ICJ #1

IISD Earth Negotiations Bulletin

Earth Negotiations Bulletin

A Reporting Service for Environment and Development Negotiations

Issue No.1 | Online at: enb.iisd.org/events/international-court-justice-climate | Tuesday, 3 December 2024

ICJ Highlights: Monday, 2 December 2024

The much awaited oral proceedings of the International Court of Justice (ICJ) kicked off with a passionate plea by Vanuatu, the small island state that had lobbied support for the UN General Assembly (UNGA) resolution requesting the ICJ advisory opinion. Together with the Melanesian Spearhead Group, they pointed to the continued expansion of fossil fuel production and consumption as a clear breach of climate obligations. Others engaged in technical elaborations as to what they consider to be applicable law and what, in their view, constricts States' obligations and impedes the attribution of responsibility to specific States.

Opening of the Oral Proceedings

ICJ President Nawaf Salam recalled that UNGA Resolution 77/276 requested the ICJ to provide an advisory opinion on the following questions:

- 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 (GHGs) for States and for present and future generations; and
- 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:
  - States, including, in particular, small island developing States (SIDS), 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; and
  - peoples and individuals of the present and future generations affected by the adverse effects of climate change.

Salam noted that a number of organizations, including the Alliance of Small Island States (AOSIS), the European Union (EU), the African Union, the Organization of the Petroleum Exporting Countries (OPEC), and the International Union for the Conservation of Nature (IUCN), were also authorized to participate. He recalled that the ICJ had received 91 written statements and 62 written comments, as well as submissions by various NGOs. ICJ President Salam announced that questions posed by members of the Court to participants will be presented at the close of the hearings, with written replies to be submitted a week later.

Statements

VANUATU and the MELANESIAN SPEARHEAD GROUP lamented that anthropogenic contributions to global warming and the risks of GHG emissions have been known since the 1960s, and yet, global GHG emissions have increased by over 50% since the 1990s. They underlined that a handful of readily identifiable countries have produced the vast majority of historical and current GHG emissions.

VANUATU and the MELANESIAN SPEARHEAD GROUP further argued that under international law, States have obligations to act with due diligence to: prevent significant harm to the environment; reduce their emissions; provide support to the countries most vulnerable to the impact of their activities; protect the human rights of present and future generations; protect and preserve the marine environment; and respect the fundamental rights of countries, including island nations, to self-determination in their own lands. They stressed that the failure by a handful of large emitting States to fulfil these obligations constitutes an internationally wrongful act and triggers legal consequences under the international law of state responsibility, in accordance with the International Law Commission's (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts.

On self-determination, they emphasized this right as a cornerstone of the international legal order, noting the Court has previously characterized it as both an essential principle of contemporary international law and as a fundamental human right with a broad scope of application. They recalled the UN Human Rights Committee's description of the realization of self-determination as an essential condition for the effective guarantee and observance of individual human rights. They further asserted that the right to self-determination gives rise to *erga omnes* obligations, that is, universally owed to all, and that it is also widely recognized as a peremptory norm of international law, that is, a norm from which no derogation is permitted under international law. Noting the impact of climate change on the Melanesian people and territories, they concluded that climate change is affecting their ability to enjoy the right to self-determination in their land.

VANUATU and the MELANESIAN SPEARHEAD GROUP further identified the obligations of due diligence and prevention as core requirements of state conduct, as previously recognized by the ICJ, by the International Tribunal for the Law of the Sea

