# ICJ, Advisory Opinion of 23 July 2025, Obligations of States in respect of Climate Change

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# Halftone Climate Justice in The Hague: The Choice for an Ambitious but Formalistic Interpretation of International Law

**International Court of Justice (ICJ) – Advisory Opinion – Uni**
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**Attribution – Causation – Reparation – Obligation To Prevent Significant Environmental Harm – Obligation To Cooperate – Sea Level Rise – United Nations Framework Convention on Climate Change (UNFCCC) – Paris Agreement – 1.5 °C – Due Diligence – Common but Differentiated Responsibilities and Respective Capabilities (CBDR) – Equity – Right to a Clean, Healthy and Sustainable Environment – Human Rights – Climate Justice – (Im)Mobility – Displacement – Migration – Principle of Non-Refoulement – Teitiota – International Protection – Planned Relocation – Adaptation – Daniel Billy – Small Island Developing States (SIDS).**

*The advisory opinion of the International Court of Justice (ICJ) on climate change is historic: in terms of the level of participation in the proceedings, the unanimity of the verdict, and the operative part in many respects. Preventing significant harm to the climate system, notably through the reduction of greenhouse gas emissions, and cooperating to this end are recognised as customary obligations, erga omnes, engaging the responsibility of States and giving rise to reparation. By bringing the case before the ICJ, the small island developing States, which initiated the United Nations General Assembly resolution, are raising an issue common to humanity but particularly affecting them. However, climate justice, which underpins the request, is treated in a formalistic and depoliticised manner. The issue of human mobility, which will arise in unique ways for these States but will also be part of all States' responses to climate change, is also addressed superficially.*

**Marie Courtoy**

# A. Advisory Opinion

On 12 April 2023, the Secretary-General of the United Nations forwarded to the International Court of Justice (ICJ) the questions that the United Nations General Assembly had decided to ask it through Resolution 77/276 adopted on 29 March 2023. The initiative came from law students at the University of the South Pacific, who formed a collective with their professors called Pacific Islands Students Fighting Climate Change. They succeeded in convincing the Government of Vanuatu, which surrounded itself with a core group of 18 States on whose behalf it submitted the draft resolution. The resolution was adopted by **consensus**, i.e. without a vote because there was no opposition, and co-sponsored by 132 of the 193 States in the General Assembly (para 47).

The ICJ issued its advisory opinion on 23 July 2025.[1] The enthusiasm it generated was historic. With more than 250 submissions by States and international organisations during the written phase and public hearings, this is the highest level of **participation** in proceedings ever achieved in the history of the ICJ and its predecessor, the Permanent Court of International Justice (as ir[illegible] press release). The advisory opinion was also adopted **unanimo** Retirer des favoris al

for the ICJ, as it is only the fifth advisory opinion to be adopted in this way out of the 29 issued since its creation more than 80 years ago (ICJ press release). Nevertheless, it is accompanied by 12 separate opinions expressing the views of judges who are not entirely satisfied with the advisory opinion as formulated.

The request asked the ICJ (1) about the *obligations* of States under international law in respect of climate change, and (2) about the *legal consequences* of States' violation of these obligations with regard to (i) States, in particular small island developing States, and (ii) peoples and individuals of present and future generations.

# 1. Preliminary Considerations

From the outset, the ICJ sets the tone: "it is scientifically established that the climate system has undergone widespread and rapid changes, including, in particular, an increase in global surface temperatures, or global warming. Climate change is caused by the accumulation of certain gases in the atmosphere that trap the sun's radiation around the Earth, leading to a greenhouse warming effect. While certain GHGs [greenhouse gases] occur naturally, it is scientifically established that the increase in concentration of GHGs in the atmosphere is primarily due to human activities [...]" (para 72).

The ICJ goes on to describe the "severe and far-reaching" consequences of climate change, based on reports by the Intergovernmental Panel on Climate Change (**IPCC**), which the parties to the proceedings agreed constituted the best scientific data available, and concludes by describing climate change as an "urgent and existential threat" (para 73).

It therefore justifies its expansive interpretation of the **material scope** of its analysis, about both the behaviours and the actors responsible for them. The ICJ does not limit itself to those who directly emit GHGs, but "encompasses the full range of human activities that contribute to climate change as a result of the emission of GHGs, including both consumption and production activities" (para 94). It also considers that the material scope includes all "actions or omissions" by States, but also those of "non-State actors within their jurisdiction or effective control" (para 95).

Finally, the ICJ notes that it is called upon to rule on the obligations incumbent on States in this area in the light of the entire body of international law. Furthermore, in its advisory opinion, it also refers to the **case law of other supranational bodies**. Concerning the law of the sea, it explains that "[a]lthough the Court is not obliged, in the exercise of its judicial functions, to model its own interpretation of UNCLOS [United Nations Convention on the Law of the Sea] on that of ITLOS [International Tribunal for the Law of the Sea], it considers that, in so far as it is called upon to interpret the Convention, it should ascribe great weight to the interpretation adopted by the

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Tribunal", in the interests of clarity and consistency of international law and legal certainty (para 338).

# 2. States' Obligations in respect of Climate Change

The ICJ sets out the obligations of States arising from each legal source, which creates redundancy and does not allow for an overview. Summarising the 133 pages of the decision, therefore, required me to make some personal interpretations in terms of structure. I have chosen here to distinguish between what I would describe as ecocentric obligations and anthropocentric obligations. It is clear that ecocentric obligations, by protecting nature, are also generally beneficial to individuals, as the ICJ itself points out when it states that the enjoyment of human rights depends on the protection of the environment (para 373). I therefore do not presuppose that environmental protection is of no interest to humans. Conversely, some obligations I describe as anthropocentric can also contribute to environmental protection, such as ecosystem restoration, which the IPCC cites as an example of effective adaptation and the ICJ echoes (para 86). The distinction is therefore not as clear-cut as the structure suggests, but it does offer a degree of legibility.

