DECLARATION OF JUDGE TLADI

The Court's important contribution to the interpretation of obligations under the climate change treaties — The Paris Agreement's temperature goal — The content of nationally determined contributions prepared under the Paris Agreement — Recognition of the right to a clean and healthy environment as a human right under international law — Erga omnes *character of obligations relating to common spaces — Role of the Court in addressing the climate crisis.*

1. INTRODUCTION

1. The subject-matter of this Advisory Opinion concerns one of the most consequential issues in the history of the Court. The climate change crisis, often described as an existential crisis, affects, potentially, the future of humanity as a whole. Of course, in previous advisory opinions, the Court has addressed other consequential issues of grave importance, such as occupation, subjugation and denials of the right to self-determination[1]. The potential impact of climate change, the subject-matter of the current Advisory Opinion, however, is not limited to one geographical situation. Given that the world's leading scientists have concluded with high confidence that climate change is a threat to "human well-being and planetary health" and that there is a "rapidly closing window of opportunity to secure a livable and sustainable future for all"[2], I believe that the subject-matter of this Opinion is even more consequential than the subject-matter of the *Nuclear Weapons* Advisory Opinion, which was described as relating to "the survival of the human species" by Judge Shahabuddeen[3].

2. In my view, the magnitude of the climate change crisis demanded at least two things of the Court in rendering this Advisory Opinion. First, it demanded a unified Court rendering, if possible, its reply with the unanimous support of all judges — a rarity in the history of the Court's advisory jurisprudence. Second, it demanded that the unity of the Court not be achieved at the expense of the robustness of the Opinion. To meet this dual demand was always going to be challenging, but I am pleased to say that, in this case, the Court has largely risen to the challenge.

3. The Court's reply to the General Assembly's questions is *both unanimous and robust.* Against this background, I wish to address only four main issues in this declaration. First, I will address the Court's interpretation of the obligations of parties to the climate change treaties, with a special focus on the Paris Agreement. The second issue that I will address is the recognition by the Court of the right to a clean and healthy environment as a human right under international law. The third issue that I wish to address is the characterization of certain obligations relating to common spaces as obligations *erga omnes* or obligations *erga omnes partes* — a determination that has implications for the Court's jurisprudence beyond these proceedings. Finally, I would like to make

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[1] See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion, I.C.J. Reports 1971*, p. 16; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 403*; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 136*; Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 95; *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024.*

[2] IPCC, Sixth Assessment Report, 2023, Synthesis Report (Working Groups I, II and III), Summary for Policymakers, para. C.1.

[3] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, dissenting opinion of Judge Shahabuddeen, p. 375.

some observations about the role of the Court in addressing global crises such as the climate change crisis.

2. THE COURT'S INTERPRETATION OF THE OBLIGATIONS OF PARTIES TO THE PARIS AGREEMENT

4. Although many of the submissions of participants give the impression that the Paris Agreement is the "only game in town", the Court's Opinion does not adopt this position, and it is correct that the Court should dismiss this impression. To this end, the Court deftly dispenses with the notion that the climate change treaties, and the Paris Agreement in particular, constitute *lex specialis* applicable to the exclusion of other rules of international law concerning the protection of the climate system and other parts of the environment[4]. In respect of the climate change treaties themselves, the Court acknowledges that all three treaties remain in force and applicable to the respective States that are party to them[5]. Both conclusions are, in my view, correct. Yet, at the same time, the flavour of the Opinion has a definite slant in favour of the climate change treaties, and in particular the Paris Agreement. This bias in favour of the Paris Agreement is not a normative position about the relative importance of that instrument *vis-à-vis* other rules of international law concerning climate change, but simply a recognition that, as a practical matter, it is that treaty that currently commands much of the attention of the States.

5. Since the Paris Agreement, while not the only game in town — or even the most important game in town — has taken centre stage as the response of States to the climate change crisis, the proper interpretation and application of this instrument has assumed particular importance. In these proceedings, and in academic literature, the Paris Agreement has been described by many in ways that suggest that it is nothing more than an empty shell[6]. While it has often been described as a masterpiece in diplomacy[7], it has rarely been described as an instrument that is substantively capable of addressing the crisis of climate change.