This issue of the *Earth Negotiations Bulletin (ENB)* © <enb@iisd.org> is written and edited by Jennifer Bansard; Tomilola Akanle Eni-ibukun, Ph.D.; Daniel Bertram; and Eugenia Recio, Ph.D. The Digital Editor is Diego Noguera. The Editor is Elena Kosolapova, Ph.D. <ekosolapova@iisd.org>. The ENB is published by the International Institute for Sustainable Development (IISD). The Sustaining Donor of the *Bulletin* is the European Union (EU). General support for ENB during 2024 is provided by the German Federal Ministry for the Environment, Nature Conservation, Nuclear Safety and Consumer Protection (BMUV), the Japanese Ministry of Environment (through the Institute for Global Environmental Strategies - IGES), the New Zealand Ministry of Foreign Affairs and Trade, the Government of Switzerland (Swiss Federal Office for the Environment - FOEN), and SWAN International. The contents of this report are the sole responsibility of the authors and can under no circumstances be regarded as reflecting the position of the donors or IISD. Generative AI was not used in the production of this report. Excerpts from ENB may be used in non-commercial publications with appropriate academic citation. For information on the *Bulletin*, including requests to provide reporting, contact the ENB Lead, Jessica Templeton, Ph.D. <jtempleton@iisd.org>. The ENB team at the ICJ Hearings can be contacted by e-mail at <jenniferb@iisd.net>.

(ITLOS) in its Advisory Opinion on Climate Change, and in the preamble of the UN Framework Convention on Climate Change (UNFCCC). They highlighted that these obligations require States to undertake rapid, deep, and urgent reduction of GHG emissions in all sectors in this decade, in line with Intergovernmental Panel on Climate Change (IPCC) findings. Yet, they argued, the largest emitting and producing States have breached these obligations by continuing to expand the extraction and use of fossil fuels, with fossil fuel subsidies from States reaching USD 7 trillion in 2022.

They called on the Court to affirm that the conduct of large emitting States has caused significant harm to the climate system and other parts of the environment, and has therefore breached international law with attendant legal consequences such as:

- cessation of the wrongful conduct, by refraining from fossil fuel exploitation, eliminating fossil fuel subsidies, and dismantling the systemic structures that drive emissions;
- assurances of non-repetition, including effective safeguards against false solutions that risk aggravating the harm, such as geo-engineering;
- reparations in proportion to the responsible States' historic contributions to the harm, which should include ecosystem restoration and monetary compensation for harms that cannot be undone; and
- satisfaction, to repair spiritual, dignitary, and other aspects of the injury that cannot be cured by compensation or restitution, and should cover acknowledgement of the harm and commemoration and tribute to the victims.

SOUTH AFRICA noted that African countries have to devote nearly 1% of their GDP to climate adaptation and emphasized that any determination of States' rights and obligations must take both historic and current emissions into account. On the applicable law, they underscored the centrality of the UNFCCC, the Kyoto Protocol, and the Paris Agreement on climate change, while highlighting the intrinsic link of those treaties to the principle of sustainable development and the "emerging" right to development. They pointed to the compliance mechanisms available under these treaties, and said that the international law of state responsibility should only apply where those mechanisms are not adhered to. As for the legal status of decisions of the Conference of the Parties (COP) to the UNFCCC, they maintained that these are not binding, but that their arduous negotiation reflects a common will of parties and they give practical effect to the provisions of the climate treaties.

On States' legal rights and obligations, SOUTH AFRICA recalled the importance of equity and the principle of common but differentiated responsibilities (CBDR) in interpreting the relevant legal provisions. They said the Paris Agreement imposes an obligation on parties to pursue successively more ambitious mitigation measures in line with the prevention and due diligence principles within the "means at their disposal," emphasizing that countries have different capabilities. They underscored that developing countries cannot be held responsible for failing to reach nationally determined contributions (NDCs) if the promised support is not forthcoming. Further, they mentioned that the targets enshrined in the Kyoto Protocol must be the "starting point" in terms of specificity and ambition for developed countries' climate action under the Paris Agreement in line with the principle of progression.

ALBANIA highlighted the injustice of the climate crisis, urging the ICJ to issue a bold, direct, and clear advisory opinion affirming that, while all States must mitigate emissions, the law imposes differential obligations. They emphasized two complementary obligations under international law:

- developed States, with greater resources and disproportionate historical responsibility for GHG emissions, are obligated to significantly reduce emissions; and
- developed States must provide financial resources and facilitate technology transfer to support developing countries' mitigation and adaptation efforts.

