DECLARATION OF JUDGE KITTICHAISAREE

I. Introduction

1. This Advisory Opinion by the Tribunal is the first on climate change by an international court or tribunal, to be followed in due course by those of the International Court of Justice in the request submitted by the United Nations General Assembly and the Inter-American Court of Human Rights in the request submitted by Colombia and Chile.

2. The questions posed to these three international judicial bodies differ substantially in their respective scopes. The 1982 United Nations Convention on the Law of the Sea (hereinafter "the Convention") has 169 States Parties; the ocean, which serves as a natural absorber of excessive global heat and is the world's largest sink,[1] accounts for more than 70 per cent of the Earth's surface. The Convention also encompasses land-based pollution and pollution from or through the atmosphere. Therefore, this Advisory Opinion by the Tribunal should have an overarching impact on, as well as inform, the advisory opinions to be rendered by the other two international courts.

3. The Tribunal rightly points out in paragraph 114 of this Advisory Opinion that "an advisory opinion is given to the requesting entity, which considers it desirable in order to obtain enlightenment as to the course of action it should take", and that "[a]n advisory opinion as such has no binding force". Nevertheless, it is necessary to draw a distinction between the binding character and the authoritative nature of an advisory opinion. Judicial determinations made by the Tribunal in advisory opinions concerning the Convention carry no less weight and authority than those in its judgments in contentious cases because they are made with the same rigour and scrutiny by the principal judicial organ set up by the Convention itself.[2]

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[1] Paras. 54, 55 and 390 of this Advisory Opinion.
[2] Cf. *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean*, Preliminary Objections, ITLOS Judgment of 28 January 2021, para. 203.

II. Jurisdiction and discretion

4. Some participants submitted that the present proceedings afford a good opportunity for the Tribunal to provide even more clarity as to the conditions or criteria (on the basis, personal and material scope, and procedural framework) it will be applying when requested for an advisory opinion in the future.

5. By virtue of article 21 of the Statute of the Tribunal, the jurisdiction of the Tribunal comprises "all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal." Paragraph 87 of this Advisory Opinion clarifies that "[a]rticle 21 and the 'other agreement' conferring jurisdiction on the Tribunal are interconnected and constitute the substantive legal basis of the advisory jurisdiction of the Tribunal". Nonetheless, the Tribunal remains silent on the question whether two or more States can conclude an international agreement specifically to request an advisory opinion from the Tribunal.

6. I consider it appropriate to respond to the contention by some participants that the Commission of Small Island States on Climate Change and International Law (hereinafter "the Commission") concluded an international agreement for the "sole purpose" of submitting the request for this Advisory Opinion, with the potential effect of encouraging further similar requests which may distort the object and purpose for which the Tribunal was established. It was also argued that the Commission is not truly an "international body" contemplated by the Convention. I find that these contentions are not well founded.

7. The Agreement for the Establishment of the Commission provides that the purpose of the Commission is to, *inter alia*, "[assist] Small Island States to promote and contribute to the definition, implementation, and progressive development of rules and principles of international law concerning climate change, in particular the protection and preservation of the marine environment". The nine members of the Commission scattered across the globe are united by their connection to and dependence on the marine environment and its resources. Even before the establishment of the Commission on 31 October 2021, small island developing

States had come together in 1990, during the Second World Climate Conference in Geneva, to lead international climate discussions and set up the Alliance of Small Island States, or AOSIS. Through AOSIS, they advocated for the rights of small island States during the negotiation of key climate treaties, including the UNFCCC and the Paris Agreement. The Commission is open to all members of AOSIS, which has a membership of 39 Small Island Developing States, or SIDS. The following members of AOSIS which are not also members of the Commission participated in these proceedings before the Tribunal: Belize, Comoros, Mauritius, Micronesia, Nauru, Singapore and Timor-Leste.

8. Since small island States bear a disproportionate and overwhelming burden of the adverse effects of greenhouse gas (GHG) emissions despite contributing negligibly to such emissions, the members of the Commission are "States whose interests [are] specially affected".[3] These advisory proceedings before the Tribunal are the first, but certainly not the last, initiative of the Commission, since the Commission has also been authorized to participate in the advisory opinion proceedings before the International Court of Justice and the Inter-American Court of Human Rights.

9. Therefore, in my opinion, the Commission did not conclude an international agreement for the "sole purpose" of submitting the request for this Advisory Opinion by the Tribunal. Nor is the Commission not truly an "international body" which may be authorized to request an advisory opinion from the Tribunal.