6. The interpretation of the Paris Agreement as an empty shell has been supported through *en vogue* concepts and notions such as the distinction between "procedural obligations" and "substantive obligations", the distinction between "obligations of conduct" and "obligations of result", and the distinction between "bottom-up" and "top-down" approaches. Yet, as the Court has shown in its Opinion, these distinctions, as is true of many distinctions in law, are not absolute. In my view, there should not exist a bright line between many of these concepts[8]. The fluidity of these concepts has been correctly described in this Opinion as not necessarily "impermeable"[9]. The Opinion of the Court notes in this respect that some obligations may exhibit characteristics of both.

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[4] Advisory Opinion, para. 171.

[5] *Ibid.*, paras. 221 and 269.

[6] See, for example, S. Niggol Seo "Beyond the Paris Agreement: Climate Change Policy Negotiations and Future Directions", *Regional Science Policy & Practice*, Vol. 9 (2017), p. 129.

[7] See W. Obergassel, C. Arens, L. Hermwille, N. Kreibich, F. Mersmann, H. Ott, and H. Wang-Helmreich, "Phoenix from the Ashes: an Analysis of the Paris Agreement to the United Nations Framework Convention on Climate Change – Part I" *Environmental Law and Management*, Vol. 27 (2015), p. 243. These authors take the view that the Paris Agreement "does not resolve anthropogenic climate change" and that, instead, what it does is to "create[s] periodical political space that needs to be filled through national ambition".

[8] See Jutta Brunnée, *Procedure and Substance in International Environmental Law* (Brill 2020), p. 20. See also Matina Papadaki "Substantive and Procedural Rules in International Law Adjudication: Exploring their Interaction in Intervention before the International Court of Justice" in Hélène Ruiz Fabri (ed), *International Law and Litigation: A Look into Procedure* (Nomos 2019), p. 37.

[9] Advisory Opinion, para. 175.

7. While the Court is aware that the distinction between these concepts is not rigid, it understandably relies on these distinctions (i.e. procedural obligations v. substantive obligations, and obligations of conduct v. obligations of result) in the present Advisory Opinion. I say understandably because these distinctions were invoked by the participants: they are ever-present in the jurisprudence of both this Court and other tribunals, such as the International Tribunal for the Law of the Sea (ITLOS), and are generally part of the parlance of international law. Yet, and in no way meaning to suggest that the distinctions are irrelevant, to my mind, what is important is not how the obligations are characterized, i.e. substantive or procedural obligations, or whether they are obligations of conduct or of result. Rather, what is important is the determination of the content of the obligation, which can only be done through the application of the ordinary rules of interpretation of international law, both in its treaty and customary form.

8. I believe that the Court makes two important, interrelated, contributions to the interpretation of the Paris Agreement. The first concerns the collective temperature goal under Article 2 (1) (*a*) of the Paris Agreement and the second concerns the content of the nationally determined contributions (NDCs) under Article 4 (2). I discuss these two contributions briefly in turn.

9. The first important contribution that the Court makes to the robust interpretation of the Paris Agreement concerns the temperature goal. Under Article 2 (1) *(a)* of the Paris Agreement, the parties aim to hold "the increase in the global average temperature to well below 2°C above pre-industrial levels" while "pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels". A purely literal interpretation of this provision might suggest that the legally relevant temperature goal under the Agreement is the 2°C target, with the 1.5°C target being a mere aspiration. The Court, however, interprets the 1.5°C target as "the parties' agreed primary temperature goal for limiting the global average temperature increase under the Paris Agreement"[10].

