The Evasion of Historical Responsibility?

Colonialism, Temporality and Reparative Justice in the ICJ's Climate Advisory Opinion

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The International Court of Justice's (ICJ) advisory opinion on *Obligations of States in Respect of Climate Change* has been celebrated as marking the start of a "new era of climate reparations." The question of how the ICJ engaged with reparations has already been examined in two other posts in this series (here and here). In my contribution, I want to draw attention to how, even as the ICJ opened the door to climate reparations, it was evasive on the key temporal questions that are central to any future claims about reparations owed by individual countries for their historical greenhouse gas emissions. Additionally, the advisory opinion avoided addressing how colonial histories continue to shape present-day climate injustices and the need to decolonize international law.

Why do historical greenhouse gas emissions matter?

Reparations for historical greenhouse gas emissions are a central aspect of climate justice, and demands for such reparations have been made by small-island states and climate-vulnerable countries since before the *United Nations Framework Convention on Climate Change* (UNFCCC) was adopted in 1992 (see here and here).

As the ICJ noted in its advisory opinion, it is the accumulation of greenhouse gases in the atmosphere that is causing significant harm to the climate system (para. 72), and thus unequal historical emissions are directly relevant to understanding present-day harms. The ICJ quoted the findings of Working Group III of the Intergovernmental Panel on Climate Change that "the three developing regions together contributed 28% to cumulative CO_2 FFI [carbon dioxide from fossil fuels and industrial processes] emissions between 1850 and 2019, whereas Developed Countries contributed 57% and Least-Developed Countries contributed 0.4%" (para. 80).

Historical emissions matter, not just because they have caused serious harm (which they have), or because they appropriated atmospheric space (which they also have), but because of what these emissions enabled and the world they produced. They enabled colonial suppression "abroad" and class and racial suppression "at home," which helped lay the foundations for the contemporary, unjust, and unequal international legal order (as Sarah Riley-Case and I have argued elsewhere). Historical emissions are constitutive not only of the climate crisis, but also "constitutive in enabling the conditions of dispossession, violence, slavery, racial difference and uneven wellbeing that did – and continue to – generate stark asymmetries between and within countries".

Applicability of customary duty to prevent harm and principles of State responsibility

One of the most significant aspects of the ICJ's advisory opinion is the court's affirmation of the applicability of broader principles of general international law to the climate crisis (see the contribution by Wewerinke-Singh to this symposium). While many high-polluting States argued that the applicable law of obligations is that contained in the specialized climate treaties – the UNFCCC, Kyoto Protocol, and Paris Agreement – climate vulnerable countries argued that the broader corpus of international law is applicable to climate change, and the obligations in those treaties should be read within this broader "normative context." The ICJ agreed with the arguments of climate vulnerable countries and identified other treaty and customary obligations as part of the "most directly relevant applicable law" (para. 132-139). This included,

most significantly for reparations claims, the customary law duty to prevent significant harm to the environment. Moreover, the ICJ identified that the obligation to act with due diligence was "stringent" (para. 138).

While high-polluting States tried to argue that questions of breach are governed solely or primarily by the climate change treaty framework, the ICJ agreed with the submissions made by climate-vulnerable States that general rules on State responsibility apply (para. 418). While the ICJ only spoke in general terms about consequences for breach, it identified as applicable a State's duty of cessation and guarantees of non-repetition, satisfaction, and the duty to make reparations, provided "a sufficiently direct and certain causal nexus between the wrongful act . . . and the injury suffered" can be shown (para. 436).

Evasiveness on temporal questions

Despite these important pronouncements, the ICJ was evasive about the temporal aspects relevant both to the existence of customary obligations and their breach. In discussing the temporal scope of the request for an advisory opinion, the ICJ identified that issues of temporality were relevant to both question (a) about the obligations of States to protect the climate system, as well as question (b) about the legal consequences for breaches of these obligations (para. 97).

