What advisory opinion of ICJ on states' obligations on climate change means for climate finance for Africa

OPINION BY
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The Advisory Opinion

The long awaited ICJ Advisory opinion on states obligation on Climate Change is finally here! It says that government actions driving climate change are illegal, and states are legally bound to cut their emissions and compensate vulnerable nations for the harm they have caused. This implies that countries need to get serious about tackling climate change as soon as possible. This is huge. The ICJ is basically saying states must work together to cut emissions, honor global climate agreements, and protect vulnerable communities and ecosystems. The Court even declared that having a "clean, healthy, and sustainable environment" is a fundamental human right.

If countries fail to take action to protect the planet, it could constitute a violation of international law. Judge Yuji Iwasawa emphasized that "States must cooperate to achieve concrete emission reduction targets." If countries fail to comply with the stringent obligations outlined in climate treaties, that constitutes a breach of international law. The Court also made it clear that countries are responsible for the actions of companies under their jurisdiction or control, which means they need to rein in fossil fuel production.

Background To the Advisory Opinion

This initiative's roots go back to a 2019 grassroots movement spearheaded by Pacific Island youth - the Pacific Islands Students Fighting Climate Change (PISFCC). These young leaders, who are on the frontlines of the climate crisis, showed determination and vision. In March 2019, they took action, writing to all Pacific governments to seek support for their proposal for an ICJ advisory opinion. Their efforts paid off, gaining backing from regional leaders and, crucially, Vanuatu's Foreign Minister who with others, would champion the course to secure the UNGA resolution for this.

In 2023, the UN General Assembly, under Article 96 of the Charter of the United Nations, decided to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to render an advisory opinion on the following question:

“Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment,

a. What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations?
b. What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:

    i. 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?
    ii. Peoples and individuals of the present and future generations affected by the adverse effects of climate change?”

The decision to request this Advisory Opinion was taken as the UNGA noted with utmost concern the scientific consensus, expressed, inter alia, in the reports of the Intergovernmental Panel on Climate Change, including that anthropogenic emissions of greenhouses gases are unequivocally the dominant cause of the global warming observed since the mid-20th century, that human-induced climate change, including more frequent and intense extreme events, has caused widespread adverse impacts and related losses and damages to nature and people, beyond natural climate variability, and that across sectors and regions the most vulnerable people and systems are observed to be disproportionately affected.

As the opinion was awaited UNGA continued emphasising the urgency of scaling up action and support, including finance, capacity-building and technology transfer, to enhance adaptive capacity and to implement collaborative approaches for effectively responding to the adverse effects of climate change, as well as for averting, minimizing and addressing loss and damage associated with those effects in developing countries that are particularly vulnerable to these effects.

Provision of climate finance has always been an emotive issue that has perpetually widened the North-South divide over who has the obligation to provide climate finance and on what terms. In recent years, this scenario has characterised climate negotiations, leaving developing countries with the impression that developed countries keep making climate finance discussions a “red flag” as though developing countries are just begging or are simply money minded. This could even be seen during this ICJ process when many developed country states raised the *lex specialis* argument, which suggests that the specific treaty regimes related to climate change – such as the UNFCCC and the Paris Agreement – should be considered as the primary or only source of law for determining states’ obligations in relation to climate change.

This is threat to climate justice and now that this *lex specialis* argument was rejected by the Court and with the unequivocal Advisory Opinion of the ICJ stating that states are legally bound to cut their emissions and compensate vulnerable nations for the harm they have caused, there is a need to look at Climate Change and Climate Finance (especially adaptation finance) negotiations from a Transitional Justice perspective.

The Urgent Need for A Transitional Justice Approach to Climate (Adaptation) Finance

Historical Responsibility: Developed countries have contributed significantly more to greenhouse gas emissions historically. A transitional justice approach acknowledges this responsibility and aims to correct historical injustices by ensuring these countries contribute more to climate finance. It is true, we all have to "clean the climate mess," but in doing so, we should not forget who created the mess and continued to do so, who benefited from the mess and continued to do so, who can stop the mess and has the capacity to do so. This is what the Principle of Common but Differentiated Responsibility according to Respective Capabilities (CBDR), which is a cornerstone of the Framework Convention on Climate Change, is all about. Again, remember, the impacts of climate change are already there and are increasing daily. The Paris agreement is very clear about who should provide the money, for whom and for what purposes. Article 9, paragraphs 1 and 2 state that:

1. *Developed country Parties shall provide financial resources to assist developing country Parties for both mitigation and adaptation in continuation of their existing obligations under the Convention.*
2. *Other Parties are encouraged to provide or continue to provide such support voluntarily.*

If everyone must put their hands on deck to stop and clean the climate mess, money is needed, and therefore, developed countries are obliged to provide the money for developing countries to do so. Other parties (non-developed countries) are *encouraged* (not obliged) to provide or (for those who have already been doing so) continue to provide such support *voluntarily*.