10. While the Court is not elaborate in its interpretative process due to what former Vice-President of the Court, Christopher Weeramantry, referred to as the "highest common denominator" limitation[11], the conclusion it arrives at is in conformity with the application of the customary rules of treaty interpretation. Article 2 (1) (*a*) sets forth two targets, with the 2°C temperature goal *appearing* to be the primary target and the 1.5°C goal being the secondary, or aspirational target. Yet the relationship between these two targets must be understood in their *context.* That context is to be found, *inter alia*, in the Paris Agreement's science-based approach. The preamble of the Paris Agreement, for example, provides that "an effective and progressive response to the urgent threat of climate change" must be done "on the basis of the best available scientific knowledge"[12]. According to the best scientific knowledge of the day, "an effective . . . response to the urgent threat of climate change" requires that the increase in the global average temperature be held well below 1.5°C above pre-industrial levels, which would make the 1.5°C threshold as the principal target[13].

11. The object and purpose of the Paris Agreement, to be found in the United Nations Framework Convention on Climate Change, i.e. "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate

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[10] Advisory Opinion, para. 224.

[11] See Christopher G Weeramantry, "The Function of the International Court of Justice in the Development of International Law", *Leiden Journal of International Law*, Vol. 10 (1997), p. 328.

[12] Paris Agreement, preambular para. 4.

[13] See IPCC, Global Warming of 1.5°C: An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty, Full Report (2018).

system", is also to be taken into account in interpreting the relationship between the two temperature goals. Based on the current state of scientific knowledge, an understanding of the Paris Agreement that the 2°C threshold is the main temperature target will undermine the object and purpose of the Agreement.

12. Additionally, the States parties to the Paris Agreement, through their subsequent agreement, have confirmed this understanding by, having recalled the targets set forth in the Paris Agreement, recognized "that the impacts of climate change will be much lower at the temperature increase of 1.5°C compared with 2°C" and "resolv[ing] to pursue efforts to limit the temperature increase to 1.5°C"[14].

13. It is not any one of the elements above that leads to the conclusion that the 1.5°C temperature target is to be seen as the primary goal. It is all these elements, that, when taken together — or placed in the metaphoric "crucible" — lead to this interpretation.

14. The second significant contribution of the Court to the interpretation of the Paris Agreement concerns the content of the NDCs. Article 4 (2) of the Paris Agreement provides that

> "[e]ach Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions."

15. Many have interpreted Article 4 (2) as giving complete discretion to the party formulating the NDCs, i.e. because the contributions are *nationally determined*, the party is free to *determine* its NDCs as it deems fit, with no room for objective assessment of whether a party's NDCs are sufficient. Fancy phrases such as "bottom-up approach", and distinctions such as the one between "obligations of conduct" and "obligations of result", have been deployed to perpetuate this interpretation. Yet, since the NDCs are the main tool for achieving the objectives of the Paris Agreement, this interpretation would leave the Paris Agreement as a hollow shell, dependent on the will and convenience of each individual party. How different would such a scenario be to Hardin's Tragedy of the Commons[15]?

16. Unfortunately, the 2024 Climate Change Advisory Opinion rendered by ITLOS may be read to justify the view of an unfettered discretion by States. In that Opinion, ITLOS states that the "Paris Agreement does not require the Parties to reduce GHG emissions to any specific level according to a mandatory timeline but leaves each Party to determine its own national contributions in this regard"[16]. Without more, these words *might suggest* an unfettered discretion. I am, however, conscious that ITLOS was not concerned with the interpretation of rules of international law other than the United Nations Convention on the Law of the Sea, and was relying on these external rules only to interpret the Law of the Sea Convention[17]. The need for precision in the interpretation of these external rules may, therefore, not have been paramount for ITLOS.

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[14] See decision 1/CMA.3, Glasgow Climate Pact, paras. 21 and 22.

[15] Garrett Hardin, "The Tragedy of the Commons" (1968), *Science*, Vol. 162 (3859), p. 1243.

[16] *Climate Change, Advisory Opinion, ITLOS Reports 2024*, p. 80, para. 222.