With regard to question (a), the ICJ acknowledged that there was an unresolved and highly contested question as to when there was a "crystallization and identification of obligations for States" to protect the climate system (para. 97). The identification of this moment of crystallization has important legal implications for question (b) given the requirement that an "international obligation is 'in force' when the conduct allegedly leading to the breach occurred" (para 97). Additionally, the ICJ acknowledged a related temporal question as to when there was "sufficient scientific understanding of the causes of climate change and its adverse effects" to give rise to foreseeability of harm, and thus, obligations under customary international law. Yet, the ICJ declined to opine on these temporal questions. Instead, it observed that "while these temporal issues may be particularly relevant for an *in concreto* assessment of the responsibility of States for breaches of obligations pertaining to the protection of the climate system, the present opinion is not concerned with the invocation and determination of the responsibility of individual States or groups of States" (para. 97).

Later in the opinion, when discussing the principles of State responsibility, the ICJ again flagged the relevance of temporal questions. The ICJ noted that questions of temporality are relevant to any discussion of a breach of an obligation identified in question (a) because such a breach "does not necessarily occur through one, temporally contained, action or omission" (para. 423) but arguably through cumulative emissions over time. Climate vulnerable States had invoked principles related to "acts having a continuing character" and "composite acts" (e.g. Written statement submitted by the Republic of Vanuatu para 530-535) as a way of addressing the "challenges of precisely determining the critical date for the identification of a breach of States' obligations to protect the climate system" (para 423) However, the ICJ again declined to provide further clarity on these temporal questions. Instead, it repeated its earlier stance that these temporal questions are necessary "elements of an *in concreto* assessment" but are "beyond the scope of this Advisory Opinion" (para 423).

Thus, even as the advisory opinion opens the doors to potential future claims for climate reparations, it also highlights the many still existing legal hurdles that such claims would face. In avoiding the temporal questions, the ICJ's advisory opinion replicates the way in which demand for reparative justice has been persistently evaded within the international climate regime due to developed countries' refusal to discuss any compensation of historical harm or anything that might give rise to liability.

Separate opinion of Judge Yusuf

In his separate opinion, Judge Yusuf was scathing about what he called the ICJ's "excessively formalistic approach" and argued that the questions posed "deserved more concrete and tangible replies capable

of engaging with their material scope, the context in which they were posed and the objectives underlying the request for an advisory opinion" (para. 2). He decried the ICJ's "abstract examination of the law of State responsibility" that was divorced from the reality of harm and climate injustices (para. 7) and quoted the famous remarks of Anatole France that "[t]he 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" (para. 8).

Judge Yusuf wanted a more direct and concrete engagement with the question of historical emissions, because, as he said, "historical responsibility is not just a matter of history but a matter of continued contribution, since the historical emissions of industrialized countries continue to have a significant impact on the current climate system" (para. 13). Yet, despite this searing rhetoric, his factual discussion, which seems to date knowledge of climate harm to the 1980s, would arguably limit reparations for historical emissions to the last 40 years (para 32-33).

Historical emissions, reparation and colonialism

Scholars working in the Third World Approaches to International Law (TWAIL) tradition have shown how claims for reparations for historical injustices are "faced with numerous legal obstacles under the existing system of international law" (p. 11). In the opening pages of his text, *Imperialism, Sovereignty and the Making of International Law,* Antony Anghie observes "that international law had not only legitimized colonial exploitation" but also "developed many mechanisms to prevent any claims for colonial reparations" (p. 2). Sarah Riley-Case has shown how "[h]istorically, international law facilitated slavery, colonialism, and the rise of the extractive economy" and that in the aftermath of decolonization "liberal international law erected barriers against reparations for historical injustices that persist in present-day racial and ecological discrimination".

If we approach the problem of climate reparations with this TWAIL sensibility, it suggests (as Sarah Riley-Case and I have argued) that the difficulties that claims for historical emissions face in demonstrating all elements of the duty to prevent significant harm to the climate system, including meeting all the evidentiary requirements, does not indicate an inherent "weakness" in these claims. Rather, it highlights how the doctrines of international law are themselves often still implicated in historical harms, and thus inadequate, for properly remedying the complex harms arising from cumulative, historical emissions.

Therefore, reparative justice might require not just applying international legal rules, but actively transforming them. For example, in her final report as special rapporteur on contemporary forms of racism, Tendayi Achiume called on the international community to "[p]rioritize reparations for historical environmental and climate harms and for contemporary harms rooted in historic injustice.". She continued, "[t]o the extent that contemporary international legal principles present barriers to historical responsibility for climate change, United Nations Member States must decolonize or transform this law" (para. 78).

