DECLARATION OF JUDGE CLEVELAND

Lex lata *provides a diverse range of rules for addressing climate change — Importance of carbon sinks and reservoirs in mitigating GHG emissions — Obligations to protect and enhance carbon sinks and reservoirs — Obligations with respect to harms from armed conflicts — Interpretation of international investment law in light of States' obligations in respect of climate change.*

1. Climate change resulting from human activity is an urgent, existential challenge facing our planet, and a quintessential global commons and collective action problem. It is essential that the *lex lata* be able to assist the international community in addressing this problem. A number of participants have taken the position that the existing law is not up to the task — that the *lex lata* either does not apply to, or is ill-equipped to address, the particular circumstances posed by climate change and that existing treaties impose no meaningful obligations.

2. As this Advisory Opinion shows, these concerns are unfounded. Existing international law provides a diverse range of rules for responding to the challenges posed by climate change. The duty to prevent transboundary harm, which traces its roots at least as far back as the *Alabama* arbitration of 1872[1], has long been recognized as applicable to the environment[2]. In the context of climate change, it imposes stringent obligations of due diligence, accompanied by customary international law duties to co-operate. The climate change treaties, other environmental treaties, and the United Nations Convention on the Law of the Sea (UNCLOS) likewise impose extensive obligations on States in relation to the protection of the climate system. Further, conventional and customary international human rights law obliges States to take a range of mitigation and adaptation measures to protect human beings from the harmful effects of climate change.

3. As the Court recognizes, these rules, applied to climate change, impose stringent obligations on States, including with respect to the production, licensing and subsidization of fossil fuels. I have elaborated on this issue in my joint declaration with Judge Bhandari. I write separately to address other aspects that, in my view, warranted further consideration in the Advisory Opinion: States' obligations with respect to carbon sinks and reservoirs, their obligations with respect to harms to the climate resulting from armed conflicts, and the relationship between international investment law and climate obligations.

I. PROTECTION AND ENHANCEMENT OF CARBON SINKS AND RESERVOIRS

4. Forests, oceans, mangroves, wetlands and other ecosystems are the lungs of the earth. They play a crucial role in climate mitigation by removing or storing greenhouse gases (GHGs) from the atmosphere[3], and their destruction can contribute significantly to climate harm. The duty to protect and enhance carbon sinks and reservoirs is therefore central to the obligations of States in combating climate change, and a necessary corollary to the reduction of emissions. While the Court recognized

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[1] *Alabama claims of the United States of America against Great Britain*, United Nations, *Reports of International Abitral Awards (RIAA)*, Vol. XXIX, pp. 125-134.

[2] *Trail Smelter case (United States/Canada), decision of 11 March 1941, RIAA*, Vol. III, p. 1965 ("[N]o State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence"); *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 242, para. 29.

[3] Advisory Opinion, para. 200.

various obligations of States with respect to the protection and promotion of carbon sinks and reservoirs, it did not, in my view, sufficiently emphasize the vital role of these obligations in protecting the climate system and other parts of the environment.

5. As the Court observed in its Advisory Opinion, it is scientifically established that increased atmospheric concentrations of GHGs are primarily due to human activities, "whether as a result of GHG emissions . . . *or* . . . *the weakening or destruction of carbon reservoirs and sinks*, such as forests and the ocean"[4]. Indeed, the Intergovernmental Panel on Climate Change (IPCC) defines mitigation as "human intervention to reduce emissions *or* enhance the sinks of greenhouse gases" and recognizes that enhancing sinks through measures such as reforestation and reduced deforestation is central to mitigation[5].

6. These obligations are reflected in the climate change treaties, with Article 4, paragraph 2, of the United Nations Framework Convention on Climate Change (UNFCCC) requiring each Annex I party to take the lead in mitigating climate change "by limiting [its] GHG emissions and enhancing [its] GHG sinks and reservoirs"[6]. This includes obligations to adopt national policies and take corresponding measures to protect and enhance carbon sinks and reservoirs, and to periodically communicate detailed information on such policies and measures, with the aim of returning combined emissions and removals by sinks and reservoirs to their 1990 levels (UNFCCC, Article 4, paragraph 1 *(a)* and *(b)*)[7]. States parties also are obliged to promote and co-operate in the conservation and enhancement of sinks and reservoirs, "including biomass, forests and oceans[,] as well as other terrestrial, coastal and marine ecosystems" (UNFCCC, Article 4, paragraph 1 *(d)*)[8].

