already been published, and two more are anticipated in 2025, each one adding weight to the collective push to define and enforce climate obligations at a global level. This book captures this critical juncture, aiming to spark a conversation on the role, importance, and far-reaching implications of these advisory opinions. This moment, however, is not happening in isolation; it reflects decades of mounting climate litigation and a steadily rising demand for accountability.[18] The escalating number of climate cases across domestic, regional, and international bodies shows a groundswell of concern over climate change and its relentless impacts. Until recently, climate litigation unfolded primarily in domestic courts, but the shift to international forums underscores an acknowledgment that climate change is a global issue requiring global solutions. This book invites readers to explore the significance of this turning point and to consider how advisory opinions may shape the path forward in addressing one of the most pressing challenges of our time.

This introductory chapter is structured as follows: Section 2 briefly discusses the advantages of the advisory route. Section 3 provides a brief overview of the three distinct requests for advisory opinions. Section 4 outlines the organization of the book, while Section 5 concludes the discussion and sets the stage for the chapters to come.

2 A Strategic Choice: Advantages of the Advisory Route

The requests for advisory opinions result from unparalleled advocacy work from States and civil society, who were concerned with the disappointing outcomes of negotiations at the COPs under the UNFCCC, as well as with the

Harmony vs Cacophony in the ITLOS Advisory Opinion on Climate Change, Climate Law Blog (Jun. 15, 2024), https://blogs.law.columbia.edu/climatechange/2024/06/15/relevant-rules-as-normative-environment-harmony-vs-cacophony-in-the-itlos-advisory-opinion-on-climate-change/.

17 For an overview of the decisions, see Maxim Bönnemann & Maria Antonia Tigre (eds.), *The Transformation of European Climate Litigation* (Verfassungsbooks, 2024).

18 See Michael Burger and Maria Antonia Tigre, *Global Climate Litigation Report: 2023 Status Review* (Sabin Center for Climate Change Law, Columbia Law School & United Nations Environment Programme 2023); Maria Antonia Tigre and Margaret Barry, *Climate Change in the Courts: A 2023 Retrospective* (Sabin Center for Climate Change Law, December 2023).

growing evidence that the global stocktake of States' NDCs remains short to meet the long-term temperature reduction goals of the Paris Agreement.[19] As a result, concerned States and civil society turned to the advisory jurisdiction of international and regional courts and tribunals as the most effective forum to provide an authoritative contribution to clarifying and advancing international climate law. Whilst Campbell, Robertson, and Sthoeger explain in detail the role of States in pursuing judicial clarification in the context of climate change in Chapter 9,[20] Narulla and Nanthakumar focus on how civil society movements pursued the same goal of clarification of what States' obligations to mitigate and adapt to climate change are in Chapter 10.[21]

As these authors explain, seeking an advisory opinion is not about involving courts and tribunals in the political negotiation process under the United Nations (UN), nor is it a substitute for negotiations within the COPs. Instead, it aims to clarify the legal obligations that underpin these political discussions. In this context, the trio of requests for advisory opinions is not a form of 'lawfare' but rather a genuine effort to provide an objective, depoliticized foundation for COP negotiations and climate litigation more broadly. By establishing a shared understanding of the legal framework applicable to climate change, these opinions can help ground the political process in a more explicit legal context.

The reason for resorting to advisory proceedings is straightforward: the rights-turn in climate litigation is linked to an upsurge of claims brought by the applicants into domestic courts or, at the supranational and international level, to the Court of Justice of the European Union, the ECtHR, the UN Human Rights Committee, or the UN Committee on the Rights of the Child. What these cases have in common is their inherently contentious nature: each was initiated through a petition or complaint against a State, raising specific legal issues that could impede a successful outcome, such as questions of standing, causation, attribution, redressability, or compliance with procedural requirements. Therefore, scholars have focused on the procedural requirements, challenges, and possible outcomes of climate change-related disputes. However, the lack of clarity with regards to the (bindingness of the) international climate law – hand in hand with fears of retaliation or damaging diplomatic

19 UNFCCC, 2023 Synthesis report on GST elements, Views on the elements for the consideration of outputs component of the first global stocktake, Synthesis report by the secretariat, FCCC/SB/2023/9 (4 October 2023), available at https://unfccc.int/sites/default/files/resource/SYR_Views%20on%20%20Elements%20for%20CoO.pdf. See also UNFCCC, *Outcome of the first global stocktake*, https://unfccc.int/topics/global-stocktake/about-the-global-stocktake/outcome-of-the-first-global-stocktake.

20 Chapter 9 in this book.

21 Chapter 10 in this book.

relations and the lack of consent to jurisdiction under Article 14 of the UNFCCC, Article 24 of the Paris Agreement or other regulations of international courts and tribunals or other adjudicatory bodies – means that the prospects for a State-to-State contentious case (necessarily at the level of international law) are extremely short, if at all. In this context, requesting an advisory opinion emerges as the most viable alternative – one that may also prove more effective for clarifying and developing the foundational principles of international climate law. This approach is both possible and advantageous because it avoids the complex factual context and procedural challenges that could 'muddle the waters' in contentious cases.

3 The Requests for Advisory Opinions

This section briefly explores the processes that resulted in the trio of requests for advisory opinions – bearing in mind that, as a process, they took place hand in hand with the diplomatic negotiations within the aegis of the COPs to the UNFCCC. However, a remarkable consequence of the trio of advisory opinions is that the primary outcomes in the international climate change law are, and will be, delivered not as a result of treaty negotiations or judicial dispute settlement, but rather from purely advisory proceedings. Advisory opinions are *prima facie* non-binding, but the judicial reputation of these bodies and the narratives they adopt explain why they can help unveil States' obligations under international law and further develop international climate change law, filling the blanks of a slow development under political processes. This idea is further explored in Section 4 of this Introduction, as well as by Guerreiro Teixeira and Galvão Teles in Chapter 2. The use of advisory opinions is not new in the recent history of international law. Still, the failure of dispute settlement mechanisms under the UNFCCC's legal complex means this is the first time that an entire block of international law is inaugurated and brought before three of the central international courts and tribunals simultaneously and through advisory opinions.

3.1 *The International Tribunal for the Law of the Sea*

Requesting an advisory opinion from ITLOS was not completely evident at first sight. In fact, the only reference in UNCLOS to the advisory jurisdiction of ITLOS is found in Article 191, which establishes that its Seabed Disputes Chamber can render an advisory opinion at the request of the Assembly or the Council of the International Seabed Authority on legal questions arising within the scope of their activities – ie questions regarding Part XI of UNCLOS

ruling the exploitation of minerals in the International Seabed Area. However, Article 21 of ITLOS Statute (Annex VI to UNCLOS and thus having the same legal status as UNCLOS)[22] sets out that the jurisdiction of ITLOS comprises 'all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.' In other words, since State consent is the basis of an international court's or tribunal's jurisdiction, the ITLOS' jurisdiction can be enlarged by means of an *ad hoc* treaty related to the purposes of UNCLOS. In the *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (*SRFC*),[23] ITLOS took the opportunity to espouse its understanding of this provision – and, namely, if it can be used for granting ITLOS an advisory competence.[24] In a nutshell, ITLOS concluded that States can enter a treaty in which they vest ITLOS with an advisory competence, provided that (i) the treaty relates to the purposes of UNCLOS; (ii) the treaty provides explicitly for the submission to ITLOS of a request for such an advisory opinion; (iii) the request is submitted by the body authorized by, or in accordance with, the latter treaty; and (iv) the opinion is given on a legal question (which, because ITLOS is a specialized international tribunal, must be a law of the sea question).[25] This understanding finds resonance in Article 138 of ITLOS Rules.

As such, during (but in parallel to) the 26th COP to the UNFCCC in Edinburgh (2021), the Governments of Antigua and Barbuda and Tuvalu signed the Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law (COSIS),[26] through which they created COSIS as a new international legal person.[27] COSIS' primary goal is to request an advisory opinion from ITLOS, according to Article 21 of ITLOS Statute[28] – therefore relying on Article 138 of ITLOS Rules and the understanding of the *SRFC Opinion*.

The COSIS Agreement was registered on the same day of adoption and entry into force and is open for accession to all Members of the Alliance of Small Island States.[29] If the urgency of climate change explains the speed of

22 UNCLOS, art 318.

23 *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (*SRFC*) (Advisory Opinion, 2 April 2015) ITLOS Case No 15 (*SRFC Opinion*).

24 ibid §§37–69.

25 ibid §60.

26 Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law (adopted and entered into force 31 October 2021) 3444 UNTS (COSIS Agreement).

27 ibid art 1(2).

28 ibid art 2(2).