## i. Ecocentric Obligations

So-called ecocentric obligations focus on environmental protection and constitute the bulk of the advisory opinion.

### – Climate Treaties and, in particular, the Paris Agreement: The 1.5 °C Comeback and Due Diligence

"[W]hile the Paris Agreement provides for limiting the global average temperature increase to well below 2 °C above pre-industrial levels as a goal and 1.5 °C as an additional effort, **1.5 °C** has become the scientifically based consensus target under the Paris Agreement" (para 224). The ICJ considers the decisions taken at the Conferences of the Parties (COP) following the adoption of the Paris Agreement (1/CMA.3 and 1/CMA.5), which indicate the 1.5 °C target as the target to be pursued, as subsequent agreements that should guide the interpretation of the Paris Agreement within the meaning of Article 31 para 3 (a) of the Vienna Convention on the Law of Treaties. This bold interpretation was already foreshadowed in the scientific context defined by the ICJ, where it emphasised that "risks and projected adverse impacts and related loss and damage from climate change will escalate with every increment of global warming" (para 83).

To achieve this 1.5 °C target, the Paris Agreement provides for States to adopt nationally determined contributions (NDCs), which indicate the

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commit to taking to achieve this common goal. The ICJ specifies in this regard that "the discretion of parties in the preparation of their NDCs is limited. As such, in the exercise of their discretion, parties are obliged to exercise **due diligence** and ensure that their NDCs fulfil their obligations under the Paris Agreement and thus, when taken together, are capable of achieving the temperature goal of limiting global warming to 1.5 °C above pre-industrial levels, as well as the overall objective of the 'stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system'" (para 245).

## – The Customary Obligation To Prevent Significant Harm to the Environment and Due Diligence

The concept is also found in customary law, since "States must fulfil their duty to prevent significant harm to the environment by acting with **due diligence**" (para 280). This requires States to take *appropriate measures* (paras 281–282) in light of the *scientific and technological information* available to them (paras 283–286) and *relevant international rules and standards* (paras 287–289) in accordance with their *different capabilities* (paras 290–292), including procedural measures for *risk assessment and environmental impact assessment* (paras 295–298).

To comply with this obligation, States must adopt the **precautionary** *approach or principle* and take action even in the absence of scientific certainty, whenever there is a risk of serious or irreversible damage to the environment (paras 293–294). This is consistent with the determination of the risk of significant harm since, as ITLOS states in its advisory opinion on climate change and international law cited by the ICJ, it depends on "both the probability or foreseeability of the occurrence of harm and its severity or magnitude" (para 275).

Furthermore, "[t]he Court is of the view that a risk of significant harm may also be present in situations where significant harm to the environment is caused by the **cumulative effect** of different acts undertaken by various States and by private actors subject to their respective jurisdiction or control" (para 276). This is important in this context because, unlike transboundary damage between neighbouring countries, "[i]t is the sum of all activities that contribute to anthropogenic GHG emissions over time, not any specific emitting activity, which produces the risk of significant harm to the climate system" (para 277).

Thus, and fundamentally, the ICJ recognises that "[t]he duty to prevent significant harm to the environment also applies to the climate system, which is an integral and vitally important part of the environment and which must be protected for present and future generations" (para 273). The obligation to protect the climate is therefore **customary** and applies to all States, whether or not they are parties to climate treaties.

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## – The Interrelationship between Conventional and Customary Law on Climate Issues

This raises the question of the **relationship between the two types of climate obligations**, conventional on the one hand and customary on the other. Based on its *Gabčíkovo-Nagymaros* case law, the Court considers that "the obligations arising from the climate change treaties, as interpreted herein, and State practice in implementing them inform the general customary obligations, just as the general customary obligations provide guidance for the interpretation of the climate change treaties" (para 313).

It concludes that "a non-party State which co-operates with the community of States parties to the three climate change treaties in a way that is equivalent to that of a State party, may, in certain instances, be considered to fulfil its customary obligations through **practice that comports** with the required conduct of States under the climate change treaties. However, if a non-party State does not co-operate in such a way, it has the full burden of **demonstrating** that its policies and practices are in conformity with its customary obligations" (para 315).

The ICJ's interpretation of climate treaties in its advisory opinion is therefore relevant to all States, including those that are not parties to them, in order to ensure compliance with their customary obligations.

## – Equity and the Principle of Common but Differentiated Responsibilities and Respective Capabilities

The issue of particularly affected States is raised by the participants in the second question of the request, relating to legal consequences. However, the ICJ considers that the rules on responsibility and reparation apply equally to any State whose rights have been violated (para 109). On the other hand, it recognises **specific obligations** towards these States, which it includes in its response to the first question on climate change obligations.

Climate obligations do indeed vary from State to State. The operative part of the advisory opinion (para 457) refers to the principle of **common but differentiated responsibilities and respective capabilities** (CBDR-RC), both in treaty law, in relation to the Paris Agreement (3, A, e), and in customary law, in relation to the duty to prevent significant transboundary environmental harm (3, B, a). With regard to the United Nations Framework Convention on Climate Change (UNFCCC), the Court establishes that "States parties listed in Annex I [...] have additional obligations to take the lead in combating climate change by limiting their greenhouse gas emissions and enhancing their greenhouse gas sinks and reservoirs" (para 457, 3, A, b).

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The ICJ sees this principle as recognising "the need to distribute equitably the burdens of the obligations in respect of climate change, taking into account, inter alia, States' historical and current contributions to cumulative GHG emissions, and their different current capabilities and national circumstances, including their economic and social development" (para 148). This principle is examined in paras 148 to 151 as a component of the principle of **equity**, which is itself examined in paras 152 to 154. The ICJ considers equity to be the act of a court choosing "among several possible interpretations of the law the one which appears, in the light of the circumstances of the case, to be closest to the requirements of justice", referring to the *Continental Shelf* case (para 152). Intergenerational equity, also derived from equity in the broad sense, is also analysed as a principle of law (paras 155–157). All three constitute principles that should guide the interpretation of the applicable rules.

