ICJ #5

IISD Earth Negotiations Bulletin

Earth Negotiations Bulletin

A Reporting Service for Environment and Development Negotiations

Issue No. 5 | Online at: enb.iisd.org/international-court-justice-climate | Monday, 9 December 2024

ICJ Highlights: Friday, 6 December 2024

Island States urged the Court to safeguard the continuity of statehood and sovereignty over maritime zones amid rising sea levels. Kenya suggested vulnerable States unilaterally cancel or restructure their debt when they need to address imminent perils related to climate change. Kuwait highlighted its work on "environmentally friendly oil products."

Statements

JAMAICA delineated how climate change affects freshwater resources, human health, infrastructure, and the country's primary productive sectors. Noting that the right to health extends to the underlying determinants of health, such as food and nutrition, housing, potable water, safe working conditions, and a healthy environment, they underscored the interconnected nature of human rights. They urged the Court to confirm that human rights obligations of States in the context of climate change extend beyond their borders.

JAMAICA emphasized the need to distinguish between primary obligations regarding States' acts and omissions under different sources of international law and secondary rules of State responsibility, including the duty to make full reparations. In this regard, they underscored that the existence of the Loss and Damage Fund and the "meager," voluntary contributions to the Fund do not satisfy the duty to make reparations whose purpose is to erase all consequences of illegal acts.

They noted it is too late to completely undo the harm caused by greenhouse gas (GHG) emissions, but highlighted measures that could amount to restitution: assistance with land reclamation; support for adaptation measures; and the recognition of existing sovereign and maritime spaces of small island developing States (SIDS) who may lose their territory to sea-level rise. They underscored States' obligation to provide compensation for both material and non-material loss, including redress for the psychological toll associated with displacement and compromised food security. They underscored that monetary compensation on its own is not sufficient and called for: technology transfer; capacity building; support for national and regional scientific research; and reasonable access to climate finance.

PAPUA NEW GUINEA said climate change is the greatest security threat to Pacific island States, pointing to impacts such as: biodiversity loss; loss of land areas due to sea-level rise; forced displacement; social strife; and loss of Indigenous languages, cultures, and governance arrangements.

On applicable law, they urged the Court to consider the entire corpus of international law, saying that climate change is an "inherently cross-cutting and multidimensional" issue. In addition to the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC), PAPUA NEW GUINEA underlined the right to self-determination as "cardinal," and asserted this peremptory norm had been violated through the conduct responsible for climate change, a breach evidenced by the forced displacement of people from their ancestral territories. Countering the argument that States incurred no obligation under international law at the time that historical emissions occurred, they pointed out that the right to self-determination has been recognized since 1945.

In terms of legal consequences, they called for ensuring the continuity of statehood and maritime zones, as demanded by the principle of permanent sovereignty over natural resources, among others. They also requested additional technical and financial assistance in line with the three reparation modalities under the law of State responsibility: restitution; compensation; and satisfaction.

KENYA asserted that even if climate change treaties, or some of their rules, have attained customary law status, these treaties exist alongside, and do not subsume, the customary law obligations of prevention and due diligence. They further affirmed that the climate change regime, comprising the UNFCCC, Kyoto Protocol, and Paris Agreement, operates as a consistent whole and urged the Court to dismiss the argument that the Paris Agreement has replaced the former two as the sole governing instrument for climate change.

Highlighting that the pressing issue at the heart of these hearings is States' historical responsibility for GHG emissions, KENYA urged the Court to clarify the temporal scope of legal

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>.

obligations, including the extent to which historical emissions should influence the content and application of CBDR-RC. Noting that since 1992 the climate change treaty regime has applied in parallel with customary international law, they urged the Court to clarify that the customary law obligation not to cause harm from excessive GHG emissions existed before 1992.

KENYA argued that States that have caused significant harm to the global climate system through their GHG emissions must bear the legal consequences under the law of State responsibility, encompassing cessation and reparation, including compensation for loss and damage. They proposed further measures as forms of satisfaction, asking the Court to confirm that:

- debt cancellation arrangements are appropriate satisfaction, as they would free up resources that can be used for mitigation and adaptation in countries where debt servicing accounts for a significant portion of the national budget;
- unilateral debt restructuring or cancellation by vulnerable States, where climate change harms constitute grave and imminent peril, may be a legitimate circumstance precluding wrongfulness under international law, in accordance with Article 25 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA); and
- where States implement regulatory measures that are inconsistent with obligations owed to investors, such measures are justified when necessary to mitigate adverse effects of climate change.