29 COSIS Agreement, art 4(2). For a list of accessions, see <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002805c2ace>.

the registration and entry into force process, the pivotal role of small island States is also easy to understand. These States are more vulnerable to climate change-related consequences in the marine environment: sea level rise, for instance, threatens the very survival of such States, as was explicitly highlighted in the preamble of the COSIS Agreement.[30] For these States, facing the marine impact of climate change is a matter of urgency and of short- to medium-term survival. Their exposure and vulnerability towards marine factors also explain why small island States were keen on having ITLOS (as a specialized law of the sea international tribunal) making an authoritative pronouncement on States' obligations under UNCLOS in relation to the causes and consequences of climate change, emphasizing their obligations regarding the protection and preservation of the marine environment.

Accordingly, on December 12, 2022, COSIS lodged its request for an advisory opinion from ITLOS, where it asked what the States' specific obligations are under UNCLOS to prevent, reduce, and control pollution of the marine environment related to or resulting from excessive anthropogenic GHG emissions, as well as to protect and preserve the marine environment against the deleterious impacts resulting from climate change.[31] The request referred to, but was not limited to, States' obligations under Part XII of UNCLOS. On May 21, 2024, ITLOS rendered its advisory opinion.[32] This opinion is explored in more detail by Ollino and Papanicolopulu (Chapter 3). Still, it is worth mentioning that it was the first-ever pronouncement from an international court or tribunal on States' obligations to mitigate and adapt to climate change, having ITLOS adopted the innovative stance already espoused in prior advisory opinions related to the protection and preservation of the marine environment and natural resources.[33]

3.2 *The Inter-American Court of Human Rights*

The advisory competence of the IACtHR is established in Article 64 of the American Convention on Human Rights (ACHR), which sets out that members

30 COSIS Agreement, Preamble, §1.

31 The text of the request is available at <https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf>.

32 See also Maria José Alarcon and Maria Antonia Tigre, *Navigating the Intersection of Climate Change and the Law of the Sea: Exploring the ITLOS Advisory Opinion's Substantive Content*, Climate Law Blog (Apr. 24, 2023), https://blogs.law.columbia.edu/climatechange/2023/04/24/navigating-the-intersection-of-climate-change-and-the-law-of-the-sea-exploring-the-itlos-advisory-opinions-substantive-content/.

33 *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (*Request for Advisory Opinion Submitted to the Seabed Disputes Chamber* (Advisory Opinion, 1 February 2011) ITLOS Case No 17; SRFC Opinion (n 22).

of the Organization of American States (OAS), even if they are not parties to the ACHR,[34] and the organs listed in Chapter X of the Charter of the OAS,[35] can request an advisory opinion from the IACtHR regarding 'the interpretation of this Convention or of other treaties concerning the protection of human rights in the American [S]tates.'[36] As a result, although the requesting States or organs cannot ask the IACtHR about the interpretation of UNCLOS or the Paris Agreement, they can still request its advisory opinion regarding States' human rights obligations in relation to climate change under the ACHR. This conclusion stems from the fact that the IACtHR is a specialized international court, whose subject matter jurisdiction is limited to the interpretation and enforcement of the ACHR – although the interpretation and enforcement of the ACHR is an exclusive competence of the IACtHR also. Such a restrictive subject matter jurisdiction seems at odds with a request for an advisory opinion related to climate change, unless one bears in mind, one the one hand, the impacts of climate change on the effective enjoyment of human rights and, on the other hand, that systemic interpretation pursuant to the Vienna Convention on the Law of Treaties[37] implies that the ACHR's provisions are to be read in light of the entire building of international law, this including the UNFCCC and the Paris Agreement.

As such, requesting an advisory opinion from the IACtHR on what States' human rights obligations are to mitigate and adapt to climate change did not raise any concern. Therefore, on 9 January 2023, Chile and Colombia submitted a request for an advisory opinion from the IACtHR, seeking clarification regarding what such human rights obligations are in the context of climate change. In light of the subject matter jurisdiction of the IACtHR, the request focused on the obligations stemming from the ACHR and elaborated on a prior opinion from the IACtHR regarding human rights and the marine environment,[38] and the Inter-American Commission on Human Rights (IACmHR)'s

34 American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No 36.

35 Charter of the Organization of American States (adopted 39 April 1948, entered into force 13 December 1951) 119 UNTS 3.

36 ACHR, art 64(1). Furthermore, at the request of a member State of the OAS, the IACtHR may provide that State with 'opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.' (ibid, art 64(2)).

37 1969 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331, art 31(3)(c).

38 *The Environment and Human Rights* (*State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human*

Resolution No. 3/2021.[39] While in OC-23/17, the IACtHR recognized the existence of a human right to a healthy environment as directly derived from Article 26 ACHR, in Resolution No. 3/2021, the IACmHR fleshed out States' obligations in the context of climate change. The scope of the pending request for an advisory opinion is very broad. It encompasses various legal issues such as obligations on mitigation, adaptation, loss and damage, common but differentiated responsibilities, cooperation among states, procedural matters, the protection of environmental defenders, and climate migration.

At the inception of this request for an advisory opinion from the IACtHR was an initiative by an international organization.[40] Since only member States and some organs of the OAS can lodge a request for an advisory opinion,[41] that organization approached Chile and Colombia, as both States had shown openness and political willingness to pursue such a request for an advisory opinion.[42] For instance, Chile and Colombia have been particularly active in pursuing international environmental goals, with Colombia being the requesting State of the landmark advisory opinion OC-23/17.[43] As Guerreiro Teixeira and Galvão Teles elaborated in Chapter 2, the turn to non-binding advisory opinions is explained by the authoritativeness of the court's pronouncement while avoiding any risk of retaliation or damage to diplomatic relations. But in the case of the request for an opinion lodged before the IACtHR, other factors help explain the turn to opinions: (i) the urgency of the climate situation favors advisory proceedings, which are much faster than contentious proceedings instituted by individuals (which need to go first through the IACmHR);[44] (ii) the need for using 'international tools' to establish a shared understanding of what are States' international obligations concerning climate change; (iii) the broader participation of States and civil society movements in advisory

Rights) Advisory Opinion OC-23/17, Inter-American Court of Human Rights Series A No 23 (15 November 2017).

39 IACmHR, Resolution No 3/2021, Climate Emergency: Scope of the Inter-American Human Rights Obligations' (31 December 2021).

40 According to Tomás Pascual (from the Chilean Ministry of Foreign Affairs), as reported to Maria Antonia Tigre: see n 14, 639.

41 ACHR, art 64(1).

42 Tigre (n 14) 639–640.

43 See also Maria Antonia Tigre, Natalia Urzola and Juan Sebastian Castellanos, *A Request for an Advisory Opinion at the Inter-American Court of Human Rights: Initial Reactions*, Climate Law Blog (Feb. 17, 2023), https://blogs.law.columbia.edu/climatechange/2023/02/17/a-request-for-an-advisory-opinion-at-the-inter-american-court-of-human-rights-initial-reactions/.

44 ACHR, art 44.

proceedings;[45] and finally (iv) the fact that requesting an opinion depends only on the State's Government and does not require any form of intervention of that State's Parliament or a judiciary.[46]

3.3 *The International Court of Justice*

Pursuant to the Charter of the United Nations[47] and the Statute of the ICJ,[48] the ICJ also holds jurisdiction to render advisory opinions. Nonetheless, contrary to what happens with ITLOS or the IACtHR, States are not entitled to request an advisory opinion from the ICJ. In fact, according to Article 96 of the UN Charter, only the General Assembly, the Security Council, or other UN organs or specialized agencies (provided that authorized by the General Assembly and that the question falls within their scope of activities) can lodge a request for an advisory opinion from the ICJ. However, although small island States and other concerned States could not request an advisory opinion from the ICJ on States' obligations regarding climate change, they could still lobby for creating a coalition vote that would secure the approval of such a request in the General Assembly.[49]

Furthermore, also in contrast with ITLOS or the IACtHR, the subject matter jurisdiction of the ICJ is broader since under Article 96 of the UN Charter, the ICJ can render an advisory opinion on any question of (i) international (ii) law (iii) whose interpretation is not an exclusive competence of other international court or tribunal. Accordingly, the ICJ's advisory jurisdiction is delimited negatively by excluding domestic or purely political questions or questions that fall in the exclusive jurisdiction of other international courts or tribunals (as is the case of the interpretation or enforcement of the ACHR). In a request for an advisory opinion, the requirement regarding a 'legal' question needs a few words since climate change mitigation and adaptation action are also political topics – and politically divisive issues. However, being political and legal topics simultaneously does not preclude the ICJ from rendering an advisory opinion on States' obligations regarding climate change. As the ICJ mentioned in the *Nuclear Weapons* opinion, 'The fact that this question also has political aspects, as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a

45 IACtHR Rules of Procedure, art 73.

46 Tigre (n 14) 640–641.

47 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119, art 96 (*UN Charter*).

