SEPARATE OPINION OF VICE-PRESIDENT SEBUTINDE

The Advisory Opinion falls short in fully addressing the questions posed by the General Assembly —It lacks comprehensive and clear answers, particularly regarding the legal implications of climate change for present and future generations, as well as for least developed and small island States. These States are especially vulnerable to climate change due to their geographical and developmental circumstances — The opinion does not adequately recognize the imbalance between major polluters and States with negligible greenhouse gas emissions —It also fails to emphasize the obligation of States to protect the climate for vulnerable communities whose habitat or cultural way of life is affected by climate change, and to ensure a sustainable and equitable world — The Court takes an overly cautious approach to the effects of sea level rise on statehood and the right to self-determination — The principle of common but differentiated responsibilities and respective capabilities (CBDR-RC), which promotes fairness in climate action, should have been more thoroughly explored — Issues pertaining to State responsibility, such as attribution and causation, should be reserved for contentious proceedings and are beyond the scope of the General Assembly's request.

I. SCOPE OF THE GENERAL ASSEMBLY'S QUESTIONS

1. I have participated in the unanimous vote regarding the various obligations of States identified in paragraph 457, subparagraph 3, of the Advisory Opinion, as well as the unanimous vote regarding the various legal consequences identified in paragraph 457, subparagraph 4, thereof. Regrettably, however, I am of the view that the Advisory Opinion does not go far enough in interpreting the full scope of the two questions put to it by the General Assembly. As a result of the narrow interpretation, the conclusions that the Court has reached in answering question *(a)* (legal obligations for States), as well as question *(b)* (consequences for breach of those obligations), are not as comprehensive and succinct as one would have wished. In this separate opinion, I will only comment on a few key areas in the Advisory Opinion that, in my view, could have been handled differently.

2. Pursuant to Article 65 of the Statute of the Court, the General Assembly in its resolution 77/276 requested the Court to render an advisory opinion on the following questions:

> "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?"

3. As far as question *(a)* is concerned, the General Assembly expects the Court to address the obligations of States under international law not only towards other States in general, but specifically "*for present and future generations*" (emphasis added). The General Assembly, in the preamble to its resolution 77/276, recognized that the "*well-being of present and future generations of humankind*" depends on our immediate and urgent response to the challenge posed by climate change to the whole of civilization, and recalled that it has passed many resolutions and decisions "*relating to the protection of the global climate for present and future generations of humankind*" (emphasis added). In my view, the Advisory Opinion glosses over these important aspects of the request and does not go far enough in addressing them in answering question *(a)*.

4. Similarly, regarding question *(b)*, the General Assembly expects the Court, in addressing the legal consequences stemming from the violation of obligations identified under question *(a)*, to consider the legal implications for 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". As noted in the preamble, this group includes "the *least developed countries and small island developing States*" (emphasis added). Additionally, the Court is expected to address the legal consequences for "*[p]eoples and individuals of the present and future generations*" impacted by climate change (emphasis added). Regrettably, the Advisory Opinion does not, when addressing the legal consequences, give much attention to the above categories of subjects, thus failing to explore the full scope of question *(b)*.

5. Furthermore, the Court's Advisory Opinion also ignores or circumvents the fact that climate justice is at the heart of the General Assembly's present request for an advisory opinion. The Advisory Opinion downplays the fact that, historically, it has been scientifically recognized that "the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per capita emissions of developing countries are still relatively low and that the share of global emissions originating in developed countries will grow to meet their social and development needs" (preamble to the United Nations Framework Convention on Climate Change (UNFCCC)). Furthermore, the Intergovernmental Panel on Climate Change (IPCC) has scientifically established that those States that have historically contributed the lowest amounts of greenhouse gas emissions (GHGs) also happen to suffer the worst effects of that climate change and environmental harm, oftentimes resulting in a threat to their very existence as States. Consequently, I respectfully disagree with the narrow interpretation expressed in paragraphs 101-110 of the Advisory Opinion, in particular paragraphs 109 and 110. Climate justice requires, at the very least, a recognition that there is an imbalance between the major polluters (constituting a small number of developed or industrialized countries) and the majority of States (comprising least developed and small island States) whose GHG emissions are negligible. The fact that these latter States have faced and are likely to face greater levels of climate change-related harm due to their geographical circumstances and level of development, despite their negligible contribution to GHG emissions, should not be downplayed and is at the very heart of both questions *(a)* and *(b)*. The Court should have recognized and addressed this important aspect of climate justice when answering the two questions.

