

Part IV: Re-negotiation of the Postcolonial International Legal Order

The Advisory Opinion on Climate Justice and the ‘Global North-South Divide’

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I. Introduction

The International Court of Justice (ICJ or Court)’s Advisory Opinion on the *Obligations of States in respect of Climate Change*¹ has the potential to contribute to the future of international law and climate governance and the pursuit of climate justice in different ways.² This contribution focuses on the challenges and limitations of international law and the ICJ in addressing the historical and current power asymmetries underlying the so-called ‘Global North–South Divide’ to achieve climate justice. For this purpose, it starts by explaining two key terms – ‘Global South’ and ‘climate justice’ – while acknowledging that the former is not uncontested and the latter may have multiple meanings. This is followed by an examination of the Court’s engagement with climate justice and a related concept ‘equity’ whose temporal and spatial dimensions are captured in the principles of inter-generational and intragenerational equity or justice. Then it considers how the Court engages with the distinction between developed and developing countries and the request for determination of specific legal

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1 ICJ, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025.

2 See Martina Igini, “‘Landmark Moment for Climate Justice’: Reactions Pour in After ICJ Delivers Historic Opinion on States’ Climate Change Obligations”, Earth.Org 24 July 2025, <https://earth.org/landmark-moment-for-climate-justice-reactions-pour-in-after-icj-delivers-historic-opinion-on-states-climate-change-obligations/>. See the contributions to this volume as well as Maria Antonia Tigre, Maxim Bönnemann & Antoine De Spiegeleir (eds.), *The ICJ’s Advisory Opinion on Climate Change* (Verfassungsbooks, 2025)..

consequences of obligations of States. The penultimate section revisits some cautionary notes about the potential influence of the Advisory Opinion on the future of climate litigation.

II. Two Key Terms: 'Climate Justice' for the 'Global South'

The Global South refers to the world's developing economies and least developed countries³ that account for 80 percent of the total population. More fundamentally, this term 'references an entire history of colonialism, neo-imperialism, and differential economic and social change through which large inequalities in living standard, living expectancy, and access to resources are maintained'.⁴ These factors have contributed to or exacerbated the vulnerability of these countries to the adverse impacts of climate change, and therefore influenced their demands for climate justice.⁵ Climate justice, according to Sultana, 'fundamentally is about paying attention to how climate change impacts people differently, unevenly, and disproportionately, as well as redressing the resultant injustices in fair and equitable ways'.⁶

III. Climate Justice and Equity

Climate justice for the Global South is at the heart of the request for the Advisory Opinion from the ICJ. The very idea of seeking this Advisory Opinion is traceable to an extracurricular task of promoting climate justice given to a group of law students at the University of the South Pacific in Fiji.⁷ In addition, achieving climate justice was an important objective of the core group of States' initiative to seek an Advisory Opinion.⁸ The

3 See UNCTAD, *Country classification*, 20 March 2025, <https://unctadstat.unctad.org/EN/Classifications/ClassificationsNewsletter_March2025_US_EN.pdf>.

4 Nour Dados and Raewyn Connell, 'The Global South', *Contexts* 11(1) (2012), 12-13.

5 Gurminder K Bhambra and Peter Newell, 'More than a metaphor: "climate colonialism" in perspective', *GSCJ* 2(2) (2023), 179-187, (183).

6 Farhana Sultana, 'Critical climate justice', *The Geographical Journal* 188(1) (2022), 118-124, (118).

7 Aditi Shetye and Manon Rouby, 'Climate Justice: Advisory Opinion of the International Court of Justice and the Impact of Youth Advocacy', *CLJP – JDCP* 27 (2022) 79-94, (81-83).

8 UN General Assembly resolution A/RES/77/276 (4 April 2023).

Court received submissions from several countries as well as organizations in the Global South. However, neither the Court nor any of the country submissions use the term Global South. Further, the Court 'ignores or circumvents' the climate justice focus of the request for an Advisory Opinion.⁹ However, Judge Xue deals with climate justice in her Separate Opinion. She emphasizes the historical roots of the climate change issue,¹⁰ and the need to consider the transfer of GHG emissions, for example, due to the relocation of carbon-intensive production, from developed to developing countries in conformity with the principle of equity¹¹.