KIRIBATI emphasized their aim to secure self-determination and permanent sovereignty over their natural resources, deeply tied to their traditional way of life and relationship with nature, which are threatened by climate change-induced sea-level rise. They highlighted the applicability of the well-established no-harm obligation to GHG emissions, arguing that the invisibility and global dispersion of emissions are legally irrelevant. States, they stressed, must ensure their actions do not violate collective rights, particularly when such actions threaten the survival and sovereignty of others.

KIRIBATI said the principle of sovereign equality ensures no State possesses greater rights than others, including in the governance of shared resources. Whether the atmosphere belongs to everyone or no one, they said no State may appropriate it at will. Accordingly, they argued the global carbon budget must be subject to equitable and reasonable use and to the obligation to prevent significant harm. States, they added, lack sovereign discretion to exploit common resources in ways that harm the atmosphere, as one State's freedom ends where it harms others' rights. They linked these arguments to the duty of all States to act positively to support others' right to self-determination, forming the foundation of the obligation to cooperate.

On extraterritorial human rights, KIRIBATI said the principle that views States as primary rights protectors collapses when emissions threaten their very existence, leaving "victim States" unable to protect their citizens. They called claims of sovereign discretion by emitting States "deeply cynical," asserting that human rights jurisdiction arises from emitters' failure to prevent harmful emissions that irreparably harm human rights elsewhere.

KUWAIT underscored the country's economic dependence on the production and export of fossil fuels and outlined domestic efforts taken to mitigate GHG emissions and adapt to climate impacts, despite the country's low historical contribution to climate change. For instance, they highlighted the country's State-owned Kuwait National Petroleum Company's Clean Fuels Project aimed at producing "environmentally friendly oil products."

On State obligations, they asserted these are governed and limited by the specialized climate treaty regime, which imposes obligations of conduct, not of result. They stressed the importance of taking national circumstances into account when assessing States' obligations, including the specific circumstances of fossil fuel-dependent countries, as recognized by Article 4.8(h) of the UNFCCC. None of these obligations, they argued, can be interpreted to prohibit the production or export of fossil fuels. Emphasizing the carefully negotiated balance of the climate treaties, KUWAIT asserted these incorporate and subsume customary law, such as the prevention and precautionary principles. Consequently, they submitted, any State in compliance with its treaty obligations automatically complies with its due diligence and precautionary duties.

On legal consequences, KUWAIT suggested that since the treaty regime does not prohibit GHG emissions *tout court*, these emissions cannot constitute an internationally wrongful act. They further submitted that the customary law contained in ARSIWA has been replaced by the climate treaties, including the compliance mechanism of the Paris Agreement, which adopts a facilitative approach and does not impose sanctions or include any obligation to make reparations. Elaborating the difficulties involved in establishing a causal link in cases of historical and cumulative contributions to climate harms, they doubted whether the acts of private actors responsible for GHG emissions could be attributed to States.

LATVIA affirmed the idea of "State continuity," asserting that existing rights are not affected by climate change-related sea-level rise because factual control is not always required for statehood. As an example, they highlighted how Latvia's statehood, first gained in 1918, was maintained throughout "decades of Soviet occupation."

They submitted that the UNFCCC and the Paris Agreement are the primary legal instruments addressing climate change, but that States' obligations extend beyond this regime. Like others, they recognized that obligations under the climate change regime, including under Article 4.2 of the Paris Agreement (on the preparation of nationally determined contributions), constitute an

obligation of conduct, not result. They argued that the discretion given to States in Article 4.2 is wide but not unlimited, and requires them to act with due diligence and in good faith to ensure their activities are in line with the Agreement's purpose and objectives, particularly the long-term temperature goal.

LATVIA further submitted that States may incur obligations under international human rights law to provide effective protection against the impacts of climate change when the impacts on an individual's human rights are both foreseeable and serious. They said when this threshold is met, the human rights norms require due diligence comprising both general obligations to implement appropriate regulatory measures based on best available science, and special obligations to protect the rights of particular individuals or groups. They therefore supported a human rights-integrated approach to tackling climate change.