However, while the division between **developed and developing countries**[2] is relevant, the ICJ considers that it cannot be limited to this. In para 150, between developed and least developed States, it thus refers to an intermediate category: "States that have progressed considerably in their development since the conclusion of the UNFCCC in 1992 [...] and some of which now contribute significantly to global GHG emissions and possess the capacity to engage in meaningful mitigation and adaptation efforts, as well as other States with significant resources and technical capabilities to contribute to addressing global climate change". The breach had already been opened in the Paris Agreement by including a reference to "national circumstances" alongside the principle of CBDR-RC and the distinction between developed and developing countries.

In its assessment of the elements that form the basis of due diligence, the ICJ no longer refers to the CBDR-RC principle, but only to "different capabilities", which it considers to be **dynamic** and evolving according to the circumstances of each State: "While developed States, in the context of climate change, must take more demanding measures to prevent environmental harm and must satisfy a more demanding standard of conduct, the standard required in each case ultimately depends on the specific situation of each State, namely 'all the means at its disposal' (see *Pulp Mills on the Uruguay River (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 56, para. 101). The difference between the respective capabilities of States, as one of the factors which determines the diligence required, cannot therefore merely result from a distinction between developed and developing countries, but must also depend on their respective national circumstances. The multifactorial and evolutive character of the due diligence standard entails that, as States develop economically and their capacity increases, so too are the requirements of diligence heightened" (para 292).

## – The Customary and Conventional Obligation To Cooperate

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In addition to differentiated commitment, capacity also demonstrates the need for cooperation between States. In its analysis of the duty to cooperate as a **customary obligation** deriving from the obligation to prevent transboundary environmental harm, the ICJ notes: “Climate change is a common concern. Co-operation is not a matter of choice for States but a pressing need and a legal obligation” (para 308).

“[S]ustained and continuous” cooperation “in good faith” (para 457, 3, B, b) is therefore a customary obligation incumbent on all States. However, cooperation is also a **treaty obligation** under several treaties, including the United Nations Framework Convention on Climate Change (para 457, 3, A, c) and the Paris Agreement, which specifies that this includes “technology and financial transfers, which must be performed in good faith” (para 457, 3, A, h).

Some participants in the proceedings questioned the ICJ about the possibility of including debt relief for developing countries in the obligation to cooperate under the Paris Agreement. The Court replied that “States are free to select the **means** of co-operating, as long as such means are consistent with the obligations of good faith and due diligence” (para 262). The ICJ also specifies that the level of financial assistance must enable the collective temperature objective to be achieved and that it “can be evaluated on the basis of several factors, including the capacity of developed States and the needs of developing States” (para 265).

In the section on **sea level rise**, the ICJ emphasises that “the duty to co-operate assumes particular significance in this context” and “is founded on the recognition of the interdependence of States and the ensuing need for solidarity among peoples” (para 364). It points out that “co-operation in addressing sea level rise is not a matter of choice for States but a legal obligation” (para 364).

## ii. Anthropocentric Obligations

Apart from the analysis of human rights, the advisory opinion rarely mentions individuals. So-called anthropocentric obligations are only found in brief, scattered references.

### – The Right to a Clean, Healthy and Sustainable Environment as a Condition for the Enjoyment of Human Rights

The ICJ affirms the **link between environmental protection and respect for human rights** in para 373: “The environment is the foundation for human life, upon which the health and well-being of both present and future generations depend (see *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 241, para. 29). The Court thus considers that the protection of the environment is a precondition for the enjoyment of human rights, whose promotion is one of the purposes of the United Nations as set out in Article 1, paragraph

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follows logically that States have "obligations under international human rights law to respect and ensure the effective enjoyment of human rights by taking necessary measures to protect the climate system and other parts of the environment" (para 457, 3, E). It also refers to regional case law, in particular the recent advisory opinion on climate emergency and human rights of the Inter-American Court of Human Rights (IACHR), discussed elsewhere in this special issue, and the KlimaSeniorinnen judgment of the European Court of Human Rights (para 385).

When questioned by several States on the **right to a clean, healthy and sustainable environment**, the ICJ remains ambiguous. Legal doctrine seems to interpret the advisory opinion as holding that the ICJ does not consider it an autonomous right but rather an essential principle for the enjoyment of other human rights. However, it surreptitiously shifts from the need for a clean, healthy and sustainable environment to the need for a *human right* to a clean, healthy and sustainable environment in its development in para 393: "[T]he Court is of the view that a clean, healthy and sustainable environment is a precondition for the enjoyment of many human rights, such as the right to life, the right to health and the right to an adequate standard of living, including access to water, food and housing. The right to a clean, healthy and sustainable environment results from the interdependence between human rights and the protection of the environment. Consequently, in so far as States parties to human rights treaties are required to guarantee the effective enjoyment of such rights, it is difficult to see how these obligations can be fulfilled without at the same time ensuring the protection of the *right* to a clean, healthy and sustainable environment *as a human right*. The *human right* to a clean, healthy and sustainable environment is therefore inherent in the enjoyment of other human rights. The Court thus concludes that, under international law, the *human right* to a clean, healthy and sustainable environment is essential for the enjoyment of other human rights" (emphasis added).

## – The Obligation To Adapt beyond the Obligation To Mitigate

Climate treaties provide for **adaptation** obligations, both in the United Nations Framework Convention on Climate Change (paras 209 *et seq.*) and in the Paris Agreement (paras 255 *et seq.*). Both emphasise the obligation to **cooperate** in this area. The ICJ further considers that "a State's failure to implement timely and adequate adaptation measures to address the adverse impacts of climate change may violate the right to privacy, family and home" (para 381), referring to the *Daniel Billy* communication of the United Nations **Human Rights** Committee (UNHRC).

