SEPARATE OPINION OF JUDGE BHANDARI

Climate change as an existential threat and legal concern — Insufficient treatment of the "polluter pays" principle — Ambiguity surrounding the right to a clean, healthy and sustainable environment — Legal consequences require greater specificity — The need for compensation mechanisms and equitable remedies.

1. Climate change remains one of the most profound existential threats facing our planet. It is not a distant or abstract concern; for many States, it poses an immediate threat to their very survival. While all States are affected, some are experiencing such severe and irreversible harm that their populations are effectively becoming refugees within their own territories. The urgency and gravity of the situation demand serious and co-ordinated efforts by the international community. Against this backdrop, the international community has turned to this Court for an authoritative articulation of the legal principles governing this crisis. I am gratified that the Court has reached a unanimous decision in delivering this Advisory Opinion. While I endorse the Court's reasoning, and notwithstanding the joint declaration with Judge Cleveland concerning States' obligations regarding the production, licensing and subsidizing of fossil fuels[1], I write separately below to underscore certain aspects of the Opinion that, in my view, warrant particular emphasis.

2. First, I wish to address the "polluter pays" principle, a matter that has long been of particular concern to me in the context of both national and international environmental law[2]. This principle, in my view, constitutes a critical normative tool in confronting the global climate crisis. Yet, the Advisory Opinion addresses it only in passing, limiting its treatment to two brief paragraphs[3]. The Opinion appears to discount the principle's applicability, solely on the basis that it is not expressly codified in existing climate treaties. This narrow approach overlooks the principle's broader normative and jurisprudential grounding in international environmental law. Notably, the Opinion later acknowledges the potential applicability of strict liability for pollution-related harm, thereby implicitly affirming the rationale underlying the polluter pays principle. In my view, the Advisory Opinion would have benefited from a more robust engagement with this principle, not only as a mechanism for environmental remediation, but also as a means of ensuring that those responsible for causing environmental harm bear the corresponding financial and legal consequences. By failing to integrate the principle into its legal framework, the Opinion misses an opportunity to strengthen the accountability architecture essential for addressing climate change.

3. With respect to the right to a clean, healthy and sustainable environment, it remains unclear whether the Court ultimately affirmed the existence of this right as a distinct norm of customary international law. In my view, the Court's characterization of the right as "inherent" in the enjoyment of other human rights does not sufficiently clarify its normative status or the precise nature of its relationship to other established rights[4]. Furthermore, although the Opinion includes a dedicated subsection addressing this right[5], it is notably absent from the concluding paragraphs of the section on obligations of States under international human rights law[6]. This omission contributes to a lack of

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[1] Advisory Opinion, joint declaration of Judges Bhandari and Cleveland.

[2] *Indian Council for Enviro-Legal Action* v. *Union of India and others*, 13 February 1996, (Indian) Supreme Court Cases, Vol. 3, p. 212.

[3] Advisory Opinion, paras. 159-160.

[4] *Ibid.*, para. 393.

[5] *Ibid*., paras. 387-393.

[6] *Ibid*., paras. 403-404.

clarity regarding the Court's position. In any event, I take the view that the Opinion recognizes the existence of this right under customary international law, yet it stops short of articulating its normative content or distinguishing it from the broader proposition that climate change adversely affects the enjoyment of various human rights.

4. The final part of my opinion addresses the issue of legal consequences. In my view, the Court could have approached the section on legal consequences with greater specificity. Rather than articulating general and abstract propositions — such as the statement that "in appropriate circumstances, a responsible State could be required to offer appropriate assurances and guarantees of non-repetition"[7] — the Court should have identified more concrete instances of legal consequences arising from the established breaches.

5. Thus, for example, the Court could have declared that, considering the scientific consensus regarding the causal relationship between greenhouse gas (GHG) emissions and climate change, cessation would probably have to take the form of discontinuing practices that directly contribute to GHG emissions (e.g. fossil fuel extraction and emission-intensive industrial processes and subsidies for fossil fuel production and consumption) and adopting policies that facilitate deep and immediate cuts in GHG emissions.

