SEPARATE OPINION OF JUDGE YUSUF

It is difficult to disagree with the findings of the Court — They restate well-known legal rules and principles — They do not properly and adequately respond to the questions — General Assembly did not ask for a scholarly dissertation on general obligations of States nor on theoretical legal consequences — The law ought to have been applied to the realities and implications of climate change — Excessively formalistic approach adopted by the Court — The full scope and the underlying concerns of the request ignored — Question (b) *is premised on scientific findings and factual situations — There are States that have predominately contributed to GHG emissions — There are other States that are specially affected or particularly vulnerable to the adverse impacts of climate change — This distinction cannot be set aside — It is recognized in the General Assembly resolution — IPCC reports contain supporting scientific evidence — The existing legal framework on climate change acknowledges differentiated responsibilities based on it — Examination of legal consequences should have been based on it — The legal avenues for those who have suffered most should have been analysed — They are not nameless — The possibility for SIDS, LDCs and other injured States to invoke Article 42 of the ILC Articles on State Responsibility should have been addressed — The Court missed a historic opportunity to clarify the legal consequences of the failure of gross GHG-emitting States to take appropriate actions to save the planet — This has undermined the practical relevance of the Advisory Opinion — It also failed to take into account the legal consequences of injuries arising out of conduct not prohibited by international law — This is a helpful normative framework which can ensure justice in matters relating to climate change.*

I. INTRODUCTION

1. It is difficult to disagree with the findings of the Court regarding the obligations of States under international law to protect the climate system and the general legal consequences arising from a breach of such obligations. They simply restate well-known customary rules and principles of international law and the provisions of the climate change treaties relating to obligations of States. They also describe in general terms the responsibility of States for internationally wrongful acts. However, they fail to respond properly and adequately to the questions posed by the United Nations General Assembly and, in particular, to address the realities on which those questions are based and the scientific findings of the Intergovernmental Panel on Climate Change (hereinafter the "IPCC") and other international bodies which inspired them.

2. I, therefore, have to express my disappointment, with the excessively formalistic approach adopted by the Court in formulating its Advisory Opinion. The General Assembly did not ask for a learned scholarly dissertation on the obligations of States in relation to climate change and the legal consequences that may theoretically arise from a breach of such obligations. Its questions deserved more concrete and tangible replies capable of engaging with their material scope, the context in which they were posed and the objectives underlying the request for an advisory opinion.

II. THE TWO QUESTIONS POSED BY THE GENERAL ASSEMBLY

3. The two questions posed by the General Assembly are closely interconnected. While question *(a)* seeks clarification on the specific obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases (hereinafter "GHG emissions"), the full scope and the underlying concerns of the request are most clearly articulated in question *(b)*. The structure of question *(b)* is pivotal to a proper understanding of the material scope of the request. It refers to legal consequences under the obligations identified in question *(a)* for States "where they, by their acts and omissions, *have* caused significant harm to the climate system and other parts of the environment", with respect to (i) States,

"including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change" and (ii) "Peoples and individuals of the present and future generations affected by the adverse effects of climate change" (emphasis added). In this regard, question *(b)* is premised on scientific findings whereby there are States that, by their actions and omissions, have over the years predominantly contributed to the GHG emissions which caused significant harm to the climate system and other parts of the environment, and other States that are specially affected or particularly vulnerable to the adverse effects of climate change as well as individuals and peoples affected by such adverse effects. Question *(b)* asked the Court to specify the legal consequences under the obligations identified in question *(a)* for the first category of States with respect to the second category of States as well as the peoples and individuals affected by climate change.

4. However, it is surprising that the Court, in an attempt to avoid the characterization of the actions of the first category of States in the same manner as resolution 77/276 of the General Assembly, decided to rewrite the text referring to such States and change its meaning. Thus, in paragraph 108 of the Advisory Opinion, it is stated that the term "for States" in question *(b)* "refers to States that, by their actions or omissions, may have adversely affected the climate system and other parts of the environment through GHG emissions". This rephrasing substantively departs from the text of the resolution and assigns a new meaning to the characterization of the actions of that group of States.

5. In a further attempt to elude the substance of the question, the Court in that same paragraph immediately pivots to a totally different issue stating that "the Court recalls that it is not called upon to determine the responsibility of any State or group of States under international law, generally or in any specific instance". This is fundamentally flawed reasoning which misses the point or perhaps deliberately changes the subject-matter of the question to avoid addressing it. What the Court was asked is not, of course, to determine which specific State or States have caused significant harm to the climate system or to name and shame such States. Rather, it was requested to specify the legal consequences arising from international obligations for those States that, by their actions or omissions, have caused significant harm to the climate system with respect to other States that have been injured or adversely affected by climate change, as well as peoples and individuals similarly affected. Thus, the task entrusted to the Court was simply to spell out the legal consequences arising from the actions and omissions of the first category of States with regard to the second category of States and of the individuals and peoples adversely affected by climate change.

6. The misinterpretation of the questions put to the Court continues in paragraph 109 of the Advisory Opinion, where it is further affirmed that "[the Court] is also not called upon to determine any specific legal consequences with respect to particular injured States or groups of States". This is where the Court's attempts to dodge, elude and avoid by all means the ordinary meaning and material scope of question *(b)* borders on the unreal. If the reference in question *(b)* to

> "legal consequences under these obligations . . . with respect to . . . States, including, in particular small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change"

does not require the Court to clarify the legal consequences for a particular group of States, which are injured or particularly affected by climate change, what do all the above words mean? This kind of reformulation takes us to the world of Alice in Wonderland where Humpty Dumpty says "when I use a word, it means just what I choose it to mean — neither more nor less". When Alice questions

whether words can have such arbitrary meanings, Humpty Dumpty replies that "it is a matter of who is in control: the speaker or the language itself".