## – A Brief Mention of the Principle of Non-Refoulement

In the section on human rights, the ICJ also addresses the possible application of **the principle of *non-refoulement*** to individuals forced to flee an environment that has

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become threatening to their lives (para 378). However, the reference is brief, referring to the *Teitiota* communication from the UNHRC.

### – Issues Specific to Sea Level Rise

The ICJ also addresses the specific case of small island developing States facing sea level rise, which had highlighted their particular situation. On the one hand, it considers that States are not required to update the delimitations of their **maritime zones** (para 362) and, on the other hand, notes that "once a State is established, the disappearance of one of its constituent elements would not necessarily entail the loss of its **statehood**" (para 363).

## 3. Legal Consequences in the Event of States Violating their Obligations in respect of Climate Change

The obligations identified in international law may make States legally liable for breaches, on an *erga omnes* basis, entitling victims to reparation.

### – Establishment of State Responsibility

The ICJ recognises the special nature of climate change in para 421 and considers it necessary to clarify two issues that arise in the application of customary rules on State responsibility: attribution and causation.

The ICJ considers that the question of **attribution** does not pose any specific problem since "in principle, the rules on State responsibility under customary international law are capable of addressing a situation in which there exists a plurality of injured or responsible States [...] and that the responsibility of a single State for damage may be invoked without invoking the responsibility of all States that may be responsible" (para 430). It therefore concludes that: "in the climate change context, [...] each injured State may separately invoke the responsibility of every State which has committed an internationally wrongful act resulting in damage to the climate system and other parts of the environment. And where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act" (para 431).

Concerning the question of **causation**, "the Court concludes that while the causal link between the wrongful actions or omissions of a State and the harm arising from climate change is more tenuous than in the case of local sources of pollution, this does not mean that the identification of a causal link is impossible in the climate change context; it merely means that the causal link must be establish[illegible]igh

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an *in concreto* assessment while taking into account the aforementioned elements outlined by the Court" (para 438).

Fundamentally, "the Court considers that all States have a common interest in the protection of global environmental commons like the atmosphere and the high seas. Consequently, States' obligations pertaining to the protection of the climate system and other parts of the environment from anthropogenic GHG emissions, in particular the obligation to prevent significant transboundary harm under customary international law, are obligations ***erga omnes***. In the treaty context, the Court recalls that the UNFCCC and Paris Agreement acknowledge that climate change is 'a common concern of humankind' (UNFCCC, first preambular paragraph; Paris Agreement, eleventh preambular paragraph), requiring 'a global response' (Paris Agreement, Article 2). They seek to protect the essential interest of all States in the safeguarding of the climate system, which benefits the international community as a whole. As such, the Court considers that the obligations of States under these treaties are obligations ***erga omnes partes***" (para 440).

### – Legal Consequences of an Unlawful Act

While any State is entitled to bring proceedings against another State that has breached an *erga omnes* obligation, the ICJ specifies that "[t]here is, however, a difference between the position of injured States or specially affected States on the one hand, and that of non-injured States on the other, as concerns the availability of remedies. While a non-injured State may pursue a claim against a State in breach of a collective obligation, it may not claim reparation for itself. Rather, it may only make a claim for **cessation** of the wrongful act and **assurances and guarantees of non-repetition**, as well as for the performance of the obligation of reparation in the interest of the injured State or of the beneficiaries of the obligation breached" (para 443).

For the rest, the ICJ considers that the full range of legal consequences provided for by the law of responsibility may apply. "These include obligations of cessation and non-repetition, which are consequences that apply irrespective of the existence of harm, as well as the consequences requiring **full reparation**, including restitution, compensation and/or satisfaction. The Court also notes that breaches of States' obligations do not affect the continued duty of the responsible State to perform the obligation breached" (para 445). It refers to the classic forms of reparation available (paras 451–455), while specifying that "[t]he appropriate nature and quantum of reparations cannot be assessed in the abstract and depends on the circumstances of a particular case" (para 450).

## B. Discussion

Beyond the historical circumstances surrounding its adoption, [illegible] is notable in its operative part. It reflects the **importance** that the

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questions raised, which it explains go beyond the legal framework and "concern an existential problem of planetary proportions that imperils all forms of life and the very health of our planet" (para 456). Preventing significant damage to the climate system, notably through the reduction of greenhouse gas (GHG) emissions, and cooperating to this end are recognised as customary obligations, *erga omnes*, engaging the responsibility of States and giving rise to reparation. The ICJ considers that conventional climate law provides relevant guidelines in this regard, even for States that are not parties to the relevant treaties. The ICJ also retains 1.5 °C above pre-industrial levels as the standard below which States must keep the global average temperature increase, interpreting the Paris Agreement in light of the decisions taken at subsequent COPs. It is thus aligning itself with the advisory opinions of the ITLOS and the Inter-American Court of Human Rights, at a time when scientists are saying that exceeding this target is now inevitable. Still regarding the Paris Agreement, the ICJ considers that States have limited discretion in their nationally determined contributions and are required to exercise due diligence to achieve this standard collectively. It thus runs counter to the trend of States' reluctance to make any binding commitments in this area (Aykut and Dahan).

In a reading of the advisory opinion focused on human victims of climate change, and therefore on the anthropocentric obligations that the ICJ identifies in current international law, the ICJ seems to have set aside certain avenues, or not listened sufficiently to certain voices, in particular, but not only, the **small island developing States** behind the request. The latter are at the forefront of climate action (notably COP negotiations and ITLOS advisory opinions). The issue is existential for them in the short term, with a considerable proportion of their low-lying territories threatened by rising sea levels. By bringing their case before the ICJ, the small island developing States are raising an issue common to humanity but particularly affecting them. However, climate justice, which underpins the request, is treated in a formalistic and depoliticised manner. The issue of human (im)mobility[3], which will arise uniquely for these States but will also be part of all States' responses to climate change, is also addressed superficially.