[17] See Ellen Hey, "Some Reflections on External Rules in ITLOS' Advisory Opinion on Climate Change" (7 October 2024), Blog of the Norwegian Centre for the Law of the Sea. Available at https://site.uit.no/nclos/wp-content/uploads/sites/179/2024/10/Ellen-Hey-NCLOS-blog-3.pdf.

17. I am pleased that the Court has not fallen into the trap of the unfettered discretion and has instead given a robust interpretation to the obligation to prepare and maintain NDCs. In this Opinion, the Court concludes that parties to the Paris Agreement do not have an unfettered discretion to determine the content of their NDCs. Rather, the Court interprets Article 4 (2) to mean that parties have an obligation to pursue the temperature goal expressed in Article 2, and that each individual NDC must be objectively capable of contributing towards the temperature goal — or in the language used by the Court, NDCs "when taken together, are capable of achieving the temperature goal of limiting global warming to 1.5°C above pre-industrial levels"[18]. Of course, the scope and content of necessary measures contained in the NDCs may vary in accordance with, for example, the means available to respective parties and their respective capabilities, as well as the historical contribution to the atmospheric concentration of greenhouse gases of the relevant party. What this interpretation makes clear, however, is that NDCs have to be ambitious and that whether the NDC is sufficient is open to scrutiny, including judicial scrutiny and therefore cannot be regarded as discretionary.

18. As with the Court's interpretation of the temperature goal under the Paris Agreement, the Court arrives at its interpretation of Article 4 (2) of the Paris Agreement after a careful application of the customary international law rules of interpretation, even if not fully articulated.

19. The ordinary meaning of the words "[e]ach Party shall prepare, communicate and maintain successive nationally determined contributions" is neutral as to whether the content of NDCs is to be left completely to the unfettered discretion of the parties. Article 4 (8) provides relevant context to what is otherwise a neutral provision. Article 4 (8) requires parties to provide necessary information in accordance with decision 1/CP.21. That decision in turn provides a number of elements which are to accompany the submission of the NDCs, which elements can only be understood as providing a standard for assessing the adequacy of any NDCs so provided[19].

20. While all elements of the general rule of interpretation, i.e. ordinary meaning, context and object and purpose, play an important role in the single combined operation of interpretation, in this case the element of object and purpose plays a particularly important role. As noted by several participants in response to the question that I posed at the end of the oral proceedings, the object and purpose of the Paris Agreement must have a bearing on the interpretation of Article 4 (2). The parties would likely fail to meet the 1.5°C target, and consequently would likely fail to achieve the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system", if each party had complete freedom to set inadequate NDCs. This is precisely the entrenchment of Hardin's Tragedy of the Commons. Thus, interpreting Article 4 (2) of the Paris Agreement, as leaving the NDCs to the unfettered discretion of parties is contrary to the object and purpose of the Paris Agreement.

21. There is one additional point I wish to make about the relevance of object and purpose in the interpretation of Article 4 (2). In response to my question about the relevance of the object and purpose of the Paris Agreement in the interpretation of Article 4 (2), some participants argued that the object and purpose cannot override the ordinary meaning of the terms of the treaty. This is undoubtedly correct but, in the interpretation offered by the Court and explained a little more here,

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[18] Advisory Opinion, para. 457 (3) (A) *(f)*; see also para. 245.

[19] See especially paras. 25 and 27 of decision 1/CP.21. Paragraph 27, for example, includes "the information to be provided by Parties communicating their nationally determined contributions" includes "quantifiable information on the reference point (including, as appropriate, a base year), time frames and/or periods for implementation, scope and coverage, planning processes, assumptions and methodological approaches including those for estimating and accounting for anthropogenic greenhouse gas emissions and . . . how the Party considers that its nationally determined contribution is fair and ambitious, in the light of its national circumstances, and how it contributes towards achieving the objective of the Convention".

the object and purpose of the treaty does not override the ordinary meaning of the words in Article 4 (2). This is so particularly because, as I have said above, Article 4 (2) is drafted in a neutral way, leaving open the question of discretion. When the ordinary meaning of the words, neutral on its face, is placed together with the context, which indicates that a level of scrutiny was intended, and account is taken of the fact that the object and purpose of the treaty would be defeated if parties had unfettered discretion, then the only reasonable interpretation of Article 4 (2) must be that the parties do not have unfettered discretion in the preparation of their NDCs.

