DECLARATION OF JUDGE NOLTE

Relationship between climate change treaties and the corresponding obligations under customary international law — Limitation of the Court's examination of legal consequences to those resulting from internationally wrongful acts — Conditions for compensation.

1. Climate change is an extraordinarily daunting and complex challenge for humanity. Many people and States are pinning their hopes of addressing it on the law and on courts, particularly on international law and international courts. The present Advisory Opinion concerns not only the law relating to climate change; it also concerns the role of courts in responding to this challenge.

2. While I agree with the operative paragraphs of the Opinion and most of the reasoning, I wish to elaborate on two points, namely the relationship between the climate change treaties and the corresponding customary obligations (I), and certain issues concerning legal consequences, namely the limitation of the Court's analysis to internationally wrongful acts and conditions for compensation (II).

I. CLIMATE CHANGE TREATIES AND THE CORRESPONDING CUSTOMARY OBLIGATIONS

3. The Court arrives at a finding concerning the relationship between the climate change treaties and the corresponding customary obligations which, at first sight, appears ambiguous:

> "As it is difficult to determine in the abstract the extent to which the climate change treaties and their implementation practice influence the proper understanding of the relevant customary obligations and their application, the Court considers that, at the present stage, compliance in full and in good faith by a State with the climate change treaties, as interpreted by the Court (see paragraphs 174-270 above), suggests that this State substantially complies with the general customary duties to prevent significant environmental harm and to co-operate. This does not mean, however, that the customary obligations would be fulfilled simply by States complying with the obligations under the climate change treaties (see *Climate Change, Advisory Opinion*, *ITLOS Reports 2024*, pp. 85-86, para. 223). While the treaties and customary international law inform each other, they establish independent obligations that do not necessarily overlap." (Advisory Opinion, para. 314)

4. The Court bases this finding mainly on considerations regarding the general relationship between treaties and customary international law (Advisory Opinion, paras. 310-312). However, it does not elaborate much on how these considerations apply to the specific relationship between the climate change treaties and the corresponding customary obligations (*ibid.*, para. 313). In my view, it is the character of this specific relationship that explains the presumption which the Court describes by the term "suggests" (*ibid.*, para. 314).

A. Climate change treaties give substance to the general customary obligations

5. The customary duty to prevent significant harm to the environment is a source of inspiration for the climate change treaties and it constitutes their normative background. Referring to this customary obligation, the preamble of the United Nations Framework Convention on Climate Change (UNFCCC) recalls that States have a "responsibility to ensure that activities within their

jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".

6. The Paris Agreement incorporates the objectives of the UNFCCC and is therefore also motivated by the customary duty to prevent significant harm to the environment (preamble and Article 2). Thus, these climate change treaties are means by which States seek to fulfil their general customary obligations to prevent significant harm to the environment and to co-operate for its protection.

7. The general customary duties to prevent significant harm to the environment and to co-operate for its protection are indeterminate, multifactorial and evolutive in nature, and they therefore do not provide sufficiently clear guidance in many contexts and situations. This is an important reason why States have concluded treaties for the protection of the environment. These treaties contain more specific rules and provide for ongoing regulatory procedures, setting standards which could not be achieved simply by identifying and applying the customary due diligence standard in individual situations.

8. This is especially true in the field of climate change. Climate change constitutes a particularly complex collective action problem which involves all States with their widely different situations, priorities and capabilities. The significance and the effectiveness of measures taken by individual States, as well as their omissions, often depend on the actions of other States. Climate change treaties are the most obvious source from which States can derive more specific rules that are required to fulfil the fundamental — but not always sufficiently determinate — general customary obligations incumbent upon them and on which they can base co-ordinated approaches[1]. The climate change treaties and their implementation are examples of where the "present content" of a customary rule is "confirmed and influenced" by a treaty[2]. They are an appropriate means of fulfilling a general customary obligation and they guide the determination of the content and the application of that obligation in specific situations. Obligations arising from climate change treaties give substance to general customary obligations[3].

B. *Lex specialis*

9. Determining the content of and applying customary obligations in the light of climate change treaties is not an application of the *lex specialis* principle. The determination that a (treaty) rule is *lex specialis* is the result of an interpretative process which leads to the conclusion that the (treaty) rule claims to take precedence over a corresponding, more general (customary) rule (see paragraphs 166 and 167). I agree that the climate change treaties are not intended to generally replace the customary duties to prevent significant harm to the environment and to co-operate for the protection of the environment (see paragraphs 168-170). However, this does not prevent the climate change treaties and the general customary obligations from informing and influencing each other.