# 1. A Formalistic and Depoliticised Climate Justice

> "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."[4]

It is with a quote from Anatole France that Judge Yusuf explains, in his separate opinion, his disagreement with the Court's general and abstract approach (para 8). He considers that the ICJ deliberately failed to answer the second question on the **legal consequences** by reformulating it in general terms. In paras 108 and 109, the ICJ thus considers that "it is not called upon to determine the responsib

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group of States under international law" or "any specific legal consequences with respect to particular injured States or groups of States". It also reiterates in para 406 that "the Court's task is to identify, in a general manner, the legal framework under which the conduct of States can be assessed in order to determine whether a State, or a group of States, is responsible for a breach of its obligations pertaining to the protection of the climate system".

According to Judge Yusuf, "[t]his is an approach rooted in extreme formalism and completely detached from the empirical realities and the scientific findings relating to the causes and consequences of climate change, as well as the generally acknowledged principle of common but differentiated responsibilities, which underpins the legal framework for combating the climate crisis for all" (para 8). He thus shares the opinion of Judge Sebutinde, who considers that the Court "ignores or circumvents the fact that **climate justice** is at the heart of the General Assembly's present request" and does not take sufficient account of the scientific evidence showing that historical and current emissions originate mainly from developed countries and affect more those countries that have contributed least to them (para 5). The judge considers that "[c]limate justice requires, at the very least, a recognition that there is an imbalance between the major polluters (constituting a small number of developed or industrialised countries) and the majority of States (comprising least developed and small island States) whose GHG emissions are negligible" (para 5).

Admittedly, the ICJ mentions the historical responsibility of certain States in the scientific context (para 80) and in the explanation of the **principle of common but differentiated responsibilities and respective capabilities** (CBDR-RC, paras 148–151). However, it does so only as an observation, without drawing any real legal consequences. The ICJ effectively reduces the principle of CBDR-RC to a variation of the principle of equity that guides the interpretation of international law without creating new obligations (para 151), which both Judge Sebutinde (paras 9–12) and Judge Xue (para 3) deplore. In their view, this cornerstone of international law has its own content, aiming at the equitable distribution of climate action efforts based on the historical responsibility of so-called developed States on the one hand and each State's financial and technological capacity on the other. Yet, in its assessment of the elements of due diligence required to comply with the customary obligation to prevent transboundary environmental harm, the ICJ limits itself to "respective capabilities" without taking into account the principle of CBDR-RC as a whole, i.e. including historical responsibility.

Furthermore, the ICJ identifies, without legal basis, a **new category of States** between so-called developed States and so-called developing States: those "that have progressed considerably in their development since the conclusion of the UNFCCC in 1992 [...] and some of which now contribute significantly to global GHG emissions and possess the capacity to engage in meaningful mitigation and adaptation efforts, as well as other States with significant resou

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capabilities to contribute to addressing global climate change" (para 150). Judge Xue considers, however, that "individual changes of States in their social and economic development do not negate the distinction of developed and developing countries that underlies the legal structure of the climate change treaty régime" (para 67). The distinction is not the result of a legal analysis but is established based on economic, social, human, and institutional development indicators by institutions such as the United Nations, the International Monetary Fund, and the World Bank, and has implications for international aid, in particular.

Furthermore, while the *current* share of emissions from **so-called developing States** in this intermediate category is increasing, their *per capita* emissions remain relatively low (separate opinion of Judge Xue, para 15) and their *past* emissions are minimal. This is all the more true if the emissions made by the colonial States at the time (as claimed in particular by the Organisation of African, Caribbean and Pacific States) and by the so-called developed States whose companies have relocated production (separate opinion of Judge Xue, para 74) are attributed to the latter rather than to the States on whose territory the activities took place. Judge Xue also emphasises the dilemmas that so-called developing States constantly face between their needs for climate change mitigation and adaptation and their needs for poverty eradication and development (paras 70–71).

**Past contributions** to GHG emissions are a crucial issue. Authors such as Dehm (with Riley Case and then Mason-Case) emphasise the need to obtain reparation for past emissions. On the one hand, past emissions are directly relevant today, since it is their accumulation in the atmosphere that leads to climate change (separate opinion of Judge Yusuf, para 13). While this did not constitute an internationally wrongful act likely to engage the responsibility of States until now, since they had not made any commitments to reduce their emissions at the time, the ICJ's recognition of a customary obligation to prevent significant damage to the climate system makes this argument possible today (see in particular para 427). On the other hand, it must also be recognised that past emissions have created the conditions conducive to asymmetries between and within States. Dehm thus regrets that the ICJ does not recognise the role that colonialism and capitalism have played and continue to play, even though this is a sufficiently consensual observation to be included in the latest IPCC report (AR6 WGII). However, this is not for lack of States raising these issues (Vanuatu, Saint Vincent and the Grenadines, Timor-Leste and the Cook Islands cited by Dehm).

Burkina Faso highlights "the extreme injustice of the situation of peoples, like the people of Burkina Faso, whose development has been held hostage in turn by slavery, **colonization**, the injustices of the global economic and financial system, and terrorism, only to be severely hampered, if not jeopardized, by the greenhouse gas emissions of the very same States that committed these historical crimes". Saint Lucia considers that "there can be no sustainable development witho Retirer des favoris nd

climate justice, as colonialism is a historic as well as an ongoing driver of the climate crisis. [...] the vulnerability of ecosystems and people in these countries to climate change has its roots in enslavement, historical patterns of inequity and colonialism, which has resulted in unsustainable ocean and land use. Under colonialism it was clear that the Caribbean was denied participation in Europe's industrialization process, and was confined to the role of producer and exporter of raw materials". Kiribati emphasises the position of those "States whose part of the conduct has been insignificant, which are exposed to a greater share of the risk, including a risk to their very survival and to the lives of their citizens, whose subjection to colonization involved robbing them of much of their natural resources, and whose resources are insufficient to address these risks". Bolivia points out that "the structural causes of climate change the current anthropocentric model, and in particular with the **capitalist** world system of the last two centuries, which has caused the current climate crisis and is modifying the life cycles of Mother Earth".

