

## ICJ Highlights: Monday, 9 December 2024

The second week of the proceedings opened with Namibia highlighting its struggles with water scarcity and Nepal delineating the specific challenges of mountainous countries and the downstream effects of glacier melting. Mexico and Namibia emphasized States' obligation to regulate private entities to prevent harm to the environment. Palestine called for addressing the impacts of armed conflicts.

### Statements

MEXICO acknowledged that the climate crisis transcends borders and generations and is not gender-neutral. Rebutting the idea that the climate treaties constitute a self-contained regime, they argued for a harmonious interpretation of the climate treaties with general international law.

On State obligations, MEXICO highlighted the due diligence principle and the concomitant duty of prevention, asserting that compliance with these norms can be assessed through four factors:

- the preparation and implementation of nationally determined contributions (NDCs) that reflect the highest possible ambition;
- addressing loss and damage, including through the Santiago Network and the Loss and Damage Fund;
- climate finance, whose provision is a legal obligation for developed States; and
- technology transfer and capacity building through “inclusive” mechanisms that integrate cultural and gender perspectives.

They urged the Court to recognize these obligations as obligations of result that States must achieve. MEXICO further highlighted the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC) as a “well-established and cross-cutting” principle and rejected characterizations of CBDR-RC as an “evolving notion.”

On State responsibility and the difficulties of attribution, they recognized that much climate harm emanates from private entities but reiterated States' due diligence obligation to regulate private actors. They also said obligations under the climate regime are owed to all, that is, *erga omnes*. Countering arguments that highlight the complexity of attributing specific greenhouse gas (GHG) emissions to States, they said this complexity cannot become a shield for States to avoid accountability. They called for

innovative tools to overcome evidentiary burdens, underscoring information provided by civil society organizations.

As for consequences arising from a breach of State obligations, MEXICO emphasized the importance of reparations, and in particular compensation, saying that compensation must cover non-economic harm and the loss of ecosystem services. They said climate change is a human rights challenge and called on the Court to consider human rights obligations, including of non-state actors.

The FEDERATED STATES OF MICRONESIA (FSM) countered the contention that the UNFCCC, Kyoto Protocol, and Paris Agreement constitute *lex specialis*, and supported the International Tribunal for the Law of the Sea (ITLOS) Advisory Opinion stating that GHG emissions amount to pollution of the marine environment under the UN Convention on the Law of the Sea (UNCLOS), and obligations under UNCLOS are not fulfilled simply by complying with obligations under the Paris Agreement.

On applicable law, FSM asserted the relevance of intergenerational equity, affirming that States have obligations to prevent the harmful impact of GHG emissions from compromising the ability of future generations, including Indigenous Peoples, to enjoy the planet's natural resources in perpetuity. They also affirmed the applicability of human rights obligations, rejecting assertions that these do not apply extraterritorially. In this regard, they submitted that the Court should consider the effective control of a particular State over emission sources rather than effective control over the territories where the impacts occur or over the persons affected by the impacts. They further asserted that even if human rights generally do not apply extraterritorially, the right to self-determination is a peremptory norm of international law applicable to all, and thus applies extraterritorially. They argued that meeting States' obligations to protect the environment from GHG emissions is essential to avoid undermining the right to self-determination.

Regarding the relevant conduct, FSM pointed to individual and cumulative releases of GHG emissions from activities within the jurisdiction or control of “particular States” that have resulted in significant harm to: States, particularly small island developing States; peoples, including Indigenous Peoples; and to individuals of present and future generations, including rights holders.

They identified these “particular States” as those with historical

responsibility for the majority of GHG emissions, as established by the Intergovernmental Panel on Climate Change.

FSM argued the legal consequences of breaching obligations should be determined in accordance with the law of State responsibility as set out in the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), and could comprise: cessation and non-repetition, including eliminating fossil fuel subsidies, adopting binding regulations to cut emissions in the near term, and eventually phasing out fossil fuels; and reparation, including restitution, monetary compensation, and satisfaction. They asserted the Court must differentiate, to the extent possible, between the reparations owed to States, peoples, and individuals.

MYANMAR highlighted the principle of CBDR-RC and emphasized that responsibility for climate action must consider historical contributions, climate vulnerability, and national capacity. Accordingly, they said, industrialized nations, as historical emitters, have the responsibility to provide financial support, technology transfer, and adaptation assistance to developing countries.

MYANMAR affirmed States' duty of due diligence in preventing transboundary environmental harm, including conducting environmental impact assessments, and said breaches of these duties would trigger legal consequences under ARSIWA.

