What the Court has left for Later, including Liability

Throughout the Advisory Opinion the Court has had to draw the line at what it is realistic and appropriate to give views on in the context of the Advisory Opinion. This applies both in relation to the primary law and also the Court's response to the second part of the General Assembly's question relating to legal consequences. In many cases, the Court has approached the drawing of this line by telling us that certain matters would call for assessment *in concreto*. This is a positive way of phrasing the matter; an alternative was to convey that the Court was unable to address certain matters *in abstracto*. The Court has rather opted for a forward-looking tone, which assists in maintaining the Advisory Opinion's affirmative energy. A good example of this approach is seen in relation to the setting of Nationally Determined Contributions under the Paris Agreement, where the Court explains that how the principle of common but differentiated responsibility and respective capabilities in the light of national circumstances plays in would need to be assessed *in concreto*.[1]

The Court's line-drawing is particularly apparent in relation to the requirements of customary international law. Matters that would call for assessment *in concreto* here include, centrally, the requirements of due diligence in a given case,[2] as well as whether any specific risk of harm or actual harm would constitute significant harm,[3] and also the relevance of decisions of the Conferences of the Parties as current standards for determining risk so far as it goes to assessing the due diligence required in a given case.[4] There are also other areas of the primary law where the Court took the view that a matter would need to be argued and determined based on specifics. This is the case for instance for the continuity of Statehood which the Court leaves to be argued *in caso*.[5] In relation to the territorial scope of human rights treaties the Court takes the view, as mentioned, that it need not determine the specific circumstances under which a State can be regarded as exercising its jurisdiction outside its own territory, since this will depend on the provisions of the particular treaty in question.[6]

The Court also circumscribed the scope of what the Advisory Opinion can contribute when it comes to legal consequences, where the Court focuses essentially on legal consequences under the law on State responsibility. Firstly the Court addresses the remaining primary law matter of the temporal scope of States' obligations. The Court is clear that the assessment of the temporal scope of States' obligations would be need to be considered *in concreto*.[7] This issue could be crucial in contentious litigation and this was a matter that was fiercely argued in pleadings.[8] Perhaps the furthest position is taken by Judge Nolte, that it was in the second half of 1980s that general understanding and recognition of risks associated with emissions came about, and so this is when customary international law became applicable and wrongful conduct could have begun to occur.[9]

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[1] *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025 [2025] ICJ Reports [247].
[2] [137].
[3] [278].
[4] [278].
[5] [363].
[6] [402]. Inter-American Court of Human Rights, Opinión Consultiva OC-32/25 sobre Emergencia Climática y Derechos Humanos [277]. In contrast, see the European Court of Human Rights' decision in *Duarte Agostinho and Others v. Portugal and Others* (Case 39371/20) [167].
[7] [97], [423].
[8] European Society of International Law Interest Group on International Courts and Tribunals webinar "Interest Group on International Courts and Tribunals | 'Taking Stock – A Roundtable Discussion on the Public Hearing in the ICJ Climate Change Advisory Proceedings' 16 December 2024, available at https://esil-sedi.eu/ig-on-international-courts-and-tribunals-taking-stock-a-roundtable-discussion-on-the-public-hearing-in-the-icj-climate-change-advisory-proceedings/
[9] Separate Opinion of Judge Nolte [23].

Based on the tenor of the Advisory Opinion, one might perhaps predict that in the future a line may be drawn identifying the time in history when States had or should have had sufficient knowledge of the harm that atmospheric greenhouse gas concentration, bringing into play the customary international law obligations of prevention and cooperation. One interesting question is whether both duties would run from the same point in time. Claims in relation to these two distinct duties might have different aims. Findings around the point in time at which each could be considered to have been triggered might be needed more in relation to the preventive duty, where financial remedies of some description may be more likely.

The Court then comes to matters of secondary law proper, considering that *in concreto* assessment would be needed in relation to the responsibility of individual States or groups of States.[10] As the Court reiterates several times, that is not a task the Court has been asked to undertake here and the determination of State responsibility is beyond the scope of the Advisory Opinion.[11] Among other matters, causality would need to be determined.[12] Neither is the Court asked in this Advisory Opinion to indicate or quantify legal consequences in the sense of remedies.[13]

The Court also left to one side the possibility of reparation for harm that has been caused by conduct that is not internationally legally wrongful.[14] Judge Yusuf makes the point that (a) the regime of State responsibility for wrongful acts, and (b) the international legal principles or rules that may apply in relation to allocation of loss caused by conduct that is not wrongful, are intertwined.[15] Importantly, in the climate change context, if we assume that the temporal scope of obligations on which State responsibility for harm caused by climate change may one day be specified, emissions prior to that could be caught by the regime on allocation of loss. The regime could perhaps be considered still under development, although it has received sustained attention in the past from the International Law Commission, leading most recently to the Commission's Principles on the Allocation of Loss.[16] Though valuable, these principles may not approve to be the end of the story. The international experience with climate change in the coming years might be a crucible for further development of the law in this respect.

[10] [106, 108] [109] [406].
[11] [423].
[12] [437, 438].
[13] [445, 451-452].
[14] As highlighted in the Separate Opinion of Judge Yusuf [41-48]. See also Separate Opinion of Judge Bhandari [2] and Declaration of Judge Nolte [15-17].
[15] Separate Opinion of Judge Yusuf [42].
[16] See the International Law Commission's Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, 2006, Yearbook of the International Law Commission, 2006, vol. II, Part Two. For an early critique during the formulation of the principles, see Caroline Foster, "The ILC draft Principles on the Allocation of Loss in the case of Transboundary Harm Arising Out of Hazardous Activities: Privatising Risk", (2005) 14(3) *Review of European Community and International Environmental Law*, 265.