7. Worse still is the Court's assertion in paragraph 406 that its task in this Advisory Opinion is to "identify, in a general manner, the legal framework under which the conduct of States can be assessed in order to determine whether a State, or a group of States, is responsible for a breach of its obligations pertaining to the protection of the climate system". Did the General Assembly really need to seek an advisory opinion of such general and abstract nature from the Court? Isn't such a general legal framework readily available under the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter "ILC Articles on State Responsibility") which lays down the general conditions under international law for the States to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom? By trying to elude the actual meaning and material scope of the questions put to it by the General Assembly, the Court has indeed ended up engaging in an abstract examination of the law of State responsibility in a manner divorced from the reality of the significant harm to the climate system caused by the historical and current GHG emissions of gross emitters and the injury suffered by the most vulnerable victims of climate change such as small island developing States (hereinafter "SIDS") or the least developed countries (hereinafter "LDCs").

8. This reminds me of the famous remarks by Anatole France that "[t]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread". By adopting a general and abstract approach to addressing the questions put to it by the General Assembly, the Court has effectively opted for a "majestic equality of the law" with regard to all States in relation to climate change. This is an approach rooted in extreme formalism and completely detached from the empirical realities and the scientific findings relating to the causes and consequences of climate change, as well as the generally acknowledged principle of common but differentiated responsibilities, which underpins the legal framework for combating the climate crisis for all.

9. This approach further disregards the fundamental concerns that gave rise to the request and the context in which resolution 77/276 was adopted by the General Assembly. It should indeed be recalled that the Prime Minister of Vanuatu, when introducing draft resolution A/77/L.58, which later became resolution 77/276, stated on behalf of "a core group of States" that "[c]limate change is the defining existential challenge of our times". He further observed that, "[f]aced with challenges of such magnitude, it is the firm belief of the core group that we must use all the tools at our disposal to address the climate crisis and its threats to human, national and international security". He then added:

> "It is in this context that the core group is leading the initiative to seek an advisory opinion from the International Court of Justice to clarify the rights and obligations of States under international law in relation to the adverse effects of climate change, especially with respect to small island developing States and other developing countries particularly vulnerable to the adverse effects of climate change, and importantly to achieve climate justice."[1]

The words of the Prime Minister and the objectives underlying the request appear to have been lost on the Court.

[1] Sixty-fourth plenary meeting of the Seventy-seventh Session of the General Assembly, 29 March 2023, A/77/PV.64, p. 2.

10. It should also be noted that in preambular paragraph 8 of resolution 77/276, the General Assembly

> "[notes] with profound alarm that emissions of greenhouse gases continue to rise despite the fact that all countries, in particular developing countries, are vulnerable to the adverse effects of climate change and that those that are particularly vulnerable to the adverse effects of climate change and have significant capacity constraints, such as the least developed countries and small island developing States, are already experiencing an increase in such effects, including persistent drought and extreme weather events, land loss and degradation, sea level rise, coastal erosion, ocean acidification and the retreat of mountain glaciers, leading to displacement of affected persons and further threatening food security, water availability and livelihoods, as well as efforts to eradicate poverty in all its forms and dimensions and achieve sustainable development".

11. In the following four sections, I will first examine the scientific evidence identifying those who have historically contributed to cumulative GHG emissions, and thus to climate change, since the Industrial Revolution, as well as those who are disproportionately suffering most acutely the consequences of climate change today with little or no contributions to such emissions. This includes an analysis of the particular vulnerability of the LDCs, the SIDS and other particularly affected States and peoples, in contrast to the industrialized countries that possess significantly greater capacities both in terms of adaptation and mitigation. Secondly, I will turn to the recognition in international law, based on scientific evidence, of historical responsibility and the principle of common but differentiated responsibilities, and demonstrate that, under the existing legal framework on climate change, a distinction is clearly drawn between those States that have historically and predominantly contributed to climate change and those that bear its greatest burdens. Thirdly, I will address the issue of the legal consequences with respect to "(i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change". Fourthly, I will address the failure of the Court to take into account the legal consequences of injuries arising out of conduct not prohibited by international law, which is of crucial importance in the context of climate change. Finally, I will say a few words about the inability of the Court to make up its mind with respect to the legal characterization of the precautionary principle.

III. THE SCIENTIFIC GROUNDING FOR THE QUESTIONS POSED BY THE GENERAL ASSEMBLY

12. It is true that all States have obligations under international law to ensure that activities under their jurisdiction and control do not harm the climate system through GHG emissions. However, not all States are equally, or even comparably, at the origin of acts and omissions that have caused "significant harm" to the climate system. It is well established by science that certain States have outsized historical responsibility for significantly high contributions to the GHG emissions over time. The critical scientific foundation informing the task entrusted to the Court under the questions posed by the General Assembly is quoted in paragraph 80 of the Advisory Opinion but is thereafter left unaddressed in the Advisory Opinion. Paragraph 80 refers to the assessment of Working Group III of the IPCC that "the three developing regions together contributed 28% to cumulative CO_2-FFI emissions between 1850 and 2019, whereas Developed Countries contributed 57% and Least Developed Countries contributed 0.4%"[2]. Indeed, as early as in the First Assessment Report

[2] IPCC, 2022, *Climate Change 2022: Mitigation of Climate Change*, Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 218.

of the IPCC, it was acknowledged that "[a] major part of emissions affecting the atmosphere at present originates in industrialized countries"[3].

13. Why does the IPCC count historical emissions since 1850? This is because CO_2 emissions remain in the atmosphere not for decades, but for centuries. Accordingly, historical responsibility is not just a matter of history but a matter of continued contribution, since the historical emissions of industrialized countries continue to have a significant impact on the current climate system. This further explains why the total carbon budget is calculated "starting from the pre-industrial period"[4]. This is also reflected in the warning by the IPCC that "[c]ontinued emissions of these gases at present rates would commit us to increased concentrations for centuries ahead"[5].

14. However, the most striking example of downplaying this well-established scientific foundation for differentiated responsibilities of States is to be found in paragraph 277 of the Advisory Opinion. In paragraph 277, it is stated, among others, that

> "anthropogenic climate change is *inherently a consequence of activities* undertaken within the jurisdiction or control *of all States*, although individual States' historical and current contributions differ significantly. *It is the sum of all activities* that contribute to anthropogenic GHG emissions over time, not any specific emitting activity, which produces the risk of significant harm to the climate system. This does not mean that individual conduct leading to emissions cannot give rise to the obligation to prevent significant transboundary harm even if such activity is environmentally insignificant in isolation. However, it means that the risk associated with climate change is a consequence of *a combination of activities by different States*, and that States need to avert the risk through a co-ordinated and co-operative response." (Emphasis added.)

