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ICJ Highlights: Tuesday, 3 December 2024

During the morning segment, countries were in lock-step in denouncing the grossly insufficient mitigation of greenhouse gas (GHG) emissions to date and outlining their expectations for remedial action. The afternoon took a different turn, with speakers diverging on whether common but differentiated responsibilities (CBDR), intergenerational equity, or the polluter pays principles fall under customary international law and should inform the Court's consideration of States' obligations with respect to climate change.

Statements

BELIZE questioned whether the application of the customary international law obligation of prevention in the context of climate change is as legally complex as often argued. They countered common arguments used by major carbon-producing and consuming States to "neutralize" the prevention obligation. They emphasized that harm caused by GHG emissions is transboundary, existential, and significant, and falls within the scope of the prevention obligation referenced in the preamble of the UN Framework Convention on Climate Change (UNFCCC). Responding to an alleged lack of *opinio juris*, BELIZE underscored that the due diligence obligation of prevention is universally recognized. On the invocation of *lex specialis*, they argued that this approach applies only in cases of normative inconsistency, which does not exist between the prevention obligation and climate treaties. Regarding the use of Article 31.3(c) of the Vienna Convention on the Law of Treaties to interpret the relationship between climate treaties and other norms of international law, they noted that harmonious interpretation does not neutralize the prevention obligation under customary law, which applies in parallel to the existing climate treaties.

BELIZE likened GHG emissions to a transboundary river polluted by upstream States, arguing that both cases involve potential transboundary harm and trigger the prevention obligation, including impact assessments based on best available science. They added that general causation suffices to apply the prevention obligation in the context of climate change, and should be distinguished from particular causation, which is key for determining reparation obligations *in concreto*.

On causation, BELIZE emphasized that no single legal text establishes universal causation standards, and the content of the specific obligation must guide causal determination. As part of the prevention obligation, they highlighted the obligation to assess potential risks before they materialize, ensure public scrutiny, and cooperate with and notify potentially affected States.

BOLIVIA stressed that the climate crisis stems from the "capitalistic" development model that has dominated over the past two centuries. They said the "bitter fights" over climate finance at the recently concluded 29th session of the Conference of the Parties (COP) to the UNFCCC illustrate that the international community needs clear legal guidance.

On the scope of States' obligations, they argued that climate treaties are not the only source of States' obligations and that compliance with those treaties cannot absolve States of all responsibility for climate change. They further asserted that the principles of prevention and due diligence apply to climate harm, and that the cumulative and global nature of the harm reinforces, rather than suspends, their application. They further said these substantive obligations are complemented by procedural ones—including the duty of cooperation—and pleaded with the Court not to allow countries to use the complexity of causation and attribution science to evade obligations under international law.

On CBDR, BOLIVIA explained that this principle not only applies to the climate regime, but also shapes the understanding of human rights obligations in the context of environmental harm. They said CBDR implies that the due diligence standards must differ between countries with different historical contributions and different capabilities to take climate action, as confirmed by the advisory opinion on climate change delivered by the International Tribunal for the Law of the Sea (ITLOS). They added that CBDR must inform the application of the law of State responsibility without displacing the latter.

On the duty of cooperation, they pointed to States' well-recognized obligation to engage in good faith in multilateral efforts to combat climate change. This duty, they said, implies in particular that developed countries should provide assistance to developing countries under Articles 7, 8, 9, 10, and 11 of the Paris Agreement. They specified crucial avenues to discharge this duty, such as access to climate finance, providing grants and Special Drawing Rights rather than loans, and contributing to the Loss and Damage Fund. They underlined that voluntary cooperative measures do not replace, but are complementary to, the legally binding rules on State responsibility.

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BRAZIL outlined the scientific basis for historical responsibility: current global warming is predominantly a result of developed countries' historical emissions accumulated over the last 250 years. They added that these past emissions have not only reduced the carbon budget available today, they also constrain the social and economic development of developing countries and affect the livelihoods of the most vulnerable. BRAZIL underlined that consequently, the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC) is the cornerstone of the international climate regime composed of the UNFCCC, Kyoto Protocol, and Paris Agreement. They stressed this principle translates historical responsibility into legal terms.