10. As a separate matter, it should be noted that, according to paragraph 83 of this Advisory Opinion, the Tribunal will first consider whether it has jurisdiction to give the advisory opinion requested by the Commission and, if so, whether there is "any reason" the Tribunal should, in the exercise of its discretion, decline to answer the Request. The term "any reason" is much broader than the term "compelling reasons" used by the Tribunal in *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, where the Tribunal states:

[3] In the sense described in *North Sea Continental Shelf*, *I.C.J. Reports 1969*, p. 3 at p. 42, para. 73.

> Article 138 of the Rules, which provides that "the Tribunal may give an advisory opinion", should be interpreted to mean that the Tribunal has a discretionary power to refuse to give an advisory opinion even if the conditions of jurisdiction are satisfied. It is well settled that a request for an advisory opinion should not in principle be refused except for "compelling reasons" (see *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, *I.C.J. Reports 1996*, p. 226, at p. 235, para. 14). The question is whether there are compelling reasons in this case why the Tribunal should not give the advisory opinion which the SRFC has requested.[4]

III. The nature of the obligations: conduct or result

11. One of the questions which has been the subject of much debate before the Tribunal, and where there is division among the participants, deals with the nature of the obligations laid down by Part XII of the Convention: are these obligations of conduct or obligations of result? In Australia's words, "[t]he fundamental difference between an obligation of conduct and an obligation of result is whether the obligation requires a State actually to achieve a specific outcome (an obligation of result) or whether it obliges a State to take measures towards a particular outcome, without the State being obliged to achieve that outcome in every instance (an obligation of conduct)."[5] According to the Tribunal, an obligation of conduct is an obligation "to deploy adequate means, to exercise best possible efforts, to do the utmost", that is, to act with "due diligence", to obtain the intended result. It is thus the conduct of a State – not the result which would be entailed by the conduct – that will determine whether the State has complied with its obligation.[6]

12. According to Judge Wolfrum, a former President of this Tribunal, there are ample references in international judgments and accompanying declarations or opinions to the nature of international obligations; the jurisprudence of the International Court of Justice refers to international obligations of result, those of conduct, and goal-oriented obligations, with the last category yet to be fully developed. He considers it necessary to add two further categories: international obligations which are in fact addressed to private entities (although via States) and under which States encounter supplementary responsibilities; and obligations which

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[4] *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 4, at p. 25, para. 71.
[5] Australian comments on the further responses of COSIS and IUCN, para. 4.
[6] Paras. 233 and 234 of this Advisory Opinion.

combine obligations of result and conduct. In his view, international jurisprudence thus far does not seem to have fully developed the criteria on how to distinguish between the various types of international obligations, and, even less, what consequences this differentiation entails for State responsibility.[7]

13. The primary provision in the Tribunal's reply to Question (a) is article 194 of the Convention, whereas the primary provision in its reply to Question (b) is article 192. The views of the Tribunal on Question (a) are fully applicable to Question (b).[8] The operative clause of the Advisory Opinion states that the obligations in paragraphs 1 and 2 of article 194 and the obligation in article 192 of the Convention are obligations of due diligence.[9] This conclusion must be seen in its proper context.

14. Paragraph 238 of this Advisory Opinion reads:

> The Tribunal observes that the obligation under article 194, paragraph 1, of the Convention, and, in fact, obligations under some other provisions of Part XII, including article 194, paragraph 2, are formulated in such a way as to *prescribe not only the required conduct of States but also the intended objective or result of such conduct*. *Whether this obligation is that of conduct or of result depends on whether States are required to achieve the intended objective or result*, i.e., prevention, reduction and control of marine pollution. This, in turn, depends essentially upon the text of the relevant provision and the overall circumstances envisaged by it. … [T]he Tribunal considers that what is required under article 194, paragraph 1, is not to achieve the prevention, reduction and control of marine pollution but *to take all necessary measures to that end*. (Emphasis added)

15. The Tribunal considers, in paragraph 243, the standard of due diligence under article 194, paragraph 1, of the Convention to be "stringent, given the high risks of serious and irreversible harm to the marine environment from such emissions"; however, the implementation of the obligation of due diligence may vary according to States' capabilities and available resources.

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[7] Rüdiger Wolfrum, "Obligation of Result versus Obligations of Conduct: Some Thoughts about the Implementation of International Obligations", in Mahnoush Arsanjani *et al.* (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Brill, 2011), p. 363 at pp. 369–383.

[8] Para. 370 of this Advisory Opinion.

[9] *Ibid.*, para. 441, subparagraph 3 (c) and (d) and subparagraph 4 (c).