22. The Opinion of the Court has devoted a considerable number of paragraphs — perhaps too many — on the relationship between customary international law and the climate change treaties, including the Paris Agreement. Of that discussion, I would make only two points, one of which is tangential, and the other of which is relevant to the interpretation of the climate change treaties, including the Paris Agreement. As for the tangential point, the statement at paragraph 314 that "compliance in full and in good faith by a State with the climate change treaties, *as interpreted*" (emphasis added) in the Opinion "*suggests* that this State substantially complies with the general customary duties" (emphasis added) is only a point of departure. This statement does not provide a cover for States to avoid their customary international law obligations by reference to the Paris Agreement. In each case, when considering whether a State has complied with its obligations under customary international law, an independent assessment of the customary international law rules and the State's compliance with those rules has to be undertaken, with the treaty rules only serving as an aid to that assessment. For example, it is not impossible that the interpretation of the temperature goal under the Paris Agreement arrived at by the Court may, now or in the future, be insufficient to protect the global system. Under such a scenario, it may well be the case that full and good faith compliance with the Paris Agreement may not amount to compliance with the customary international law obligations of a State.

23. The second, and more directly relevant point, is that the relationship between the customary international law duty to prevent significant harm, and the standard of due diligence, has a particular consequence for the interpretation of Article 4 (2) of the Paris Agreement in accordance with the rule set forth in Article 31 (3) *(c)* of the Vienna Convention on the Law of Treaties. The Court has stated, in this Opinion, that because of the nature of the climate change threat, the standard of due diligence to be applied is a stringent one[20]. Applying a stringent standard of due diligence *requires* the setting of NDCs which are sufficiently high so as to be capable of contributing to the achievement of the object and purpose of the Paris Agreement. This means, by definition, that the sufficiency of the NDCs cannot be subject to the determination of the submitting State.

3. THE RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT

24. The relationship between human rights and the environment has traditionally been conceptualized in three ways. The first is the recognition of a self-standing right to a clean and healthy environment[21]. The second is the protection of the environment through other (substantive) rights, including the right to life, the right to dignity, and so on. The third is the pursuit of environmental goals through procedural rights, such as the right to access to information, right to public participation and the right to be heard. The second and third approaches do not raise any legal issues, since it is beyond doubt that, empirically, failure to protect the environment can impact certain human rights and that, empirically, persons and entities are in a better position to take action for the protection of the environment, including through litigation, if they are provided with information and are given

[20] Advisory Opinion, para. 246.

[21] Although the Court uses the more elaborate "right to a clean, healthy and sustainable environment", I find the insertion of the word "sustainable" to introduce conceptual difficulties since sustainability already includes considerations of a clean and healthy environment.

the right to be heard in the event that environmentally harmful decisions are taken by State authorities.

25. The first approach, however, i.e. the existence or not of a right to a clean and healthy environment under international law is not just an empirical question but raises a legal question about the recognition of such a right under international law. The Court's Opinion addresses this point but does so in a way that might be unclear, or even confusing. In those parts of the Opinion where the right to a clean and healthy environment is referred to, the Court does so in a way that could be seen as conflating the first and second approaches to the relationship between the protection of the environment and international human rights law.