15. This is both scientifically and factually incorrect. If we take, for example, data and graphs from PRIMAP, which is an international dataset cited by the IPCC in the reports of Working Group III[6], for the sole purpose of comparison, we will find that Burkina Faso, classified as a least developed country, has historically contributed a negligible share to global CO_2 emissions. Its emissions remained nearly flat until the 1960s and did not exceed 1 Mt CO_2 annually until after 2000. From 1850 to 2023, its cumulative emissions represent virtually 0 per cent of global CO_2 emissions to date[7]. Similarly, Tuvalu, a small island developing State which may soon lose large swathes of its territory due to sea level rise, contributed essentially no emissions between 1850 and 1960. Since 1998, its emissions have plateaued at the extremely low level of approximately 0.01 Mt CO_2 per year. Tuvalu's total cumulative CO_2 emissions from 1850 to 2023 also amount to a vanishingly small

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[3] IPCC, 1992, *Climate Change: The IPCC 1990 and 1992 Assessment: IPCC First Assessment Report*, Overview and Policymaker Summaries and 1992 IPCC Supplement, Overview, p. 57.

[4] IPCC, 2023, *Climate Change 2023: Synthesis Report*, Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Glossary, p. 121.

[5] IPCC, 1992, *Climate Change: The IPCC 1990 and 1992 Assessment: IPCC First Assessment Report*, Overview and Policymaker Summaries and 1992 IPCC Supplement, Overview, p. 52.

[6] IPCC, 2022, *Climate Change 2022: Mitigation of Climate Change*, Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, pp. 221 and 223-224, referring to Gütschow, Johannes; Busch, Daniel; Pflüger, Mika (2025): The PRIMAP-hist national historical emissions time series (1750-2023) v2.6.1. Zenodo; available at https://doi.org/10.5281/zenodo.15016289.

[7] HISTCR, Burkina Faso, Carbon Dioxide, country reported 1850 to 2023, available at https://primap.org/primap-hist/#scenario=histcr&id=bfa&entity=co2. For global total cumulative CO2 emissions, according to the IPCC: "Between 1850 and 2019, total cumulative CO2 emissions from the fossil fuel industry (FFI) and agriculture, forestry, and other land use (AFOLU) were 2400 (±240 Gt)." IPCC, 2022, *Climate Change 2022: Mitigation of Climate Change*, Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, p. 274. See also, HISTCR, Global Emissions, Carbon Dioxide, country reported 1850 to 2023.

fraction — effectively 0 per cent — of the global total[8]. On the other hand, Germany, as a developed country and one of the top ten historical emitters, saw a gradual increase in CO_2 emissions from 1850 to 1910. By 1880, its emissions had reached approximately 135 Mt CO_2, rising further to around 581 Mt CO_2 by 1913. Over the entire period from 1850 to 2023, Germany's cumulative CO_2 emissions are estimated at approximately 90 to 100 Gt CO_2 (90,000 to 100,000 Mt CO_2), accounting for about 4 per cent to 5 per cent of total global CO_2 emissions since 1850[9].

16. Burkina Faso and Tuvalu do not contribute — and have never contributed — to GHG emissions on a scale remotely comparable to that of Germany or any other industrialized country. Their emissions are minimal to the point of being statistically negligible in the context of global GHG emissions, and a generalized statement such as that used in paragraph 277 of the Advisory Opinion does not do justice to their situation as compared to highly industrialized States, and unfairly attributes to them a much more important role in GHG emissions than they actually play. While GHG emissions have existed throughout the history of life on Earth, climate change, as recognized by scientific consensus and codified in Article 2 of the United Nations Framework Convention on Climate Change (hereinafter "UNFCCC"), arises when GHG concentrations in the atmosphere reach certain levels that interfere dangerously with the stability and functioning of the climate system. In this regard, the assertion that climate change is "inherently a consequence of activities . . . *of all States*" (emphasis added) is scientifically ill-grounded. This statement also flies in the face of historical contributions to climate change which led to the recognition and application of the principle of common but differentiated responsibilities in all negotiations and treaties regarding climate change.

17. It is also important to emphasize that it is not only the contributions to GHG emissions and therefore to climate change of various groups of States that cannot in any way be compared or formalistically glossed over, but also the fact that they are disproportionately affected by its adverse effects which cannot be denied[10]. In *Climate Change 2001: Impacts, Adaptation, and Vulnerability* which is Working Group II's contribution to the Third Assessment Report of the IPCC, it is stated that

> "[t]he effects of climate change are expected to be greatest in the developing world, especially in countries reliant on primary production as a major source of income. Some countries experience impacts on their GDP as a consequence of natural disasters, with damages as high as half of GDP in one case."[11]

This report, which is considered to be one of the most comprehensive scientific assessments of the consequences of, and adaptation responses to, climate change then continues as follows:

> "Most less-developed regions are especially vulnerable because a larger share of their economies are in climate-sensitive sectors and their adaptive capacity is low due to low levels of human, financial, and natural resources, as well as limited institutional and technological capability. For example, small island states and low-lying coastal areas are particularly vulnerable to increases in sea level and storms, and most of them

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[8] HISTCR, Tuvalu, Carbon Dioxide, country reported 1850 to 2023, available at: https://primap.org/primap-hist/#scenario=histcr&id=tuv&entity=co2.

[9] HISTCR, Germany, Carbon Dioxide, country reported 1850 to 2023, available at https://primap.org/primap-hist/#scenario=histcr&id=deu&entity=co2.

[10] See IPCC, 2023, *Climate Change 2023: Synthesis Report*, Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policymakers, Statement A.2, p. 5; General Assembly resolution 77/276 of 29 March 2023, preambular para. 8.

[11] IPCC, 2001, *Climate Change 2001: Synthesis Report*, Contribution of Working Groups I, II, and III to the Third Assessment Report of the Intergovernmental Panel on Climate Change, p. 233.