Such recognition is not theoretical, as it can lead to broader forms of **cooperation or assistance**, or even to **reparation**. (Neo)colonialism and capitalism constitute the framework that has allowed deep social inequalities and power relations to develop and that today reproduces them; they prevent the States that have been and continue to be victims from escaping a form of dependence on the perpetrator States. The modalities of cooperation, assistance or reparation could thus be part of this broader framework and take the form, for example, of debt relief, which some participants have advocated in the proceedings (separate opinion of Judge Sebutinde para 12, see also Petel). In her latest report (para 78), the Special Rapporteur on contemporary forms of racism, Achiume, recommends "[prioritizing] reparations for historical environmental and climate harms and for contemporary harms rooted in historic injustice". This refusal to commit to historical responsibility is also illustrated by the absence of the principle of intragenerational equity (recognised by Judge Xue, para 28), which goes further than the principle of CBDR-RC since it is not limited to the distribution of climate efforts but also aims to correct disparities between States, in particular through the transfer of funds or technology (Redgwell). For Judge Yusuf, however, the principle of CBDR-RC is also relevant for interpreting the duty of cooperation: "solidarity must rest on a genuine appreciation of historical disparities, present and future inequality, and a serious regard for the differentiated responsibilities firmly embedded in the existing international legal framework" (para 29).

As Tigre, Bönnemann and De Spiegeleer point out, two legal paradigms clash in the advisory opinion: law as a living instrument for climate justice on the one hand, and the prudence in respecting treaty limits and political sensitivities on the other. With regard to climate justice, the ICJ has opted for a diplomatic approach of **depoliticisation**: climate change is seen as an external threat to obscure issues of responsibility, power, and dependency relations (Ferguson and Herbeck). Watered-down language also fuels the veil of depolit

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interpretation of the terms of the request, the ICJ refers to States that "may have affected" (para 108) rather than States that "have caused harm" as stated in the request. Several judges also criticised the lack of specificity and tangibility in the ICJ's responses, particularly about the legal consequences (separate opinions of Judge Bhandari, para 4, and Judge Yusuf, para 2).

## 2. (Im)Mobility in a Changing Climate: The Bare Minimum

The questions put to the Court did not concern human mobility as such, although the preamble made a brief reference to it in relation to the consequences of climate change already suffered. Yet, nearly two thirds of the written submissions from States – excluding many from civil society – referred to it (McAdam). The ICJ, in its advisory opinion, does not entirely ignore the issue. It mentions displacement among the consequences of climate change in para 73, as well as in para 357 specifically in the context of sea level rise. However, from a legal point of view, it merely states the principle of *non-refoulement* by simply referring to the *Teitiota* case law of the UNHRC (para 378). Admittedly, the consolidation of minimum standards for international protection in the context of climate change is to be welcomed, and it is legitimate to give priority to environmental protection through what I have termed ecocentric obligations. Nevertheless, its understanding of human mobility – which has been clarified in recent years, notably in para 14f of the Cancún Adaptation Framework – suffers from several shortcomings, both in general and specifically for States that had hoped for a more substantial commitment to climate justice.

### – Consolidation of Minimum Achievements in International Protection

The ICJ refers to international protection in one paragraph (much to the regret of Judge Aurescu, who felt that the issue deserved more attention, para 25): "The Court considers that conditions resulting from climate change which are likely to endanger the lives of individuals may lead them to seek safety in another country or prevent them from returning to their own. In the view of the Court, States have obligations under the principle of non-refoulement where there are substantial grounds for believing that there is a real risk of irreparable harm to the right to life in breach of Article 6 of the ICCPR if individuals are returned to their country of origin (see Human Rights Committee, *Teitiota v. New Zealand*, 24 October 2019, UN doc. CCPR/C/127/D/2728/2016, para. 9.11)" (para 378).

When we read the words chosen by the ICJ carefully, we see that its **language** is cautious and forward-looking: it refers to conditions who "may lead" individuals to flee, as if this were not already the case today. However, the IPCC, w

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extensively in the advisory opinion, refers to displacement caused by extreme weather events as a *current* observation with high confidence (AR6 Synthesis Report, p. 51). The ICJ itself seems more assertive in defining the relevant scientific context when it emphasises that "[e]xtreme weather events [...] are becoming more frequent and intense, [...] displacing populations" (para 73).

The positive point is the recognition of the application of the **principle of *non-refoulement***, derived from human rights, in the context of climate change. However, by referring only to the *Teitiota* views from the UNHRC (for a commentary, see Courtoy), the ICJ does not allow us to overcome the pitfalls of this decision, in particular the question of "where the tipping point lay" since the author of the communication did not benefit from it in this case. Furthermore, the ICJ considers the principle of *non-refoulement* only from the perspective of the right to life, whereas it can generally be applied to any serious violation of human rights (UNHCR). The UNHRC, though, took a broad approach to the right to life, also examining socio-economic rights (Courtoy).

Furthermore, the ICJ does not mention **refugee law**, which must take precedence over subsidiary protection as it offers greater guarantees to individuals. Admittedly, the environment *per se* is not a ground for persecution within the meaning of the Geneva Convention. However, the doctrine (Kaldor Centre, Refugee Law Initiative) and bodies such as the United Nations High Commissioner for Refugees (2020, 2023) have now established a clear framework for when people threatened by climate change can be granted refugee status.