BRAZIL argued that there is no reason why the Court's case law on harm prevention, with due diligence at the core, should not apply to climate change. Underlining that due diligence must be understood on a case-by-case basis, they pointed out the role of CBDR-RC in this context and asked the Court to confirm:

- the legal value of UNFCCC COP decisions, especially those on the provision of finance by developed to developing countries; and asked the Court to confirm these COP decisions constitute agreement and subsequent practice for interpreting the climate treaties, in accordance with the Vienna Convention on the Law of Treaties;
- the use of terms in climate treaties such as "may" and "should" is not the sole determinant of the binding nature of obligations, instead, parties' intentions must also be taken into account;
- that trade-related environmental matters must not result in discrimination between like products, in accordance with the General Agreement on Trade and Tariffs (GATT) and World Trade Organization (WTO) case law, as well as Article 3.5 of the UNFCCC; and
- that it is scientifically possible and feasible to quantify States' national historical responsibility for global warming, in order to address causation-related issues, and underlined their country's proposed methodology for achieving this.

In response to calls for caution in delivering an advisory opinion, BURKINA FASO urged the Court to exercise its jurisdictional competence as the supreme international judicial organ. They outlined States' *erga omnes* obligations to protect the climate system, including obligations to: refrain from causing significant harm to the climate system; take measures to avoid emissions by third parties within their territory; preserve and enhance the absorption capacities of carbon reservoirs and sinks; implement preventive measures to ensure activities within their territory do not infringe upon the rights of other States and individuals; and cooperate in good faith to address the challenges posed by GHG emissions and their adverse effects.

They also highlighted specific obligations for certain States, such as: taking the lead in addressing climate change; and providing technical and financial assistance to developing countries to help them meet their climate obligations, adapt to climate change, and uphold the right to development.

BURKINA FASO stressed that ordinary legal consequences under the law of State responsibility should apply to the breach of such obligations, including cessation, non-repetition, full reparation, and compensation. They emphasized that reparation or compensation should be provided by States identified as major contributors to climate change, many of which are listed in Annex I of the UNFCCC, particularly to benefit small island developing States (SIDS) and States affected by desertification.

They concluded with a question: "Can a small group of States, in accordance with international law, destroy with impunity a common good indispensable for humanity, while shifting the burden to others?" They answered: "No one should achieve economic development at the expense of the enjoyment of rights of other peoples and States."

CAMEROON noted in opening that the Court's large caseload in recent years demonstrates the extent to which States rely on its guidance, and highlighted: the link between climate change and human rights; the CBDR principle; and the "crime of ecocide" implied by the climate crisis and its attendant legal consequences in terms of State responsibility.

On the content of States' obligations, they submitted that the due diligence obligation, human rights obligations, and the duty to prevent transboundary harm, are all relevant to the questions at hand, in addition to the climate change treaties. They underscored the African Charter on Human and Peoples' Rights as another key instrument and endorsed its focus on combining environmental protection with poverty eradication and sustainable development. Further, they urged the Court to recognize the "crime of ecocide" to prohibit acts that could lead to the destruction of the planet; and called for inviting States to exercise their criminal jurisdiction over such acts, so as to protect the rights of future generations. They also said the law of State responsibility and the principle of CBDR dictate that developed countries provide compensation for harm accrued to developing countries, for instance through dedicated funds.

CAMEROON also pointed to Article 24 of the African Continental Free Trade Area Protocol on Investment, which stipulates that States have a "right to regulate" investments in line with climate policies, and specifies that any measures taken to comply with international law shall not give rise to compensation under international investment law.

The PHILIPPINES highlighted that States incur obligations under the UN Charter, UN Declaration of Human Rights, and UN Convention on the Law of the Sea (UNCLOS), among others. They rejected some States' argument that climate-related obligations only arise from specific international treaties, asserting instead that the severity of climate change requires the plethora of customary international law, general principles of international law, and various conventions and treaties, be correlated and applied simultaneously.

On custom, the PHILIPPINES argued that the obligation to prevent transboundary harm compels all States to ensure activities within their territory and control respect the environments of other States and of areas beyond national jurisdiction. They averred that this applies alongside States' obligation to exercise due diligence, through adopting appropriate measures and exercising vigilance in their enforcement.

On general principles of international law, the PHILLIPINES identified sustainable development and intergenerational equity as fundamental for scrutinizing the actions of States and of non-State

actors in relation to their GHG emissions. They underlined that States' actions in this regard must not compromise the long-term sustainability of resources or the ability of future generations to meet their own needs. Regarding other treaties, the PHILLIPINES emphasized the applicability of all environmental and human rights-related treaties.

The PHILIPPINES asserted that States that do not comply with these obligations are committing internationally wrongful acts, triggering State responsibility, and that this requires a remedy. They proposed that a remedial measure similar to the "Writ of Kalikasan"—a legal remedy in the Philippines that protects the right to a healthy environment—be adopted at the international level to afford affected States the recourse needed.

