doi:10.1017/amp.2021.97

JUDGING THE CLIMATE CRISIS: THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE IN ADDRESSING ENVIRONMENTAL HARMS

This panel was convened at 11:15 a.m., Wednesday, March 24, 2021, by its moderator Jorge E. Viñuales from the University of Cambridge, who introduced the panelists: Lavanya Rajamani of the University of Oxford; Christina Voigt of the University of Oslo and Co-Chair of the Paris Agreement's Implementation and Compliance Committee; and Solomon Yeo of the Pacific Islands Students Fighting Climate Change Initiative.

Introductory Remarks by Jorge Viñuales*

Good morning, afternoon, or evening to all and welcome to this session of ASIL's Annual Meeting on "Judging the Climate Crisis: the Role of the International Court of Justice in Addressing Environmental Harms," which is held online this year due to the COVID-19 pandemic.

My name is Jorge Viñuales and I am the Harold Samuel Professor of Law and Environmental Policy at the University of Cambridge. It is a pleasure to moderate this panel with my colleagues and friends Lavanya Rajamani, Christina Voigt, and Solomon Yeo. In a moment, I will be introducing them to the audience, but I would like to briefly situate the focus of this session first.

In the last two decades, there have been significant efforts to bring climate change before international courts and tribunals. The current surge in climate change litigation at the domestic level and, increasingly, before human rights bodies is a manifestation of this long-matured process. Yet, the International Court of Justice (ICJ) has not yet been called to take a position on climate change, at least not yet.

Some attempts have been made in the past. For example: in March 2002, Tuvalu's prime minister, Toloa Kalake, announced an initiative (jointly with Kiribati and the Maldives) to bring an action against Australia and the United States before the ICJ in connection with climate change-driven sea level rise. On February, 2012, the resident of Palau, Johnson Toribiong, announced in a speech at the UN General Assembly (UNGA) that it would seek an advisory opinion from the ICJ on the question of climate change. Similarly, on November 22, 2018, Vanuatu's minister of foreign affairs, Ralph Regenvanu, announced in a statement at the Climate Vulnerable Forum his government's intention to explore legal action as a tool to address the loss and damage suffered in Vanuatu. More recently, starting in March 2019, a campaign launched by grass-roots youth movements at the Pacific Island Forum (PIF) called for states to request an advisory opinion to the ICJ on the impact of climate change and human rights. At its fiftieth meeting, the PIF adopted a resolution "noting" this initiative.

This is the broad context in which this panel will explore the potential role of the ICJ on "judging the climate crisis" or, more specifically, on addressing the international legal dimensions raised by the broad, composite and epoch-defining phenomenon of climate change.

Rather than sequential presentations, this session will take the form of a moderated discussion between the panelists structured around four questions. We hope that this format will be more suitable to tease out the prospects of what the ICJ could say about climate change.

* Harold Samuel Professor of Law and Environmental Policy, University of Cambridge.

We have a distinguished and representative panel to discuss these issues. I would like now to introduce my colleagues very briefly, in alphabetical order, and then move to the substance of the debate.

Lavanya Rajamani is a professor of international environmental law at the Faculty of Law, University of Oxford. Lavanya has authored several books and articles in international environmental and climate change law, including the ASIL prize-winning co-authored book, *International Climate Change Law* (Oxford University Press, 2017). She serves as coordinating lead author for the Intergovernmental Panel on Climate Change (IPCC)'s Sixth Assessment Report and has also served as a consultant and legal advisor, among others, to the Secretariat of the UN Framework Convention on Climate Change (UNFCCC) and the Alliance of Small Island States (AOSIS). She was part of the UNFCCC's core drafting and advisory team for the 2015 Paris Agreement.

Christina Voigt is professor at the Department of Public and International Law, at the University of Oslo. She is also chair of the World Commission on Environmental Law of the International Union for the Conservation of Nature (IUCN) and co-chair of the Paris Agreement's Committee to Facilitate Implementation and Promote Compliance. She has published extensively on environmental law and climate change, and she was the principal legal advisor to the government of Norway in the negotiations of the Paris Agreement and its Rulebook.