Indeed, climate change **interacts with other social, economic and political factors** that can lead to displacement. The ICJ itself recognises, in the section on human rights (in particular paras 382–384), that specific individuals have vulnerabilities that make them more likely to be affected by climate change. In her separate opinion, Judge Charlesworth refers to groups vulnerable to climate change, including potential intersections between different vulnerabilities, which must be taken into account in accordance with the principles of equality and non-discrimination (paras 13–29).

McAdam also sees in the ICJ's advisory opinion a possible new line of argument on this issue based on the **right to a clean, healthy and sustainable environment**, which the ICJ has recognised as an essential prerequisite for the enjoyment of many other rights (para 393). The author considers that "[a] failure by authorities to guard against known future climate risks could support a claim to international protection, at least in situations where risk reduction actions would not pose '[a]n impossible or disproportionate burden' on the government (referring to Budayeva v Russia, para 135)" (Kaldor Centre).

## – A Legitimate Focus on Environmental Protection and Adaptation in situ

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The need to protect the environment *in order to* protect human rights helps explain the advisory opinion's focus on what I have termed ecocentric obligations, with only a secondary consideration of so-called anthropocentric obligations. This echoes the treatment of climate change adaptation in international negotiations, which has long been taboo for fear that it would distract from the urgency of reducing emissions and mitigating climate change (Gemenne). While it is now recognised that adaptation is necessary, if only to deal with the consequences of emissions already present in the atmosphere, this certainly does not call into question the importance of reducing emissions and should not lead to the **assumption that displacement is inevitable** (Boas *et al.*). Giving priority to protecting the environment also meets the expectations of victims, whose primary wish is often to be able to stay where they are.

This issue is crucial for **small island developing States**, for whom discourses trivialising the prospect of having to leave their islands are intolerable. As the Maldives stated during the oral proceedings: "The Maldives has a will to survive. It refuses to accept relocation of Maldivians as an inevitability" (para 18). "We are a civilization that is thousands of years old, and we have no intention of abandoning our homeland. We have the right to live on the land to which we have unbreakable social, cultural and economic ties and where our families have lived for countless generations" (para 5). Tuvalu, in its written statement, declares: "To be clear, for Tuvalu and its people, displacement is not an acceptable response to the climate crisis [...]. The prerogative and 'priority of the Tuvaluan people is to stay and to continue living on their God-given land'" (para 59).

In their written statement, the Cook Islands also explain: "In the Cook Islands, the significance of one's ties to their 'ipukarea' inherited land, homeland, ancestral home is profound. Contemplating the loss of belonging to one's place, to one's ancestral home is more than a loss of indigenous ties to land sea and sky, it is a loss of deep belonging to one's generations past, present and future. Following the birth of a child, it is customary to bury the placenta on ones inherited land. Thereby maintaining the spiritual ancestral ties between past and future generations to their lands. To be without a connection to one's land, diminishes a fundamental interconnected dimension of holistic wellbeing" (para 109, citing an expert report).

Based on this observation, researchers working on the nexus of human mobility and climate have shown interest in **voluntary immobility** (Farbotko, here and here). In this field of study, it is now commonly accepted that the issue of human mobility is intrinsically linked to immobility and *in situ* adaptation (Zickgraf, Thomas *et al.*). I would also add that none of these can be studied without considering their impact on the environment and climate change mitigation, as part of a holistic approach to planning the response to a changing environment. Judge Xue seems to be calling for this approach when she emphasises – while regretting that the Court did not do so – the need for an integrated approach to the implementation of

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taking into account economic, social, environmental and human rights issues, with a view to sustainable development and poverty eradication (para 2, also para 50).

The focus on mobility rather than the absence of mobility stems from a sedentary bias, from which flows the Western idea that all individuals, if given the choice, would prefer not to move and that migration is therefore a problem to be solved (Fröhlich and Klepp; Castles). However, mobility, whether within or across borders, can be a **form of adaptation** for individuals, for themselves or their loved ones, sometimes even allowing them to remain in place (see the literature on remittances, notably Brüning). While this may seem to contradict the above observation that individuals often wish to remain at home, it is important to note that not all forms of mobility are the same. As the Cook Islands pointed out: "Climate mobility is not what Cook Islands people want. […] Just because Cook Islands people have demonstrated considerable innovation as mobile people, does not mean that they have an unqualified predisposition to move. Being mobile is not the same as being a climate migrant forced to move because of the impacts of climate change" (para 110, citing an expert report).

The key is to let States and their citizens decide when and how to respond to a changing environment, in accordance with the **principle of self-determination** (see the statements made by several States in this regard, including Tuvalu, Vanuatu, Kiribati, the Cook Islands, Saint Vincent and the Grenadines, Madagascar, Sierra Leone, Mauritius, the Solomon Islands, Liechtenstein, Nauru, the Dominican Republic, Timor-Leste, Kenya, Bangladesh, Burkina Faso, Costa Rica, Micronesia, and the Comoros).

## – A Very Partial Understanding of the Issues of Human (Im)Mobility and Silence on Solidarity Mechanisms

Thus, the concept of human (im)mobility and the role of law in this regard have evolved considerably (Courtoy). Numerous studies (Kaldor Centre Principles on Climate Mobility, Agenda Nansen) have been carried out to summarise the **diversity of measures** that need to be taken in order to address the challenges of human (im)mobility in a context of environmental degradation, and these measures go far beyond international protection. In another paper (Courtoy), I explained how the Refugee Convention, even if revised, even if taking into account the principle of *non-refoulement*, the application of which is not conditional on specific grounds, would not be sufficient to satisfactorily address the needs in this area, simply because it is a palliative tool, limited to cross-border movements, *vis-à-vis* States that are unwilling or unable to act to protect their citizens, where planning that places States and their citizens at the centre of the response is necessary.

