

ICJ Highlights: Thursday, 5 December 2024

Island States underscored the colonial underpinnings of the climate crisis. Several developing countries emphasized the need for debt relief and enhanced access to climate finance. Solomon Islands urged the Court to address the issue of climate-induced displacement.

Statements

FRANCE underscored the advisory opinion of the International Court of Justice (ICJ) might not only clarify the scope and nature of States' obligations, but also bolster regional and domestic litigation efforts to achieve climate justice.

They examined Article 4.2 of the Paris Agreement, which stipulates that parties shall prepare nationally determined contributions (NDCs). FRANCE asserted this implies a legally binding obligation of conduct in light of different national capacities and circumstances, which "can never be an excuse for inertia." Highlighting the standard for NDCs to reflect the highest possible ambition and constant progression, they argued that this implies a heightened level of diligence. This conclusion, they said, is also supported by the customary international law principle of prevention, which requires that diligence be higher for riskier activities, and that in the case of climate change, the risk of harm is at the highest level.

FRANCE said Article 4.2 must be interpreted in light of other norms, including: the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC); the decision on the first Global Stocktake, which calls for a just and equitable transition away from fossil fuels in energy systems and for conserving and restoring greenhouse gas (GHG) sinks such as forests and marine ecosystems; and human rights, including the duty to preserve the choices and meet the needs of future generations.

Turning to legal consequences, FRANCE said attribution of responsibility to individual States is beyond the Court's mandate, but that the opinion could clarify the date from which States incurred an obligation to avert climate harm. They stated this could include the point at which international law recognized a general principle of prevention of climate harm, and when States became aware of the need to take measures to prevent risks from

GHG emissions. The Court could also provide guidance on the establishment of a causal link between a State's wrongful act and injuries to other States, they said, noting this would need to happen on a case-by-case basis.

Pointing to legal consequences beyond the scope of State responsibility, FRANCE underscored climate finance and efforts to address loss and damage as grounded in international solidarity.

SIERRA LEONE highlighted that climate change is not just a major threat to the environment, but also to humankind, and that it undermines citizens' fundamental rights to life, health, food, water, and self-determination. They urged the Court to take into account all relevant sub-regimes of international law.

They emphasized that, under the principle of prevention, States are required to prevent the risk of significant harm to other States or areas beyond national jurisdiction, especially considering the often irreversible nature of environmental damage. They underscored that while due diligence affords States a margin of appreciation, discretion must be exercised in accordance with best available science. SIERRA LEONE further noted that the due diligence obligation to meet the Paris Agreement's temperature goals also arises under human rights law, which provides that no one shall be arbitrarily deprived of their life without legal protection, and that it also applies when the source of harm is anthropogenic GHG emissions.

They urged the Court to confirm that States enjoy a margin of appreciation in regulating, in the public interest, the conduct of private actors within their jurisdiction, underscoring this would give States greater confidence in taking steps to address climate change without fear of claims by foreign investors.

SIERRA LEONE called on the Court to give effect to the duty to cooperate and the CBDR principle, noting that standards that are fair for developed or high-emitting countries may not be fair for developing or low-emitting ones. Stressing that international law is "a vital equalizer of States, regardless of size or power," they called on the Court to determine that GHG emissions cause material and non-material damages and that States responsible for such are obligated to provide full reparation. They pointed to debt relief and debt restructuring as possible options, underscoring that many African countries spend more on servicing their debt than on their people and that no one should be surprised that highly

indebted countries feel compelled to engage in polluting activities to secure funds to pay their debt.

GHANA drew a parallel between climate change and nuclear weapons, emphasizing both as global threats requiring comprehensive legal and moral responses. They cited the Court's Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, where ecological harm was recognized as non-abstract, and requiring restitution for transboundary damage. GHANA argued that the entire corpus of law is relevant to climate change obligations and that a narrow approach risks undermining justice for developing countries, particularly in Africa, adding, "developing countries cannot become sacrifice zones for the benefit of wealthier nations."

They highlighted that the principle of CBDR predates climate treaties, tracing its origins to a 1967 Maltese proposal to declare the deep seabed and Ocean floor as the common heritage of humankind.

They emphasized that the omission of liability or compensation in Article 8 of the Paris Agreement does not displace international law on State responsibility for loss and damage. Supporting Vanuatu's submission, they asserted that causality between specific States' emissions and climate harm can be scientifically established, with responsibility arising once States became aware that GHG emissions cause global warming.