48 Statute of the International Court of Justice (Annex to the UN Charter), arts 65–68 (*ICJ Statute*).

49 UN Charter, arts 18 and 96(1).

"legal question" and to "deprive the Court of a competence expressly conferred on it by its Statute".'[50]

With this background in mind, the grassroots movement to request an advisory opinion from the ICJ began in 2019, with an exercise proposed by Professor Justin Rose to law students at the Vanuatu campus of the University of South Pacific.[51]/[52] Already in 2021, Vanuatu announced its intention to fight for the approval, at the UN General Assembly, of a request for an advisory opinion from the ICJ;[53] and one year afterwards, Vanuatu had already secured a coalition at the General Assembly to support its initiative,[54] including the drafting of a resolution with the support also of law firms and advocacy groups.[55] Thus, on 29 November 2022, the core group of States (led by Vanuatu) sent to all UN member States a draft resolution for a request to the ICJ on States' obligations in relation to climate change.[56] On 23 January 2023 (after the requests to ITLOS and the IACtHR had been lodged), the core group sent a revised draft resolution, which incorporated the views from some member States.[57] And finally, on 20 February 2023, a final draft resolution was circulated among UN Member States,[58] and was supported by 18 core States and co-sponsored by more than 120 States[59] (including Antigua and Barbuda, Tuvalu, Chile, and Colombia, being the requesting States in the advisory proceedings before ITLOS and

50 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, §13.

51 Tigre (n 14) 644 ff, where there is a detailed description of the youth movement that is responsible for the advisory opinion requested to the ICJ.

52 However, already in 2011, Palau had suggested for the first time requesting an advisory opinion from the ICJ on the topic of climate change. See UNGA, 16th Plenary Meeting Thursday, 22 September 2011, UN Doc A/66/PV.16 (Sep 22, 2011) available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/508/71/PDF/N1150871.pdf?OpenElement>.

53 See Bernadette Carreon, 'Vanuatu to Seek International Court Opinion on Climate Change Rights' *The Guardian* (London, 25 September 2021) available at <https://www.theguardian.com/world/2021/sep/26/vanuatu-to-seek-international-court-opinion-on-climate-change-rights>.

54 Amy Gunia, 'Pacific Island Nations Are Bringing Their Climate Justice Fight to the World's Highest Court' Time (New York, 18 July 2022) available at <https://time.com/6197027/pacific-island-nations-vanuatu-climate-change/>.

55 Tigre (n 14) 650–652.

56 First Draft of UN Doc A/77/L.58.

57 Second Draft of UN Doc A/77/L.58.

58 Final Draft of UN Doc A/77/L.58.

59 UN General Assembly, *Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change*, UN Doc A/77/L.58 (1 March 2023) available at <https://documents-dds-ny.un.org/doc/UNDOC/LTD/N23/063/82/PDF/N2306382.pdf>.

the IACtHR). On 29 March 2023, the General Assembly (UNGA) resolution – requesting an advisory opinion from the ICJ on States' obligations in respect of climate change – was adopted by consensus.[60] In this request, the UNGA worked upon the subject matter jurisdiction of the ICJ, and asked the ICJ to pronounce on States' obligations in relation to climate change under the UN Charter, the International Covenant on Civil and Political Rights,[61] the International Covenant on Economic, Social and Cultural Rights,[62] the UNFCCC, the Paris Agreement, UNCLOS, general human rights law (including the non-binding Universal Declaration on Human Rights),[63] and the general principles of environmental law.[64]

4 Book Structure

This volume, *The Role of Advisory Opinions in International Law in the Context of the Climate Crisis*, is designed to provide a comprehensive view of the processes behind the trio of advisory opinion requests, the potential implications of these opinions, and their future impact on international law and climate governance. While two of these advisory opinions are forthcoming, this book's themes were crafted to ensure a timeless relevance. The chosen topics and analyses are structured not to be limited by the content of future advisory opinions, but rather to serve as a foundation upon which these impending opinions – and others that may follow – can build and enrich our understanding of climate law.

The book is organized into three sections, each exploring an essential facet of advisory opinions in shaping international law in response to the climate crisis.

The first section, *Advisory Opinions as Instruments of Climate Governance*, sets the stage by examining the foundational role advisory opinions play in the evolution of international law, particularly within the climate sphere. This section investigates how advisory opinions help clarify State obligations under

60 UNGA Res 77/276 (29 March 2023) UN Doc A/RES/77/276.

61 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171.

62 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

63 UNGA Res 217A (III) (10 December 1948).

64 See also Maria Antonia Tigre and Jorge Alejandro Carrillo Banuelos, *The ICJ's Advisory Opinion on Climate Change: What Happens Now?*, Climate Law Blog (Mar. 29, 2023), https://blogs.law.columbia.edu/climatechange/2023/03/29/the-icjs-advisory-opinio-on-climate-change-what-happens-now/.

various jurisdictions, including the ICJ, ITLOS, IACtHR, and AfCtHPR, offering insights into the unique contributions of each body. By analyzing obligations under the UNFCCC legal framework, UNCLOS, the ACHR, and broader international legal principles, this section underscores the jurisdictional creativity that enables the recognition and enforcement of states' climate responsibilities, emphasizing the essential focus on climate justice in this expanding body of jurisprudence.

The second section, *Voices and Participation in Advisory Opinion Proceedings*, delves into the participatory nature of advisory proceedings, highlighting the roles of critical actors in framing and advancing climate-related obligations. This section explores how narrative tools are utilized within advisory proceedings to address systemic inequities and vulnerabilities, including the voices of states, civil society organizations, and diverse judicial perspectives. The section illustrates how these actors collectively enhance the legitimacy and influence of advisory opinions, helping to bridge the judiciary's role with the broader international community's goals in the fight against climate change.

The third section, *The Lasting Impact of Advisory Opinions*, considers the influence of advisory opinions beyond their immediate legal contexts, analyzing their effects on domestic litigation, national legal frameworks, and the case law of other international bodies. This section provides a forward-looking perspective, examining how advisory opinions can shape the future of international climate governance and impact domestic legal landscapes. By examining both the immediate and potential future impacts, this section underscores the enduring influence of advisory opinions on the evolution of climate governance at multiple levels.

Together, these sections offer a thorough exploration of advisory opinions as a transformative tool for addressing the climate crisis within the framework of international law. By weaving together insights from various perspectives, actors, and jurisdictions, this volume seeks to deepen the understanding of advisory opinions' potential to advance climate justice and promote global accountability. Each section is briefly discussed in the following chapters.

4.1 *Advisory Opinions as Instrument of Climate Governance*

Section I explores how advisory opinions function as tools of climate governance, shaping the development of international law, specifically climate change law, by clarifying States' responsibilities. Rita Guerreiro Teixeira and Patrícia Galvão Teles analyze the potential of advisory opinions for defining States' obligations toward climate action, providing a foundation for international legal standards. Alice Ollino and Irini Papanicolopulu examine the substantive contributions of the advisory opinion from ITLOS and how the

IACtHR and the ICJ could clarify climate-related obligations under international law. Melissa Stewart examines innovative uses of jurisdiction to reinforce these obligations within the pressing context of the climate emergency. Alejandro Carillo Bañuelos and Susan Ann Samuels discuss the collaborative role of various judicial bodies, including the ICJ, ITLOS, IACtHR, and AfCtHPR, in fostering a cohesive legal dialogue on climate issues. Lastly, Dina Lupin and Ruth Nekura focus on the African Human Rights System, emphasizing how civil society actors contribute to advisory proceedings on human rights and climate change, broadening the scope of climate accountability through regional frameworks.

Chapter 2, '*Advisory Opinions and the Development of International Law: an Opportunity for Climate Change Law?*', by Rita Guerreiro Teixeira and Patrícia Galvão Teles, discusses the role of international courts and tribunals in the judicial clarification and development of the international law on climate change. It supports the idea that 'the Court is not a legislative body. Its duty is to apply the law as it finds it, not to make it,'[65] as the ICJ expressly mentioned. In the *Nuclear Weapons* opinion, the ICJ further clarified that the role of courts 'is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules,' meaning that 'it [only] states the existing law and does not legislate.'[66] However, 'the distinction between author and interpreter [is] more a matter of different aspects of the same process.'[67] In a legal system such as international law, where no centralized lawmaker exists, international courts and tribunals can enhance our understanding of the existing law by clarifying and developing its rules and principles. That is achieved by selecting the relevant facts and laws and eventually interpreting and applying these laws to those facts. In performing these mental operations, judges are not limited to the wording of law: they also carry their worldview and cultural imprint and contribute to flesh out what results from, and is implied in, every rule or legal principle. As a result, courts' contribution to the clarification and development of law is a natural 'collateral effect' of adjudication.[68]

65 *South West Africa* (*Liberia v South Africa*) (2nd Phase) [1966] ICJ Rep 6, §89.

66 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, §18.

67 Ronald Dworkin, *Law's Empire* (Hart 1998) 229.

68 See, among others, Samantha Besson, 'Legal Philosophical Issues of International Adjudication', in Romano et al (eds), *The Oxford Handbook of International Adjudication* (OUP 2015) 413, 420–426; Armin von Bogdandy & Ingo Venzke, 'Beyond Dispute: International Institutions as Lawmakers (20211) 12 *German Law Journal* 979, 981; or Alan E Boyle & Christine M Chinkin, *The Making of International Law* (OUP 2007) 268.