They further called for recognition of the right to a clean, healthy, and sustainable environment as fundamental to protecting human life, dignity, and well-being. They argued that this right must be accompanied by State obligations to limit activities causing GHG emissions and harming human rights within and beyond borders.

MYANMAR lamented the repeated [deferral](#) of the consideration of its representatives' credentials and the resulting exclusion from the climate negotiations, which, they argued, hinders its efforts to address climate challenges and infringes on fundamental rights. They called for inclusive global cooperation, warning that excluding any nation undermines collective climate action and justice.

NAMIBIA explained the catastrophic impacts of climate-related drought on its population and ecosystems, warning that the country risks becoming locked into a permanent state of aridity. Noting that "the hydrosphere knows no boundaries," they characterized water scarcity as a human rights issue.

In terms of State obligations, NAMIBIA highlighted the harm caused by GHG emissions to the hydrosphere and adverse consequences on human rights, including the right to water. They stressed obligations arising from the no-harm, due diligence, and prevention principles to protect the hydrological system. These obligations, they asserted, entail: mitigation, including through regulation of private entities; adaptation, including through increasing resilience of the water system; and cooperation to ensure other States are aware of activities impacting the hydrosphere. Recalling the Court's case law on transboundary water streams, they argued the rights and obligations of upstream and downstream States must be extended to every State in the global water cycle.

On human rights, NAMIBIA asked the Court to affirm the right to water under customary and treaty law, and, stressing its relevance to the right to self-determination, asked the Court to recognize its *erga omnes* character. They emphasized States' responsibility to respect, protect, and fulfill the right to water, and rebutted arguments that human rights law was not applicable based on:

- location, upholding the extraterritorial application of the right to water;
- substance, saying that obligations to respect and protect human rights apply irrespective of the source of infringement and that compliance with the climate treaties alone does not guarantee compliance with human rights obligations; and
- personality, saying that future generations are not "abstract" and that States are under a fiduciary obligation to protect water resources as trustees.

NAMIBIA also affirmed the applicability of the law of State responsibility, said the science is clear that GHG emissions are responsible for the harm witnessed, and called for mandatory compensation alongside voluntary mechanisms such as the Loss and Damage Fund.

JAPAN emphasized the need for all countries, particularly major emitters, to be united in addressing climate change by peaking emissions and reaching net zero. They emphasized the climate treaties as most relevant for the matter before the Court.

JAPAN noted the legal scope of due diligence is not well defined and varies according to: individual States' primary obligations and specific circumstances and capacity; scientific and technological advances; the risk of harm and level of urgency; and evolving rules and standards. They considered that CBDR-RC provides guidance on how relevant obligations should be interpreted and applied, underscoring that the principle's application should not undermine the fulfilment of obligations and the achievement of the Paris Agreement's objective.

They emphasized that the expression "legal consequences" is not synonymous with secondary obligations of reparations. They underscored that the proceedings do not allow for the consideration of secondary obligations of State responsibility because the questions addressed to the Court are posed in abstract terms and do not identify specific States or categories of States or the conduct in question.

JAPAN noted that even if there is scientific consensus on their adverse effects, activities such as fossil fuel extraction, sales, or subsidies are not prohibited under international law, but only regulated. They noted the call for transitioning away from fossil fuels in energy systems was welcomed as a victory in the UN climate negotiations, but said the implementation of the decision requires a new industrial revolution in most countries and stressed that economies are not transformed by "applying jolts of secondary obligations."

They emphasized that historical responsibility and responsibility for wrongful acts are different concepts, asserting that accepting a leadership role in reducing emissions is not the same as accepting retroactive obligations or existence of the secondary obligation of reparation. JAPAN further highlighted

that while parties to the Paris Agreement recognized the importance of addressing loss and damage, this does not provide a basis for liability or compensation. With regard to the Paris Agreement's provisions on climate finance, they said "climate solidarity cannot be held hostage by outdated categories frozen in time."

NAURU asserted that the most important obligations in the current proceedings are those under general international law. Underlining that the UNFCCC, Kyoto Protocol, and Paris Agreement do not derogate from these international law obligations, they identified the obligation to prevent transboundary harm to the environment of another State, and the due diligence duty arising from this obligation, as of particular importance in this context.