CANADA highlighted how implementing pollutant-specific regimes, such as the Vienna Convention for the Protection of the Ozone Layer, supports climate goals. However, they cautioned that obligations arising from other treaties must not conflict with the carefully negotiated frameworks of climate treaties.

Regarding the no-harm principle, CANADA stated that it should be interpreted consistently with climate instruments, but noted insufficient State practice and *opinio juris* to establish its customary status in the climate context. Similarly, they argued that concepts like CBDR, the precautionary principle, the polluter pays principle, and intergenerational equity, while influential, lack consensus and do not constitute customary international law nor binding obligations. On CBDR, CANADA described it as an evolving concept emphasizing shared responsibility for mitigating GHG emissions while considering States' respective capabilities, and argued against linking it to historical environmental degradation.

CANADA advocated a rights-based approach to climate measures, affirming that effective implementation of environmental obligations supports meeting human rights obligations. However, they stressed that human rights obligations cannot be broadened to encompass universal duties for GHG mitigation. Additionally, CANADA emphasized that human rights law does not generally apply extraterritorially, except in cases involving *jus cogens* norms, which environmental principles are not.

On legal consequences, CANADA highlighted the non-punitive and collaborative compliance mechanisms under the UNFCCC and Paris Agreement particularly designed for the matter at hand. Pointing to these treaties as the primary sources of obligations on climate change, they emphasized that responsibility requires an attributable wrongful act at the time of breach and obligations cannot retroactively apply to actions predating these treaties.

CHILE reiterated their view that the climate regime does not exclude or supersede general international law, such as the "no-harm" principle. They said this general obligation entails both an obligation of conduct in the form of due diligence and an obligation of result. They further submitted that mere compliance with the climate treaties cannot satisfy the due diligence obligation to avoid harm.

On the interaction between the climate treaties and human rights law, CHILE held that both regimes overlap and that States' failure to limit GHG emissions may constitute a breach of human rights, alluding to the finding of the European Court of Human Rights, in the *Klimaseniorinnen* case, that simply elaborating nationally determined contributions (NDCs) does not suffice to satisfy the requirements of human rights law. They also noted that these duties may apply extraterritorially.

In terms of State responsibility, CHILE insisted that the Warsaw International Mechanism for Loss and Damage and the Paris Agreement do not address liability arising from climate change, and underlined the applicability of the law of State responsibility. They also noted the role of attribution science in determining individual countries' historical and current contribution to global warming. Denouncing the insufficiency of current NDCs, they recalled that the Court had previously found that responsibility for collective harm should be apportioned according to countries' contributions to that harm.

CHINA urged the Court to focus on the identification and clarification of *lex lata*, the law as it is, and refrain from developing and applying *lex feranda*, that is, the law as it should be. They further urged the Court to uphold the UN climate change negotiations as the primary channel of global climate governance in order to, among other things, prevent fragmentation of international climate law.

CHINA identified the UNFCCC, Kyoto Protocol, and Paris Agreement as the basic legal regime on climate change, asserting that this regime constitutes *lex specialis* and should guide the Court's deliberations. They said that for areas not regulated by the UNFCCC regime, other branches of law, such as UNCLOS and human rights treaties, may play a complementary role but their application must be consistent with the purpose, principles, and rules of the UNFCCC regime.

CHINA identified specific obligations under the UNFCCC regime, specifying that the obligation to prepare NDCs is one of conduct, with the scope, form, and ambition of NDCs subject to each party's determination. They emphasized developed countries' historical responsibility as being at the heart of the climate change regime.

CHINA disagreed with the assertion that anthropogenic GHG emissions are pollutants, arguing against the ITLOS advisory opinion. They stated that adverse effects from anthropogenic GHG emissions have their own legal status, and urged the Court to leave this matter to be determined through scientific research and state practice, or international lawmaking. CHINA further affirmed that GHG emissions do not entail an internationally wrongful act under general international law, and that the resulting loss and damage cannot be addressed through State responsibility or the liability regime, but must be left to the UNFCCC's special assistance arrangements for loss and damage, and compliance.

COLOMBIA emphasized the need for a comprehensive advisory opinion to establish clear legal principles for unified global climate action. They advocated for a harmonious view of the climate regime, human rights law, and customary international law, as outlined in the Vienna Convention on the Law of Treaties, citing the Inter-American Court of Human Rights' 2017 Advisory Opinion to showcase how environmental protection and human rights were integrated.

COLOMBIA described due diligence as a dynamic obligation requiring States to proactively prevent harm within and beyond their jurisdictions, adapting measures based on evolving science. They argued that States with the greatest historical contributions and capabilities must lead mitigation efforts, while developing countries, often hosting large carbon sinks, require financial support, technology transfer, and capacity building.