Still, advisory opinions are not judgments, meaning they lack a binding character. Nonetheless, the authority to clarify and develop the law is rooted in the nature of the institution, not in the (binding) nature of the act. In other words, it results from how that institution is perceived by the players in the international legal system as an authoritative and knowledgeable court or tribunal, so that their findings (ie their clarifications and developments) are perceived as the best interpretation of the existing law. This same idea was entertained by ITLOS, which recognized the authoritativeness of the ICJ's advisory opinions. In the *Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives*,[69] one issue at stake was the non-binding character of the ICJ's advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*,[70] and namely whether the findings of the ICJ should be binding upon, or at least legally relevant to, ITLOS. In its judgment on the preliminary objections, ITLOS mentioned that although 'it is generally recognized that advisory opinions of the ICJ cannot be considered legally binding,' it still 'entails an authoritative statement of international law.'[71] As such, ITLOS 'finds it necessary to draw a distinction between the binding character and the authoritative nature of an advisory opinion of the ICJ. An advisory opinion is not binding because even the requesting entity is not obligated to comply with it in the same way as parties to contentious proceedings are obligated to comply with a judgment. However, judicial determinations made in advisory opinions carry no less weight and authority than those in judgments because they are made with the same rigour and scrutiny by the "principal judicial organ" of the United Nations with competence in matters of international law.'[72]

In this light, Chapter 2 explores how an advisory opinion rendered by ITLOS, the IACtHR, and the ICJ can contribute to clarifying and developing the international law on climate change, namely by fleshing out States' obligations and the fundamental principles of law relevant to the context of climate change – principles deriving from the UNFCCC legal complex, general international law, the law of the sea, or human rights law. In fact, if they are non-binding, the point of advisory opinions is actually to provide authoritative guidance on complex legal questions, offering clarity on international obligations.

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69 *Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean* (*Mauritius/Maldives*) (*Preliminary Objections*) (Judgment, 28 January 2021) ITLOS Case No 28 (*Maritime Boundary between Mauritius and Maldives*).

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

71 *Maritime Boundary between Mauritius and Maldives* (n 63) §202.

72 ibid §203.

Chapter 3, '*Climate-Related Obligations under the UNCLOS, the ACHR, and International Law in General*,' by Alice Ollino and Irini Papanicolopulu, discusses in more detail the substantive findings of ITLOS, the IACtHR, and the ICJ. As such, this chapter is not concerned with whether advisory opinions *can* develop international climate law but rather zooms in and focuses on *what are*, or *what can be*, the specific contributions of these international courts and tribunals. To that end, the chapter adopts a regime-based lens to flag the particular rules and principles from each legal regime that are more apt to be clarified or developed by ITLOS, the IACtHR, or the ICJ.

To that end, the chapter works upon the advisory opinion rendered by ITLOS on 21 May 2024.[73] It explores how ITLOS concluded that the emission of GHG and ocean warming fit in the concept of pollution of the marine environment,[74] thus triggering the application of Part XII, and Article 194 specifically, of UNCLOS. According to this provision, States bear the obligation to prevent, reduce, and control pollution of the marine environment, which can be qualified as a due diligence obligation,[75] ie an obligation of conduct whose performance can be assessed objectively by international law and which is subject to international judicial oversight. This obligation applies to the whole typology of sources of marine pollution, including land-based and vessel-sourced pollution. Moreover, Chapter 3 also analyzes how ITLOS interpreted the duty to protect, preserve, and ameliorate the marine environment in the context of climate change – an obligation that can be key in building coastal resilience and adapting to certain marine climate change-related impacts.

Although Chapter 3 was written before the IACtHR's and the ICJ's advisory opinions, it still explores the potential outcome of these opinions in human rights law and general international law (including environmental law and the UNFCCC legal complex). More particularly, Chapter 3 explores the potential use of 'positive obligations' to protect and secure the human rights of individuals in light of the deleterious effects of climate change. In fact, it is easy to frame climate change as a human rights issue, considering the pervasive consequences of climate change-related impacts on the effective enjoyment of human rights. The ECtHR highlighted this same idea in *Verein KlimaSeniorinnen Schweiz and Others v Switzerland*.[76] In this chapter, Ollino and Papanicolopulu explain what

73 *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*).

74 Article 1(1)(4) of UNCLOS.

75 *COSIS Opinion* (n 69) §198.

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

human rights are more likely to be mobilized in the advisory opinions (even though the full gamut of human rights may be affected by climate change-related effects), as well as what positive obligations promoting adaptation or mitigation can be flagged explicitly by the IACtHR or the ICJ on their opinions. To that end, Chapter 3 relies heavily on the case law of the ECtHR, the IACtHR, and UN treaty-based bodies to show a surprising coherence line among these bodies.[77] Furthermore, Chapter 3 explores in detail the obligations that stem from the principles of prevention of transboundary environmental harm and cooperation, as well as the obligations to mitigate and reduce GHG emissions that stem from the UNFCCC and the Paris Agreement.

Chapter 4, *'Jurisdictional Ingenuity in Pursuit of Promoting States' Obligations in the Context of the Climate Emergency,'* by Melissa Stewart, explains how international courts' and tribunals' jurisdiction (personal and subject matter) can be (and was) used strategically to pursuit climate justice through advisory opinions. It starts from Articles 14 of the UNFCCC and 24 of the Paris Agreement to highlight the limited potential use of these provisions and, thus, the limited potential for a State-to-State dispute settlement regarding climate change obligations. Thus, Chapter 4 explores the potential of 'jurisdictional ingenuity,' which means the pursuit of alternative jurisdictional avenues when direct means of dispute settlement are not available or are difficult to use. In particular, Stewart assesses how States have created a new international organization with the sole purpose of conferring advisory jurisdiction upon an existing tribunal and requesting an opinion from it, by resorting to diplomatic tools to secure a request for an advisory opinion that before was considered politically unrealistic; and by framing legal questions in a wording that may induce international courts and tribunals to open new avenues for future dispute settlement. In this regard, ITLOS's words cannot pass unnoticed when it stated that 'Article 2, paragraph 2, of the COSIS Agreement authorizes the Commission to request advisory *opinions* from the Tribunal.'[78] The use of the plural suggests ITLOS took the opportunity not only to clarify its advisory jurisdiction under the COSIS Agreement but also, and mostly, to highlight that it is open to receiving other requests for advisory opinions in the future.

Stewart highlights a design flaw and a design choice of international law. The shortcomings of international dispute settlement, namely in the realms of climate change and environmental law, result from an explicit and conscious

77 Concluding for the alignment, see also Armando Rocha & Rômulo Sampaio, 'Climate Change before the European and the Inter-American Court of Human Rights: Comparing Possible Avenues before Human Rights Bodies' (2023) 32(2) *RECIEL* 279.

78 *COSIS Opinion* (n 69) §141.

choice of States unwilling to discuss the interpretation and enforcement of climate and environmental agreements before a court of law. However, the lack of enforcement mechanisms under such treaties – or the lack of consent to jurisdiction, as under Article 14 of the UNFCCC and Article 24 of the Paris Agreement – does not necessarily mean that climate change is doomed to stay outside the courtroom. Cross-regime interaction and an ingenious understanding of the advisory jurisdiction of international courts and tribunals helped bring climate change into the docket of ITLOS, the IACtHR, and the ICJ – and may be used in the future for pursuing other alternative avenues of access to international courts and tribunals. The silver lining here is that the system may be flawed. Still, creativity and ingeniousness may be enough to bring climate change-related matters into the docket of international courts and tribunals.

Chapter 5, '*The Dialogue between the ICJ, the ITLOS, the IACtHR and the African Court*', by Susan Ann Samuels and Alejandro Carillo Bañuellos, examines the unique moment in climate litigation represented by the current surge in requests for advisory opinions from international courts and tribunals. It begins by analyzing the significance of having four major courts – the ICJ, ITLOS, IACtHR, and potentially the AfrCtHPR – involved in shaping legal obligations related to climate change through advisory opinions (hand in hand with the rulings already issued by the ECtHR). Each court operates within specific jurisdictional boundaries, covering areas such as international law, human rights, and the law of the sea. The chapter emphasizes how the diverse subject matter scopes of these courts and tribunals allow for a comprehensive interpretation of climate change-related obligations, reflecting both the fragmented yet interconnected nature of climate governance.

Specifically, Chapter 5 delves into the notion of judicial dialogue, exploring how ITLOS, the IACtHR, and the ICJ may interact formally and informally to create a more cohesive approach to international climate law. A comparative analysis of the advisory proceedings invites a discussion of how the courts and tribunals may share principles like due diligence, prevention, and obligations toward vulnerable groups affected by climate change. This dialogue can help bridge jurisdictional gaps and foster consistency across their opinions, encouraging a unified global response to the climate crisis. However, Chapter 5 also considers the practical limits of cross-institutional dialogue, addressing factors that may restrict or enable collaboration. For instance, it assesses how jurisdictional mandates, the range of participants, and the specific questions posed in each advisory opinion shape the extent of this interaction. By investigating these dynamics, the chapter underscores the potential and challenges of achieving coherent and impactful advisory opinions across different judicial regimes, ultimately aiming for a more integrated legal response to climate change.