7. The Paris Agreement likewise requires States parties to fulfil the goals of the Agreement, including the 1.5°C temperature goal, by "achiev[ing] a balance between anthropogenic emissions . . . and removals by sinks" (Article 4, paragraph 1)[9]. Article 5 of the Paris Agreement further elaborates that "Parties should take action to conserve and enhance, as appropriate, sinks and reservoirs of greenhouse gases . . ., including forests"[10].

8. The preservation and enhancement of carbon sinks, to the point where the production and removal of GHGs are in balance, is thus central to the mitigation obligations under the Paris Agreement. States' successive nationally determined contributions (NDCs) must take into account adverse activities such as logging and the draining of wetlands, and be capable of achieving their obligations through, *inter alia*, the preservation and enhancement of carbon sinks. The Paris Agreement thus reinforces the obligations relating to the promotion and enhancement of carbon sinks and reservoirs set forth in Article 4 of the UNFCCC, by recognizing that the protection of carbon reservoirs and sinks is one of the two primary levers, alongside emission reduction, in achieving the temperature goal and other climate mitigation measures.

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[4] *Ibid.*, para. 72 (emphasis added).

[5] *Ibid.*, para. 85 (emphasis added).

[6] *Ibid.*, paras. 199-200.

[7] *Ibid.*, paras. 203 and 206.

[8] *Ibid.*, para. 214.

[9] *Ibid.*, para. 230.

[10] *Ibid.*, para. 232.

9. Other instruments, in so far as they are designed to protect and enhance certain carbon sinks and reservoirs, are also critical in protecting the climate system and other parts of the environment. This is notably the case for the Desertification Convention, which, *inter alia*, aims to prevent land degradation and encourage reforestation and the replenishment of sinks and reservoirs[11]; the Convention on Biological Diversity, in so far as it aims to protect ecosystems[12]; and UNCLOS, with respect to the protection and preservation of the marine environment.

10. Preserving and enhancing carbon sinks are likewise essential to the fulfilment of States' customary international law obligations to prevent significant harm to the environment and to co-operate in such efforts. The stringent due diligence standard requires a State to "use all the means at its disposal" to protect and enhance carbon sinks[13]. Therefore, the destruction of carbon sinks through deforestation and other activities must be addressed by States when fulfilling their substantive obligations to prevent significant harm. It must also be taken into account in the implementation of their procedural obligations, including in environmental impact assessments, and when performing their duty to co-operate under customary international law.

11. With respect to all of these obligations, States with greater capabilities and those that are major contributors to global warming have a responsibility to assist less-resourced States in their mitigation and adaptation efforts, including in the preservation of carbon sinks and reservoirs such as forests and wetlands. This is particularly true for large-scale resources such as the Amazon rainforest, where the burden of protection falls disproportionately on a few States whose actions have an outsized influence on the overall climate system. These States have a heightened duty of care to prevent damage to the climate system. At the same time, a State with limited resources to protect carbon sinks and reservoirs within its jurisdiction cannot be expected, as a result of this heightened responsibility, to adopt measures that are unreasonable in light of its financial or technical capacities. The stringent standard of due diligence, coupled with the principle of common but differentiated responsibilities and respective capabilities, and the duty to co-operate, require States with greater capacities to provide assistance to other States as part of the measures available to them. In my view, failure to do so could breach a State's due diligence obligations.

12. This is not to say, however, that States' obligations can be conditioned upon receiving assistance[14]. While the burdens on States may vary depending on their current capacity[15], all States remain bound by the obligations identified in the Advisory Opinion with respect to, *inter alia*, the protection and enhancement of carbon sinks.

13. Finally, as the Court notes, breaches of any State's obligations with respect to carbon sinks and reservoirs would give rise to legal consequences under the law of State responsibility, including the duty of cessation. For instance, as the Court observes, "States have a continuing duty to preserve and improve the absorption capacity of reservoirs and sinks, notwithstanding any breaches of those obligations under the climate change treaties"[16].

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[11] *Ibid.*, para. 65.

[12] *Ibid.*, para. 326.

[13] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 56, para. 101.

[14] Joint declaration of Judges Bhandari and Cleveland, para. 27.

[15] Advisory Opinion, para. 292.

[16] *Ibid.*, para. 446.

II. OTHER RULES OF INTERNATIONAL LAW

14. In identifying the applicable law under question *(a)*, the Court observes that other rules of international law may be relevant under various circumstances, including international humanitarian law and international investment law[17]. Both areas were addressed by participants, and I will briefly elaborate on each in turn.

International humanitarian law and armed conflicts

15. It is well established that armed conflicts cause significant damage to the environment[18]. Such harms include damage to the climate system due to, *inter alia*, direct emissions from military aircraft, ships and vehicles; the weakening or destruction of carbon sinks and reservoirs; and emissions from the reconstruction of infrastructure destroyed during conflicts. Military exercises, transport, construction and weapons testing also can generate significant GHG emissions and other harms to the climate system.