6. Moreover, while some participants argued that restitution would likely be unfeasible in the context of climate change — given the scale and irreversible nature of much of the harm — it is conceivable that, in certain circumstances, a restoration of the prior situation may be possible in principle. The Court itself acknowledged that, in cases of environmental damage, "active restoration measures may be required in order to return the environment to its prior condition, in so far as that is possible"[8]. In light of this, the Court could have gone further and affirmed that restitution may encompass measures aimed at protecting, preserving, and enhancing the absorption capacity of GHG reservoirs and sinks; rebuilding damaged or destroyed infrastructure; restoring terrestrial and marine habitats; rehabilitating ecosystems and biodiversity; and, where feasible, returning lost territory or property.

7. Additionally, the Court should have concluded that restitution should include, where appropriate, the continued recognition by all States of the maritime entitlements and sovereign rights of States adversely affected by sea-level rise, including in cases where their territory becomes submerged or otherwise compromised. This conception of restitution aligns with the commentary to Article 35 of the International Law Commission (ILC)'s Draft Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter the "ARSIWA"), which defines restitution as encompassing "any action that needs to be taken by the responsible State to restore the situation resulting from its internationally wrongful act"[9]. While the Court addressed issues relating to the continued statehood of affected States under question *(a)*, it should have also considered this issue under question *(b)*, which pertains to the legal consequences for breaches of obligations identified under question *(a)*. Restitution could have further extended to the restoration of the rights of indigenous peoples to their lands, territories, and resources adversely affected by climate change.

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[7] *Ibid.*, para. 448.

[8] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I)*, pp. 28-29, paras. 42-43.

[9] ARSIWA, Article 35, commentary, *Yearbook of the International Law Commission (YILC)*, 2001, Vol. II, Part Two, pp. 97-98 para. 5.

8. Moreover, under the Court's jurisprudence, in cases where the precise extent of damage cannot be fully ascertained, compensation may be awarded in the form of a global sum — within the evidentiary range and guided by equitable considerations — as an exceptional measure[10]. Such equitable considerations are particularly relevant in the context of climate change, where small island developing States and others that have contributed least to its causes are often disproportionately affected. Within this framework, the Court could have gone further in this Opinion by recommending, *inter alia*, the establishment of mechanisms such as claims commissions to systematically address the potentially vast number of claims. Although the Court did not propose such mechanisms, I suggest that the General Assembly consider establishing them, as they fall within its competence and are consistent with the broader legal architecture articulated in the Advisory Opinion. Relatedly, it is imperative that a special fund be established under the auspices of the United Nations, to which developed and more affluent States should be encouraged to contribute generously. Such a fund could play a vital role in supporting equitable and effective responses to the global challenges posed by climate change.

9. The Court's treatment of satisfaction is also notably brief and abstract. In my view, it could have considered specific forms of satisfaction, such as the recognition of States and communities as victims of climate change, as well as commemorations and tributes to those affected. The ILC, in its commentary on Article 37 of the ARSIWA, has also acknowledged that a trust fund to manage compensation payments in the interest of beneficiaries, or a symbolic monetary award for non-pecuniary damage, may constitute forms of satisfaction[11].

10. This Advisory Opinion is not the final word on international climate change law — nor could it be, as the advisory function is not designed to exhaustively define all climate change-related obligations in concrete terms. Yet it marks a significant legal milestone — one that can shape and elevate international legal discourse on climate responsibility. At its heart, this Opinion speaks to the future of our planet — our shared *Bhūmi Devi* (Mother Earth), the foundation and sustainer of all life. When she is harmed, all of humanity and the natural world suffer. It is this universal stake that underscores both the importance of the Opinion and the depth of attention it rightly commands.

(Signed) Dalveer BHANDARI.

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[10] See e.g. *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I)*, pp. 26-27, para. 35; *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 337, para. 33.

[11] ARSIWA, Article 37, commentary, *YILC*, 2001, Vol. II, Part Two, p. 106, para. 5.