The Court does recognize the principle of equity and its relationship with justice generally.¹² It further identifies the principles of common but differentiated responsibilities and respective capabilities (CBDR-RC) and intergenerational equity as manifestations of equity.¹³ In fact, the 'legal questions' in respect of which the Advisory Opinion was requested concerned the obligations of States under international law to ensure protection for, and legal consequences of acts or omissions that have caused significant harm with respect to, present and future generations.¹⁴ Further, according to the Court, the principle of CBDR-RC reflects the need for equitable distribution of the burdens of obligations in respect of climate change.¹⁵

Another aspect of equity is the principle of intragenerational justice among members of a generation.¹⁶ The principle of CBDR-RC and the equitable distribution of the burdens of obligations in respect of climate change can capture some elements of this principle but the latter is broader. It also seeks to address disparities between states, for instance, through financial and technical support.¹⁷ Judge Xue explicitly mentions 'intra-

9 Separate Opinion of Vice President Sebutinde, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025, paras. 5, 9.

10 Separate Opinion of Judge Xue, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025, para. 72.

11 Separate Opinion of Judge Xue (n. 10), para. 74.

12 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 152.

13 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), paras. 151 and 157. For a critique of this framing, see Rebecca Breukers 'Equity in the International Court of Justice's Climate Change Advisory Opinion' CILJ Blog, 24 September 2025.

14 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), paras. 1, 40.

15 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 148.

16 See Oscar Schachter, *Sharing the World's Resources* (Columbia University Press 1977), 16.

17 Catherine Redgwell, 'Principles and Emerging Norms in International Law: Intra- and Inter-generational Equity', in: Kevin R Gray, Richard Tarasofsky, Cinnamon P.

erational equity’ and identifies the underlying issue of the persistent gap between developed and developing countries as the reason why developed countries are asked to take the lead in combating climate change and its adverse effects.¹⁸ Notably, the Court does refer to the obligations, in the Paris Agreement, for developed States to provide support to developing States with respect to their mitigation and adaptation responsibilities as forming part of the duty of cooperation.¹⁹ Developed States are to implement these obligations ‘at a level that allows for the achievement of the objectives listed in Article 2’, and the evaluating factors include ‘the capacity of developed States and the needs of developing States’.²⁰ The inclusion of the capacity of developed States may increase their level of support to developing States. Conversely, the former’s capacity may be considered before the latter’s needs. In fact, the Court notes: ‘The duty of cooperation is founded on the recognition of the interdependence of States, requiring more than the transfer of finance or technology, in particular efforts by States to continuously develop, maintain and implement a collective climate policy[...]’.²¹ This should not lead to an inequitable distribution of the burdens of obligations between developed and developing countries or de-emphasise the importance of transfer of technology or finance from the former to the latter for mitigation as well as adaptation measures.

IV. Obligations of States: Developed and Developing Countries

Following the text of the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol and the Paris Agreement, the Court refers to ‘developed countries’ and ‘developing countries’. This distinction is based on the level of development of countries, as defined by the United Nations.²² Judge Xue, in her Separate Opinion, notes in the context of the international climate regime that this distinction is ‘not just about a criterion but a crucial factor for States to participate in a meaning-

Carlarne (eds), *The Oxford Handbook of International Climate Change Law* (Oxford University Press 2016), 185–201.

18 Separate Opinion of Judge Xue (n. 10), para. 28.

19 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 227.

20 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 265.

21 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 306.

22 UN, *Country classification* (2014), <www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf>.

ful way in the global response to climate change'.²³ However, the Court attempts to redefine this distinction by placing the most developed States, States that have undergone considerable development since the UNFCCC, and the least developed States on a spectrum.²⁴ According to the criteria of the International Monetary Fund and the World Bank, this spectrum corresponds to 40 most developed States, 110 developing States in the middle and 44 least developed States.²⁵ In this regard, Judge Xue notes: 'Without any specific and credible criteria, this new division of the developing countries has no legal basis in the treaties, which may be perceived as a deviation from the current burden sharing of obligations between developed and developing countries under the UNFCCC, the Kyoto Protocol and the Paris Agreement'.²⁶

The Court further notes that the insertion of the phrase 'in the light of the different national circumstances' in the Paris Agreement to the principle of common but differentiated responsibilities as set out in the UNFCCC recognises that 'the status of a State as developed or developing is not static. It depends on an assessment of the current circumstances of the State concerned'.²⁷ According to Judge Xue, this interpretation is likely to further weaken the principle's role in the international climate change regime.²⁸ This is because the distinction 'underlies the legal structure of the climate change treaty regime'.²⁹ Further, this interpretation fails to acknowledge the role of historical events in shaping the differences in current circumstances in developed and developing countries, which do not make it from the negotiations to the text.