> have limited capabilities for adaptation. Climate change impacts in polar regions are expected to be large and rapid, including reduction in sea-ice extent and thickness and degradation of permafrost. Adverse changes in seasonal river flows, floods and droughts, food security, fisheries, health effects, and loss of biodiversity are among the major regional vulnerabilities and concerns of Africa, Latin America, and Asia where adaptation opportunities are generally low."[12]

18. This disparity is further highlighted in the most recent analytical report of the United Nations Development Programme titled "Climate and Disaster Risk Finance and Insurance (CDRFI) in National Adaptation Plans and Nationally Determined Contributions" published on 25 June 2025, where the following observation is made:

> "Between 2000 and 2019, in aggregate dollar terms, 55 climate-vulnerable economies in the Vulnerable Twenty (V20) Group lost approximately US$525 billion because of climate change's temperature and precipitation patterns, and economic losses cut their GDP growth by 1 percent per year on average (Baarsch et al., 2022)."[13]

19. In light of the above considerations, the Court, by avoiding to address in legal terms the disparities identified by science in the contributions of different States to global warming, and by avoiding to reply to question *(b)* posed by the General Assembly, has failed to rise to the occasion and to provide the international community with the legal tools necessary for combating climate change in an equitable manner for all States, be they industrialized and economically advanced or least developed or small island developing States. In particular, it is a pity that it failed to examine, in light of the ILC Articles on State Responsibility, the legal consequences arising from a breach of international obligations with respect to "States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change" (see Section V below).

IV. THE LEGAL FRAMEWORK FOR DIFFERENTIATED RESPONSIBILITIES

20. The disparities in historical and current contributions of various groups of States to climate change and the distinctions in the responsibilities they bear, over which the Advisory Opinion tries to draw a formalistic veil, is fully recognized and well established in contemporary international law relating to the protection of the climate system.

21. Principle 7 of the 1992 Rio Declaration, which has inspired and served as the basis of the recognition of differentiated responsibilities in all climate change treaties provides that,

> "[i]n view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command."[14]

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[12] *Ibid.*, p. 233.

[13] United Nations Development Programme, 2025, *Climate and Disaster Risk Finance and Insurance (CDRFI) in National Adaptation Plans and Nationally Determined Contributions*, p. 2.

[14] Rio Declaration on Environment and Development, 13 June 1992, UN doc. A/CONF.151/26, Principle 21.

It was, however, alluded to already in 1972 in Principle 23 of the Stockholm Declaration, which states that "it will be essential in all cases to consider the systems of values prevailing in each country, and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries"[15].

22. The recognition of historical responsibility and its consequent obligations is a core aspect of the principle of common but differentiated responsibilities. This is presented in the third preambular paragraph of UNFCCC which notes that "the largest share of historical and current global emissions of greenhouse gases has originated in developed countries" and that "per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs". Article 3, paragraph 1, of the UNFCCC further affirms the principle of common but differentiated responsibilities as one of the principles by which all parties "shall be guided" in their actions to achieve the objectives of the Convention and to implement its provisions. The inclusion of the term "and respective capabilities" supplements the factors to be taken into account for the purposes of equity. The provision concludes with the prescription: "Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof."

23. The Kyoto Protocol, which in its preamble recognizes its conclusion as being "in pursuit of the objectives" of the UNFCCC, also notes that the parties to the Protocol are "being guided by Article 3" of that Convention which incorporates common but differentiated responsibilities and refers to the principle in its Article 10.

24. The Paris Agreement devotes several provisions to the related concepts of historical responsibility and common but differentiated responsibilities. In addition to the reiteration in the preamble, it underscores, in Article 2, paragraph 2, that the Agreement will be implemented in accordance with equity and the principle of common but differentiated responsibilities. In Article 4, paragraphs 3 and 19, when addressing the central issue of nationally determined contributions, it stipulates that the content of the nationally determined contributions should reflect, and the long-term low GHG emission development strategies should take into account, States parties' common but differentiated responsibilities. In Article 4, paragraph 4, it reaffirms the need for developed countries to "continue taking the lead by undertaking economy-wide absolute emission reduction targets" with the developing countries being "encouraged to move over time towards economy-wide emission reduction".

25. It may therefore be affirmed that from the UNFCCC to the Paris Agreement, the differentiated responsibilities have never been de-emphasized. In addressing the distinctions in the responsibilities that various groups of States bear and the specific considerations to which certain groups of States should be given, the UNFCCC refers to "developed countries" or "developed country Parties" in ten provisions, "developing countries" or "developing country Parties" in sixteen provisions, LDCs in two provisions and "small island countries" in one provision. The Paris Agreement contains eight provisions with reference to "developed country Parties", thirty-three provisions with reference to "developing country Parties" or "developing countries", five provisions with reference to LDCs and five provisions with reference to SIDS. Furthermore, in decision 1/CMA.5 "Outcome of the first global stocktake" of 13 December 2023, which comprises 196 paragraphs in total, "developed country Parties" or "developed countries" is mentioned in thirteen paragraphs, "developing country Parties" or "developing countries" is mentioned in

[15] Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, UN doc. A/CONF.48/14/Rev.1 (hereinafter "Stockholm Declaration").

thirty-four paragraphs, and "the least developed countries and small island developing States" is mentioned in four paragraphs[16].

26. In this connection, it must be emphasized once again that historical responsibility and the principle of common but differentiated responsibilities are not merely legal constructs born of treaty negotiations. Rather, they are grounded in scientific findings on climate change, as detailed in Section III above. The principle of common but differentiated responsibilities — encompassing the indispensable aspect of historical responsibility — was incorporated into the climate change treaty régime as an equitable legal principle designed to address the disparities identified by science in the contributions of different countries to global warming and the different ways in which they suffer its impact.

27. Moreover, this equitable legal principle of common but differentiated responsibilities is intended not only to address historical disparities, but also to account for present and future inequities. Germany, for instance, as a fully industrialized country and one of the top ten historical emitters from 1850 to present, has already reached its peak of CO_2 emissions in the late 1970s and early 1980s. On the other hand, Burkina Faso, which is an LDC, only started to increase its CO_2 emissions comparatively significantly from the 1990s. This is in line with the acknowledgement in the preamble of the UNFCCC that "per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs". The preamble of the UNFCCC further affirms that

> "responses to climate change should be coordinated with social and economic development in an integrated manner with a view to avoiding adverse impacts on the latter, taking into full account the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty".