Chapter 6, '*An Advisory Opinion on Human Rights and Climate Change in the African Regional Human Rights System,'* by Dina Lupin and Ruth Nekura, examines why the African human rights system is well-suited for an advisory opinion on States' human rights obligations in the face of climate change, highlighting two main factors: the severe impact of climate change on Africa's vulnerable populations and the progressive, cooperative framework of the African Charter on Human and Peoples' Rights.[79] Although Africa contributes minimally to global emissions, it faces severe threats from climate change affecting its development, food security, and human rights. The continent is particularly vulnerable to the impacts of climate change.

However, it also possesses a rich and diverse set of legal, policy, and regulatory mechanisms that could be instrumental in addressing climate-related harms and protecting human rights. For example, the African Charter recognizes an individual and collective (i) right to a satisfactory environment and (ii) economic, social, and cultural development (both of which have been recognized as creating climate change-related obligations for States. The Kampala Convention[80] recognizes climate change as a driver of internal displacement, and the AfCHR has recognized both States and corporate entities as duty bearers with respect to human rights obligations.

Lupin and Nekura, therefore, briefly introduce the African Human Rights System through its 'intricate framework of norms and institutions,' ie the African Commission on Human and Peoples' Rights (AfCmHPR), the African Committee of Experts on the Rights and Welfare of the Child, and the African Court on Human and Peoples' Rights (AfCtHPR). At the subregional level, they note the Economic Community for West African States (ECOWAS)'s Community Court of Justice (ECCJ) and the East African Community's Court of Justice (EACJ). While there haven't been any climate cases yet, a few examples of environmental and rights-based cases have been adjudicated before the AfCmHPR, the AfCtHPR, and the ECOWAS court, paving the way for climate cases.

Despite a progressive system, Lupin and Nekura observe that African States continue to engage in carbon-intensive and extractive activities. These actions are often linked to human rights violations, mass displacement, and violent conflicts with Indigenous and traditional communities. Furthermore, these States have not adequately addressed the impacts of climate change on

79 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (*African Charter*).

80 African Union Convention for the Protection and Assistance of Internally Displaced Persons (adopted 23 October 2009, entered into force 6 December 2012) 3014 UNTS 3.

human rights or made efforts to alleviate existing vulnerabilities, which would help make communities more resilient to climate change.

Within this context, Lupin and Nekura highlight the complex interplay of (i) promising laws and policies and (ii) vulnerable and impoverished communities, which highlights a significant gap in the efforts of states to address human rights threats adequately. This situation underscores the potential value of an advisory opinion from the AfCtHPR that clarifies the human rights responsibilities of States concerning climate change. Further, the AfCmHPR, the ECCJ, and the EACJ also have (underutilized) advisory jurisdiction, which could be leveraged for such an opinion on climate change-related responsibilities. The main problem is that standing to request advisory opinions in these mechanisms lies restrictively with duty bearers in the context of treaty obligations, ie member States or Council of Ministers, which may be reluctant to ask for further clarity in their obligations.

The AfCtHPR is the only international court that allows NGOs to request advisory opinions, in addition to the African Union (AU), all AU members (not only the ones that have ratified the AfCtHPR's Protocol), and AU organs. Still, the AfCtHPR's restrictive stance on standing provisions limits access for the most affected communities and civil society actors. Indeed, the authors note that the AfCtHPR's interpretation of 'African organizations recognized by the AU' has caused ambiguity and confusion, limiting the extent to which NGOs and civil society can access the AfCtHPR's advisory jurisdiction. Therefore, Lupin and Nekura argue that the urgency of climate change presents an opportunity for the Court to reconsider its approach to standing, potentially making it a more accessible institution. An advisory opinion on climate change, could, according to the authors, clarify crucial topics such as (i) mitigation of GHG emissions by carbon-intensive economies, (ii) procedural environmental rights that could further enable climate litigation, (iii) integration of rights-based standards into regional agreements and climate policies, (iv) climate refugees, (v) environmental rights of children, (vi) rights of Indigenous people, (vii) setting precedents for the expansion of climate litigation in domestic jurisdictions.

4.2 *Voices and Participation in Advisory Opinion Proceedings*

Section II delves into the voices that have guided and influenced the advisory opinions. Antoine De Spiegeleir delves into storytelling as a tool used by actors involved in the advisory opinions. Miriam Cohen provides a broad overview of participation and how the different actors have engaged with the judiciary. Austyn Campbell, Claire Robertson & Eran Sthoeger focus on the role of States in advisory opinions, while Harjeevan S. Narulla & Rohan Nanthakumar concentrate on the role of civil society.

Chapter 7, '*Storytelling in Advisory Proceedings on Climate Change*,' by Antoine De Spiegeleir, adopts a narrative-based perspective to explore the role of storytelling in climate change advisory opinions. This novel perspective draws attention not only to the legal substance of advisory opinion proceedings but also to their narrative makeup. The chapter argues that climate change proceedings, like all judicial processes, depend on the stories that legal actors construct and tell each other. Since storytelling has been demonstrated to shape public and institutional attitudes toward climate policy, it is paramount to understand better the narrative strategies used in climate change litigation.

De Spiegeleir paves the way for such an understanding by clarifying the links between climate change, storytelling, and international adjudication, as well as exploring international courts' multifaceted audiences and the role of other forms of judicial communications beyond judgments and advisory opinions. De Spiegeleir notably uses the examples of the amicus curiae brief submitted by the Avaaz Foundation to the IACtHR and the opening oral pleadings made by representatives of small island states before ITLOS. These examples illustrate how international courts function both as storytellers and as forums for others to tell stories. Ultimately, Chapter 7 provides a foundation for future research on the interplay between law, narrative, and climate change, underscoring the power of stories in the realm of international adjudication.

In Chapter 8, '*Participation in Climate Change Advisory Proceedings: Bridging the Gap between the Judiciary and the International Community,*' Miriam Cohen investigates the rules of participation governing the three international courts. Given the significance of the climate crisis and the strong role that civil society organizations have played in climate litigation more broadly, Cohen questions whether these procedural distinctions can limit the variety of arguments put before the courts, and therefore directly influence the outcome of the advisory opinions. As such, Cohen argues for a broader participation in advisory proceedings in fostering climate justice while also garnering their 'sociological legitimacy' and implementation.

Drawing on a wide array of international and regional treaties, as well as on principles of participatory democracy and participatory justice theory, Cohen emphasizes the importance of the active involvement of communities, Indigenous groups, NGOs, and other stakeholders in shaping policies, strategies, and adaptation/mitigation measures, including through advisory proceedings. Nonetheless, she notes that '[i]ssues such as power imbalances, representation,

and the need for capacity-building' represent limitations.'[81] This became clear for small island developing States, for example, that had never before participated in any proceedings at the ICJ.

Advocates, therefore, organized 'writeshops' in Africa, the Caribbean, and the Pacific to encourage active participation of governments in these regions. These were held through a collaborative effort of governments, youth, and civil society organizations and in partnership with the African Union Commission, CariCom, and the Pacific Community, respectively.[82] These initiatives are intended to level the playing field and ensure that countries that have never before participated in ICJ proceedings have a chance to do so. This initiative, alongside a broad social media campaign and diplomacy work at the United Nations, helped garner unprecedented participation in the ICJ advisory opinion. For the first round, with the deadline of 22 March 2024, the ICJ received a record of 91 written statements.

More particularly, the ICJ received statements from 76 States, with five Scandinavian States (Denmark, Finland, Iceland, Norway, and Sweden) making a joint submission. Additionally, 14 European States participated.[83] Of these European submissions, five came from the Eastern European Group.[84] There were also submissions from 13 African States,[85] 21 from the Americas (19 from the Group of Latin American and Caribbean States (GRULAC),[86] along with the United States and Canada), and 31 from the Asia/Pacific region. This Asia/Pacific group includes 11 South Pacific nations,[87] three countries from the Gulf Cooperation Council (GCC),[88] as well as Australia and New Zealand.[89]

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81 Miriam Cohen, Chapter 8, 207.

82 Available at <https://www.sprep.org/news/work-to-seek-an-advisory-opinion-on-climate-change-from-the-icj-hailed-as-a-success-story-of-collaboration>.

83 France, Germany, Netherlands, Liechtenstein, Portugal, Spain, Switzerland, and the United Kingdom.

84 Albania, Latvia, Romania, Russian Federation, and Slovenia.

85 Burkina Faso, Cameroon, Democratic Republic of Congo, Egypt, The Gambia, Ghana, Kenya, Madagascar, Mauritius, Namibia, Seychelles, Sierra Leone, and South Africa.

86 Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Grenada, Mexico, Peru, Bolivia, Saint Lucia, Saint Vincent & the Grenadines, and Uruguay.