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[1] See J. Brunnée, "Harm Prevention", in L. Rajamani and J. Peel (eds.), *Oxford Handbook of International Environmental Law*, Oxford University Press (OUP), 2021, p. 282; C. McLachlan, *The Principle of Systemic Integration in International Law*, OUP, 2024, 5.16, 5.42 and 5.44; J. Viñuales and P.-M. Dupuy, *International Environmental Law*, Cambridge University Press, 2018, p. 39.

[2] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America*), *Merits, Judgment, I.C.J. Reports 1986*, p. 94, para. 176.

[3] See ITLOS, *Climate Change, Advisory Opinion, ITLOS Reports 2024*, p. 110, para. 298.

10. The Opinion correctly recalls the Court's holding in *Nicaragua* v. *United States* that treaties and customary law are separate sources which retain a separate existence (Advisory Opinion, para. 310). However, the universally ratified climate change treaties and their implementation practice may nevertheless express what States consider to be adequate to fulfil their general and less determinate customary obligations.

C. The way in which climate change treaties may influence the customary rules

11. While it may, in principle, be possible to find that a general customary rule is more demanding than treaty rules which are designed to fulfil a State's customary obligations, States parties, in concluding the climate change treaties and thereafter, have not expressed the view that the conventional obligations are generally less demanding than the customary rules. Even the nine parties which submitted declarations at the adoption of the Paris Agreement stating, each in slightly different terms, that they considered that the Agreement was "inadequate to prevent global temperature increase of 1.5°C above pre-industrial levels and as a consequence, w[ould] have severe implications for our national interests" and "that ratification of the Paris Agreement shall in no way constitute a renunciation of any rights"[4], did not call into question the bona fide effort of the community of States parties to prevent, by way of collaboration through the Paris Agreement, significant harm to the climate system. Rather, the declarations expressed scepticism as to whether the 1.5°C element of the temperature goal of the Paris Agreement (which the Court has identified as "primary" in paragraph 224) could be reached by the mechanisms provided for in that Agreement. These nine parties have not claimed that the obligations and co-operative procedures under the climate change treaties are incapable of meeting the requirements of customary international law and this Advisory Opinion recognizes their claim that the Paris Agreement does not constitute a renunciation of their rights.

12. The customary duty to prevent significant harm to the environment, as understood in the light of the climate change treaties, may lead to the conclusion that a State, in view of its specific circumstances, has not exercised due diligence in its efforts to mitigate its greenhouse gas (GHG) emissions during a particular period. However, I am sceptical as to whether fixed quantitative mitigation obligations, as primary obligations, can be derived from that general customary duty alone. After all, the States parties to the Paris Agreement, representing the entire international community of States, have agreed that, for the time being, their collective efforts are not to be pursued through general fixed quantitative commitments for some States, as under the Kyoto Protocol, but rather through more strictly co-ordinated and less substantially predetermined nationally determined contributions (NDCs) for all States. Adding obligations of the kind of commitments provided for in the Kyoto Protocol by way of an interpretation of the general customary obligations would therefore in all likelihood be a form of judicial legislation. The European Court of Human Rights in *KlimaSeniorinnen* v. *Switzerland* and the Supreme Court of the Netherlands in *Urgenda Foundation* v. *The Netherlands* have based their findings mainly on more specific rules and steps that the respective States had *themselves* taken within the framework of the climate change treaties and not on the general customary obligation to prevent significant harm to the environment[5].

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[4] Paris Agreement, Declarations made upon ratification by the Cook Islands, the Marshall Islands, Micronesia, Nauru, Niue, the Philippines, the Solomon Islands, Tuvalu, Vanuatu, United Nations, *Treaty Series*, Vol. 3156, pp. 87, 92, 94 and 96-98.

[5] *Verein KlimaSeniorinnen Schweiz and Others* v. *Switzerland*, [GC] — European Court of Human Rights, App. 53600/20, Judgment of 9 April 2024 [GC], paras. 558-574; *Urgenda Foundation* v. *State of the Netherlands*, Supreme Court of the Netherlands, No. 19/00135, 20 December 2019, paras. 5.7.1-5.7.5.

D. The presumption

13. While courts should remind States of their responsibilities towards present and future generations, they should not try to engage in climate policy, and they should not attempt to push States beyond the collective process and thereby undermine it. Collective action may be our only chance to save the world from the worst effects of climate change. I therefore agree with the Court's recognition that, at present, the full and bona fide compliance by a State with its obligations under the climate change treaties "suggests" that this State substantially complies with, i.e. is presumed to fulfil, the customary duty to prevent significant harm to the environment (Advisory Opinion, para. 314). This approach is not *lex specialis* by another name. Rather, it is a way of achieving a harmonious interpretation of, and maintaining a proper relationship between, the climate change treaties and customary international law. This presumption is qualified and gives room for nuance and complexity. It can also take account of the different character of the respective sources of obligations and of possible future scenarios.