In the same vein, Article 10, paragraph 5, of the Paris Agreement provides:

> "Accelerating, encouraging and enabling innovation is critical for an effective, long-term global response to climate change and promoting economic growth and sustainable development. Such effort shall be, as appropriate, supported, including by the Technology Mechanism and, through financial means, by the Financial Mechanism of the Convention, for collaborative approaches to research and development, and facilitating access to technology, in particular for early stages of the technology cycle, to developing country Parties."

28. As Judge Weeramantry pointed out in his separate opinion in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, albeit in a different context, the Court "must hold the balance even between the environmental considerations and the developmental considerations raised by the respective Parties"[17]. In this sense, the principle of common but differentiated responsibilities links disparities in the past to inequalities in the present and future. Only through full engagement with the principle can the true scope of the request posed by the General Assembly be properly addressed — one that underscores the distinction between those States that have caused significant harm to the climate system, and those States that are injured or specially affected by or particularly vulnerable to the adverse effects of climate change, as well as peoples and individuals of the present and future generations affected by the adverse effects of climate change.

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[16] See decision 1/CMA.5, Outcome of the first global stocktake, UN doc. FCCC/PA/CMA/2023/16/Add.1.

[17] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, separate opinion of Vice-President Weeramantry, p. 88.

29. While the Court in paragraph 364 of the Advisory Opinion states that "a duty of co-operation is founded on the recognition of the interdependence of States and the ensuing need for solidarity among peoples", it must be equally underscored that solidarity must rest on a genuine appreciation of historical disparities, present and future inequality, and a serious regard for the differentiated responsibilities firmly embedded in the existing international legal framework. After all, while common challenges bring States and peoples together, inequality may easily divide them; and "inequality defines our time"[18].

V. LEGAL CONSEQUENCES "FOR STATES" WITH RESPECT TO OTHER STATES UNDER QUESTION *(B)*

30. It should be recalled at the outset that international law does not differentiate between harming the environment of one's neighbour through sulphur dioxide (SO_2) fumes and harming the atmosphere of numerous other States through GHG emissions (e.g. CO_2, CH_4 and N_2O). GHG emissions are not materially different from the conventional case of transboundary harm. As was explained by the International Law Commission, the only activities that are excluded from the concept of "transboundary harm" are those which "cause harm only in the territory of the State within which the activity is undertaken without the possibility of any harm to any other State"[19]. Harming the atmosphere harms your neighbours as well as all other States and is by itself a violation of international law because the atmosphere cannot be used by any State as its personal dumping ground. As the counsel for Kiribati put it:

> "Despite their invisibility, greenhouse gases are harmful, even more harmful than transient smoke. This has been a matter of general awareness since the 1960s. When the famous *Trail Smelter* award stated that no State had the right to 'cause injury by fumes in or to the territory of another'[,] it did not qualify the nature of the fumes. Nor did it make sense to do so: under customary international law, harmful gases are harmful gases, whether or not they are visible to the naked eye."[20]

31. The harmful gases — GHG emissions — impacting the climate system and the scientific findings clarifying their effect on global warming came to the attention of the international community in the 1980s. With the adoption of General Assembly resolution 43/53 by consensus in 1988, it was generally acknowledged that "climate change is a common concern of mankind"[21]. In its 1990 First Assessment Report, the IPCC concluded:

> "We are *certain* of the following: . . . *Emissions resulting from human activities* are substantially increasing the atmospheric concentrations of the greenhouse gases . . . These increases will enhance the greenhouse effect, resulting on average in an additional warming of the Earth's surface."[22] (Emphasis added.)

The IPCC further confirmed: "We calculate with confidence that: . . . Carbon dioxide has been responsible for over half of the enhanced greenhouse effect in the past, and is likely to remain so in

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[18] United Nations Secretary-General António Guterres, Nelson Mandela Annual Lecture: "Tackling the Inequality Pandemic: A New Social Contract for a New Era" (as delivered), 18 July 2020.

[19] International Law Commission, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, *Yearbook of the International Law Commission (YILC)*, 2001, Vol. II, Part Two, Article 1, p. 151, para. 13.

[20] CR 2024/43, p. 44, para. 7 (Kiribati: Benvenisti), referring to *Trail Smelter Arbitration (United States/Canada), Reports of International Arbitral Awards (RIAA)*, Vol. III (1941), p. 1964.

[21] UN doc. A/RES/43/53, 6 December 1988, operative paragraph 1.

[22] IPCC, 1992, *Climate Change: The IPCC 1990 and 1992 Assessment: IPCC First Assessment Report*, Overview and Policymaker Summaries and 1992 IPCC Supplement, Overview, p. 52.

the future."[23] At the same time, Article 1, paragraph 2, of the Vienna Convention for the Protection of the Ozone Layer defines "adverse effects" as "changes in the physical environment or biota, including changes in climate, which have significant deleterious effects on human health or on the composition, resilience and productivity or natural and managed ecosystems, or on materials useful to mankind".

32. Both the availability of scientific evidence and political awareness of the existence of climate change due to GHG emissions became widespread as of 1985 and were further disseminated by the IPCC First Assessment Report of 1990, which, among others, found that

> "[c]arbon dioxide has been responsible for over half of the enhanced greenhouse effect in the past, and is likely to remain so in the future. Atmospheric concentrations of the long-lived gases (carbon dioxide, nitrous oxide and the CFCs) adjust only slowly to changes of emissions. Continued emissions of these gases at present rates would commit us to increased concentrations for centuries ahead . . . Stabilization of equivalent carbon dioxide concentrations at about twice the pre-industrial level would occur under Scenario D towards the end of the next century. Immediate reductions of over 60% in the net (sources minus sinks) emissions from human activities of long-lived gases would achieve stabilization of concentration at today's levels"[24].