Referencing the Articles on the Responsibility of States for Internationally Wrongful Acts, they recalled the drafters included serious breaches of international obligations essential for safeguarding the environment—such as the prohibition of massive atmospheric pollution—alongside State crimes like aggression, slavery, genocide, and apartheid in the now-deleted Article 19. They suggested that these breaches fall under *ius cogens*, underscoring their universal and peremptory character.

GRENADA recalled the findings of the Intergovernmental Panel on Climate Change (IPCC) about the intensification of tropical cyclones and extra tropical storms. Urging the Court to reject all arguments that deny this science, they acknowledged that while science does not outline States' legal obligations, it provides clear evidence of the causes and adverse impacts of climate change. They described the devastation caused by Hurricane Beryl that made landfall in 2024, highlighting the destruction of hospitals and schools, total destruction of a recently-completed solar farm, and the washing away of graves of loved ones into the Ocean, with loss and damage to national infrastructure of about USD 22 million.

Underlining that this is climate injustice, not misfortune, GRENADA lamented the vicious financial cycle of borrowing at commercial interest rates to rebuild, followed by waiting for the next extreme event to occur. They also highlighted mental health impacts, particularly identifying with two categories of emerging psychological syndromes: climate worry and climate trauma.

On legal consequences, GRENADA called for debt restructuring for all small island developing States (SIDS),

improved access to climate funds, and scaled up support to the Loss and Damage Fund. They highlighted cessation and non-repetition and reparation, including restitution, compensation, and satisfaction, as remedies, underlining the need for major polluters to pay for the harm they are causing to the climate system. GRENADA also affirmed that States owe a fiduciary obligation to future generations to act as trustees of the climate system and the environment, based on the principle of intergenerational equity. They described this obligation as comprising duties of good management and good conscience, and urged the Court to declare so.

GUATEMALA said climate change "affects every square meter of this Earth" but it does not do so equally. Elaborating on the scope of the UN General Assembly's (UNGA) request to the Court, they remarked that relevant conduct concerns anthropogenic GHG emissions, and that the "climate system" should be defined holistically, as set out in the UN Framework Convention on Climate Change (UNFCCC). They urged the Court to be "as clear as possible" in determining which adverse effects of climate change are relevant to States' obligations, and argued that these entail effects on living and non-living parts of nature that are essential to socioeconomic systems, human health and welfare, and intergenerational concerns.

On legal obligations, GUATEMALA stressed:

- the applicability of a variety of legal instruments, and the need to interpret them harmoniously;
- the distinction between legally binding and non-binding provisions, saying that States cannot invoke the non-binding nature of a provision to defeat the purpose of a treaty;
- the principle of CBDR-RC; and
- the application of human rights law and the duty to cooperate and provide assistance, saying the "human dimension at the center of these proceedings" should not be overlooked.

GUATEMALA further asserted that the law of State responsibility is not replaced by the climate treaties, but contains secondary norms describing the consequences of violating obligations enshrined in primary law. As such, they said, it operates concurrently with the compliance regime of the Paris Agreement. They also stressed that the Court need not prove causation to attribute conduct, noting that a specific causal link is only required for full reparation.

The COOK ISLANDS urged the Court to adopt an intersectional lens and deliver a climate justice-centered opinion confirming that by contributing to the climate crisis a handful of States have breached their human rights obligations regarding the prohibition of racial and gender discrimination.

They affirmed that the greatest "colonial and racist" threat to the traditional knowledge and lives of Cook Islanders is the unlawful conduct of States that have fueled climate change, emphasizing that Indigenous Peoples' traditional knowledge depends on their ability to live in harmony with their natural environment.

The COOK ISLANDS argued that State obligations regarding racial discrimination arise from multiple sources, including human rights treaties, as well as the *ius cogens* and *erga omnes* prohibitions of racial discrimination. They argued these human rights obligations apply extraterritorially and to all States, regardless of whether and when they ratified specific human rights treaties. They further affirmed that the prohibition of discrimination encompasses both intentional or direct, as well as indirect discrimination related to seemingly neutral actions. They concluded that as a result of the racially and gender-disparate impacts of climate change, the responsible States have breached their racial equality and non-discrimination obligations under international law.