II. LEGAL CONSEQUENCES

14. As far as legal consequences are concerned, the Court has described applicable rules of State responsibility in the abstract and has not elaborated much on the possible legal limits of and difficulties for climate change-related claims. I think that only hinting at such limits and difficulties and leaving their elucidation for contentious proceedings risks creating false expectations, at least with respect to claims for compensation for climate change-related harm.

A. The narrowing of question *(b)* to legal consequences of wrongful acts

15. The Court has interpreted question *(b)* as referring only to *wrongful* actions or omissions of States. It therefore does not examine the legal consequences that might flow from lawful acts or from a combination of lawful and wrongful acts.

16. Legal consequences from lawful actions or omissions could ensue if conduct leading to GHG emissions were a hazardous activity giving rise to strict liability. Such liability is contemplated by the International Law Commission (ILC)'s Principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities[6]. However, these principles do not reflect customary international law. They are only "intended to contribute to the process of the development of international law in this field, both by providing appropriate guidance to States in respect of hazardous activities not covered by specific agreements, and by indicating the matters that should be dealt with in such agreements"[7]. The ILC has thus not sought "to identify the current status of the various aspects of the draft principles in customary international law"[8]. And regardless of whether the ILC principles reflect customary international law, it is not generally asserted that GHG emissions, in and of themselves, constitute a hazardous activity. To say that the cumulative effect of GHG emissions, as demonstrated by scientific evidence, makes them a hazardous activity would be to mistake the effect for the cause.

17. I think that the Court should have acknowledged that international law, unlike several domestic legal systems, does not currently contain a general customary rule establishing strict liability for certain lawful acts. This would have been a purely legal determination which would not

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[6] ILC, Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, with commentaries, 2006, UN doc. A/61/10.

[7] *Ibid.*, p. 59, para. 5.

[8] *Ibid.*, pp. 60-61, para. 13.

have given rise to factual or practical difficulties. By making that determination, the Court would not have closed the door to a likely future development of the law, as it has noted with respect to the "polluter pays" principle (Advisory Opinion, para. 160).

B. Compensation for wrongful acts

18. Wrongful acts can only give rise to compensation if they have "caused" harm (ILC Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), Article 36, paragraph 2). While the Court has hinted at possible difficulties when it comes to the identification of wrongful acts that have caused harm to the climate system (Advisory Opinion, para. 433-438), it has not elaborated on other manifest issues which arise in this context. In the following, I will address only a few such issues.

1. Causation and the role of natural science

19. I agree with the Court that it is not a "single activity or group of activities identifiable or associated with a certain State or States" but "the collective and aggregate effects of GHGs, anthropogenic as well as from natural sources, that cause damage to the climate system" (Advisory Opinion, para. 421). I also agree that "in principle, the rules on State responsibility under customary international law are capable of addressing a situation in which there exists a plurality of injured or responsible States" (*ibid.*, para. 430). However, these observations do not affect the requirement under the customary law of State responsibility that the harm in question must have been caused by a plurality of *wrongful* actions or omissions. The identification of such a plurality of wrongful acts by States poses difficulties in the context of climate change.

20. One difficulty is whether any particular combination of *wrongful* acts can be identified that would be sufficient to have caused relevant harm to the climate system (or even to have caused specific damage to States). Contrary to what the Court seems to suggest when it observes that, "while climate change is caused by cumulative GHG emissions, it is scientifically possible to determine each State's total contribution to global emissions, taking into account both historical and current emissions" (Advisory Opinion, para. 429), natural science can contribute only to a limited extent to the identification of wrongful acts. No doubt, natural science can provide precise information about the total amount of anthropogenic GHG emissions since the beginning of industrialization. And natural science can also identify with a high degree of precision the share of each State's contribution to this overall amount or at any given moment in time. But these facts are of little help when it comes to identifying a combination of *wrongful* acts that could give rise to a claim for compensation under the customary rules on State responsibility. Natural science cannot help in determining which GHG emissions since the beginning of industrialization have resulted from internationally wrongful acts, and natural science can help only to a limited extent in determining whether a given wrongful act translates to a particular quantity of GHG emissions. In particular, the question whether a State has undertaken its best efforts to reduce its GHG emissions is not one that natural science can answer; nor can natural science determine whether a particular level of GHG emissions amounts to a violation of the obligation to undertake best efforts. These are legal assessments which do not simply flow from natural science — even if natural science necessarily has a role to play in bringing them about.