Highlighting that human rights protections extend to harm caused by climate change, including transboundary impacts, COLOMBIA said States are required to act when activities in their jurisdiction affect the rights of others. On legal consequences, they referred to the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), emphasizing:

- GHG emissions leading to climate change can constitute a composite wrongful act under Article 15, resulting from accumulated actions;
- ongoing omissions by States represent continuous breaches of international law;
- remedies, including compensation, are obligations arising from the continued perpetration of wrongful acts, such as historical and ongoing GHG emissions; and
- compensation can include financial assistance, debt-for-climate action swaps, debt-for-nature swaps, or green bonds.

COLOMBIA argued that addressing loss and damage must be treated as a legal obligation rather than an act of goodwill.

DOMINICA described at length the devastating impacts of climate change on vulnerable island States, saying they are trapped in a vicious cycle and are in need of assistance from the international legal system. They reaffirmed the importance of the prevention principle, rejected the idea that this principle was replaced by climate treaties, and recalled that the environment is not an abstraction but a living system crucial to human health and life, including that of generations unborn.

On human rights, DOMINICA asked the Court to affirm the peremptory nature of the human rights to life and bodily integrity, and outlined that the rights to self-determination and development have been breached by the emission of GHG.

On State responsibility, they maintained that every wrongful act is the responsibility of that State and that collective harm can be attributed to individual States in line with the principles of equity and CBDR. They said breaches of international obligations must be remedied by cessation of the internationally wrongful act, non-repetition, and compensation for damages. They mentioned technical assistance and borrowing at concessionary rates as potential compensation, while underlining that this should not be seen as a mere expression of goodwill, but as a moral and legal duty.

The REPUBLIC OF KOREA identified the UNFCCC and its Paris Agreement as the primary sources of international law on climate change for the parties thereto, stressing their core obligations stem from these treaties. They affirmed that those States that are not parties to this treaty regime will be bound by applicable rules of customary international law, as well as other treaties to which they are party, such as the UNCLOS or human rights treaties, if applicable.

The REPUBLIC OF KOREA asserted that climate change treaties must be given normative priority and centrality as *lex specialis*, but that this does not mean avoiding or setting aside other international legal obligations. They underlined that the climate change regime stipulates specific obligations that cannot be derived from other sources of international law, but that other sources can complement this regime.

The REPUBLIC OF KOREA said customary international law obligations, particularly the duties of cooperation and prevention of significant harm to the environment, are applicable in the context of climate change. They said these obligations imply a duty of due diligence and can complement the climate change treaty obligations. They however urged the Court not to identify new customary international law obligations that are not sufficiently grounded in general practice accepted as law.

On the applicability of ARSIWA in the context of climate change, the REPUBLIC OF KOREA confirmed their applicability in principle, but stressed the legal consequences of wrongful acts are addressed primarily under the normative mechanisms specific to the climate change regime, especially the Paris Agreement. They identified difficulties with applying ARSIWA more generally to climate change, such as the issue of the plurality of responsible States, noting all States have contributed to climate change to varying extents.

The REPUBLIC OF KOREA further underlined the importance of considering the approach used by the *lex specialis* when determining legal consequences, noting the Paris Agreement established cooperative and facilitative mechanisms to address the adverse effects of climate change.

In the Corridors

The sun that greeted participants as they entered the Peace Palace did not carry over into statements heard during the second day of hearings. Divergences in legal interpretation deepened into formidable divides. "It is quite something to see Canada and China champion the Paris Agreement's notoriously weak compliance mechanism," noted an observer, who also picked up on the Republic of Korea's emphasis on the "facilitative" approach to addressing loss and damage.

In contrast, "cessation, non-repetition, full reparation, and compensation" crystallized as a recurrent mantra of the opposing camp, with speaker after speaker recalling these well-established remedies from the International Law Commission's draft Articles on the Responsibility of States for Internationally Wrongful Acts. In a nod to the deliberations at the International Criminal Court, just a few blocks away, Cameroon went as far as to urge the Court to recognize the crime of "ecocide" and invited countries to exercise their criminal jurisdiction to ensure the "non-repetition" of climate harms.

In another nod to happenings outside the Court—specifically the People's Assembly which provides witnesses a platform to have their voices heard—countries on the frontlines of climate impacts, such as the Philippines and Dominica, used some of their speaking time to project videos showcasing that "when [they] are not being drenched, [they] are scorched" and that "it is no hyperbole to say that greenhouse gas emissions have weaponized the sea into a catastrophic threat."