In *Rethinking Reparations,* Olúfemi Táíwò argued that we should adopt a "constructive view" of reparations. That is, reparations should not be backward-looking, but rather "as concerned with building the just world to come" (p. 74). Reparations, on this view, is one part of a "broader worldmaking project" (p. 74). This suggests that working towards the still unanswered imperative of reparative justice calls for broader thinking about how we might transform or "remake" international law.

Climate change and colonialism

In closing, I want to draw attention to another missed opportunity in the ICJ's advisory opinion, namely, to situate the climate crisis within the broader context of colonialism. The relevance of colonialism to understanding climate change, both as a historical driver of the climate crisis and also because of how it continues to exacerbate vulnerabilities to climate change, was recognised in the 2022 Working Group II report of the IPCC (see also here and here). A growing body of scholarly work has exposed how "legacies of colonialism, imperialism, and capitalism co-produce and exacerbate the climate crisis" and the need to confront this

climate coloniality in working towards climate justice (see also here).

The relationship between colonialism and climate justice was foregrounded in a number of the oral arguments made by climate-vulnerable nations before the ICJ. For example, in their opening submission, the Republic of Vanuatu and the Melanesian Spearhead Group argued that "the injustice of the climate crisis is inseparable from our shared colonial histories." Their submission continued:

> *"The majority of anthropogenic greenhouse gas emissions can be attributed to the conduct of a few readily identifiable States, some of which colonized and exploited the land, the resources and the peoples of Melanesia. We have not yet recovered from the enduring violence that colonization has inflicted on us, as we struggle to rebuild and assert ourselves within a system we did not create. Climate change is now depriving our peoples, again, of our ability to enjoy our right to self determination in our land" (p. 102, para. 7).*

Other submissions also emphasized the links between colonialism and climate change. In their oral submissions, Saint Vincent and the Grenadines argued that "[t]his 'wicked' problem of climate change, as we deem it in the environmental world, is colonization on repeat. Let us never forget who bears the historical responsibility. To tackle an issue, we must go not to the symptoms but beyond to the root cause" (p. 11, para 2). The Democratic Republic of Timor-Leste argued that

> *"the legacy of historic injustices continues into the present. Climate justice cannot be achieved without accounting for the inequality arising from colonial rule and the actions of developed and high-emitting States" (p. 26, para 20).*

Similarly, the Organisation of African, Caribbean and Pacific States (OACPS) underscored that

> *"historical emissions" are the cause of climate change and that present day "acts and omissions resulting in such emissions, including the promotion of fossil fuels and the failure to regulate emissions are unlawful and they are also discriminatory, perpetuating the inequities rooted in our colonial past" (p. 49, para 5).*

In its submissions, the Cook Islands specifically argued that the questions put to the ICJ required it to engage with colonialism, submitting that "[t]his deeply colonial and racialized patterning of the relevant conduct and its effects are also unsurprisingly embedded in the questions put to the Court, which highlight that small island developing States are 'injured or specially affected by or are particularly vulnerable to the adverse effects of climate change'" (p. 16-17, para 27). They continued, that "[t]o adequately respond to these questions, it is clear that the Court must address the colonialism and racism that underpins the unlawful conduct and patterns its effects around the world" (p. 17, para 28).

This forceful invitation to draw the links between colonialism and climate change was not taken up by the ICJ. The word "colonialism" is not mentioned in the advisory opinion or any of the twelve separate opinions or declarations. (The Separate Opinion of Judge Ausescu mentions decolonization but only in the context of discussing the principle of *uti possidetis juris* (para 17). Thus, even as it delivered more than many climate advocates dared to hope for, the advisory opinion also speaks to the limits of progressive liberal legality and the ongoing challenge of decolonising international law.

The advisory opinion has provided many hooks and tools for future advocacy: as Rohan Nanthakumar has argued, it has transformed climate action into a "game of chess rather than checkers" and has thereby created more opportunities to strategically utilize the law to advance climate justice. However, in order to use the tools provided by international law strategically, it is crucial that we soberly and critically assess the terrain of struggle and that we do not, as Mario Prost has cautioned, "euphemise shortcomings or pass off conservative decisions as ground-breaking". Properly "untangling and illuminating" the role of colonialism in structuring the climate crisis and a truthful reckoning with the coloniality of international law is needed as we work towards reparative climate justice.

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