Citing the interlocked systems of domination of “colonialism, racism, imperialism, hetero-patriarchy, and ableism” underlying the climate crisis, the COOK ISLANDS highlighted the need for structural remedies, particularly law reforms at the domestic, regional, and international levels. They identified, for instance, legislative and constitutional prohibitions on fossil fuel expansion and subsidies. At the international level, they called for dismantling the current system that enables the rights-violating conduct and building a new one that guarantees the rights of all living things, including “our lands and oceans.”

The MARSHALL ISLANDS highlighted their unique situation as a small island State grappling with the compounding effects of a nuclear testing legacy and climate change, stressing the existential threat posed by sea-level rise. They urged the Court to prevent climate-vulnerable developing countries from being condemned to “watery graves” and to hold accountable those responsible for the impacts of climate change.

They demonstrated the devastating impacts climate change will have this century, stating that with “just” 50 cm of sea level rise, minor flooding events will become disasters, causing displacement, food insecurity, and destruction of critical infrastructure and livelihoods. They warned that unchecked emissions will render their islands uninhabitable. Lamenting challenges in accessing finance, they said the *status quo* is unaffordable, with adaptation costs for just two urban centers estimated at USD 9 billion—far beyond the nation’s capacity.

The MARSHALL ISLANDS called on the Court to refer to the entire corpus of international law, including customary law and principles, when determining obligations. They emphasized that the risk—not the occurrence—of transboundary harm triggers States’ duty of due diligence to minimize risks and prevent harm. They noted that States have known about these risks since at least the 1960s, long before climate treaties were adopted. Due diligence, they said, requires rapid, deep emission cuts.

On legal consequences, the MARSHALL ISLANDS argued these should be determined under the law on State responsibility, which applies to composite acts of States. They said States have obligations to take reasonable steps to prevent harm, including cutting emissions, ending fossil fuel subsidies, and providing full reparation for damages already caused.

SOLOMON ISLANDS opened by illustrating how climate change affects their diverse nation, lamenting that five islands have already been lost to sea-level rise. They underscored the problem of climate-related displacement and noted that relocation not only implies a profound loss of identity and culture, but also risks causing social strife and conflict in the country’s customary land ownership system.

They joined other speakers in calling on the Court to consider the entire corpus of international law to answer the questions before it, and highlighted CBDR-RC as a central principle governing States’ differentiated climate obligations. They explained that the principle evolves with changing circumstances and that States whose capacities have grown must assume a larger burden.

With respect to climate displacement, SOLOMON ISLANDS recalled the IPCC finding as early as 1990 that climate change could lead to forced displacement, saying “this is not an issue the Court can afford to overlook.” They argued that States incur an obligation under the Paris Agreement, human rights law, and refugee law to provide technical and financial assistance for dealing with climate displacement. Citing the 1951 Refugee Convention, they asserted that those displaced by climate change beyond borders should be recognized as refugees and be afforded protection as such. In support, they referenced the 1984 Cartagena Declaration on Refugees, which extends the notion of “refugee” to those displaced by “circumstances which have seriously disrupted public order” and said that climate change poses such a serious disruption. Acknowledging that the Cartagena Declaration is a regional, non-binding instrument, they invited the Court to recognize the “disruption to public order” formulation as an evolving norm enjoying considerable State practice. They also argued that returning persons to territories threatened by sea-level rise would violate the non-refoulement obligation.

INDIA highlighted the complexity of climate change, emphasizing historical responsibility, unjust enrichment from resource exploitation, intergenerational equity, fairness, and developmental disparities. They criticized demands from developed nations for developing countries to limit the use of their natural energy resources despite benefiting from decades of fossil fuel-based development.

On State obligations, they stressed that obligations under general international law to prevent transboundary harm are further elaborated by the UNFCCC, Kyoto Protocol, and Paris Agreement. They said these instruments aim to strengthen the global response to climate change while respecting the priorities of developing countries, such as poverty eradication and sustainable development. INDIA emphasized the principles of equity, climate justice, and CBDR-RC, which they said guide the differentiation of obligations based on historical emissions and States’ capacities.

They pointed to the inequalities in *per capita* emissions, highlighting that developed countries have disproportionately

consumed the global carbon budget and appropriated the commons. They urged the Court not to impose new or additional obligations beyond those agreed upon under the existing climate regime, emphasizing the need to respect the balance of interests achieved in these instruments. They stressed that any meaningful assessment of obligations must include an evaluation of the financial and technological support to be provided by developed to developing nations.