33. With the widespread availability of scientific evidence in the 1980s establishing the risk of harm to the climate system arising from the GHG emissions, its urgency for the planet and the severity and magnitude of the threat for humanity in general, it was to be expected that those States that were, and still are, responsible for a major part of the GHG emissions affecting the atmosphere would exercise due diligence and adopt the necessary measures to ensure that activities within their jurisdiction or control would not cause harm to the climate system in accordance with the rules of international law. The existence of an obligation of prevention in customary international law with respect to the risk of harm to the territory or environment of another State, or to areas beyond national jurisdiction, was generally acknowledged at the time, having been clearly recognized by the Court in the *Corfu Channel* case of 1949 and even earlier by the *Trail Smelter Arbitral Award* of 1941[25]. Unfortunately, the conduct of those States did not change. Indeed, according to the IPCC's Sixth Assessment Report,

> "[g]lobal greenhouse emissions have continued to increase, with unequal historical and ongoing contributions arising from unsustainable energy use, land use and land-use change, lifestyles and patterns of consumption and production across regions, between and within countries, and among individuals (high confidence)"[26].

34. Under question *(b)*, the Court was not requested to indicate reparation for specific States or to identify such States individually, nor to proceed to the quantification of compensation to be paid by the plurality of States that are the highest emitters of global GHGs. It was, however, requested to clarify the legal consequences under the obligations identified in reply to question *(a)* for States "where they have caused significant harm to the climate system", with respect to (i) other States,

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[23] *Ibid*.

[24] *Ibid.*

[25] *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22; *Trail Smelter Arbitration (United States/Canada), RIAA*, Vol. III (1941), p. 1965.

[26] IPCC, 2023, *Climate Change 2023: Synthesis Report*, Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policymakers, Statement A.1, p. 4.

such as SIDS, which are injured or specially affected or particularly vulnerable; and (ii) peoples and individuals of the present and future generations affected by the adverse effects of climate change.

35. There is no doubt that the apportionment or allocation of responsibility among a plurality of States which are historically and currently considered as the highest emitters of GHGs thus causing harm to the climate system with widespread adverse effects on other States, on peoples and on nature and the allocation of reparation among a plurality of injured States involve difficulties. However, the identification of both groups of States is facilitated by science and by the reports of the IPCC and other entities on climate change. As observed by many participants: "[c]limate change is a phenomenon that has not been caused by all States equally, nor will all States equally suffer its effects."[27] This is echoed by the IPCC, which in its Sixth Assessment Report clearly states that,

> "[w]idespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred. Human-caused climate change is already affecting many weather and climate extremes in every region across the globe. This has led to widespread adverse impacts and related losses and damages to nature and people (high confidence). *Vulnerable communities who have historically contributed the least to current climate change are disproportionately affected* (high confidence)" (emphasis added)[28].

36. It is on the basis of these scientific findings that the General Assembly was able to enquire in resolution 77/276 about legal consequences for "those States where they, by their actions or omissions, have caused significant harm to the climate system and other parts of the environment" with respect to "States, including, in particular small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change"; thus, underlining the distinction between those who have caused significant harm to the climate system and those who have been injured or particularly affected by the adverse effects of climate change. It is a pity that the Court decided to overlook this crucial distinction and the legal consequences arising from it for the two categories of States. This has fundamentally undermined the legal relevance of the Advisory Opinion, as well as its practical significance for those who have suffered most from the adverse effects of climate change.

37. For example, in view of the specific wording of question *(b)* (i), it was reasonable to expect the Advisory Opinion to examine the possibility for SIDS or LDCs and other States particularly affected by sea level rise or other extreme weather events caused by climate change to invoke Article 42 of the ILC Articles on State Responsibility. This provision reads as follows:

> "A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to: *(a)* that State individually; or *(b)* a group of States including that State, or the international community as a whole, and the breach of the obligation: (i) specially affects that State; or (ii) is of such a character as radically to

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[27] CR 2024/44, p. 63, fn. 247: See e.g. the Written Statements of Albania (para. 144); African Union (paras. 8-9); Bangladesh (paras. 5, 21-25); Barbados (para. 112); Burkina Faso (para. 26); Colombia (para. 2.8); the Commission of Small Island States (paras. 5-6, 20, 33); Costa Rica (para. 64); Ecuador (para. 1.17); Egypt (paras. 53 and 60); Grenada (paras. 72-73); India (paras. 45, 71(iv) and 72); the International Union for Conservation of Nature (App. 1, para. 38); Liechtenstein (paras. 21 and 30); Mauritius (para. 59); Melanesian Spearhead Group (paras. 34, 224 and 339); Nauru (para. 10); the Organisation of African Caribbean and Pacific States (paras. 7 and 167); Pakistan (para. 11); Sierra Leone (paras. 1.5-1.6 and 3.38); Solomon Islands (para. 89); Timor-Leste (para. 36); United Kingdom (para. 13.2); United Arab Emirates (para. 11); Uruguay (para. 21); the World Health Organization (para. 9); Vanuatu (paras. 87-91). See also the Written Comments of Antigua and Barbuda (para. 2); Costa Rica (para. 37); Kenya (para. 5.27); Gambia (paras. 2.11 and 2.16); Vanuatu (para. 49).

[28] IPCC, 2023, *Climate Change 2023: Synthesis Report*, Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policymakers, Statement A.2, p. 5.

> change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation."

For a State or group of States to be considered injured under this provision, they must be affected by the breach in a way which distinguishes them from the generality of other States to which the obligation is owed. This is of course the case, for example, of SIDS, which, according to resolution 77/276, are injured or specially affected in view of their geographical circumstances and level of development. It is also a scientifically well-established fact which has been widely discussed in the IPCC reports.

38. The breached obligation may arise either from multilateral treaties such as the climate change treaties or from customary international law. Subparagraph *(b)* of Article 42 of ILC Articles on State Responsibility is most relevant for a reply to question *(b)* (i) of the General Assembly resolution. It refers to injury arising from collective obligations, i.e. obligations that apply between more than two States, which is the case in matters relating to climate change. It also stipulates that a State is injured if it is specially affected by the violation of a collective obligation. Of particular interest in this context is paragraph 12 in the International Law Commission commentary relating to the term "specially affected" which reads as follows:

> "Even in cases where the legal effects of an internationally wrongful act extend by implication to the whole group of States bound by the obligation or to the international community as a whole, the wrongful act may have particular adverse effects on one State or on a small number of States. For example, a case of pollution of the high seas in breach of article 194 of the United Nations Convention on the Law of the Sea may particularly impact on one or several States whose beaches may be polluted by toxic residues or whose coastal fisheries may be closed. In that case, independently of any general interest of the States parties to the Convention in the preservation of the marine environment, those coastal States parties should be considered as injured by the breach."