2. Translation of wrongful conduct to a particular quantity of GHG emissions

21. A related issue concerns the translation of wrongful conduct to a particular quantity of GHG emissions. An obligation to prevent, which is an obligation of conduct to exercise due diligence, by definition, does not require the conduct to be causally connected to the achievement of the aim at which that obligation is directed. Thus, a State may fulfil its due diligence obligation to

prevent significant environmental harm by undertaking its best efforts, but those efforts may lead to no reduction of its GHG emissions, or to only a limited reduction. Conversely, a State may fail to undertake any effort and nevertheless see a significant reduction in its annual GHG emissions. It follows that the violation of an obligation to undertake best efforts to mitigate GHG emissions cannot, without an additional legally determined step of translation, be understood as being the cause of a certain quantity of emissions on the part of a State.

3. Determination of the relevant total amount of wrongful acts

22. Different approaches may be taken to determining the causation of harm to the climate system. One is to take the condition of the climate system before industrialization as a reference point and to ask whether a specific plurality of wrongful acts has caused harm to that system. Another approach might be to take the condition of the climate system at a later moment in time and to ask whether one or more wrongful acts that took place after that point has caused harm to the climate system. Both approaches give rise to legal difficulties.

23. Anthropogenic GHG emissions that took place before any restrictive international legal rules became applicable to them were not wrongful. The customary duty to prevent transboundary environmental harm was first recognized in the 1940s[9]. However, that duty was not applicable to the emission of GHGs until there was a general understanding and recognition of the risks associated with those emissions. Such recognition (except with respect to the ozone layer) crystallized during the second part of the 1980s (possibly with General Assembly resolution 43/53 of 6 December 1988[10], which endorsed the establishment of the Intergovernmental Panel on Climate Change (IPCC)).

24. The fact that the States parties to the UNFCCC "not[ed]", in the preamble of that instrument, "that the largest share of historical and current global emissions of greenhouse gases . . . originated in developed countries"[11] does not constitute a recognition that prior emissions were caused by *wrongful* acts or that "the largest share" of the total amount of prior emissions, i.e. those of developed countries, were wrongful, while other emissions were not. Rather, the UNFCCC's preambular paragraph serves to enable the "widest possible cooperation by all countries . . . in an . . . international response [to climate change]"[12] and justifies the distinction, for the time being, between developing States (whose "share of global emissions . . . will grow to meet their social and development needs")[13] and developed States (who "need . . . to take immediate action in a flexible manner on the basis of clear priorities, as a first step towards comprehensive response strategies")[14].

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[9] *Trail Smelter case (United States/Canada)*, Award, 1941, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. III, p. 1905, p. 1965; see also *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22.

[10] "Noting with concern that the emerging evidence indicates that continued growth in atmospheric concentrations of 'greenhouse' gases could produce global warming with an eventual rise in sea levels, the effects of which could be disastrous for mankind if timely steps are not taken at all levels."

[11] Third preambular paragraph.

[12] Sixth preambular paragraph.

[13] Third preambular paragraph.

[14] Eighteenth preambular paragraph.

25. This situation has implications for potential legal responsibility in respect of any plurality of wrongful anthropogenic GHG emissions when adopting the approach of using the condition of the climate system before industrialization as a reference point. As the Court has noted, the IPCC has found that, by 2019, approximately 58 per cent of all anthropogenic GHG emissions since the beginning of industrialization were emitted prior to 1990, while the remaining 42 per cent were emitted between 1990 and 2019[15].

26. GHG emissions since the second half of the 1980s can only have been wrongful to the extent that States either did not comply with their treaty-based mitigation commitments and obligations or did not undertake their best efforts to prevent significant harm to the climate system pursuant to the general customary obligation.

27. All this suggests that only a limited amount of all anthropogenic GHG emissions since industrialization has been caused by *wrongful* acts. I wonder whether this amount can be sufficient to cause harm to the climate system (as determined from the perspective of the condition of the climate system at the beginning of industrialization), thereby fulfilling one of the conditions for compensation claims.

28. The concepts of "composite acts" or "continuing acts" are unlikely to change this assessment. The cumulative GHG emissions of a State over time do not constitute a "composite act". This would require "a series of actions or omissions defined in aggregate as wrongful"[16]. However, some emissions of a State are the consequence of lawful conduct while others are the consequence of wrongful actions or omissions. And even if a part of a State's emissions over time constituted a wrongful "composite act", this could not lead to the extension of responsibility beyond the limitations set by the rules of intertemporal law and thus be an exception to the presumption of non-retroactivity[17]. The same is true if one were to assume that a State's emissions over time constituted a "continuing act"[18].