LIECHTENSTEIN stressed that climate impacts jeopardize health and human rights for current and future generations. They urged the Court to "help the international community correct its course" and support the ongoing climate negotiations. They emphasized that climate change-related obligations flow from States' universal duty to uphold human rights while considering international climate and environmental law.

Citing the UN Human Rights Council, LIECHTENSTEIN stated that climate change jeopardizes the right to self-determination, which is a peremptory norm from which no derogation is permitted and which is enforceable against all. Emphasizing that States must take all necessary measures to protect this right, they also cited the non-binding Maastricht Principles on the Human Rights of Future Generations, which extend this right to future generations.

Referring to the findings of the Intergovernmental Panel on Climate Change, LIECHTENSTEIN warned that sea-level rise poses an existential threat to low-lying island States, leading to potential climate-induced statelessness. They reaffirmed the inalienable nature of self-determination and the presumption of continued statehood, even for States whose land territories become inundated and whose populations are relocated. Referring to the UN Convention on the Law of the Sea, they said baselines for State territory should remain fixed, even as sea levels move landward. They supported the recognition of States in deterritorialized forms and added that States which no longer meet the criteria under the Montevideo Convention on the Rights and Duties of States should retain their statehood due to the strong presumption of State continuity.

Failure to achieve the Paris Agreement's 1.5°C temperature goal, they cautioned, would severely threaten the habitability of territories worldwide and infringe on multiple human rights, not just to self-determination, but also other dependent rights such as the right to life, housing, water, sanitation, food, cultural heritage, and to a clean, healthy, and sustainable environment.

LIECHTENSTEIN emphasized States' duty of due diligence to take all necessary steps to meet the 1.5°C target and implement effective mitigation and adaptation measures. On CBDR, they called for reassessing the obligations between Annex I and non-Annex I parties under the UNFCCC, noting that some non-Annex I parties have become significant GHG emitters since 1992.

LIECHTENSTEIN said failure to fulfill international legal obligations generates State responsibility, stressing the need for both individual claims against States and collective accountability measures. On remedies, they advocated for collective obligations on major emitters to finance mitigation and adaptation actions, as well as preventive measures, such as environmental impact assessments.

MALAWI reiterated the climate crisis is a "crisis of inequity" and expounded the particular perspective of least developed countries. They said that recently suffered climate harms led to a "massive setback" in their progress toward the Sustainable Development Goals and the African Union's Agenda 2063, and hampered their ability to repay debt.

Noting they did not come to the Court to "legislate" or create new law, MALAWI urged the Court to recognize the central importance of the CBDR-RC principle and to consider the entire corpus of international law. Rebutting arguments that applicable law is limited to the climate treaties, they called this position "radical and wrong" and pointed to the UNFCCC's reference to the prevention principle as evidence of the latter's applicability to GHG emissions. They said legal obligations are also found in customary norms, including a stringent due diligence obligation that respects national circumstances. They mentioned the phasing down of unabated coal power plants and the phasing out of inefficient fossil fuel subsidies in this regard.

On legal consequences, MALAWI stressed the "cardinal principle" that an internationally wrongful act gives rise to legal consequences. Recognizing that an assessment of reparations owed would need to be discussed in specific cases, they asked the Court to affirm the responsibilities of States in the abstract, highlighting:

- cessation of the wrongful conduct;
- assurances of non-repetition;
- restitution, including material restoration where possible; and
- compensation for the benefit of present and future generations.

They also proposed the creation of a reparation fund and a damage register modeled after institutions established by the UN in the context of the conflicts in Ukraine and Palestine, respectively.

MALDIVES described the devastating impact of climate change on their communities and territory, in particular slow-onset events such as sea-level rise, and emphasized their refusal to adopt a policy on forced relocation or accept it as inevitable. Lamenting that the cost of adaptation exceeds their financial capacity,

MALDIVES stressed they should not have to choose between funding sea walls or funding education and clean water. They highlighted developed countries have concrete legal obligations, not just a moral ones, to provide support for adaptation, and argued these obligations exist under both the climate change treaty regime and customary international law.