ALBANIA underscored that human rights instruments and customary international law, alongside climate-specific instruments, form the basis of States' obligations. They pointed to the Paris Agreement's preamble recognizing the link between climate action and human rights, as well as national and regional court rulings affirming States' obligations under international human rights law in the climate context.

ALBANIA outlined three key obligations under international human rights law: preventing significant harm to the climate system that violates human rights; ensuring climate measures do not infringe on human rights; and providing redress for human rights violations resulting from climate impacts. They emphasized these obligations may apply extraterritorially where clear causation exists and there is impact on an individual's human rights.

Highlighting climate change as a "threat multiplier," ALBANIA noted its disproportionate impacts on women, Indigenous Peoples, children, persons with disabilities, and those living in poverty. They called on the ICJ to adopt an intersectional approach, affirm the interconnected nature of international law, and rely on science to clarify States' obligations on climate change.

GERMANY emphasized the difference between legally binding obligations and voluntary political commitments, underscoring that clarity on this distinction is a precondition for States to continue to consent to both. They considered the Paris Agreement and the UNFCCC to be the decisive treaties to determine States' legal obligations on climate change. They highlighted that the Paris Agreement strikes a careful balance between legally binding and non-binding elements and avoids a static dichotomy between developed and developing countries, while recognizing national circumstances. GERMANY underscored that the Paris Agreement sets out 1.5°C as a binding goal that parties are obliged to achieve jointly and that all parties have the legal obligation to prepare NDCs, which are to reflect each party's highest possible level of ambition depending on their national circumstances.

While emphasizing their commitment to provide financial support, including through the Loss and Damage Fund, GERMANY underscored that the Paris Agreement does not entail a legal obligation to provide compensation for loss and damage. They noted that parties who leave the Paris Agreement would still be bound by obligations stemming from customary international

law, especially the duty to cooperate. They emphasized the legality of past emissions can only be considered in light of the law applicable at that time and recalled that the IPCC published its first Assessment Report in 1990.

GERMANY also: rejected an "overbroad" expansion of extraterritorial jurisdiction; noted the goal of human rights treaties is to protect actual victims of concrete violations, not abstract persons from abstract risks; and considered the right to a safe, clean, healthy, and sustainable environment not to be part of customary law.

ANTIGUA AND BARBUDA lamented that while large wealthy countries can borrow on the capital markets at 3%, high-income SIDS have to borrow commercially at 10% to repeatedly rebuild their infrastructure damaged by hurricanes, due to the failure of other States to mitigate their emissions. They pointed out that the Loss and Damage Fund has only received pledges of USD 700 million, which is significantly inadequate to address needs.

ANTIGUA AND BARBUDA addressed assertions by some countries that the climate treaties replace customary law obligations or that compliance with the provisions of such treaties amounts to compliance with customary law. They recalled that, as the ICJ recognized, an important principle of customary international law should not be held to have been tacitly dispensed with unless there is an express and clear intention to do so. They asserted a lack of evidence of such express intention in both the climate treaties and countries' actions under the treaties.

ANTIGUA AND BARBUDA concluded that the customary international law of prevention continues to apply to climate change, underlining that compliance with the Paris Agreement is essential, but does not dispense with State obligations under customary law, the United Nations Convention on the Law of the Sea (UNCLOS), and human rights treaties, and rather complements these obligations.

ANTIGUA AND BARBUDA further underlined that the obligation of States under the Paris Agreement to submit NDCs is not simply procedural, as asserted by some countries. Instead, in accordance with Paris Agreement Article 4 (NDCs), these NDCs must be set to a level corresponding with the remaining carbon budget to achieve the 1.5°C temperature goal.

SAUDI ARABIA underlined the country's low historic emissions and emphasized that emission reductions must occur alongside energy security, poverty eradication, and sustainable development.