39. An injured State in the sense of Article 42 is entitled to have recourse to all means of redress under the ILC Articles on State Responsibility. It is entitled to ask for the cessation of the internationally wrongful act particularly when the wrongful act has a continuing character. The duty of cessation involves the requirement of the responsible State or States to use all means at their disposal to reduce their GHG emissions. This applies, in particular, to those States mentioned in question *(b)* that have predominantly and historically contributed to GHG emissions thus adversely impacting the climate system. The cessation of conduct which has led to a breach of an international obligation is the first requirement for eliminating the consequences of a wrongful act. The State responsible for the breach of its international obligations is also under an obligation to make reparation for its wrongful act. Reparation may be achieved by restitution, compensation, satisfaction or a combination thereof. The Court has in the past indicated that environmental damage is compensable under international law, and that compensation will be due for both damage caused to the environment, "in and of itself", and expenses incurred by injured States as a consequence of such damage[29].

40. It is a pity that the Court has, in this Advisory Opinion, missed a historic opportunity to clarify not only for all States but also, in particular, for those who have most suffered from the adverse effects of climate change, in a clear and tangible manner, the legal consequences of the failure of gross GHG-emitting States to take appropriate action to protect the climate system from such

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[29] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I)*, p. 28, para. 41.

emissions, including through regulations of fossil fuel production, fossil fuel consumption and the granting of subsidies or exploration licenses for fossil fuel. Similarly, it should have specified the entitlement of injured or particularly affected States such as SIDS, to invoke Article 42 of the ILC Articles on State Responsibility for the breach by the gross-emitting States of their international obligations both under multilateral treaties and customary international law. It is in the interest of all States to have their international legal obligations with respect to climate change clearly set out by an independent judicial institution such as the Court and to receive an assessment of the legal consequences of their actions and omissions in particular with respect to other States that have been particularly affected by the adverse effects of climate change. Such a clear and concrete articulation of the law would greatly facilitate international co-operation and contribute to the peaceful settlement of disputes arising from the adverse effects of climate change.

VI. LEGAL CONSEQUENCES FOR INJURIES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

41. Contrary to the approach adopted by the Advisory Opinion (see paragraphs 105 and 405 of the Advisory Opinion), I am of the view that question *(b)* in the resolution encompasses both the legal consequences of internationally wrongful acts and the legal consequences of injuries arising out of conduct not prohibited by international law. Thus both kinds of injuries or harm, i.e. harm due to acts considered unlawful under international law as well as harm due to acts not necessarily prohibited by international law should have been addressed by the Court. As early as 1969, the International Law Commission, while dealing with the law on State responsibility, recognized "the importance, alongside that of responsibility for internationally illicit acts, of the so-called responsibility for risk arising out of the performance of certain lawful activities, such as spatial and nuclear activities"[30]. In the preliminary report on the subject of "international liability for injurious consequences arising out of acts not prohibited by international law" prepared by Special Rapporteur Mr Robert Q. Quentin-Baxter in 1980, it was observed that, "[i]n the field of the environment, because most dangers are new or newly perceived, the need for international regulation is widely admitted and conventional regimes are continuously under construction at universal, regional, sub-regional and transnational levels"[31].

42. In fact, the two régimes, namely State responsibility, for which wrongfulness is a necessary element but not injury, and international liability, for which injury is indispensable but not wrongfulness, are not mutually exclusive, but are intertwined in certain circumstances. For instance, Article 27, paragraph *(b)*, of the ILC Articles on State Responsibility provides that even when the wrongfulness is precluded, legal consequences arise out of the injuries. Moreover, the principle that a State must not "allow knowingly its territory to be used for acts contrary to the rights of other States", as recognized by the Court since *Corfu Channel (United Kingdom* v. *Albania)*[32], may find expression in the overlapping area of the two régimes, which is indeed cited in the commentaries to all three relevant International Law Commission instruments, namely: the Articles on State Responsibility, the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities and the Draft Principles on the Allocation of Loss in the case of Transboundary Harm arising out of Hazardous Activities. In particular, paragraph 1 of the general commentary to the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities provides:

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[30] Report of the International Law Commission on the work of its twenty-first session, *Official Records of the General Assembly*, Twenty-fourth Session, p. 233, para. 83.

[31] Preliminary report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr Robert Q. Quentin-Baxter, Special Rapporteur, 1980, UN docs. A/CN.4/334 and Add.1 & Corr.1 and Add.2, p. 255, para. 28.

[32] *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22.

> "The articles deal with the concept of prevention in the context of authorization and regulation of hazardous activities which pose a significant risk of transboundary harm. Prevention in this sense, as a procedure or as a duty, deals with the phase prior to the situation where significant harm or damage might actually occur, requiring States concerned to invoke remedial or compensatory measures, which often involve issues concerning liability."[33]

43. Indeed, the development of a distinct régime of international liability was driven by the recognition that the consequences of environmental harm may not be adequately addressed through the framework of State responsibility for internationally wrongful acts. It shall be recalled that Principle 22 of the Stockholm Declaration in 1972 proclaimed that "States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction". Principle 13 of the Rio Declaration in 1992 reiterated in the relevant part, with greater detail, that

> "States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction."

44. One year after the Stockholm Conference, the General Assembly in its resolution 3071 (XXVIII) of 30 November 1973 recommended in operative paragraph 3 *(c)* that the International Law Commission should "[u]ndertake at an appropriate time a separate study of the topic of international liability for injurious consequences arising out of the performance of other activities". The International Law Commission commenced its study on this topic in 1978. In that year, the report of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law observed that the recommendation of the General Assembly on this topic was prompted by awareness of the need for the urgent development of legal norms due to the dramatic extension of human power to control their environment[34]. By 1997, following two decades of study, the Working Group noted that "the scope and the content of the topic remained unclear". Upon its recommendation, the Commission decided to subdivide the topic into two parts, one on prevention and the other on liability, and to proceed with prevention first[35]. In 2001, the Commission adopted both the Articles on Responsibility of States for Internationally Wrongful Acts and the Draft Articles on Prevention of Transboundary Harm for Hazardous Activities. The latter, in its preamble, refers to the Rio Declaration in general. In the same year, the General Assembly by resolution 56/82 of 12 December 2001 requested that the Commission resume its consideration of the liability aspects of the topic. Five years later, the Draft Principles on the Allocation of Loss in the case of Transboundary Harm arising out of Hazardous Activities were adopted by the Commission. The Draft Principles, in preambular paragraph 1, reaffirm Principle 13 of the Rio Declaration.