6. In a similar vein, paragraph 111 of the Advisory Opinion fails to recognize that as part of climate justice, the legal obligations owed by polluting States are owed not only to "other States" but also towards "*[p]eoples and individuals of the present and future generations*". The 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. It is self-evident that the General Assembly recognized these communities as

being "particularly vulnerable" to the adverse effects of climate change and expected the Court to address their plight in answering the two questions put by the General Assembly. Unfortunately, the Advisory Opinion in paragraph 111 appears to conflate issues of *locus standi* in the context of contentious proceedings, with the rights of these communities to a clean, healthy and sustainable environment, for example.

7. The phrase "present and future generations" refers to all individuals currently living (present generations) and those who will be born or live in the future (future generations). This concept emphasizes the responsibility of States and non-State actors to consider the long-term impacts of their actions and policies, particularly in relation to climate change and protection of the environment, to ensure a sustainable and equitable world for both current and future inhabitants. States have a legal obligation both to present and future generations not to render planet Earth unliveable. I am reminded of a wise African saying that captures this sentiment: "We do not inherit the Earth from our ancestors; we borrow it from our children." This proverb emphasizes the responsibility that present generations have towards future generations to take care of our planet. In my view, the Advisory Opinion should not have confused this important aspect with the question of *locus standi* of any individuals or "Peoples" to bring a claim for damages against an errant State or group of States, a matter that would only arise in the context of contentious proceedings. The Advisory Opinion should have confirmed, in the reasoning and in the operative paragraph 457, the fact that States owe the identified obligations to protect the climate system from the adverse effects of GHG emissions and from significant environmental harm not only to present generations but also to future generations. Instead, the Advisory Opinion employs vague language in paragraph 157, leaving it in the hands of each State to take "[d]ue regard for the interests of future generations" in the formulation of its policies.

II. OBLIGATIONS IN RELATION TO SEA LEVEL RISE, STATEHOOD AND THE RIGHT TO SELF-DETERMINATION

8. Despite many participants, and especially small island States, expressing concerns about the effects of climate change on their statehood and right to self-determination, the Advisory Opinion does not go far enough in addressing the adverse effects of climate change on the *jus cogens* right to self-determination. In a few paragraphs peppered here and there (Advisory Opinion, paras. 355-365), the Court rehearses the concerns of "some participants" on the issues of loss of statehood, loss of territory and forced displacement of peoples. After rehearsing the various concerns of affected States, the Court takes an overly cautious approach stating in paragraph 362 of the Advisory Opinion that,

> "the provisions of UNCLOS do not require States parties, in the context of physical changes resulting from climate-change related sea level rise, to update their charts or lists of geographical co-ordinates that show the baselines and outer limit lines of their maritime zones once they have been duly established in conformity with the Convention. For this reason, States parties to UNCLOS are under no obligation to update such charts or lists of geographical co-ordinates."

The Court also notes in paragraph 363 of the Advisory Opinion that "once a State is established, the disappearance of one of its constituent elements would not necessarily entail the loss of its statehood". In my view, such statements are little comfort to those small island States that are in imminent danger of losing substantial territory or completely disappearing off the map due to sea level rise. The Advisory Opinion could have better articulated the adverse effects of climate change on the right to self-determination of such States by confirming in the operative paragraph 457 the obligation incumbent upon all States to take all necessary measures to protect the right of the most vulnerable States to self-determination. In addition, the Advisory Opinion could have more clearly highlighted the presumption that the loss by a State of its territory due to climate-related sea level rise shall not lead to the loss of its statehood or maritime entitlements.