On the role of the ICJ and the applicable law, they maintained that "advisory opinions cannot be a substitute for negotiations" and urged the Court to disregard the legal materials listed in the chapeau of UNGA Resolution 77/276 (requesting the advisory opinion). They further argued that going beyond *lex lata,* that is, the law as it is, would "undermine the framework for cooperation, negotiation, and consent" of the climate regime.

On substance, SAUDI ARABIA outlined their view that States' rights and obligations exclusively stem from the UNFCCC, the Kyoto Protocol, and the Paris Agreement, rejecting the relevance of UNCLOS, human rights treaties, the rights of future generations, or the ILC's work on harmonization and systematization.

SAUDI ARABIA said States have an obligation to formulate NDCs, but stressed that the content and implementation of NDCs are not legally binding. They considered that there is "no basis whatsoever under the specialized treaty regime to establish a limit on fossil fuel extraction and production" and said the temperature goal in Article 2 of the Paris Agreement is "aspirational" and cannot give rise to new rights and obligations. They also objected to the application of the "no harm" principle and the law of state responsibility in the context of climate change, pointing to the compliance mechanism and the Loss and Damage Fund under the Paris Agreement as the apposite fora to deal with climate harm.

AUSTRALIA identified areas of consensus among speakers, including the ICJ's competence to issue an advisory opinion, the centrality of the UNFCCC and Paris Agreement as primary frameworks for establishing States' obligations on climate change, reliance on science, in particular the IPCC's Sixth Assessment Report, and the need for increased cooperation and action.

On the role of other treaties and customary law, AUSTRALIA acknowledged the complementary relevance of obligations in treaties such as UNCLOS, international environmental agreements, and human rights treaties. They emphasized that the Court does not need to invoke the rule of *lex specialis*, that is, the precedence of specific law, noting this is designed to resolve normative conflicts. Instead, they called for a harmonious interpretation of obligations to protect the climate system, citing Article 31.3(c) of the Vienna Convention on the Law of Treaties that applies for external rules of international law to inform the interpretation of a treaty but that does not mean incorporating obligations from other treaties or customary law.

AUSTRALIA rejected the application of the principle of prevention of transboundary harm to GHG emissions. They argued that GHG emissions lack the direct causation and proximate temporal effects typical of transboundary harm case law. They also pointed to the absence of consistent *opinio juris* deriving obligations under this principle for GHG emissions, which is evinced in the development of specific procedural and substantive mechanisms under the UNFCCC and Paris Agreement.

On the UNGA request, AUSTRALIA underscored that breaches of obligations and legal consequences depend on specific contexts and cautioned against broad findings on reparations without evidence-based causation. They highlighted challenges in attributing State responsibility according to Article 47 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, as separate wrongful acts would have contributed to indivisible harm. AUSTRALIA urged the ICJ to provide criteria for assessing obligations in the context of specific cases.

The BAHAMAS underscored that international law imposes robust individual obligations on States to mitigate GHG emissions, and challenged some countries' narrative that climate change is an unstoppable force that individual countries have no

control over. They recognized and accepted the CBDR principle, underlined it is not a "get out of jail free card," and affirmed the responsibility of major emitters that self-identify as developing countries to correct their current emissions trajectory.

The BAHAMAS affirmed that States have individual obligations to effect deep, rapid, and sustained GHG emissions reduction under both customary international law and under treaty law. In this regard, they pointed to the duty to prevent significant damage to the environment of other States, as confirmed by the Court in the *Corfu Channel* case (United Kingdom of Great Britain and Northern Ireland v. Albania) and developed in subsequent cases. Acknowledging that this duty has historically applied to damage that can be traced to one, often neighboring, State, they questioned why it would not apply in the same manner to the damage caused by GHG emissions. They asserted that the duty of prevention applies generally and is not limited to specific activities or to neighboring States only. They highlighted that the science is clear about the factual link between GHG emissions and serious harm to the environment, and that consequently, the excessive GHG emissions of large emitter States damage the environment of other States and trigger this obligation.