MALDIVES outlined mandatory obligations imposed by the Paris Agreement on developed countries, including: Article 7.13, which provides that continuous and enhanced international support shall be provided to developing countries to implement, among other things, mitigation and adaptation measures; and Article 10.2, which provides that parties shall strengthen cooperative action on technology development and transfer. They further highlighted specific reporting requirements, including mandatory ones, such as for the review of the adequacy and effectiveness of adaptation and adaptation support in the context of the Global Stocktake.

MALDIVES submitted that the customary duty to cooperate, which is part of the duty to prevent transboundary environmental harm, also applies in the context of climate change. On the procedural elements of this duty, they identified the duty to notify and consult in good faith with States that may be affected by an activity that can cause transboundary harm. However, they argued that the duty goes beyond this, and requires States to collaborate with others in good faith with a view to achieving agreed outcomes.

In this context, MALDIVES lamented that despite repeated commitments and pledges from developed countries, the Loss and Damage Fund is still not accessible to developing countries. They argued the duty to cooperate encompasses cooperation to achieve universal respect for, and observance of, human rights. They asserted the threat of climate change-induced relocation requires developed countries to provide financial and technical assistance to countries like Maldives to enable them to adapt to their changing environment, rather than be torn from it.

The AFRICAN UNION highlighted Africa's paradoxical role as the least contributor to global GHG emissions and the bearer of disproportionate climate impacts. Africa's vulnerability, they noted, stems from geographical, developmental, and historical factors, including its colonial past. They warned that neglecting climate justice and human rights would rewrite international climate law to the detriment of Africa and the Global South.

The AFRICAN UNION called on the Court to issue an opinion grounded in climate justice, which they said is central to the Paris Agreement. They framed climate justice as an *erga omnes* norm owed towards all, requiring proportional obligations based on States' contributions to climate change. They urged the Court to base such determination on factual assessments of the origins, causes, and impacts of climate change, emphasizing that science compels recognition of obligations to protect the climate system and accountability for harm caused.

Reaffirming core obligations, they identified climate-specific duties under the climate regime, environmental obligations under multilateral agreements, human rights obligations under human rights instruments, and trade-related obligations under investment and trade treaties. Failure to identify these obligations, they warned, would enable States to harm the climate system with impunity. They rejected confining obligations to the UNFCCC and Paris Agreement, citing the International Tribunal for the Law of the Sea's dismissal of such arguments.

They called on the Court to declare preventive duties under customary international law, including adopting science-based measures, conducting environmental impact assessments, notifying affected States, cooperating in good faith, adhering to international standards, and monitoring public and private activities. They also urged recognition of CBDR-RC, intergenerational equity, and sustainable development as customary international legal principles.

The AFRICAN UNION requested tailored legal consequences for the benefit of vulnerable States, peoples, and individuals, emphasizing the need to address disparities in geography and development. They proposed debt cancellation as a form of restitution, promoting intergenerational equity and protecting future generations from climate change and debt burdens.

In the Corridors

Wrapping up the first week of the hearings, submissions to the Court focused on the concept that lies at the very heart of the international order: sovereignty. Island States were adamant that territory lost to sea-level rise could not alter their sovereign entitlements. They found allies among small European countries. Both Latvia and Liechtenstein joined the self-determination choir. "For us small States, our sovereign rights are the only shield against predatory neighbors," said one observer, noting how climate change threatens to undo historic achievements gained through anti-imperial struggles. This framing, they anticipated, would resonate with the Court, given the centrality of self-determination to the UN Charter and the Court's prior work.

Such closing of ranks was especially notable, considering other speakers' less supportive stance. In a clear response to Germany's dismissal of future generations as "abstract persons" incurring "abstract risks," Kiribati underscored there is "nothing abstract in their predicament." Yet others seemed to be heading in a completely different direction. An observer could not help but notice the "absolute disconnect from reality" with regard to Kuwait's "desperate attempts to greenwash the fossil industry."

In the evening, civil society activists held a candlelight vigil to honor the people and communities who have dedicated—and sometimes lost—their lives to the fight for climate justice. Despite the strong winds blowing through The Hague, the environmental defenders' light shone bright into the night.