III. THE COURT HAS PRESENTED A NARROW VIEW OF THE ANSWER TO QUESTION *(B)*

9. Despite submissions by many States, especially those falling in the categories of least developed countries and "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", the Court has given practically no consideration to the many innovative ideas and solutions that were proposed by these States in order to enhance global climate justice. In particular, the Advisory Opinion downplays the importance of the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC) by equating it to "equity" (Advisory Opinion, paras. 148-151). The principle of CBDR-RC is a cornerstone principle of international law which aims to ensure fairness in how the burden of climate action is shared. On the one hand, the principle acknowledges the historical responsibility of developed or industrialized States for the bulk of GHG emissions, while on the other, encouraging all countries to contribute to mitigation efforts according to their respective means. Notably, the principle, which is referenced in Article 3 (1) of the UNFCCC, Article 10 of the Kyoto Protocol and Articles 2 (2) and 4 (3) of the Paris Agreement, entails the "common responsibility" shared by all countries to work together to combat climate change.

10. The principle further recognizes that the responsibilities of States, though common, are not identical. They are "differentiated" in that developed countries, having historically contributed more to the emission of GHGs and therefore global warming, and having greater financial and technological capabilities to address it, should take the lead in mitigation efforts. Moreover, "respective capabilities" means that the responsibilities of each country are also based on their ability to address climate change, considering their current economic and technological capacities which evolve over time. In other words, mitigation and adaptation measures must be continually assessed according to a State's capacity and level of development. The principle of CBDR-RC aims to ensure fairness and equity in global climate action, recognizing the varying levels of development and resources among nations.

11. In my view, the Advisory Opinion fails to boldly articulate the above components of the principle of CBDR-RC, instead equating it to "equity" (Advisory Opinion, paras. 148-154). Given the importance that States have given the principle of CBDR-RC, *inter alia*, in the said climate treaties, the Advisory Opinion should have better and more comprehensively reflected this principle in the final paragraph 457 in the stipulation of the obligations. For example, the Opinion should have stated in paragraph 457, subparagraph 3 (A) *(b)*, that

> "States listed in Annex 1 to the UNFCCC have additional obligations in line with the principle of CBDR-RC, to take the lead in combating climate change, including by limiting their GHG emissions, enhancing their GHG sinks and reservoirs, and through technological and financial transfers to States with less capabilities to combat climate change".

12. To further demonstrate the applicability of the principle of CBDR-RC, the Advisory Opinion should, in articulating the various legal consequences and potential remedies available to injured States, have included some of the innovative remedial measures proposed by several developing States who, at the same time, are heavily or chronically indebted to developed or industrialized States. In that regard, it is important to state that reparation measures may vary according to the national circumstances of a particular affected State (Advisory Opinion, paras. 449-455). For example, the Advisory Opinion should have included in the reasoning that appropriate reparation may include such remedies as monetary compensation, reforestation, biodiversity recovery, coastal erosion prevention, disaster or debt relief, technological transfer and infrastructural rebuilding.

IV. MATTERS OUTSIDE THE SCOPE OF THE GENERAL ASSEMBLY'S REQUEST

13. In my respectful opinion, the Court has spent unnecessary effort in volunteering an opinion on matters that fall outside the scope of the two questions comprised in the request of the General Assembly. In my view, the part of the Advisory Opinion relating to "Determination of State responsibility in the climate change context" (paras. 421-424), "Questions relating to attribution" (paras. 425-432) and "Questions relating to causation" (paras. 433-438) are all matters that would arise and need to be addressed in the context of contentious proceedings. These are matters that have no bearing whatsoever on 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" (question *(a)*). Nor do they have a bearing upon 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" (question *(b)*). In the interest of judicial economy these paragraphs should have been omitted from the Advisory Opinion.

(Signed) Julia SEBUTINDE.