Cooperation Without Justice?

On the Elusive Differentiation of Responsibilities in the ICJ's Climate Advisory Opinion

Matthias Petel

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Climate change is both a global crisis that binds humanity to a shared fate – a "common concern for humankind" – as well as the revealer of historical inequalities on the international stage, rooted in colonial legacies. Every country is vulnerable to the destabilization of the climate system and must adopt mitigation and adaptation measures. At the same time, States have not contributed equally to the crisis, nor are they similarly exposed to the risks it generates. This tension is crystallized in the principle of "*common* but *differentiated* responsibilities" which lies at the heart of international climate law.

Such tension, in turn, generates conflicting perspectives on dealing with climate change. A first approach emphasizes the universal dimension of climate vulnerability, which should foster cooperation that transcends territorial and social boundaries. Following this account, the primary urgency is to move beyond narrowly defined national interests and propel collective action. A contrasting view conceives climate policy less as a neutral space for cooperation than as a deeply distributional struggle. Climate policies must reckon with asymmetries of power, unequal ecological exchange, and colonial patterns of trade and finance to address the structural injustices that shape both responsibility for and vulnerability to climate change.

In this post, I analyze the International Court of Justice (ICJ) climate change advisory opinion in the light of these antagonistic framings of the climate crisis. The ICJ's advisory opinion insists heavily on the duty to cooperate to protect the climate system. I show that this duty of cooperation is grounded in an acknowledgment of differentiated obligations among states but falls short in specifying how those differentiated obligations should be quantified, whether in relation to mitigation or to adaptation finance. I argue this reflects a general reluctance to engage with the distributive issues central to climate justice claims which, in turn, serves to preserve the ICJ legitimacy.

States of the World, Unite!

The ICJ emphasized the central importance of the duty to cooperate to protect the environment (paras. 140-142), including the climate system (paras. 301-308). This obligation is rooted both in customary and conventional international law, notably in environmental and climate treaties, the latter specifying the content of the customary obligation of cooperation (para. 216). The ICJ traced the origins of the obligation to the United Nations Charter, which provides that the purpose of the organization is to "achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character" (Article 1). This commitment was subsequently extended to environmental challenges, notably in the Stockholm Declaration (Principle 24) and the Rio Declaration (Principle 7). Beyond this textual foundation, the ICJ highlighted the consistent practice of States in this area and thus considered that the duty to cooperate in environmental matters has acquired customary status (para. 140).

The ICJ further noted the existence of a duty to cooperate in climate treaties, most notably throughout the United Nations Framework Convention on Climate Change (UNFCCC), for example, in the areas of technological transfer, scientific research, and the preservation of natural carbon sinks (para. 214 referring to Article 4(1) of the UNFCCC). Additionally, the developed countries listed in Annex II (a subset of Annex I) are required to provide financial assistance to developing countries vulnerable to the impacts of climate change, both to cover the costs of adaptation (Article

4(4)) and to help them fulfill their obligations under the Convention (Article 4(3)). Under the Paris Agreement, these obligations of cooperation are reiterated: developed countries are expected to provide financial assistance (Article 9) and technological transfers (Article 10) as well as capacity-building measures (Article 11) to assist developing countries in both mitigation and adaptation efforts.

This duty is justified due to the very nature of environmental matters that defy national borders and highlight the interdependence of States: it is "intrinsically linked to the duty to prevent significant harm to the environment, because unco-ordinated individual efforts by States may not lead to a meaningful result" (para. 141). The ICJ cited a prior judgment stating that "it is by co-operating that the States concerned can jointly manage the risks of damage to the environment" (para. 261). In the climate change context, this duty is "indispensable" given the global nature of the crisis: all States must participate in the implementation of international action to protect the climate system (paras. 215-216). As such, cooperation represents "the very foundation of meaningful international efforts with respect to climate change" (para. 302) and is "not a matter of choice for States but a pressing need and a legal obligation" (para. 308).