87 Cook Islands, Federal States of Micronesia, Kiribati, Marshall Islands, Nauru, Palau, Samoa, Solomon Islands, Tuvalu, Tonga, Vanuatu.

88 Kuwait, Saudi Arabia, United Arab Emirates.

89 Remaining states include: Bangladesh, China, India, Indonesia, Islamic Republic of Iran, Japan, Nepal, Pakistan, Philippines, Timor Leste, Thailand, Republic of Korea, Singapore, Sri Lanka, Viet Nam.

Among those who submitted written statements, 12 were organizations.[90] The ICJ received submissions from the African Union, AOSIS, COSIS, the European Union, IUCN, Melanesian Spearhead Group, Organisation of African, Caribbean and Pacific States, Organisation of the Petroleum Exporting States, Pacific Islands Forum, Pacific Islands Forum Fisheries Agency, Parties to the Nauru Agreement Office, and the World Health Organisation.

Written comments in response to the original submissions were due in August 2024.[91] There were 62 submissions, 8 from organizations and 54 from States. Among the states that submitted written statements, ten were from Africa[92] and 21 from the Asia-Pacific region. The Asia-Pacific group included 12 South Pacific nations,[93] one Gulf Cooperation Council (GCC) member,[94] as well as Australia and New Zealand.[95] From the Americas, 17 states participated, with 16 submissions coming from the GRULAC[96] and one from the United States. Europe had a total of six submissions, with only two states representing Eastern Europe.[97]

The ICJ hearings are scheduled for December 2024. At the time of this writing, 100 oral statements were scheduled, 88 from States (including a joint statement from five Nordic States) and 12 statements from international organizations. Participation in the oral hearings has surged compared to the written phase, with several new states and organizations joining. Notably, 14 new states and one organization that had not joined the written phase have participated in the oral phase, including Côte d'Ivoire, Malawi, Maldives, Senegal, Sudan, and Zambia from Africa; Dominica, Guatemala, Jamaica, and Panama from the Americas; and Fiji, Myanmar, Palestine, and Syria from the Asia-Pacific region. Additionally, the Pacific Community has joined the hearings as a new organizational participant. Meanwhile, some previous contributors, including the Democratic Republic of Congo (DRC), Madagascar, and Argentina, as well as the Parties to the Nauru Agreement Office, opted not to participate

90 AOSIS, the Organisation of the Petroleum Exporting Countries, the Pacific Islands Forum Fisheries Agency and the World Health Organisation did not file statements.

91 https://www.icj-cij.org/sites/default/files/case-related/187/187-20240816-pre-01-00-en.pdf.

92 From the ones listed above, Ghana, Madagascar, and South Africa did not file statements.

93 From the ones listed above, Tonga did not file statements.

94 From the ones listed above, Kuwait and United Arab Emirates did not file statements.

95 Remaining states that did not file statements on this round include: China, India, Indonesia, Nepal, Thailand, Republic of Korea, Singapore.

96 From the ones listed above, Argentina, Bolivia, and Peru did not file statements.

97 From Eastern Europe, Russian Federation and Slovenia did not file statements. In addition, Germany, Liechtenstein, Portugal, Spain, Romania, and the five Nordern countries, Denmark, Finland, Iceland, Norway and Sweden, did not file statements.

in the oral phase. The regional breakdown of oral participation now includes 17 states from Africa, 33 from Asia-Pacific, 24 from the Americas, and 14 from Europe (with one joint submission from the five Nordic countries), alongside 12 organizations.

The IACtHR's advisory opinion received a record number of 255 written observations from 600 entities. The majority of submissions came from NGOs, totaling 76 submissions, followed by academic institutions with 71 submissions. Other notable contributors include individual members of civil society, with 44 contributions; communities, directly or together with NGOs, with 16 submissions; and States, which provided nine submissions.[98] Additionally, there were four submissions from Organs of the Organization of American States (OAS), 13 from international organs and bodies, 11 from NGOs collaborating with civil society or academic institutions, 10 from State bodies, and one from corporate actors.[99] The IACtHR held seven days of public hearings, with 176 participants (3 days in Barbados and four days in Brazil). Cohen notes that this large and diverse participation points to a strong connection between the international community and the judiciary, which will be able to benefit from the arguments in the multiple submissions.[100]

From 11 to 25 September 2023, the 21 Members of the ITLOS heard oral arguments from 35 States and three international organizations, which included a handful of States outside the 34 States and nine international organizations that filed written statements.

Chapter 9, '*The Role of States in the Requests for Advisory Opinions*,' by Austyn Campbell, Claire Robertson and Eran Sthoeger, discusses the participation of States in advisory proceedings from three different lenses: initiation, litigation, and implementation.[101] It examines the incentives that drive State participation, smaller nations' strategic use of advisory opinions, and the legal and political implications of States' contributions to these processes. The analysis begins by looking at States' deep interest in participating in advisory proceedings, particularly concerning climate governance and ongoing COP negotiations under the Paris Agreement. As the global legal landscape shifts in response to climate change, State involvement in such proceedings is increasingly critical to shaping international environmental law and policy.

98 Nine States submitted written observations to the IACtHR, namely: Costa Rica; Vanuatu; Barbados; Paraguay; Colombia;Chile; El Salvador; Brazil, and Mexico.

99 https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1222&context=sabin_climate_change.

100 Miriam Cohen, Chapter 8.

101 Chapter 9, Campbell et al.

A key theme in the chapter is the examination of the incentives that encourage State engagement in these advisory processes. Understanding the motivations behind States' participation sheds light on the complex dynamics in international legal consultations. States are often driven by the opportunity to influence legal outcomes, advance specific policy goals, and assert their positions within global governance frameworks. These incentives are crucial for understanding why States actively seek to shape advisory opinions and engage in deliberations. For example, they note that the increased use of advisory opinions related to this theme suggests a desire for a 'top-down approach,' in which States' climate obligations under international law are clarified.

The chapter also delves into the strategic use of advisory opinions by SIDS, which have utilized these legal tools to counterbalance the influence of more powerful nations. By leveraging advisory opinions, these States have managed to elevate their political and policy objectives on the global stage. Campbell, Robertson, and Sthoeger note that while SIDS and LDCs are often sidelined in international negotiations, the advisory opinions have provided them with an opportunity to challenge the *status quo*, and push for international climate action where other methods have failed. Therefore, they highlight how advisory opinions serve not only as legal instruments but also as powerful diplomatic tools in international relations. This manifests, for example, in how the States involved have drafted the requests (ie from consensus, such as how it was done in the ICJ proceedings, or by a smaller number of States, as was done in the ITLOS and IACtHR advisory proceedings).

In 'litigating' the advisory opinions, the authors discuss the role of States in (i) influencing procedural aspects, (ii) collaborating to focus the court or tribunal's attention on certain key issues, and (iii) the number and diversity of State representation. First, States have influenced the advisory opinions by requesting extensions of the originally set deadlines for submitting written statements. This procedural flexibility has allowed the wide range of participation noted above. Second, collaboration during the proceedings is crucial to ensure that critical areas of focus are covered in the advisory opinions ultimately published by the courts. For example, during the ITLOS oral proceedings, countries referenced other submissions, either by challenging them or showing the tribunal their similar interpretation of the law. This is especially important when the wording of the request is fairly open. Campbell, Robertson, and Sthoeger note that '[t]he Tribunal's explicit acknowledgment of the specific arguments advanced by States and international organizations demonstrates the role States play in shaping the findings of an advisory opinion,' and that '[t]his all demonstrates that advisory opinions can help to create sovereign equality through neutralizing "any power differences that may

exist outside the courtroom".'[102] Third, the (impressive) number and diversity of States participating in the advisory proceedings (and in different stages) is crucial to reflect the universal impacts of climate change. The authors note the differences in rules of participation at the ICJ and ITLOS proceedings, and how these can bar smaller States from participation.

The chapter then discusses the role of States in the implementation of advisory opinions through a comparative analysis of the legal language used in other advisory opinions and recent climate-related proceedings before ITLOS and the ICJ. This analysis illuminates key similarities and differences in the way legal arguments are framed, providing insights into the evolving nature of environmental legal discourse.

Chapter 10, '*The Role of Civil Society in the Climate Change Advisory Proceedings*,' by Harjeevan Narulla & Rohan Nanthakumar, shifts our attention to the role of civil society, discussing the 'complex and shifting role' these stakeholders have played in the proceedings. The authors understand the concept of civil society to broadly include, environmental non-governmental organizations (NGOs), climate change activists and lawyers, scholars and academic or other research institutions, philanthropic funders, re-granters, Transnational Advocacy Networks (TANs), and specific cohorts or groups, in particular 'the Youth' and Indigenous peoples and communities.