26. Having laid out the relationship between human beings and the environment (Advisory Opinion, para. 388) and the relationship between environmental degradation and human rights (para. 389), the Court proceeds to speak unambiguously of a right to a clean and healthy environment (paras. 391 and 392). In those two paragraphs, the Court offers a basis, in international law, of the right to a clean and healthy environment. In its conclusion at paragraph 393, however, the Court states as follows:

> "Based on all of the above, the Court is of the view that a clean, healthy and sustainable environment is a precondition for the enjoyment of many human rights, such as the right to life, the right to health and the right to an adequate standard of living, including access to water, food and housing. The right to a clean, healthy and sustainable environment results from the interdependence between human rights and the protection of the environment. Consequently, in so far as States parties to human rights treaties are required to guarantee the effective enjoyment of such rights, it is difficult to see how these obligations can be fulfilled without at the same time ensuring the protection of the right to a clean, healthy and sustainable environment as a human right. The human right to a clean, healthy and sustainable environment is therefore inherent in the enjoyment of other human rights. The Court thus concludes that, under international law, the human right to a clean, healthy and sustainable environment is essential for the enjoyment of other human rights."

27. In this concluding paragraph, the Court seems to be conflating the two approaches. First, it refers to a right to a clean and healthy environment, suggesting that the Court is invoking a self-standing right to a clean and healthy environment. But at the same time, this concluding paragraph describes the right as "a precondition for the enjoyment of many human rights" and declares that "it is difficult to see how [obligations under human rights treaties] can be fulfilled without at the same time ensuring the protection of" a clean and healthy environment. The Court also determines the right to be "inherent in the enjoyment of other human rights". By so doing, the Court may give the impression that it is relying on the second approach, i.e. the protection of the environment through other substantive human rights.

28. While the Court could have been clearer, I do not believe the Court's approach to be ambiguous at all. That a right can exist as a self-standing right and, at the same, be essential for the achievement of other rights is not only possible but quite normal. The right to freedom of expression is a self-standing right but also, at the same time, essential for the effective exercise of other rights and freedoms, such as the right to vote and to be elected to political office. This is the essence of the notion of the interdependence of human rights. What matters — and what distinguishes the Court's approach from the second approach, i.e. the protection of the environment through other substantive human rights — is that in its Opinion, the Court explicitly refers to *a right* to a clean and healthy environment as a precondition for the enjoyment of other rights, which is different to saying that a

clean and healthy environment is a precondition for the protection of human rights — the latter is an empirical statement.

29. Admittedly, there is some equivocation in the Court's conclusion since, rather than recognizing the existence of a right to a clean and healthy environment, the Court, instead, emphasizes the utility of such a right for other rights. This sense of equivocation is buttressed by the failure to state that this right exists under customary international law. In the same way that not much ought to be made of the emphasis on the utility of the right (as opposed to its existence), so too, not much should be made of the failure to characterize the right as a right in international law. The Court is an entity whose function is limited to international law. The assertion of a right must by definition signify the existence of that right *under international law*.

30. Some will question whether the assertion by the Court of a right to a clean and healthy environment is justified. I begin by noting that, in paragraphs 391 and 392, the Court provides evidence of State practice and *opinio juris* — I will return to the sufficiency of this evidence shortly. The Opinion notes, for example, that over one hundred States have enshrined a right to a clean and healthy environment in their constitutions or domestic legislation. It is true that in a few cases, formulations do not accord a right to the environment as such. However, this should not detract from the fact that there is widespread, cross-regional recognition of the right to the environment in national constitutions and legislation, as well as in regional human rights instruments.

31. I am of the view that the General Assembly resolution on the human right to a clean and healthy environment serves as an important indication of *opinio juris*[22]. It is true that some States, on the adoption of that resolution, declared that they did not recognize that such a right existed in customary international law[23]. I also recognize that, as the International Law Commission (ILC) has observed, "explanations of positions . . . *may be* evidence" that there is no acceptance as law of a rule of customary international law contained in a resolution[24]. Nonetheless, statements, particularly by a small number of States[25], cannot override the clear language of a resolution supported by an overwhelming majority[26]. The words, in operative paragraph 1, that the General Assembly "[r]ecognizes the right to a clean, healthy and sustainable environment as a human right" are unambiguous and for me can only imply the acceptance as customary international law of such a right. This is particularly the case since the second operative paragraph is explicit that the right to the environment is "*existing* [in] international law" (emphasis added).