Developed States remain free to choose the means of cooperation, provided they act in "good faith" and with the required "diligence" (para. 262). The opinion, however, highlighted the three favored means of cooperation set out in the Paris Agreement: financial assistance (para. 263-265), technology transfers (para. 266), and capacity-building (para. 267). Notably, financial transfers are framed as binding international obligations on States (para. 264). Climate finance is thus no longer understood as voluntary humanitarian aid stemming from the benevolence of the North.

Differentiation Without Quantification

The duty to cooperate is not entirely disconnected from the historical and economic inequalities that structure the international scene, as the obligations arising from it rest primarily on developed States. More generally, the ICJ insisted on the importance of the principle of "common but differentiated responsibilities and respective capabilities":

"the principle of common but differentiated responsibilities and respective capabilities reflects 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. The principle of common but differentiated responsibilities and respective capabilities thus acknowledges, on the one hand, the historical responsibility of certain States and, on the other, that the measures which can be expected from all States with respect to addressing climate change are not the same" (para. 148)

Hence, the differentiation of obligations is affirmed. It rests not only on varying levels of development (as it is often narrowly framed by Western States reluctant to confront past emissions) but also on historical contributions. This differentiation does not operate along a rigid binary that locks States into a frozen snapshot of the past. Rather, the ICJ conceives of it as a "spectrum" with two poles (para. 150): at one end are the most developed countries and largest contributors to climate change, and at the other, the least developed countries with only minimal contributions. Between these poles lie States that have experienced significant economic development in recent decades and now command greater resources and capacities to contribute to mitigation efforts. The developed/developing divide is therefore not only spectral but also fluid.

In relation to the due diligence standard, the ICJ emphasized that its "multifactorial and evolutive character entails that, as States develop economically and their capacity increases, so too are the requirements of diligence heightened" (para. 292). According to the ICJ, this evolutive understanding of differentiation was made explicit in the Paris Agreement: Article 2 provides that "[t]his Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of *different national circum-*

stances" (emphasis added). The addition of "national circumstances" signals that the developed/developing distinction is not "static," but must be adapted to the evolving conditions of each State (para. 226).

The principle of common but differentiated obligations is relevant not only to the interpretation of cooperation duties but also to the assessment of the mitigation efforts of countries and the substance of their nationally determined contributions (NDCs) under the Paris Agreement. The opinion explicitly notes that "the standard to be applied when assessing the NDCs of different parties will vary depending, *inter alia*, on historical contributions to cumulative emissions, and the level of development and national circumstances of the party in question" (para. 247). In this sense, the ICJ recalled that each State must do its "fair share" toward the collective mitigation goal established by the Paris Agreement.

This is a step in the right direction but allocating the costs and benefits of the climate transition is not an abstract matter to be settled by general appeals to "cooperation," "good faith," or "due diligence." It is a set of very concrete questions: Who does what, and how much? Who pays, and for what? Who bears the costs of stranded fossil assets? Who reaps the benefits of emerging green industries? On these questions, the ICJ remained elusive.

The ICJ opinion contains no discussion of how to fairly allocate the remaining global carbon budget (*i.e.*, the volume of emissions that can still be emitted to respect the Paris Agreement's goals) among nations. This requires a criterion, or a set of criteria, to determine each country's level of responsibility. The opinion does stress that developed countries must "do more"; but how much more? One approach would be to distribute carbon allowances equally among all individuals, regardless of geography, thus reflecting the human rights ideal of equality. An alternative is the "grandfathering" approach, which allocates future carbon quotas partly in proportion to past emissions, thereby granting developed States, with their high historical emissions, a disproportionately large share of the future carbon budget. The ICJ declined to settle this debate, leaving it to domestic courts to determine what qualifies as diligent mitigation action. In practice, these courts have often favored the least restrictive allocation criteria in the name of separation of powers, avoiding questions of equity or even rejecting equity concerns altogether, in order to leave discretion to political authorities.