The chapter first goes over the procedural rules of the three courts, ICJ, ITLOS, and IACtHR, discussing how civil society can participate in advisory proceedings. These resulted in no official participation of civil society in the ICJ advisory opinion and 10 civil society written statements on behalf of 13 civil society actors at ITLOS (with no opportunity for oral submissions). As noted, the IACtHR received written submissions from over 300 parties. Uniquely, civil society was also allowed – and encouraged – to make oral statements at the three hearings held in Barbados, and Brasília and Manaus in Brazil. These ranged from Global North and climate-focused organizations to Indigenous groups, Afro-descendant groups, and individuals, and organizations representing other vulnerable communities directly affected by climate change.

The analysis of civil society participation allows for five key conclusions from the authors regarding the role of civil society in climate litigation and its involvement in the climate change advisory proceedings. First, civil society is identified as a highly active participant in climate litigation. Through advocacy, legal action, and grassroots mobilization, civil society organizations have become a driving force in holding governments and corporations accountable

102 Chapter 9, Campbell et al.

for environmental harm. Their role extends beyond the courtroom, influencing public discourse and shaping the development of legal principles related to climate justice.

Second, the chapter highlights civil society's essential and strategic role in catalyzing the initiation of climate change advisory proceedings, and, therefore, in the development of international law. By pushing for these proceedings, civil society groups have played a pivotal role in bringing climate issues to the attention of international tribunals, demonstrating their capacity to influence global environmental governance. Their advocacy has been instrumental in ensuring that climate-related legal questions are addressed at the highest levels.

Third, despite formal technical and procedural limitations, civil society has found innovative ways to contribute directly and indirectly to the climate change advisory proceedings. Even when unable to formally participate as part of the case files, civil society groups have employed various strategies – such as providing amicus briefs, mobilizing public support, and influencing diplomatic channels – to make their voices heard. This highlights the resourcefulness of civil society in navigating complex legal processes and shaping outcomes. This participation is crucial because civil society submissions are often 'less constrained,' broader and bolder, often reflecting the perspectives of vulnerable groups disproportionately affected by climate change. As subject matter experts, civil society has developed briefs and resources that have facilitated knowledge sharing and broader participation among other actors, or organized events that facilitated conversations on legal arguments that would be at the core of the questions asked.[103] In this respect, the authors further note that 'It is also reasonable to assume that the vast collective corpus of publicly available legal submissions made before the IACtHR in particular, but also ITLOS and the ICJ, will inform and catalyse future climate litigation at the international, regional and domestic level.'[104] Furthermore, civil society has further campaigned, advocated, and raised awareness in climate cases and beyond.

103 See Katelyn Horne, Maria A Tigre & Michael B Gerrard, *Status Report on Principles of International and Human Rights Law Relevant to Climate Change* (Sabin Center for Climate Change Law 2023). Available at: https://scholarship.law.columbia.edu/faculty_scholarship/3924; Julia Neusner and Ama Francis, *Public Health and Human Health Implications of Climate Mobility*, June 2024. Available at: https://scholarship.law.columbia.edu/sabin_climate_change/227; Jessica Wentz, *Climate Change and Human Health: A Synthesis of Scientific Research and State Obligations Under International Law*, available at https://scholarship.law.columbia.edu/sabin_climate_change/223/ (May 2024).

104 Chapter 11, Narulla and Nanthakumar.

The fourth conclusion underscores civil society's ongoing role in championing the implementation of advisory opinions once they have been issued. These groups are well-positioned to advocate for the enforcement of international legal norms at the national and international levels. By pressuring governments and other actors to comply with advisory opinions, civil society can help translate abstract legal principles into concrete environmental protections.

Lastly, the chapter emphasizes that civil society will integrate advisory opinions into their broader climate litigation strategies. By using these opinions as legal precedents or persuasive authority in national courts and international forums, civil society can extend the impact of advisory opinions far beyond their immediate legal context. This strategic use of advisory opinions can amplify their influence, helping to clarify international law for states and driving long-term changes in environmental governance. Through these observations, the chapter illustrates the indispensable role that civil society plays in advancing climate justice and shaping the future of international environmental law.

4.3 *The Lasting Impact of Advisory Opinions: Domestic Dimensions*

Section IV begins to investigate what might happen after the advisory opinions have been published, discussing their long-lasting effects as the conclusions set forth are followed or replicated at the domestic level or across other international or regional adjudicatory bodies. Lea Main-Klingst and Sophie Marjanac examine how advisory opinions shape the jurisprudence of courts at the international, regional, and domestic levels, illustrating their broad legal and political impact on the development of climate-related legal norms and showing how these opinions serve as influential interpretative tools across jurisdictions, ultimately contributing to the evolution of international climate governance.

Gastón Medici-Colombo and Armando Rocha investigate how international advisory opinions subtly shape domestic legal frameworks despite their non-binding nature, analyzing how these opinions influence state practices through interpretative guidance on treaty obligations that may prompt legislative adjustments.

The confluence of the trio of requests, as noted by Main-Klingst and Marjanac, despite the advent of the Paris Agreement and the significant attendance at annual COPs, shows an acknowledgment that 'general international law (with relevant human rights and marine protection obligations) has an important role to play' in advancing global climate action and responding to the climate crisis.[105] But which role is this?

105 Main-Klingst and Marjanac, Chapter 12, 278.

In Chapter 11, '*The Downstream Impact of Advisory Opinions in the Case Law of Other International Bodies and Domestic Litigation*,' Lea Main-Klingst and Sophie Marjanac explore how different advisory opinions influence the jurisprudence of various courts, including international, regional, and domestic bodies, through a series of examples that illustrate the broad and lasting legal and political impact of AOs on the development of legal norms. The 'downstream impact' of advisory opinions on the case law of international bodies and domestic litigation can be substantial, though it varies significantly across jurisdictions. Advisory opinions are often used as interpretative tools by other courts and tribunals, with opinions from the ICJ generally seen as the most authoritative.

Main-Klingst and Marjanac argue that the advisory opinions will have 'legal implications across the globe.'[106] This includes 'influence, interpretation and application in other courts at national, regional, and international level,' which could likely be context specific.[107] The downstream impact of advisory opinions is essential for three reasons. First, the breadth, reach, and scope of the climate crisis makes these advisory opinions potentially more influential than previous advisory opinions. In particular, this significance relies on the new and insufficient legal responses to climate change, and its 'cross-pollination' and 'influence' across jurisdictions. Second, with scientific evidence of the growing impact of climate change on communities worldwide, these advisory opinions will guide answers on 'a range of (emerging) issues.' Third, the ever increasing demand for advisory opinions and dispute settlements from international courts and tribunals shows that they remain 'the seminal interpretants of international norms.' As such, they argue, their impact extends far beyond the limits of 'enforceability' or their 'binding character.' Indeed, they are 'authorative statements' on the law, contributing to shaping and advancing the international legal order, carrying normative force, formulating 'shared or community expectations,' ultimately contributing to preventing future disputes.

For example, advisory opinions from the ICJ have 'provided conclusive statements on customary international law, interpreted and clarified treaty provisions, made pronouncements on the law in the absence of a generally agreed rule,'[108] have furthered the public discourse, led to the creation of new UN bodies, have led to General Assembly resolutions in cases on non-compliance, and guided action at the EU level. This role is even strengthened

106 ibid, 279.
107 ibid, 279.
108 ibid, 281.

for the IACtHR, which has clarified that domestic courts consider not only the ACHR but also the interpretation by the IACtHR, when applying an international treaty.

Main-Klingst and Marjanac further explore overlapping themes in the trio of advisory opinions, discussing the risk of fragmentation in international environmental law, as well as their impact on domestic litigation. For example, the question of overlapping legal regimes arise as the three AOs seek to interpret the UNFCCC and the Paris Agreement within their respective legal regimes, ie international law more broadly (ICJ), UNCLOS (ITLOS) and ACHR (IACtHR). Significantly, ITLOS has clarified that separate regimes (ie UNCLOS and the Paris Agreement) could lead to different legal obligations related to climate change.[109] Furthermore, the ECtHR also applied the ECHR to climate harms in *KlimaSeniorinnen*.[110]

With respect to the questions asked, Main-Klingst and Marjanac highlight a few themes that may draw (similar or different) answers from the international courts, such as the issue of the common but differentiated responsibilities and respective capabilities (CBDR-RC) principle and burden-sharing necessary to achieve the temperature limit of the Paris Agreement, the role of scientific evidence in informing the obligations of States, States' obligations of due diligence, States' obligations to vulnerable countries and communities (such as children and future generations, Indigenous peoples, and women).

The concept of 'cross-fertilization' – where AOs influence regional human rights courts such as the European Court of Human Rights (ECtHR) – is explored in detail, especially in terms of how these courts translate advisory findings into binding judgments. Drawing on examples from other areas of international law, the authors show a pattern of cross-fertilization, further arguing that, given the novelty of the matter and its limited jurisprudence at the international level, cross-pollination is expected.