NAURU rejected as outdated the Greek historian Thucydides' adage that "the strong do what they can and the weak suffer what they must." Stressing that "might does not make right," they said powerful States cannot avoid the consequences of the harm they have caused to vulnerable States. They explained that rising sea levels currently pose a threat violating the country's rights to sovereignty, territorial integrity, and self-determination, and its peoples' right not to be deprived of their means of subsistence. Recalling the *Alabama Claims* arbitration decision that due diligence must be exercised in proportion to the risks to which other States are exposed, NAURU affirmed that States are required to take all necessary measures to mitigate the risk of environmental harm.

NAURU rejected others' submission that the prevention duty only applies bilaterally or that the Court needs to identify a particular point in time from which the duty applies in the context of climate change. They argued that the duty has always been understood to apply generally and in the full range of factual contexts possible, as evidenced by State practice.

NAURU also asserted the Court's advice in these proceedings will be retrospective, arguing that the Court, in making its pronouncements, would be stating existing law rather than legislating new law. They affirmed that should the Court conclude that the prevention obligation applies to climate change, this means it has applied since the obligation first came into being, and any State that has acted inconsistently with the prevention obligation has violated an obligation by which it was bound at the time of commission of the act.

NEPAL invoked the 2023 address of UN Secretary-General António Guterres to Nepal's Federal Parliament, quoting his remark: "What is happening in this country as a result of climate change is an appalling injustice and a searing indictment of the fossil fuel age." They expressed gratitude to global youth for their pivotal role in advancing the International Court of Justice proceedings.

NEPAL emphasized that climate change impedes fundamental human rights, including the rights to life, food, health, housing, sanitation, and water, disproportionately affecting women, children, persons with disabilities, and the cultural rights of minorities and Indigenous communities. They said human rights law governs State-to-individual obligations and international

environmental law addresses State-to-State duties, arguing that GHG emissions from beyond Nepal's borders directly infringe upon its citizens' rights.

Citing the principle of harm prevention, NEPAL noted that this customary rule, rooted in due diligence, obligates States to use all means at their disposal to prevent harm from activities within their jurisdiction. They argued that if isolated transboundary pollution is unlawful, the same must apply to widespread GHG emissions. High-emitting States, they stressed, bear heightened responsibility to reduce emissions and urgently raise their climate ambitions.

NEPAL called for the Court to consider States' historical and current emissions, vulnerabilities, and capacities when clarifying obligations, consistent with the principle of CBDR-RC.

On legal consequences, NEPAL identified State responsibility under ARSIWA to address climate harms. Referring to the *Costa Rica v. Nicaragua* case, they highlighted that environmental damage and ecosystem service losses are compensable under international law. They argued that developed States bear a collective duty to compensate for harm caused by historical emissions, urging the operationalization of the Loss and Damage Fund as a compensatory mechanism under the polluter-pays principle. They emphasized that this is about justice, not charity, for vulnerable States.

NEW ZEALAND recalled the Pacific Island Forum's declarations on the continuity of Statehood and maritime zones under sea-level rise.

On applicable law, they submitted that the climate treaties are the key framework for climate action and said this regime is a "package deal" allowing no reservations. They conceded that other treaties, such as the Montreal Protocol on Substances that Deplete the Ozone Layer, the Chicago Convention on International Civil Aviation, or UNCLOS, as well as customary rules, such as the precautionary principle, may bear on the interpretation of obligations arising from the climate regime. They urged the Court to interpret these obligations in line with systemic integration, give due regard to the ITLOS Advisory Opinion, and reject *lex specialis* arguments.

NEW ZEALAND underscored that the well-recognized duty of cooperation is central to States' obligations under customary and treaty law. They highlighted the role of the climate change negotiations and the Global Stocktake, and characterized cooperation as an obligation of conduct, rather than result. The signing of the Paris Agreement, they noted, reflected a "starting point for cooperation rather than an end point."

NEW ZEALAND acknowledged that the law of State responsibility applies to transboundary harm, but said its application to climate change is uncertain and involves complex calculations that go beyond the mandate of the Court in these advisory proceedings. Irrespective of duties under the law of State responsibility, they emphasized existing cooperation mechanisms, including the Warsaw International Mechanism, the Santiago Network, and the Loss and Damage Fund. They also underscored the Paris Agreement's facilitative, multilateral consideration of progress and its facilitative, non-adversarial, and non-punitive approach to compliance.

PALESTINE supported the applicability of the entire corpus of international law to climate change, highlighting that States' obligations under the international climate change regime intersect with different areas of law, including the laws of armed conflict. They affirmed the responsibility of States for the contribution of armed conflict and other military activities, including occupation, to exacerbating climate change. They noted that even when there is no armed conflict, military exercises and weapons production, testing, and transport generate vast amounts of GHG emissions and contribute to climate change.