Relatedly, the ICJ noted that the level of climate finance should be sufficient to enable the fulfillment of the Paris Agreement, especially the collective temperature goal (para. 265). Additionally, it added that this obligation "can be evaluated on the basis of several factors, including the *capacity* of developed States and the *needs* of developing States" (para. 265, emphasis added). Yet the ICJ specified no concrete amounts, made no assessment of Global South needs or the current finance gap, and remained silent on the composition of climate finance, whether it must be via grants or loans, public or private money, and the implications of those various options.

Universalizing Climate Responsibilities, Silencing Climate Injustices

This lack of precision is hardly accidental. The ICJ justified it by repeating as a mantra that it "is not called upon to identify the legal responsibility of any particular State or group of States" but rather to articulate a general legal framework of obligations (paras. 106 and 108, and also mentioned in different wording in paragraph. 97). In other words, the ICJ left to contentious proceedings the delicate task of specifying the concrete content of obligations and their consequences.

The ICJ's interpretation of the General Assembly's resolution (which, as Mario Prost notes, did hint at questions of specific responsibilities and vulnerabilities) reflects a deliberate choice and illustrates its political caution. In fact, in a striking passage, the Court explicitly sets aside certain terms from the questions posed, which specifically referred to the climate harm suffered by small island developing States:

"As for legal consequences with respect to certain categories of States that are "specially affected" or "are particularly vulnerable", the Court notes that the application of the rules on State responsibility under

customary international law does not differ depending on the category or status of an injured State. Thus, "specially affected" States or States that are "particularly vulnerable" are in principle entitled to the same remedies as other injured States. Moreover, since, in these proceedings, the Court is not called upon to identify particular States that may have breached their relevant obligations, it follows that it is also not called upon to determine any specific legal consequences with respect to particular injured States or groups of States" (para. 109)

Thus, rather than focusing on the circumstances of a few highly vulnerable States (apart from succinct passages to the specific issue of statehood in the context of sea-level rise and irreversible territorial loss), the ICJ adopted an abstract framing that universalizes both vulnerabilities and responsibilities. It emphasized that "[c]limate change [...] poses a quintessentially universal risk to all States" (para. 137). And it articulated obligations that, at least in principle, apply to all States (see here).

A similar strategy is evident in its treatment of reparations: as Julia Dehm shows, the ICJ merely restates general principles of international law in the climate context, while remaining evasive and declining to situate the issue within its (neo)colonial dimensions. This formalistic posture is heavily criticized by Judge Yusuf in his separate opinion who argued that "the Court has indeed ended up engaging in an abstract examination of the law of State responsibility in a manner divorced from the reality of the significant harm to the climate system caused by the historical and current GHG emissions of gross emitters and the injury suffered by the most vulnerable victims of climate change" (para. 7).

This "no finger-pointing" approach clearly serves a legitimizing function. The ICJ sought to articulate a legal framework that is both responsive to the urgency of the climate crisis and acceptable to States deeply divided on questions of responsibility and redress. As Antoine De Spiegeleir aptly describes, the ICJ was keenly aware of its institutional boundaries and attempted to engage in climate debates while portraying itself as an "impartial and cautious interpreter of the law." In this context, the ICJ was more comfortable echoing consensual calls to international cooperation rather than confronting the historical processes of colonial domination and contemporary power asymmetries that lie at the heart of ecological crises. It was unwilling to determine what constitutes, in concrete terms, an equitable climate transition. As a result, the opinion is firm on principles, embracing the full body of international law and its relevance to climate change, while remaining reluctant to spell out the concrete implications of these obligations.

The ICJ's caution may be appropriate, and even wise, given the current political climate. The consequence of its silence, however, is that countries bearing the brunt of past and ongoing exploitation of the Earth, and its climate impacts, are left waiting to know what "cooperation" truly means in their dire circumstances. All the more reason, then, for future legal and political mobilization to turn the advisory opinion's aspirational promises into tangible justice.

ABOUT THE AUTHOR

Matthias Petel

Matthias Petel is a doctoral candidate at UCLouvain and Harvard Law School working on human rights and climate justice.

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