There is a significant difference in the Court's level of engagement with the contribution of the Global South to historical and present GHG emissions. In respect of historical emissions, the Court rightly recognises the significant contribution of the most developed States 'to the overall amount of GHG emissions since the Industrial Revolution' and the minimal contri-

23 Separate Opinion of Judge Xue (n. 10), para. 3.

24 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 150.

25 Separate Opinion of Judge Xue (n. 10), para. 64.

26 Separate Opinion of Judge Xue (n. 10), para. 64.

27 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 226. See also Ielyzaveta Badanova, 'Dynamic Differentiation and Common But Differentiated Responsibilities Under the Paris Agreement: Some Clarification But Not Yet Clarity', CILJ Blog, 30 August 2025.

28 Separate Opinion of Judge Xue (n. 10), para. 65.

29 Separate Opinion of Judge Xue (n. 10), para. 67.

bution of the least developed States.³⁰ However, it does not refer to the minimal contribution to historical emissions of the States in the middle,³¹ which include 110 developing countries in the Global South. In contrast, in respect of present emissions, the Court notes that the least developed States 'have only a limited capacity to transform their economies' while the States in the middle 'have progressed considerably in their development since the conclusion of the UNFCCC[...], and some of which now contribute significantly to global GHG emissions'.³² It is true that some developing States in the middle are now among the major CO₂ emitters, and their total emissions are approaching those of the most developed States.³³ However, the per capita GHG emissions of most of the developing States in the middle 'remain relatively low'.³⁴

V. Determination of specific legal consequences

The Advisory Opinion was requested in respect of the legal consequences of obligations for States where they, by their acts or omissions, have caused significant harm to the climate system and other parts of the environment, with respect to (a) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change; and (b) peoples and individuals of the present and future generations affected by the adverse effects of climate change.³⁵ As mentioned above, the Global South is home to a majority of these States as well as peoples and individuals.

In response to (a), the Court recognises that certain States have faced and are likely to face greater levels of climate change-related harm owing to their geographical circumstances and level of development.³⁶ It acknowledges some of the nine categories of developing countries with specific needs and concerns 'arising from the adverse effects of climate change

30 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 150.

31 See Separate Opinion of Judge Yusuf, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025, paras. 12-19.

32 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 150.

33 See International Energy Agency, *Global Energy Review* (2025).

34 Separate Opinion of Judge Xue (n. 10), para. 15 (referring to the IPCC reports).

35 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 1.

36 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 110.

and/or the impact of the implementation of response measures', as identified in Article 4, paragraph 8 of the UNFCCC,³⁷ by referring to the IPCC's report that highlights the high risk of harms associated with climate change in Arctic ecosystems and dryland regions, small island developing States (SIDS) and least developed countries, and to the written submissions from low-lying coastal States and SIDS.³⁸ However, it reframes the first part of the question from where States 'have' caused to 'may have' caused,³⁹ and decides not to determine any specific legal consequences⁴⁰.

The Court's response to (b) focuses almost exclusively on the entitlement of 'individuals' to bring claims against States.⁴¹ It does not engage with 'peoples' reflecting the general reluctance in international law to engage with peoples' rights outside specific treaty contexts. However, Vice-President Sebutinde, in her Separate Opinion, goes beyond the Court to offer a definition of 'peoples' that attempts to engage with State responsibility. She notes:

[t]he phrase "peoples" refers to distinct ethnic groups, nations or communities whose habitat and way of life is adversely affected by the effects of climate change. These include, for example, the indigenous peoples of many small island States whose very existence and way of life is threatened by rising sea levels and disappearing territory'.⁴²