Solomon Yeo is campaign director of the Pacific Island Students Fighting Climate Change. He is from the Solomon Islands, and he graduated with a Bachelor of Laws and a Bachelor of Arts (Politics) in 2019 from The University of the South Pacific, majoring in politics and law. Solomon is dedicating his life to addressing climate change and inequality. He is campaigning alongside other youth leaders from all around the world to seek an advisory opinion from the ICJ on climate change and human Rights.

Question 1: Origins of the Youth Movements' Campaign to Seek an ICJ Advisory Opinion

Jorge Viñuales

Solomon, can you tell us a bit more about the origins of the initiative and the key expectations youth movements have in terms of the pronouncement that the ICJ could make?

Remarks by Solomon Yeo*

Turning back the time to 2012, as you noted in your introductory remarks, the government of Palau announced that they were going to pursue a UNGA resolution on seeking an advisory opinion from the ICJ on climate change. However, no serious action followed suit, until 2019.

A group of concerned environmental law students from the University of South Pacific gathered to research legal initiatives that they believe could break the political impasse we are facing in the climate change debate. After a review of the Palau initiative, the students concluded that a UNGA resolution requesting an advisory opinion from the ICJ was the optimal choice going forward for Pacific Island States. The students took action by writing to the governments of the Pacific Island Forum including New Zealand and Australia to support the student's proposal and to take the initiative to the UNGA.

Yet, we realized that letters were not enough and felt like more could be done, which led to the formation of the Pacific Islands Students Fighting Climate Change and the initiation of the Pacific youth ICJAO campaign. Since its formation, we have been campaigning extensively within the Pacific region and at international platforms. Our collective efforts have seen our proposal receive

* Pacific Islands Students Fighting Climate Change Initiative.

https://doi.org/10.1017/amp.2021.97 Published online by Cambridge University Press

support from many Pacific governments, with the Vanuatu government as the championing state of the ICJAO Campaign.

The campaign benefits from the widespread support of eminent legal experts and academics,[1] over 130 international civil society organizations,[2] and inspiring youth representatives from all over the world to take the campaign to their respective countries and regions. Together with the Pacific youth, we have also formed the World's Youth for Climate Justice[3]—the umbrella network of the global youth ICJAO campaign.

Moving to the question of the youth's expectation from the ICJ, we want a concrete determination by the ICJ to provide clarity on states' obligations on human rights and intergenerational equity. To meet this end, the ICJ could specify what are the obligations of states under international law to protect the rights of the present and future generations against the adverse effects of climate change. The youth believes that a positive intervention by the ICJ could catalyze more ambitious actions that can secure our fundamental rights to live with dignity without fear of climate change denying us/them and our/their children of that freedom.

Jorge Viñuales

Thanks Solomon. Christina, in the past, there have been other similar initiatives, is the moment ripe for such a request?

Remarks by Christina Voigt*

If there has ever been a right and ripe moment, then it is probably now.

The science behind climate change causes and effects is conclusive. The IPCC in its 2018 "Special Report on Global Warming of 1.5°C" assessed the impacts of climate change at 1.5°C compared to 2°C and showed very clearly that already at 1.5°C certain damages will occur, and that they will exacerbate at 2°C. It stated that:

> Future climate-related risks depend on the rate, peak and duration of warming. They are larger if global warming exceeds 1.5°C before returning to that level by 2100 than if global warming gradually stabilizes at 1.5°C, especially if the peak temperature is high (e.g., about 2°C). Some impacts may be long-lasting or irreversible, such as the loss of some ecosystems.[4]

The IPCC also provided clear indications of pathways necessary to keep temperature increases at 1.5°C. In order not to overshoot 1.5°C (and to avoid the climate-related risks of such overshoot), global net anthropogenic CO_2 emissions have to decline by about 45 percent from 2010 levels by 2030 and, *reaching net zero around 2050*, and have to stay *negative* thereafter.[5]