16. The Tribunal considers the obligation under article 194, paragraph 2, of the Convention to be an obligation of due diligence for the same reason stated in the context of the obligation under article 194, paragraph 1.[10] The Tribunal further adds, in paragraph 257:

> In this regard, the Tribunal wishes to emphasize that *an obligation of due diligence should not be understood as an obligation which* depends largely on the discretion of a State *or necessarily requires a lesser degree of effort to achieve the intended result*. The content of an obligation of due diligence should be determined *objectively* under the circumstances, taking into account relevant factors. In many instances, an obligation of due diligence can be highly demanding. Therefore*, it would not be correct to assume* that the obligation under article 194, paragraph 2, of the Convention, as *an obligation of due diligence, would be less conducive* to the prevention, reduction and control of marine pollution from anthropogenic GHG emissions. (Emphasis added)

17. The types of pollution considered by the Tribunal to be most relevant to the present proceedings are marine pollution caused by anthropogenic GHG emissions into the atmosphere from land-based sources, vessels and aircraft, respectively. The findings it made in interpreting and applying article 194 of the Convention in relation to marine pollution from anthropogenic GHG emissions are equally applicable with regard to articles 207, 211 and 212, which respectively cover these sources of marine pollution.[11]

18. In addressing the nature of the obligation of cooperation under article 197 of the Convention, which the Tribunal determines to be an obligation of conduct,[12] the Tribunal states in paragraph 310:

> In the Tribunal's view, compliance with the obligation of cooperation is to be assessed by reference to the efforts made by States to formulate and elaborate international rules, standards and recommended practices and procedures. *The results achieved by States through cooperation may, however, be relevant in assessing States' compliance with the obligation to cooperate*. (Emphasis added)

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[10] *Ibid.*, para. 254.
[11] *Ibid*., paras. 264 and 265.
[12] *Ibid*., para. 306.

19. After also determining article 192 of the Convention to be an obligation to act with due diligence,[13] the Tribunal clarifies in paragraph 399:

> The Tribunal holds the view that, given the risks posed to the marine environment, States, in fulfilment of their obligations under article 192 of the Convention, are required *to take measures as far-reaching and efficacious as possible* to prevent or reduce the deleterious effects of climate change and ocean acidification on the marine environment. The standard of due diligence under article 192 is, as stated above, *stringent given the high risks of serious and irreversible harm caused to the marine environment by climate change impacts and ocean acidification*. (Emphasis added)

20. "Efficacious" is defined by *Cambridge Dictionary* as "able to produce the intended result", and by *Oxford Learner's Dictionary* as "producing the result that was wanted or intended". It is the adjective of "efficacy", defined by *Black's Law Dictionary* as "effectiveness; likelihood of achieving desired end by expending effort".

21. In reaching the conclusions on the nature of the obligations in question, the Tribunal faithfully adheres to the jurisprudence of its two previous Advisory Opinions, while at the same time endeavouring to accommodate the concerns expressed by the participants in the proceedings in this Request. Having found "the reality that prevention of pollution from all sources at all times is, in practice, not possible",[14] the Tribunal adopts a pragmatic approach when it opines in paragraph 199 of this Advisory Opinion as follows:

> In relation to anthropogenic GHG emissions, the objective of preventing, reducing and controlling marine pollution should be appreciated on the basis of the scientific assessment that, even if anthropogenic GHG emissions were to cease, the deleterious effects on the marine environment would nevertheless continue owing to the extent of GHGs already accumulated in the atmosphere. The obligation under article 194, paragraph 1, of the Convention requires States to take all necessary measures *with a view to reducing and controlling existing marine pollution from such emissions and eventually preventing such pollution from occurring at all.* Therefore, this obligation does *not* entail the *immediate cessation* of marine pollution from anthropogenic GHG emissions. (Emphasis added)

[13] *Ibid.*, paras. 395–397.
[14] *Ibid*., para. 198.

22. I am of the view that the binary characterization of obligations of "conduct" and of "result" should be avoided, since many obligations straddle both categories. The distinction between the obligation of conduct and one of result may be inconclusive if a particular obligation in question "is in truth a hybrid, or belongs to a different class – for example, obligations of prevention or what the International Court [of Justice] has described as 'obligations of performance'".[15] In some instances, for example articles 207 and 212 of the Convention, the obligations in Part XII require States to undertake specific measures, such as enacting and implementing legislation to prevent marine pollution. In other instances, such as article 194, States are required to adopt all necessary measures – a threshold substantially higher than best efforts, which has traditionally characterized pure obligations of conduct.

23. In the words of France, assuming that the obligations laid down by the Convention in the context of climate change are obligations of conduct, these obligations are "exigent" and "particularly severe", and, in light of the serious and urgent nature of the situation, we have to *go further than a general obligation of conduct* – there has to be a more "severe" approach in terms of diligence.[16]

24. I find there is not much practical difference between the obligation of conduct and that of result in the context of climate change. It would not matter even if the obligation were labelled a "goal-oriented" obligation, so it seems. I, therefore, can accept the conclusion reached by the Tribunal on the nature of the obligations under the relevant provisions of the Convention as elaborated above.

IV. Human rights concerns

25. It has been submitted that human rights obligations may be relevant to the correct interpretation of the Convention.[17] The amicus curiae brief of the United

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[15] James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013) at p. 224. See also Constantin P. Economides, "Content of the Obligation: Obligations of Means and Obligations of Result" in James Crawford *et al.* (eds.), *The Law of International Responsibility* (Oxford University Press, 2010), p. 371 at p. 379.
[16] France, ITLOS/PV18/rev.1/C31, p. 12, ll. 20–24.
[17] E.g., Timor-Leste, ITLOS/PV14/rev.1/C31, pp. 7–8; UNEP, ITLOS/WS/C31, pp. 37–44.

Nations Special Rapporteurs on Human Rights & Climate Change, Toxics & Human Rights, and Human Rights & the Environment contends at some length that the Convention should be interpreted through an approach which systemically integrates international human rights and international environmental law, this approach being required by the plain text of the Convention and by the 1969 Vienna Convention on the Law of Treaties (hereinafter "the VCLT").

26. According to resolution 76/300, adopted by the United Nations General Assembly on 28 July 2022 by the vote of 161 in favour to 0 against, with 8 abstentions, the General Assembly recognizes the right to a clean, healthy and sustainable environment as a human right, noting that this right is related to other rights and existing international law, and affirming that the promotion of this right requires the full implementation of the multilateral environmental agreements under the principles of international environmental law. It calls on States, international organizations, business enterprises and other relevant stakeholders to adopt policies, enhance international cooperation, strengthen capacity-building and continue to share good practices in order to scale up efforts to ensure a clean, healthy and sustainable environment for all.[18]

27. The eleventh preambular paragraph of the Paris Agreement itself alludes to human rights in the context of climate change as follows:

> *Acknowledging* that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity ….

28. In this Advisory Opinion, the Tribunal merely states briefly, in paragraph 66, that it "notes that climate change represents an existential threat and raises human rights concerns." In doing so, the Tribunal sidesteps the need to construe article 293 (Applicable law) of the Convention to cover human rights issues in order to answer the questions posed by the Request. Indeed, there are other international courts with

[18] A/Res/76/300 (1 August 2022). For a background to this resolution, see (2023) 117 *American J. Int'l L.* 129–133.

jurisdiction concerning human rights in relation to climate change, such as the European Court of Human Rights.[19] Nevertheless, my impression is that, in arriving at the conclusion on the nature of the obligations under the Convention and the answers in the operative clause of this Advisory Opinion, the Tribunal has duly borne in mind and been motivated by the human rights concerns raised in the context of climate change, as evidenced, for example, in paragraph 122 of this Advisory Opinion.

V. Primary versus secondary obligations

29. Some participants in these proceedings contended that the questions posed related exclusively to primary obligations and not secondary obligations related to the law of State responsibility.[20] China argued at length that the regime of responsibility of States for internationally wrongful acts as well as the international liability for injurious consequences arising out of acts not prohibited by international law could not be resorted to in addressing GHG emissions. In China's submission, "assistive measures" are used as unique means of relief for loss and the damage associated with climate change effects.[21]

30. Other participants argued, however, that failure to give effect to the 1.5°C goal set by the Paris Agreement would itself be inconsistent with articles 192, 193 and 194 of the Convention and would expose Parties to the risk of responsibility and liability thereunder.[22]

31. In my opinion, the pertinent question is, as cogently stated by Comoros: How do the obligations to prevent and preserve the marine environment and the

[19] See, e.g., *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, no. 53600/20, 9 April 2024; *Duarte Agostinho and Others v. Portugal and 32 Others* no. 39371/20, 9 April 2024; and *Carême v. France*, no. 7189/21, 9 April 2024.
[20] Latvia, ITLOS/PV9/rev.1/C31, p. 10, ll. 1–4; Italy, ITLOS/PV18/rev.1/C31, p. 18, ll. 22–36; EU, ITLOS/PV14/rev.1/C31, p. 24, ll. 22–34; Australia, ITLOS/WS/C31, p. 5, l. 18.
[21] China, ITLOS/PV10/rev.1/C31, pp. 26–27 and p. 30, ll. 29–38. See also the Netherlands, ITLOS/PV18/rev.1/C31, p. 28, ll. 18–20.
[22] Mauritius, ITLOS/PV9/rev.1/C31, p. 26, ll. 5–7 and pp. 30–31; Micronesia, ITLOS/PV9/rev.1/C31, pp. 41–42; and see also DR Congo, ITLOS/WS/C31, pp. 67–84.

obligations to prevent, reduce and control pollution apply to climate change and how can they be breached?[23]

32. In paragraphs 145-148 of this Advisory Opinion, the Tribunal explains why the issues of responsibility and liability are not within the scope of the Request, and that the Tribunal will confine itself to primary obligations, but to the extent necessary to clarify the scope and nature of primary obligations, the Tribunal may have to refer to responsibility and liability, as it does in paragraphs 223 and 286 – the former, because article 194 is the key or primary provision in the marine pollution regime set out in Part XII of the Convention,[24] and the latter, because many participants in the proceedings raised the issue of compliance with climate change treaties and other relevant instruments.[25] I wish to add that this does not mean a violation of other provisions of the Convention does not entail responsibility and liability. This is because States Parties to the Convention must fulfil their respective obligations thereunder in good faith in accordance with the rule of customary international law, as codified in article 26 of the VCLT. Failure to fulfil the obligations under the Convention, as explained in this Advisory Opinion, necessarily gives rise to a violation of article 235 (Responsibility and liability), which also comes under Part XII of the Convention, and reads:

> 1. States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.
>
> 2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.
>
> 3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

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[23] Comoros, ITLOS/PV16/rev.1/C31, p. 24, ll. 21–23.
[24] Paras. 189 and 193 of this Advisory Opinion.
[25] *Ibid.*, paras. 219–222.

33. However, since this case is not a contentious proceeding, the Tribunal does not determine which State is liable and what the amount of compensation is to be as a consequence of its violation of the relevant provisions of the Convention.

VI. Technical assistance

34. The Tribunal does not explain why it considers the second category of assistance measures concerning the effects of major incidents which may cause serious marine pollution, envisaged in article 202, subparagraph (b), of the Convention "to be of lesser relevance in the context of addressing marine pollution from anthropogenic GHG emissions".[26] It is my understanding that this is so because, according to its drafting history, this provision refers to assistance in relation to clean-up operations in the wake of major pollution incidents, generally one-off incidents. It complements the obligation under article 199 of the Convention for States "to cooperate, to the extent possible, in eliminating the effects of pollution and preventing or minimizing the damage", by emphasizing that assistance is to be particularly targeted at developing States.[27] In this connection, Parties to the 1990 International Convention on Oil Pollution Preparedness, Response and Co-operation undertake directly or through the International Maritime Organization and other international bodies, as appropriate, to provide support for those Parties which request technical assistance in respect of oil pollution preparedness and response.

VII. Epilogue

35. During the oral proceedings on 11 September 2023, the Honourable Gaston Browne, Prime Minister of Antigua and Barbuda, Co-Chair of the Commission, informed the Tribunal that at the 27th Conference of the Parties to the UNFCCC in Sharm el-Sheikh, Egypt, in 2022, he quoted the following soliloquy in William Shakespeare's *Macbeth*, which "resonates with a hammering significance for us small island States":

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[26] *Ibid*., para. 334.
[27] Alexander Proelß (ed.), *United Nations Convention on the Law of the Sea. A Commentary* (Hart, 2017), p. 1352.

> Tomorrow, and tomorrow, and tomorrow,
> creeps in this petty pace from day to day,
> to the last syllable of recorded time;
> and all our yesterdays have lighted fools the way to dusty death.[28]

36. I wish to respond with these famous quotes from Dante Alighieri's *Inferno*, written around three centuries before Shakespeare's *Macbeth*:

> It is always darkest just before the dawn.
> ….
> Even in the darkest places, we can find light if we only search for it.

37. I am immensely grateful to the Commission for having come to this Tribunal to search for this light to guide humankind in the right direction to ensure the survival of present and future generations amid the onslaught of climate change.

(signed)

Kriangsak Kittichaisaree

[28] The Commission, ITLOS/PV1/rev.1/C31, p. 6, ll. 34–42.