45. Although the topic of international liability was subdivided into two parts in 1997, the same Special Rapporteur, Mr Pemmaraju Sreenivasa Rao, was appointed to lead the study. In his First Report for the Draft Principles on the Allocation of Loss in the case of Transboundary Harm arising out of Hazardous Activities, he explained that the Commission relied on State liability "as a

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[33] International Law Commission, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, *YILC*, 2001, Vol. II, Part Two, p 148, para. 1.

[34] Report of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law (UN doc. A/CN.4/L.284 and Corr.1), *YILC*, 1978, Vol. II, Part Two, p. 150.

[35] Report of the International Law Commission on the work of its forty-ninth session, *YILC*, 1997, Vol. II, Part Two, p. 59.

vehicle to move issues of liability and compensation" for the following reasons. First, the whole issue is considered as an extension of its work on State responsibility. Second, the principle *sic utere tuo ut alienum non laedas* was regarded as providing adequate basis to develop State liability as a principle. Third, it was believed that such an approach may better serve the interests of innocent victims; and fourth, it was decided for policy reasons that States should be encouraged to take the obligation of *sic utere tuo ut alienum non laedas* more seriously[36]. Eventually, the twofold purpose of the Draft Principles, as set forth in Principle 3, is as follows: first, "to ensure prompt and adequate compensation to victims of transboundary damage"; and second, "to preserve and protect the environment in the event of transboundary damage, especially with respect to mitigation of damage to the environment and its restoration or reinstatement". Principle 4 introduces obligation and benchmarks on prompt and adequate compensation. Principle 5 addresses response measures required of the State of origin, the State affected, and the States concerned of the transboundary damage respectively. Principle 6 elaborates on international and domestic remedies.

46. Notwithstanding the conclusion that the ILC Articles on State Responsibility should serve as the general legal framework for legal consequences with regard to the protection of climate system and other parts of the environment, the Court should have, in my view, recognized that under certain circumstances, the régime of international liability for injuries arising out of acts not prohibited by international law also plays a complementary role when considering legal consequences for States' acts or omissions in the field of climate change. This is both necessary and important for at least three reasons. First and foremost, climate change is a common challenge for all nations and peoples and the window of opportunity "to secure a liveable and sustainable future for all" is "rapidly closing"[37]. Accordingly, the entire present *corpus juris*, where appropriate, should be fully involved and considered to pave the way for an effective legal solution to enabling and mobilizing effective actions of States, particularly with regards to those States and peoples that are most affected or are vulnerable to the adverse effects of climate change.

47. Secondly, it has been half a century since the Stockholm Declaration first called upon States to co-operate in further developing "the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction". Since then, the International Law Commission, together with the broader international community, has undertaken efforts to advance this area of law. In my opinion, it was incumbent upon the Court to recognize the insufficiency of the régime of State responsibility for internationally wrongful acts in addressing the protection of the climate system and other parts of the environment, in particular with respect to specially affected and presently vulnerable peoples and States, and to recognize the complementary role of the régime of international liability of States in bridging this gap.

48. Thirdly, climate change is a matter of cumulative nature over time and our understanding of it evolves alongside the development of science whereas the law has its inherent limits in its engagement with both time and science. Therefore, it is crucial to leave the door open rather than closed on such a critical matter for the development of international law in response to climate change. As was wisely observed by the late Professor Sompong Sucharitkul in the 1990s, before the adoption of the ILC Articles on State Responsibility and the Draft Articles on Prevention of Transboundary Harm for Hazardous Activities:

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[36] First report on the legal regime for allocation of loss in case of transboundary harm arising out of hazardous activities, by Mr Pemmaraju Sreenivasa Rao, Special Rapporteur, UN doc. A/CN.4/531 (21 March 2003), p. 79.

[37] IPCC, 2023, *Climate Change 2023: Synthesis Report*, Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policymakers, Statement C.1, p. 24.

> "The continuing evolution of international law reflects the relative insignificance of the wrongfulness requirement. What was not prohibited yesterday may be prohibited tomorrow, and what was prohibited today may not be prohibited tomorrow. The bottom line for international liability is that a State is liable for the harmful effects of activities under its control or within its jurisdiction . . . The law of international liability, which disregards wrongfulness, also opens the way for international law to evolve and develop its proscriptive rules."[38]

VII. THE INABILITY OF THE COURT TO MAKE UP ITS MIND ON THE "PRECAUTIONARY APPROACH OR PRINCIPLE"

49. Finally, I am surprised by the unprecedented inability of the Court to make up its mind on the formulation of a normative concept such as the "precautionary principle". Alternative formulations of the principle, as a "precautionary approach or principle", are offered in the Advisory Opinion and the choice is left to the readers or to the general public; the Court thus acknowledging its failure to make a decision.

50. This publicly displayed uncertainty of the World Court on how to characterize a well-known principle one way or the other is rather puzzling, to say the least. If the majority did not feel comfortable with the use of "principle", they could have at least stayed with the formulation used by the Court itself in the *Pulp Mills* Judgment and by ITLOS in its COSIS Advisory Opinion which is "precautionary approach"[39]. It would not have caused as much confusion or uncertainty as the alternative formulations.

(Signed) Abdulqawi Ahmed YUSUF.

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[38] Sompong Sucharitkul, "State Responsibility and International Liability under International Law", *Loyola of Los Angeles International and Comparative Law Journal*, Vol. 18, No. 4 (1996), pp. 833-834.

[39] See *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010,* p. 61, para. 164. See also *Request for Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion, ITLOS Reports 2024.*