16. Various international instruments recognize the need to protect and preserve the environment during armed conflicts[19]. In its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, this Court reaffirmed Principle 24 of the Rio Declaration and recognized that "important environmental factors . . . are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict"[20].

17. However, in fulfilling their obligations to protect the climate system, States do not generally consider potential harms that result from armed conflicts or other military activities. They typically do not include such emissions, including the consequences from the destruction of carbon sinks, in their national inventories under the UNFCCC, or take them into account in preparing and implementing NDCs under the Paris Agreement. The result is a significant undercount of harms to the climate system and an understating of both the magnitude of the problem and the individual and collective responsibilities of States to combat climate change.

18. Today's Advisory Opinion emphasizes that the material scope of the General Assembly's question "encompasses the full range of human activities that contribute to climate change as a result of the emission of GHGs"[21]. Given the significant contributions of armed conflicts and other military activities to atmospheric concentrations of GHG emissions through both direct emissions and the destruction of carbon sinks and reservoirs, a comprehensive approach to evaluating and mitigating harms to the climate system arising within a State's jurisdiction or control requires taking such activities into account. This includes accounting for such emissions in national inventories under Article 4, paragraph 1 *(a)*, of the UNFCCC and in the preparation and implementation of NDCs

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[17] *Ibid.*, para. 173.

[18] United Nations Environment Programme, *Protecting the Environment During Armed Conflict, An Inventory and Analysis of International Law*, 2009, pp. 4 and 8.

[19] See e.g. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977*, Art. 35 (3) (prohibiting "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment") and also Article 55; Rio Declaration on Environment and Development, Principle 24. See also ICRC *Study on Customary International Humanitarian Law*, 2005, Rules 43, 44 and 45.

[20] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 243, para. 33.

[21] Advisory Opinion, para. 94.

under Article 4 of the Paris Agreement. In my view, this conclusion is compelled by the Court's interpretation of States' obligations under the climate change treaties.

19. Moreover, the customary international law obligations to prevent harm to the environment and to co-operate necessarily require States to take into account the full range of activities that contribute significantly to global warming within their jurisdiction or control, including emissions and harms to carbon sinks resulting from armed conflicts and other military activities. The stringent standard of due diligence, which the Court's Advisory Opinion repeatedly emphasizes, can require no less.

20. Thus, the obligations of States under the climate change treaties and customary international law to assess, report on and mitigate harms to the climate system include responsibility to address the impacts resulting from armed conflict and other military activities. Failing to take such harms into account underreports and distorts our understanding of global warming and undermines the ability of the international community to tackle its causes. It is thus directly contrary to the international obligations of States to protect the climate system and other parts of the environment from GHG emissions.

International investment law

21. A number of participants stressed the potentially negative influence of international investment law on efforts taken by States to combat climate change. They pointed, in particular, to the chilling effect of onerous investment proceedings on climate-related regulation. The IPCC has acknowledged this phenomenon, observing that "international investment agreements may lead to 'regulatory chill', which may lead to countries refraining from or delaying the adoption of mitigation policies, such as phasing out fossil fuels"[22].

22. It is therefore important to underscore that the obligations of States in relation to the protection of the climate system impose significant responsibilities on States to adopt and implement appropriate environmental regulations to mitigate and adapt to climate change, including in co-operation with other States, while allowing States some discretion with respect to the particular regulatory paths that may be chosen. Accordingly, the interpretation of investment instruments must be informed by States' obligations in respect of climate change under international law, including the stringent due diligence standard to which States are bound in implementing such obligations.

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23. In sum, harm to the climate is a systemic problem which requires systemic solutions. In terms of the *lex lata*, these solutions include obligations with respect to the production, licensing and subsidization of fossil fuels, and the cumulative and downstream effects of those activities,

[22] 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. 1499, para. 14.5.1.3. See also IACHR, *Advisory Opinion OC-32/25 of 29 May 2025, Series A No. 32*, paras. 162-164, 351 ("States should also review their existing trade and investment agreements, as well as investor-state dispute settlement mechanisms, to ensure that they do not limit or restrict efforts on climate change and human rights") (unofficial translation).

as addressed in my joint declaration with Judge Bhandari. They also include robust obligations with respect to the promotion and protection of carbon sinks and reservoirs, obligations to take into account and mitigate harms to the climate system resulting from armed conflicts, and interpretation of international investment law in light of States' obligations in respect of climate change.

(Signed) Sarah H. CLEVELAND.

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