The authors then discuss the influence of advisory opinions in domestic climate litigation, contraposing examples in monist and dualist jurisdictions. In particular, the authors argue that advisory opinions can significantly influence systemic mitigation or framework cases when the jurisdiction has adopted a framework climate law or has otherwise a human rights legal framework that can be applied to climate action. Furthermore, the authors discuss how the

109 *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Case No. 31, International Tribunal for the Law of the Sea (21 May 2024) (COSIS Opinion), paras. 223–224.

110 *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* App no. 53600/20 (ECtHR, 9 April 2024).

ITLOS advisory opinion, for example, has already influenced international environmental law governing EIAs with respect to GHG emissions. These impacts go beyond affecting States directly; they also incorporate obligations to corporations as the requirements from ITLOS' advisory opinion are implemented at the national level through forthcoming regulation. These deliberations on AOs' influence on international climate governance will remain a central focus for future legal developments.

Chapter 12, '*The Impact on Domestic Law of Climate Change-Related Advisory Opinions: the Experience of the IACtHR and the ITLOS,*' by Gastón Medici-Colombo and Armando Rocha, explores the intricate relationship between international advisory opinions and their impact on domestic legal systems. The research question for this chapter seems odd at first sight since non-binding advisory opinions do not require specific enforcement for any State or party to the proceedings (if one may use the word 'party' in advisory proceedings). In other words, advisory opinions do not have an operative part or require any immediate State's action or omission. However, when an international court or tribunal clarifies and develops the law, its findings may entail a different reading of a State's international obligation, which, in turn, may imply a change in a State's domestic legislation to comply with that obligation. Yet, precisely because advisory opinions do not have a *dictum*, their impact on a State's domestic law is more difficult to detect, since changes in the domestic legislation resulting from an advisory opinion rendered by an international court or tribunal are often unacknowledged.

The chapter poses key questions on the challenges of incorporating these opinions into domestic law, underscoring the importance and limitations of advisory opinions in influencing state practices and legal frameworks. Key to their argument is the value of advisory opinions as interpretative tools of international treaties, which require an 'evolutionary reading to withstand the passage of time.'[111] In truth, they argue, these clarifications of States' obligations 'impact the fabric of international law.' Therefore, in their analysis, Medici-Colombo and Rocha researched and analyzed evidence of States' actions or inactions after an international court or tribunal rendered an advisory opinion.

Firstly, the authors discuss how international courts and tribunals interpret and clarify existing legal frameworks rather than creating new legal obligations or imposing duties on States. By doing so, these courts and tribunals are instrumental in revealing distinct aspects of international law, such as customary norms, while focusing on existing legal principles. As such, advisory opinions

111 Medici-Colombo & Rocha, Chapter 13, 307.

are positioned as a crucial tool for legal clarity, even if their findings are not binding. In the framework of the IACtHR, for example, advisory opinions are considered legally binding or quasi-binding given that they must be followed 'as part of the controlling legal substance in the exercise of conventionality control.'[112]

However, the more complex challenge lies in examining the domestic impact of these advisory opinions. The chapter delves into the complexities surrounding how States incorporate advisory opinions into their domestic legal systems, more often informally and without explicit acknowledgment. In the ACHR system, the practice of domestic courts varies depending on the constitutional order of each country, with a majority of States favoring this (quasi-)binding nature of IACtHR's case law, including advisory opinions. For the climate change advisory opinion, the foreseeable impact can be substantial, depending on how detailed the opinion is and how comprehensive the responses to all the questions posed to the court are. Based on the IACtHR's progressive interpretation of environmental law and rights as applied to the inter-American system,[113] it is likely that the impact will be 'disruptive' and reinforced in domestic climate litigation.[114]

The ITLOS has limited evidence of the impact of advisory opinions on the domestic legal framework. However, the advisory opinion on climate change recognized an obligation to adopt a national regulatory framework to reduce GHG emissions, thus requiring national implementation. This process of legal evolution is explored through specific examples such as the *Responsibilities and Obligations of Sponsoring States*[115] and the *SRFC*[116] advisory opinions, which demonstrate how international advisory opinions have shaped domestic legislation. In fact, the *Responsibilities and Obligations of Sponsoring States* is the prime example of how States are willing to make profound changes to their domestic law, although not acknowledging explicitly that these changes result from the findings espoused in ITLOS's advisory opinion.

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112 ibid page 314.

113 Maria Antonia Tigre & Natalia Urzola,' The 2017 Inter-American Court's Advisory Opinion: changing the paradigm for international environmental law in the Anthropocene' (2021) 12(1) *Journal of Human Rights and the Environment* 24.

114 Medici-Colombo and Rocha, Chapter 13, page 319.

115 *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (*Request for Advisory Opinion Submitted to the Seabed Disputes Chamber* (Advisory Opinion, 1 February 2011) ITLOS Case No 17.

116 *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (*SRFC*) (Advisory Opinion, 2 April 2015) ITLOS Case No 15.

The chapter also acknowledges that while certain jurisdictions may integrate advisory opinions into their laws directly, others may not due to differing legal structures and constraints. By mapping these dynamics, the chapter offers a nuanced understanding of how international advisory opinions, while not directly enforceable, hold an informal but substantial influence over the evolution of domestic law.

5 Wrapping Up

As outlined in this introductory chapter, this edited book focuses on the transformative potential of international climate litigation, specifically through the lens of three landmark advisory opinions requested in 2022 and 2023. With one advisory opinion already published in May 2024 and two more anticipated in the first half of 2025, we find ourselves at a critical juncture. These advisory opinions will likely leave a lasting but nuanced impact, shaping climate litigation even without directly creating enforceable obligations for states or instantaneously reducing GHG emissions. By clarifying state obligations under international law – and potentially the responsibilities of other stakeholders, such as corporations – these opinions hold the potential to unify and strengthen the global legal framework on climate change. Their influence will likely ripple across international, regional, and domestic climate litigation cases for years to come, potentially sparking a new wave of cases similar to the surge that followed the Paris Agreement.

As Justice Ruth Bader Ginsburg once observed, 'Real change, enduring change, happens one step at a time.' These advisory opinions represent a significant step forward in the evolution of climate litigation, occurring at a moment when the world faces unprecedented environmental challenges, from rising sea levels to increasingly frequent floods and droughts. This book marks the first comprehensive analysis of the topic of climate change advisory opinions, serving as a foundation for what will undoubtedly be years of continued examination and debate.

Our concluding chapter outlines a future research agenda, offering a roadmap for legal scholarship as the remaining advisory opinions are published. We aim for this book to set the stage for ongoing discourse, sparking further analyses in blog posts, journal articles, and books that will dissect, interpret, and assess the long-term impact of these advisory opinions. By publishing this work while the courts are still deliberating, we intentionally position it as a springboard for deeper conversation.

The scope and diversity of perspectives in this book reflect our commitment to capturing a broad range of viewpoints. Our contributors include scholars, practitioners, NGO advocates, and international lawyers working alongside developing States – many directly engaged with the advisory opinions – offering both close-up and broad perspectives. This spectrum of insights enriches the analysis and broadens its relevance, ensuring that this book is a valuable resource for judges, lawyers, scholars, and policymakers alike. Judges, for example, will find crucial context for interpreting these advisory opinions as they navigate future climate litigation cases, while attorneys and academics will benefit from the multi-faceted insights presented here as they strategize future cases.

The following chapters delve into the specific dimensions of international climate litigation, including the unique legal pathways created by advisory opinions, the influence of cross-court dialogue, and the evolving role of civil society in these proceedings. Readers are invited to explore how these themes intertwine and examine the broader implications for international climate governance and accountability.

The 12 chapters that follow delve into the specific dimensions of international climate litigation, exploring the transformative potential of advisory opinions in international climate governance and examining their role in defining and reinforcing States' obligations within the climate crisis framework. It highlights how advisory opinions can shape international climate law, emphasizing the judiciary's power to clarify state responsibilities and contribute to a unified legal approach to climate accountability. Through an analysis of jurisdictional collaboration, the book underscores the importance of dialogue among international courts, demonstrating how cross-court interactions foster coherence in global climate jurisprudence.

Readers are invited to explore the different chapters to understand the different ways in which international courts and tribunals are interpreting States obligations in light of the climate crisis, and the potential of advisory opinions to address inequities within international law. By integrating storytelling and inclusive legal narratives, the book illustrates how advisory opinions can elevate marginalized voices, fostering climate justice on a global scale. Participation is also central to the discussion, focusing on the involvement of states, civil society, and the international community in advisory proceedings. The book examines how civil society engagement strengthens climate advocacy through legal mechanisms, emphasizing its crucial role in shaping international climate policy. Lastly, the book considers the downstream effects of advisory opinions on domestic legal systems, assessing how these international tools influence

national policies and drive climate litigation. By examining the lasting impact of advisory opinions on both international and domestic frameworks, the book underscores their significance in building a cohesive, cross-jurisdictional response to the climate crisis.

In sum, this book aspires not only to illuminate the role of advisory opinions in the present but also to inspire future research on these decisions and contribute to a more profound understanding of the trajectory of international climate law. We hope it serves as a touchstone for all who seek to navigate and shape this dynamic and evolving field.