32. I come now to the question of sufficiency of the evidence. The evidence provided by the Court to justify the conclusion that there exists a right to a clean and healthy environment is much

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[22] General Assembly resolution 76/300, The human right to a clean, healthy and sustainable environment, 28 July 2022 (UN doc. A/RES/76/300).

[23] In their explanation of votes, the following States rejected the existence of the right to a clean, healthy and sustainable environment under customary international law: United Kingdom, New Zealand, United States of America, Belarus, Norway and India (see verbatim records of the ninety-seventh plenary meeting of the Seventy-sixth Session of the UN General Assembly, 28 July 2022 (UN doc. A/76/PV.97)).

[24] International Law Commission, Draft Conclusions on Identification of Customary International Law, with commentaries, *Yearbook of the International Law Commission*, 2018, Vol. II, Part Two, p. 108, para. 5 of the commentary to Conclusion 12 (emphasis added).

[25] While there were several States that raised issues with the resolution, not all these States explicitly questioned the existence of the right.

[26] General Assembly resolution 76/300 was adopted by 164 votes in favour, 0 against, and 7 abstentions (verbatim records of the ninety-seventh plenary meeting of the Seventy-sixth Session of the UN General Assembly, 28 July 2022 (UN doc. A/76/PV.97)).

more than what the Court routinely provides in support of similar conclusions about the existence or not of a rule of customary international law. *Pulp Mills*, a case on which the Court relies heavily in the current Advisory Opinion, is a case in point. In that case, the Court asserted an obligation to conduct an environmental impact assessment under customary international law with not so much as a reference to a single example of State practice or *opinio juris*[27]. I am sure that even though the Court has provided more evidence than it normally does, many will scream at the top of their lungs about the lack of rigour in the Court's analysis. But the truth is that the call for rigour is often nothing more than a tool for policy preferences. In 2021, during the interaction between the President of the Court and the ILC, in response to a question about the insistence on the strict application of the two-element approach to the identification of customary international law, Judge Donoghue, then serving as President, had this to say:

> "Whenever that approach [i.e. rigorous approach] to the two-element test was taken, the conclusion almost always drawn was that there was no customary international law rule, since the evidence of State practice and *opinio juris* was so difficult to find. While there was no perfect solution, it was important to provide clear reasoning when determining the existence and content of a rule of customary international law."[28]

33. The statement by former President Donoghue illustrates that sometimes the strict insistence that the Court show comprehensively how it arrives at a rule of customary international law can provide cover for policy preferences. I do not mean to suggest that we should jettison the search for rigour. No! We should not. But at the same time, the "search for rigour" should not be used as a cover for policy preferences. In this particular instance, the evidence that has been put forward to support the right to a clean, healthy and sustainable environment is much more than what has been presented in many cases where the Court found the existence of a rule of customary international law[29].

4. *ERGA OMNES* CHARACTER OF CERTAIN CLIMATE CHANGE-RELATED OBLIGATIONS

34. At paragraph 440 the Court identifies certain obligations under customary international law and the climate change treaties as having *erga omnes* and *erga omnes partes* character respectively because they related to common spaces, or "global common goods". This conclusion by the Court is correct and incontrovertible. At the same time, however, I fear that it highlights a certain incoherence in the Court's jurisprudence — an incoherence that I know can, and I hope will, be remedied in due course.

35. In its Advisory Opinion of July 2024, the Court identified the right of self-determination as a peremptory norm of international law[30]. In the same Opinion, the Court states that some of the

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[27] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 14, paras. 203-204.

[28] ILC, Seventy-second Session (second part), summary record of the 3548th meeting held on 22 July 2021 (UN doc. A/CN.4/SR.3548), p. 9.

[29] For an appraisal of the Court's methodology for identifying custom in different cases, see Stefan Talmon, "Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion" (24 July 2014), *Bonn Research Papers on Public International Law*, No 4/2014, p. 29 ("In practice, when determining the rules of customary international law, the Court does not use one single methodology but a mixture of induction, deduction and assertion"), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2470994.