Such global balance of emissions and removals by 2050, as already set out in the Paris Agreement,[6] Article 4, paragraph 1, and Article 2, paragraph 1(a), requires not only immediate, rapid, very deep, sustained emissions cuts, but also transformative changes of all sectors and societal systems. This is a demanding task and political willingness does not yet match the urgency, scope, and magnitude of that task. Political decision-making processes are slow and often full of

[1] World's Youth for Climate Change, *at* https://www.wy4cj.org/foi.

[2] Pacific Islands Climate Action Network, *at* https://pacificdemands.org.

[3] World's Youth for Climate Change, *supra* note 1.

* University of Oslo; Co-Chair of the Paris Agreement's Implementation and Compliance Committee.

[4] Intergovernmental Panel on Climate Change (IPCC), Special Report on Global Warming of 1.5°C, Summary for Policymakers, A 3.2 (2018).

[5] *Id.*, at C.2

[6] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, TIAS No. 16-1104.

https://doi.org/10.1017/amp.2021.97 Published online by Cambridge University Press

compromises, which delay the implementation of effective measures. This was, by the way, the issue of the recent climate decision by the German Federal Constitutional Court in *Neubauer et al. v. Germany*, which stated that the German Climate Protection Act was unconstitutional because it did not contain effective measures to achieve carbon neutrality (in Germany) by 2050 and had put the main burden of achieving carbon neutrality to a time post 2030, thereby disproportionately affecting young citizens in an intertemporal manner.[7]

The international climate negotiations and treaty law have only marginally addressed the issue of liability for climate-related harm, if at all. The Paris Agreement, which contains in its Article 8 provisions on loss and damage, is accompanied by its adopting decision 1/CP.21 which contains a waiver for liability and compensation (paragraph 51). Currently, no further negotiations on clarifying the issue of liability are expected.

At the same time, we see that frustrations are growing as the impacts of climate change become more and more tangible. Risk scenarios are no longer confined to the future and climate change-driven risks are already affecting people today in various ways. They are affecting primarily young people who will grow up in a future marked by climate impacts. And they are impacting populations in parts of the world that are already vulnerable to changing climate patterns, while having historically contributed very little, if at all, to the problem which now needs to be addressed with utmost urgency. The issue of liability for climate-related harm has therefore become an issue of global justice, both in a temporal and spatial dimension.

From a legal perspective, it becomes increasingly important to identify and clarify which state obligations exist to avoid harm resulting from climate change. As said above, under treaty law, they remain largely unaddressed or only indirectly captured. International customary obligations are somewhat fuzzy and in need of authoritative clarification, for example by the ICJ or another international court or tribunal with relevant jurisdiction.

So far, few voices have demanded such clarification, as Jorge mentioned in his introduction. We have some more examples in national climate litigation, but no case has yet been decided on the question of liability (public or private) for climate harm. The danger is, of course, that a request to a national court or to the ICJ, for example for an advisory opinion, could go both ways and it is uncertain what the court might say on that matter. Also, there are procedural hurdles of jurisdiction, admissibility, etc.

But the attempts to involve an international court on the issue of climate justice keep on coming, and I believe that it is only a matter of when, rather than if, an international (or national) court will rule on it.

Jorge Viñuales

Thanks Christina. Lavanya, what are your thoughts on this?

Remarks by Lavanya Rajamani*

The moment is ripe in many respects, as Solomon and Christina point out. However, the moment is also ripe because the multilateral climate negotiations have reached the point of diminishing marginal returns. The Paris Agreement is in place, and has almost universal ratification, especially now with the United States back in the fold. The multi-year, rule-making phase has all but concluded, except for the issue of markets and common time frames. The core obligations, the rules as well as the institutional architecture for ensuring faithful implementation are in place. All this is

[7] Neubauer et al v. