

DECLARATION OF JUDGE PAWLAK

1. I have voted in favour of the Advisory Opinion, requested by the Commission, and I endorse the Tribunal's findings which give clarification and guidance concerning the specific obligations of States Parties to the Convention regarding the protection and preservation of the marine environment in relation to climate change impacts. However, in my view, the Advisory Opinion could have reflected the broader implications of recent developments in climate change justice, such as the decision of the UN Human Rights Committee issued on 22 September 2022 in the *Torres Strait Islanders* case and the very important judgment of the European Court of Human Rights of 9 April 2024 in the *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* case. But the Advisory Opinion does not reflect these developments in its findings; only paragraph 122 of the Advisory Opinion indicates that "the Tribunal is mindful of the fact that climate change is recognized internationally as a common concern of humankind."

2. The European Court of Human Rights, in its judgment, went much further in that respect. It acknowledged that States have the responsibility to combat climate change to protect human rights and ruled that Switzerland had failed to act in time and in an appropriate and consistent manner to devise, develop and implement relevant legislation and measures to mitigate the effects of climate change. Therefore, Switzerland had failed to comply with its positive obligations to combat climate change effectively in order to protect the rights enshrined in the European Convention on Human Rights. As a consequence, Switzerland was exposing a group of older women, who had brought the case, to life-threatening heatwaves and greenhouse gas emissions, and violated their right to private and family life enshrined in articles 2 and 8 of the European Convention of Human Rights.

3. It should be stressed that the European Court of Human Rights, by its ruling, comprehensively dismissed the relatively popular argument that courts cannot rule on the protection of persons affected by climate change within the framework of international human rights law. The UN Human Rights Committee also disregarded that argument and, in the *Torres Strait Islanders* case, decided that this climate change case could be assessed within that framework. This approach is evident in

its decision, in which it held Australia, as a major emitter of greenhouse gases, responsible for failing to adopt mitigation measures to reduce greenhouse gas emissions and cease the promotion of fossil fuel extraction and use. The failure of Australia to do so was therefore affecting indigenous Torres Strait Islanders, endangering their livelihoods and resulting in the violation of their rights under article 6 of the International Covenant on Civil and Political Rights. Having found breaches of other provisions of the Covenant as well, the Committee imposed on Australia, among other obligations, a duty to protect the marine environment from climate change effects and to adopt measures which would ensure that the islands, which constitute the home of the claimants, do not sink.

4. The above-cited rulings against Switzerland and Australia were delivered by international human rights organs in the context of contentious cases; they were not advisory opinions. They have, however, created precedents for other judicial institutions that may find States responsible for the lack of adequate protection of persons against diverse impacts of climate change within the framework of international human rights law. The Tribunal could have used the same reasoning to support its findings in the current Advisory Opinion, but it did not do so.

5. The decision of the UN Human Rights Committee and the judgment of the European Court of Human Rights, both of which added human rights considerations to the global fight against climate change, are essential. And they are not isolated. On 29 March 2023, the United Nations General Assembly adopted a resolution requesting an advisory opinion on climate change and human rights from the International Court of Justice. A similar request has been addressed to the ICJ by Vanuatu, supported by the Commission of Small Islands States. It was followed by Colombia and Chile which, in January 2023, submitted a request for an advisory opinion to the Inter-American Court of Human Rights to clarify the obligations of States under the American Convention on Human Rights with respect to climate change.

6. The Advisory Opinion, despite its detailed presentation of the different sources of pollution of the marine environment, neglects to mention pollution from toxic gases and harmful substances – including the chemical weapons and

ammunition that were dumped into the sea after World War I and World War II in many parts of the globe – which are damaging the marine environment. This type of pollution, in my opinion, should not have been omitted. While the Advisory Opinion otherwise meticulously discusses in its findings all the requirements under the Convention, nowhere does it deal with dumping which, in article 194, paragraph 3, subparagraph (a), is listed as one of the sources of pollution that must be minimized to the fullest possible extent. Dumped wastes, by emitting mustard gas and sneeze gas, among others, create hazards to human health in coastal populations and harm living resources and marine life. It is estimated that in the Baltic Sea alone, dumped chemical weapons contain some 13,000 tons of chemical warfare agents. I understand that the discharge of this category of toxic gases in the marine environment and atmosphere does not necessarily contribute to ocean warming as do anthropogenic GHG gas emissions, but it does nonetheless harm the marine environment and contaminate the atmosphere. These dormant weapons are ticking time bombs. As they corrode over time, they produce gases which cannot be ignored and should be mitigated like other harmful gas emissions. This category of dumping might one day be an issue for another advisory opinion on the particular obligations of States, but in my view, it is worthy of at least a mention in the current Advisory Opinion.

7. In short, the Advisory Opinion could have been more comprehensive and up to date had it also reflected recent developments before courts and international bodies dealing with the issue of States' responsibility to combat climate change to protect human rights. Furthermore, including and recognizing dumping as a consequential and dangerous source of marine pollution would have meaningfully contributed to the Tribunal's conclusions in answering the questions posed by the Commission.

(signed)
Stanislaw Pawlak