[30] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024*, para. 233.

obligations breached by Israel have an *erga omnes* character. It then proceeds to describe the consequences of the breach of the *erga omnes* obligations as the duty to not recognize as lawful situations created by the breaches, the duty of non-assistance in the maintenance of such situations and the duty to co-operate to bring to an end the breach[31]. It will not go unnoticed that these are consequences that the ILC has, on two occasions, described as consequences that flow, not from the *erga omnes* character of an obligation, but rather from a serious breach of a norm of *jus cogens*.

36. If we take the 2024 Advisory Opinion at face value, then all breaches of *erga omnes* obligations, whether those obligations flow from *jus cogens* norms or not, should attract the consequences of the duty of non-recognition, non-assistance and co-operation. If that is the case, then since the Court in its current Advisory Opinion has identified *erga omnes* obligations, one would expect that the duties of non-recognition, non-assistance and co-operation would also be identified here as legal consequences resulting from the breach. But the Court does not do so. What's more the Court offers no reason whatsoever as to why those consequences do not attach to the breaches (of obligations *erga omnes*) in this case.

37. In my declaration appended to the 2024 Advisory Opinion, I warned that the Court, by attaching the duties of non-recognition, non-assistance and co-operation to the *erga omnes* character of obligations was improperly conflating the concepts of obligations *erga omnes* and *jus cogens*, and thus opening a can of worms that would create incoherence in the future[32]. Moreover, I am not the first to warn the Court of the errors of its approach, with a former President of the Court, Judge Higgins having raised a similar issue in her separate opinion appended to the Court's 2004 *Wall* Advisory Opinion[33]. There is an idiom in my language, Setswana — *go itshela moriti o o tsididi* — which literally means to pour cold shade over oneself, and which can be loosely translated to mean "to pretend not to know or see a problem". Today, having come face to face with the incoherence in its jurisprudence, the Court has chosen to pour shade over itself, and to proceed as if all was well in the world, or to use another saying in a more famous African language, *Hakuna Matata*.

5. THE COURT'S LIMITED ROLE

38. As I stated at the beginning of this declaration, the subject-matter of this Advisory Opinion is one of utmost importance. In the words of the Court, climate change is "an existential problem of planetary proportions that imperils all forms of life and the very health of our planet". I am pleased that the Court, in fulfilling its mandate and responsibility, adopts a robust approach to the obligations of States, and in this way makes a contribution, albeit a very small one, to the crisis facing our planet. Yet, as acknowledged by the Court, it should not be forgotten that the Court's role is a limited one. No number of advisory opinions, no matter how robust or thoughtful, can save the planet from the ongoing climate crisis. Others have bigger roles to play to stave off the dangers of climate change. As the Court notes, a complete solution to the climate change problem requires concerted effort and sacrifice. It requires those in decision-making positions to make the right choices for the sake of the future of our planet. The truth is that what you invest in reveals what you value. Currently, based on reported military spending compared to spending on other issues of international concern, such as

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[31] The last mentioned duty of co-operation is not included in the operative part of the Advisory Opinion, and is rendered at paragraph 279, in the following terms: "It is for all States, while respecting the Charter of the United Nations and international law, to ensure that any impediment resulting from the illegal presence of Israel in the Occupied Palestinian Territory to the exercise of the Palestinian people of its right to self-determination is brought to an end."

[32] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024*, declaration of Judge Tladi, paras. 30-32.

[33] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, separate opinion of Judge Higgins, p. 216, para. 37.

the environment and global poverty, it seems that those who are in a position of authority value war over the plight of humanity and the future of the planet.

39. I still maintain modest hope. Modest hope that those in positions of power will realize, before it is too late, that money cannot be eaten[34]. Hope, that future generations will make better choices.

(Signed) Dire TLADI.

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[34] Inspired by an old proverb that is said to have originated with the Cree: "Only when the last tree has been cut, only when the last river has been poisoned, only when the last fish has been caught, only then we will realize, that money cannot be eaten."