At the same time, the Court recognises that individuals and peoples are right-holders under international human rights law.⁴³ It mentions specific right-holder groups included in the preamble of the Paris Agreement: indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations, women and intergenerational

37 These nine categories are small island countries, countries with low-lying coastal areas, arid and semi-arid areas, forested areas and areas liable to forest decay, areas prone to natural disasters, areas liable to drought and desertification, areas of high urban atmospheric pollution and areas with fragile ecosystems, including mountainous ecosystems, countries whose economies are highly dependent on income generated from the production, processing and export, and/or on consumption of fossil fuels and associated energy-intensive products, and land-locked and transit countries.

38 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 212.

39 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 108. See also Separate Opinion of Judge Yusuf (n. 31), para. 4.

40 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 109.

41 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 111.

42 Separate Opinion of Vice President Sebutinde (n. 9), para. 6.

43 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 371.

equity.⁴⁴ The Court further considers that climate change may impair the enjoyment of human rights of groups such as women, children and indigenous peoples drawing on the work of UN bodies and the IPCC.⁴⁵ This is not a giant leap but it represents a promising tentative step for international law.

VI. Future of Climate Litigation

The Advisory Opinion is not legally binding but it has ‘the potential to open a new front in climate litigation’.⁴⁶ The Declaration of Judge Nolte provides several cautionary notes about the Advisory Opinion’s influence on the behaviour of countries.

1. The ‘general manner’ in which the Court responds to the questions concerning the law of State responsibility and its application may encourage States ‘to pursue litigation which, if successful at all, may entail only symbolic legal consequences’.⁴⁷
2. The Advisory Opinion may raise ‘false hopes that climate litigation can supplement the mechanisms of financial transfers and the remedies for loss and damage contained in the climate change treaties’⁴⁸.
3. Litigation may lead to ‘counterproductive effect on the political processes within the framework of the Paris Agreement and beyond’.⁴⁹ ‘States may in the future shy away from accepting new treaty obligations or maintaining procedures that could subject them to unpredictable legal consequences’.⁵⁰
4. States may challenge ‘the distributive implications of court decisions which, in their view, unjustifiably isolate parts of the problem from the whole’ and ‘the very legitimacy of courts, particularly international

44 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), paras. 374, 382.

45 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), paras. 382–84.

46 Jorge Viñuales, ‘The ‘world court’ and climate change’, University of Cambridge Stories, 24 July 2025.

47 Declaration of Judge Nolte, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025, para. 31.

48 Declaration of Judge Nolte (n. 47), para. 31.

49 Declaration of Judge Nolte (n. 47), para. 31.

50 Declaration of Judge Nolte (n. 47), para. 32.

courts, when these appear to unduly limit the exercise of States' political and administrative discretion'.⁵¹

The impact of the Advisory Opinion also needs to be considered in light of the growing complexity of domestic and regional climate litigation, which may be used to challenge climate injustice or to deny climate justice. Scholars have highlighted the different understandings of climate litigation in the Global South including the strategic decision not to use climate change language, mitigation, adaptation or loss and damage focus, vulnerabilities of specific individuals, groups and peoples, and use of rights-based approaches etc.⁵² The general understanding of the Advisory Opinion will further influence the nature and scope of future climate litigation and its contribution to achieving climate justice in and for the Global South.

VII. Conclusion

The Global South origin of the Advisory Opinion highlights the uneven nature and scale of the vulnerability of countries to the adverse effects of climate change. The Global North-South Divide frames the obligations of developed countries in respect of historical GHG emissions and support for adaptation measures in the Global South as well as a context-driven understanding of the mitigation and adaptation obligations of all countries. The equitable distribution of the burden of these obligations is key to climate justice and the future of peoples and our planet. For this reason, while we must pursue the opportunities offered by the Court, we must also continue to challenge the limits of international law and seek solutions to this planetary crisis beyond international law.

51 Declaration of Judge Nolte (n. 47), para. 32.

52 Melanie Jean Murcott and Maria Antonia Tigre, 'Developments, Opportunities, and Complexities in Global South Climate Litigation: Introduction to the Special Collection', *J. Hum. Rights Pract.* 16(1) (2024), 1-24.