PALESTINE noted that States do not report the GHG emissions from these activities, leading to a significant underestimation of global GHG emissions and of the action needed to address climate change. They highlighted, for instance, that the first 120 days of the ongoing war in the Gaza Strip caused between 420,000 and 650,000 tonnes of CO<sub>2</sub> and other GHG emissions, equivalent to the total annual emissions of 26 of the lowest-emitting States. Once post-war reconstruction is factored in, they said, the estimate rises to over 52 million tonnes of CO<sub>2</sub> equivalent emissions, higher than the annual emissions of 126 States and territories. PALESTINE emphasized this does not take into consideration the devastating effect on ecosystems and biodiversity, including the degradation and destruction of carbon sinks, which also threaten the climate system.

PALESTINE argued that the customary international law of prevention and due diligence applies to climate change, including emissions from armed conflict and other military activities such as occupation. They highlighted Article 35 of Additional Protocol I to the 1949 Geneva Conventions, which prohibits the use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term, and severe damage to the natural environment. They further pointed to the International Law Commission's Draft Principles on Protection of the Environment in Relation to Armed Conflicts.

They urged the Court to address and clarify the legal rules applicable to the climate catastrophe, including the obligations of States engaged in armed conflict, occupation, and other military activities.

PAKISTAN outlined the "apocalyptic" impacts of climate change on its population and economy, highlighting the 2022 floods that submerged one-third of the country, affected 33 million people, and resulted in reconstruction costs estimated to exceed USD 16 billion. Quoting the UN Secretary-General's 2022 address to the UN General Assembly, they noted: "Pakistan contributed less than 1% of global GHG emissions but its people are 15 times more likely to face death from climate-related impacts than other States."

PAKISTAN emphasized three key points:

- the Paris Agreement under the UNFCCC is the primary framework for addressing climate obligations;
- climate obligations must align with equity and CBDR-RC, encompassing provisions for climate finance, mitigation, and cooperation; and
- disputes regarding treaty obligations must be resolved through mechanisms established within those treaties.

PAKISTAN argued that the obligation of prevention, rooted in due diligence, operates alongside treaty obligations and forms part of the applicable law. They explained that due diligence requires a case-specific assessment of potential harm. They pointed to several conventions, including the UNFCCC, the Vienna Convention for the Protection of the Ozone Layer, the Convention on Long-Range Transboundary Air Pollution, and the UN Convention to Combat Desertification, as evidence that the obligation of prevention applies to diffuse harm, like GHG emissions. They added that many of the States contesting its applicability to GHG emissions are parties to these Conventions.

Rejecting claims that the UNFCCC and Paris Agreement constitute *lex specialis*, PAKISTAN argued that these treaties do not override stricter obligations under general international law. They emphasized that the obligation of prevention is triggered once a State possesses or ought to possess the "requisite knowledge" of the harmful effects of its activities. In the context of GHG emissions, they underscored that claiming ignorance is no excuse.

PAKISTAN concluded: "We are the first generation to feel the impact of climate change and undoubtedly the last generation that can do something about it."

### *In the Corridors*

"We are a week into the hearings and still see new themes emerging," noted an attentive observer. After many references to sea-level rise, the Court heard the fate of countries harboring melting glaciers and others suffering repeated droughts and fearing aridification—with Pakistan underscoring that they, along with many other vulnerable countries, suffer from a cycle of too much, followed by too little, water. Palestine urged the judges to consider the climate impacts of armed conflicts, including the significant amount of unaccounted GHG emissions caused by the war in Gaza. "War really breaks the frame of the climate regime," remarked a visibly gripped commentator, alluding to the difficulty of protecting the environment amidst the destructive forces of military warfare.

Mexico and Namibia rebutted a common argument against more ambitious climate action heard in some submissions: States' responsibility over the conduct of private actors. They forcefully explained that States are under a legal duty to rein in the harm emanating from business activities. "Many States love to hide behind their supposed lack of control over nefarious corporations," smoldered one observer, "but in some cases, they are even shareholders of those very multinationals!"

Participation and representation in the international order emerged as a recurring theme throughout the day. The Federated States of Micronesia reminded the Court that they and other formerly colonized countries had no voice in the creation of the current international legal order, and yet, they are now looking to this order for help. Nepal thanked youth activists, the "critical movers behind the scenes" who fought for the advisory opinion and are doing their best to bring attention to the process and hold governments accountable.