BANGLADESH underscored that they are the "victims of a grave injustice," pointing to the USD 400 billion needed for domestic adaptation efforts alone and the shortfalls of the USD 300 billion new collective quantified goal on climate finance reached at the Baku Climate Change Conference.

On the relationship between different legal regimes, they said customary international law on transboundary harm, the climate treaties, and fundamental norms of human rights law are all key to the questions at hand. Pushing back against the idea that the climate regime constitutes *lex specialis*, they noted that this position is inconsistent with the presumption against normative fragmentation, and that there is no normative inconsistency that would trigger the application of the *lex specialis* rule in the first place. They urged the Court to "reinvigorate" the "faltering" diplomatic process under the UNFCCC with a solid legal opinion. Moreover, they laid out how other States' conduct affects human rights on Bangladesh's territory, triggering the inter-state obligation of cooperation. They said these different norms should all be interpreted in line with the CBDR principle, which requires developed countries to shoulder the largest burden of climate action.

On concrete obligations, BANGLADESH highlighted adaptation as an overlooked, but crucial element, and emphasized the duties to: provide adaptation finance; provide technology transfer, as well as scientific and legal information; preserve and restore ecosystems; and assist with capacity-building measures, in particular in relation to climate-related displacement, including measures to accommodate climate-displaced communities.

BARBADOS emphasized that the entire corpus of international law, as identified in the ICJ Statute, is relevant and applicable to climate change. Citing some States' interventions in other proceedings, they argued that the UNFCCC and Paris Agreement should not be considered exhaustive statements of climate-relevant law, *lex specialis*, or exclusive, self-contained regimes.

BARBADOS contended that the obligation not to cause transboundary harm is an obligation of results, not means. They stressed that harm on its own gives rise to the obligation for reparation. Referring to the ILC's Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, BARBADOS noted that compensation under strict liability rules applies when hazardous activities are undertaken. They asserted that climate change harm—which is driven by the extraction, pumping, and use of fossil fuels, that are hazardous activities—falls within this regime.

Addressing claims that climate change is "too broad and complex" to attribute causally to any one State, BARBADOS countered that this is a matter of scope, not causation, and that the causes of climate change are direct, foreseeable, and proximate. BARBADOS stated that each major emitting State individually cannot avoid its obligation to provide redress simply because all major emitting States acted together to cause climate change.

On foreseeability, BARBADOS cited evidence showing that major emitters were aware for decades of the harm fossil fuel use would cause. Pointing to archival references from the US, the UK, France, West Germany, and the Union of Soviet Socialist Republics, they noted that these States knew for about 80 years that their actions would lead to "drought, famine, and political unrest" but chose to proceed regardless, breaching obligations of due diligence. BARBADOS urged the Court not to overlook these historical facts.

In the Corridors

A mix of excitement and despair, outrage and hope filled the air as the ICJ opened its hearings on the obligations of States in relation to climate change. Young protestors defied the rainy weather to remind the diplomatic corps and legal counsel flocking into the Peace Palace of the existential stakes of these proceedings. Inside the Great Hall, Vanuatu's Special Envoy for Climate Change and Environment mirrored this sentiment, remarking that "this may well be the most consequential case in the history of humanity."

That might be the only common ground that crystallized during the first day of hearings, however. The countries that took the floor not only differed substantially in terms of their political and legal assessment of the climate change conundrum, but also in tone and style. Small island States' voices brought home the social, cultural, political, financial, emotional, and spiritual catastrophes perpetuated by climate change. Their passionate interventions stood in stark contrast to other States that delivered very technical, legal elaborations. "When it comes to paying lip service to climate justice, they are all on board, but here they pull every lever to escape accountability," noted an exasperated activist.

As the proceedings continue for the next two weeks, the divergence in legal perspectives promises to deepen, setting the stage for the ICJ's task ahead. "Some may try to paint the task as complex, but it really is not," emphasized an island State representative to the few media representatives still present in the evening. An observer echoed the sentiment: "you do not need to master the depth of attribution science to understand that fossil fuel expansion is not compatible with the Paris Agreement."