29. In my view, the Court should have addressed questions of intertemporal law to the extent that they are purely legal questions. That extent could easily have been determined. The Court should not have avoided these questions by citing to their possible relevance for an "*in concreto* assessment" of the responsibility of individual States (Advisory Opinion, paras. 97 and 423).

30. Another possible approach to determining the causation of harm to the climate system through wrongful acts is to take the condition of the climate system at a given moment in time as a reference point and to ask whether any later wrongful actions or omissions have caused harm to the climate system as it existed at that moment. This approach could integrate the concept of a remaining carbon budget and avoid questions of intertemporal law. However, also under this approach, the problem of the translation of a wrongful act to a particular quantity of GHG emissions would remain. It would also not be enough to causally link a certain amount of GHG emissions to an internationally

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[15] Advisory Opinion, paras. 80 and 149; IPCC, 2023, *Climate Change 2023 Synthesis Report*, Summary for Policymakers, p. 4, Statement A.1.3.

[16] ILC, Articles on State Responsibility, *Yearbook of the International Law Commission (YILC),* 2001, Vol. II, Part Two, p. 62, para. 2 (Article 15).

[17] See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan* v. *Armenia), Preliminary Objections, Judgment of 12 November 2024,* para. 62.

[18] "[A] continuing wrongful act . . . occupies the entire period during which the act continues and remains not in conformity with the international obligation", ILC, Articles on State Responsibility, *YILC*, 2001, Vol. II, Part Two, p. 60, para. 3 (Article 14).

wrongful act and to quantify the value of the ensuing harm. Harm to the climate system is harm to a common good resulting from collective actions or omissions, whether wrongful or not. The possible contribution to such harm by a claimant State would need to be considered in accordance with Article 39 ARSIWA, and the quantum of compensation arrived at by a court would need to be apportioned among all States concerned.

C. Litigation

31. Since the Court has spoken in a general manner about the law of State responsibility and its applicability to the actions or omissions of States "where they have caused significant harm to the climate system or other parts of the environment", I am concerned that States will feel encouraged to pursue litigation which, if successful at all, may entail only symbolic legal consequences, as is usually the case if satisfaction is awarded (Article 37 ARSIWA). In my view, the Court should have addressed the potential difficulties more openly in its response to question *(b)* — to avoid raising false hopes that climate litigation can supplement the mechanisms of financial transfers and the remedies for loss and damage contained in the climate change treaties. Also, litigation as a surrogate form of climate policy risks having a counterproductive effect on the political processes within the framework of the Paris Agreement and beyond.

32. Depending on how this Advisory Opinion will be generally understood, States may in the future shy away from accepting new treaty obligations or maintaining procedures that could subject them to unpredictable legal consequences. States may also challenge the distributive implications of court decisions which, in their view, unjustifiably isolate parts of the problem from the whole. And States may challenge the very legitimacy of courts, particularly international courts, when these appear to unduly limit the exercise of States' political and administrative discretion.

III. CONCLUSION

33. This Advisory Opinion is not only about ascertaining the law. It also concerns the role of the law, and that of courts, in the efforts to mobilize the necessary political will of States to take — costly — measures today to prevent — even costlier — harm tomorrow, to the climate system, States and people. The law and the courts can reinforce the political will of States and point them in the right direction. But the law and the courts can also divert and dilute the political will of States. If this Advisory Opinion would be seen as having identified a way for States that are not satisfied with the political process under the Paris Agreement to achieve their goals through litigation, including through claims for compensation, unintended effects are likely to follow. The collective process is fragile, and the stakes are high.

34. Will this Advisory Opinion stand the test of time? Much depends on how it will be understood. As it is written, the Opinion sometimes brings to mind the Delphic Oracle[19]. If it is understood as encouraging litigation to compensate for a lack of political will on the part of the community of States to protect against climate change, it may turn out to be counterproductive. If, on the other hand, the Opinion is understood as reinforcing the commitment of States to tackle climate

[19] See A. Skordas, "Epilogue: the Delphic Oracle and a note on the beginnings", in A. Skordas and L. Mardikian, *Research Handbook on the International Court of Justice*, Elgar, 2025, pp. 599-602.

change through legally framed forms of political and administrative co-operation for which litigation plays a complementary role, then it could make a lasting contribution to the global efforts to address the daunting and complex challenge of climate change.

(Signed) Georg NOLTE.

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