INDIA recognized the duty to prevent transboundary harm as key in international law but noted that climate change's diffuse nature requires a broader approach to responsibility. They suggested attribution should focus on aggregate national contributions to emissions and be linked to States' commitments as reflected, for example, in the Kyoto Protocol.

On legal remedies, INDIA noted that State responsibility includes reparation and compensation, welcoming the establishment of the Loss and Damage Fund as a step forward.

IRAN urged the Court to address the UNGA's questions within the framework of the international climate change regime. They affirmed CBDR-RC, equity, and international cooperation as the core principles under this regime, which should govern the Court's interpretation of States' obligations.

They stressed CBDR-RC is the manifestation of equity in, and cornerstone of, the climate change regime. They identified its three components as financial support, technology transfer, and capacity building, from developed to developing countries. Underlining these components, they outlined duties of commission and omission, highlighting the need for developed countries not only to facilitate but also to refrain from creating obstacles to technology transfer to developing countries.

IRAN argued that unilateral coercive measures are contrary to developed countries' explicit legal obligations under the UNFCCC. They stressed these measures affect the full and effective implementation of the climate change regime by undermining affected countries' ability to comply with their mitigation commitments and also opening them up to unsustainable "survivalist" policies. IRAN identified the EU's Carbon Border Adjustment Mechanism as a trade-limiting measure that contradicts Article 3.5 of the UNFCCC, which prohibits measures that constitute arbitrary or unjustifiable discrimination or disguised restrictions on international trade. They therefore urged the Court to declare that CBDR-RC obligates developed countries to refrain from imposing unilateral coercive measures affecting the transfer of funds, technology, and technical support to developing countries.

IRAN highlighted that the global challenge of climate change necessitates a collaborative approach that transcends national boundaries, asserting that implementation of developed countries' financial and capacity-building obligations is essential to enable developing countries to overcome their numerous challenges.

INDONESIA underscored the relevance of the UN Convention on the Law of the Sea—in particular the obligation for

parties to prevent, reduce, and control pollution to the marine environment "from any source"—in the context of climate change, as highlighted by the recent advisory opinion issued by the International Tribunal for the Law of the Sea. They said the Ocean is particularly important for their country, which is composed of more than 17,000 islands, and although the Paris Agreement only mentions the Ocean once, the obligation to prepare, communicate, and maintain NDCs that reflect the highest ambition is crucial to combating challenges like sea-level rise. They also called for increased financial commitments and capacity-building assistance from developed to developing countries, saying "the rhetoric of highest ambition collapses when it comes to mobilizing climate finance." Emphasizing they do not wish to dwell on reparations, which would require a separate proceeding, INDONESIA pointed to the Paris Agreement's compliance mechanism as the apposite forum to ensure that States achieve their NDCs.

On human rights obligations, they argued that existing treaties and customary law do not give rise to climate change-specific obligations, and that any potential obligations are limited to States' own populations and territories, referencing Indonesia's constitutional recognition of the right to a healthy environment.

In the Corridors

Those who sat through the fourth day of back-to-back statements delivered to the Court were rewarded with some fireworks. Not mincing their words, the Cook Islands denounced the colonial, racist, and sexist underpinnings of the climate crisis. The Marshall Islands projected an image of the "coffin" that holds the radioactive remnants of the US' nuclear testing, just a few meters away from the shore. It was not the only coffin the Court saw during the day: several particularly vulnerable nations lamented that burial grounds are being washed away by sea-level rise and extreme weather events. Fittingly, Grenada emphasized that an increasing number of people are affected by climate worry and trauma.

In the corridors, many reflected on the painful realities faced by small island States and their hope for the Court to carve a path to climate justice. The Cook Islands charted a crucial first step in this regard: "genuine, heartfelt apologies" to serve as the foundation of an international system "based on trust, reciprocity, and care, rather than oppression and domination."

Surprisingly, small island States were not the only ones calling for clear and ambitious legal guidance from the Court. As one observer noticed, France joined Spain on the "more progressive side" of developed countries that have spoken so far, going as far as to highlight the role of climate litigation for achieving climate justice. "It is very interesting to see what comes of it when EU countries speak in their national capacities," they added, alluding to their custom of mingling behind a single flag at the UNFCCC negotiations. With six more days to go, more surprises await.