In their oral presentation, the Netherlands referred to this **planning** concern. of which they are well aware given their situation. Indeed, "the Netherlar

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always faced the necessity to adapt to nature. Luctor et emergo, struggle and emerge, is the motto of the province of Zeeland ('Sealand'), which has been particularly vulnerable to high tides. Land and water have been and continue to be shaped by the forces of nature and humans" (para 3). Among the strategies studied by the State to respond to the long-term risk in the Dutch delta, the Netherlands identifies in particular the flexibility strategy, which involves "the reduction of vulnerability to the effects of higher sea-level rise by means of water- or salt-tolerant land use, such as floating buildings and infrastructure on piles [...] spatial planning and/or relocation" (Deltares report).

This planning therefore also includes **relocation**, particularly in coastal areas where it may be necessary to rethink the layout in order to leave space for the sea (see the popularity of the term "integrated coastal zone management" in Courtoy), or for the most vulnerable people who will not be able to move on their own (oral presentation by Kiribati in para 10, see the concept of "trapped populations" in the literature, notably van der Geest *et al.*). However, this option is not without risk of instrumentalisation, as was the case with development projects (Cernea and Maldonado). Guidelines (Guidance and Toolbox) have been identified to avoid such abuses. Nevertheless, tensions remain between the potential of relocation for protecting the right to life and the threat it poses to cultural rights, in particular, as illustrated in the communication *Daniel Billy* of the UNHRC (for a commentary, see Courtoy).

Furthermore, it has long been known that climate change-induced mobility will primarily occur within countries (Groundswell). The ICJ mentions **internal displacement** as a fact (para 357) but does not refer to the relevant legal framework in this area, even though it has developed in recent decades (Kälin, Cantor). States must therefore establish a legal framework and mechanisms capable of organising evacuations, if necessary, and of respecting the rights of individuals as identified in the Guiding Principles.

In this sense, the role of the international community is primarily to provide **financial and technical support** to enable affected States to make their own decisions on adaptation planning and mobility management, and, above all, to put them into practice. As the Maldives stated in their oral presentation: "Small island developing States have no desire to be passive victims of climate change. The duty to cooperate, in its many aspects, is a vehicle for granting them agency" (para 19). The principle of self-determination is central and requires an obligation to cooperate in line with the principle of common but differentiated responsibilities and respective capabilities. Although the ICJ affirms that the duty to cooperate is an obligation under customary (para 308 above) and treaty international law (para 140), it treats this obligation uniformly, without accounting for disparities among groups of States, to the detriment of climate justice. Perhaps the new Loss and Damage Fund, one of whose objectives is "promoting equitable, safe and dignified human mobility in th Retirer des favoris nt,

relocation and migration in cases of temporary and permanent loss and damage" (para 9), could be a first step in this direction.

Another form of cooperation, highlighted by Portugal and the Netherlands in their interventions, is access to **legal pathways for dignified migration** for those who resort to displacement outside their borders (in line with Kiribati's policy of "migration with dignity"). The ICJ's brief mention of the principle of *non-refoulement* does not provide an answer to this question since, even assuming that it is applied to specific cases in order to understand its exact scope, it would in any case only apply to individuals in situations so extreme that they threaten their lives and could not offer valid means of adaptation to those who leave before the situation reaches a critical stage. Some States had thus mentioned innovative frameworks, notably the Falepili Union Treaty between Australia and Tuvalu (for a commentary, see Briard).

# 3. Conclusion

Some commentators criticise the International Court of Justice for being cautious, while others consider it too activist. What can be noted is a convergence among judicial bodies towards limiting the discretionary power of States in areas where the argument of separation of powers was more controversial just a few years ago. The ICJ recognises that the climate threat is significant enough to cause substantial environmental damage and to give rise to a customary obligation of prevention. It therefore does not matter whether or not States have made climate commitments; they have a duty not to infringe on the rights of other States. This is a **significant** step forward, and the advisory opinion – which carries considerable weight despite its non-binding nature (Jean) – has already had several repercussions on States (notably in Canada, South Korea and the Council of Europe).

The ICJ was not really asked about **human mobility**, but the vast majority of States mentioned it. While it affirms the relevance of the principle of *non-refoulement* in climate matters, its conditional language seems at odds with the scientific findings on which it is otherwise based. As for **climate justice**, the ICJ seems to be sparing sensibilities by surrounding it with a veil of formalism. In doing so, it loses the force of the historical argument, which it develops only as a fact without drawing any real legal conclusions. In his statement, Judge Tladi seems to be leaving it up to the powerful of this world: "[A] complete solution to the climate change problem requires [...] those in decision-making positions to make the right choices for the sake of the future of our planet. [...] I still maintain modest hope. Modest hope that those in positions of power will realize, before it is too late, that money cannot be eaten[5]. Hope, that future generations will make better choices" (paras 38–39).

What is implicit, however, is the dissonance between those who make the decisions and those who suffer the consequences. The principle of common but differentiated

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responsibilities and respective capabilities enshrines this state of affairs in law: the role of the law is precisely to correct it. Provided that it is seized upon.

# C. Suggested Reading

**To read the advisory opinion:** ICJ, Advisory Opinion of 23 July 2025, *Obligations of States in respect of climate change*.

**Case law:**

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[1] The advisory opinion was drafted in French and English, with the French text being authoritative.

[2] The terminology is that used in international climate law.

[3] On the choice of this term, see Boas *et al*. and Zickgraf.

[4] *Separate opinions* are only available in the language chosen by their author from among the two official languages of the ICJ (French and English); I have therefore quoted them in their original language. The *written third-party interventions* were drafted by their authors in one of the two official languages of the ICJ but unofficially translated into the other by the ICJ Registry; I have therefore always quoted the English version. The *oral third-party interventions* are available only in the language chosen by their authors from among the two official languages of the ICJ; I have therefore quoted them in their original language.

[5] Judge Tladi states that he was inspired by an old proverb attributed to the Cree people: “Only when the last tree has been cut, only when the last river has been poisoned, only when the last fish has been caught, only then we will realize, that money cannot be eaten.”

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