Vulnerable Populations and Equitable Distribution: Climate change disproportionately affects vulnerable populations in developing countries, who often lack the resources to adapt. Transitional justice ensures that these communities receive the necessary support to cope with climate impacts. The provision of climate Finance should be anchored on the felt needs (not quick fixing) of **developing** countries. Transitional justice promotes the equitable distribution of climate finance, ensuring that funds are allocated based on need and vulnerability rather than political or economic influence.

For this reason Article 9.3 states that :*As part of a global effort, developed country Parties should continue to take the lead in mobilizing climate finance from a wide variety of sources, instruments and channels, noting the significant role of public funds, through a variety of actions, including supporting country-driven strategies, and taking into account the needs and priorities of developing country Parties. Such mobilization of climate finance should represent a progression beyond previous efforts*. What, therefore, are the felt needs and priorities of developing countries? In general, the priority needs of developing countries, especially Africa, are adapting to the present and future impacts of climate change, poverty eradication, sustainable development, and finally mitigation. It means developed countries should provide money mostly in the form of grants to help them cope with the impacts of climate change that they never caused in the first place.

Grants, not loans, because "*you cannot set fire on someone's house and sell them the fire extinguisher or, worse still, loan them money to rebuild it*." Article 9.4 provides that: "*The provision of scaled-up financial resources should aim to achieve a balance between adaptation and mitigation, taking into account country-driven strategies, and the priorities and needs of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change and have significant capacity constraints, such as the least developed countries and small island developing States, considering the need for public and grant-based resources for adaptation.*"

Reparations and Redress: By framing climate finance through a transitional justice lens, there is a focus on reparations and redress for communities that have suffered losses and damages due to climate change, promoting healing and reconciliation. The past decades have shown us that "political feel-good announcements" that developed countries make on the stage each time we have a big meeting have not helped. We have heard this so many times! We have had experiences where developed countries turn around and baptize anything as climate finance.

Attempts to count activities such as efforts to stop illegal immigration from Africa to Europe and space research as climate finance are just a few of them. Predictability, therefore, remains key, and for that reason, the 5th paragraph of Article 9 provides that " *Developed country Parties shall biennially communicate indicative quantitative and qualitative information related to paragraphs 1 and 3 of this Article, as applicable, including, as available, projected levels of public financial resources to be provided to developing country Parties. Other Parties providing resources are encouraged to communicate biennially such information on a voluntary basis.*"

Participation, Inclusion and Trust Building: A transitional justice approach ensures that affected communities are actively involved in climate finance decision-making processes, promoting transparency, accountability, and inclusivity. Moreover, incorporating principles of transitional justice can build trust between developed and developing countries, fostering better cooperation and more effective climate action.

In providing this financial support to developing countries, developed countries have to show utmost transparency by providing timely and useful information about it. Article 9.7 provides thus: "Developed country Parties shall provide transparent and consistent information on support for developing country Parties provided and mobilized through public interventions biennially in accordance with the modalities, procedures and guidelines to be adopted by the Conference of the Parties serving as the meeting of the Parties to this Agreement, at its first session, as stipulated in Article 13, paragraph 13. Other Parties are encouraged to do so."

Conclusion: The ICJ's Advisory Opinion on climate change presents an opportunity to re-think climate adaptation finance negotiations because it clarifies states' obligations under international law and strengthens the legal basis for climate action, potentially leading to increased financial support for vulnerable nations. By clarifying these obligations, the opinion will help unlock stalled negotiations, strengthen demands for climate finance, and reinforce the need for action rooted in science. By rejecting the lex specialis argument, the ICJ affirms that obligations related to climate change extend beyond the UNFCCC and Paris Agreement, applying even to states not party to those treaties.

A Transitional Justice approach in climate adaptation finance negotiations will therefore help in addressing past injustices and ensuring fair treatment of all parties lays a foundation for long-term sustainability and resilience, creating a more just and equitable global response to climate change. Overall, integrating transitional justice into climate finance negotiations can help rectify historical wrongs, ensure fair distribution of resources, and support vulnerable populations in adapting to and mitigating the impacts of climate change.

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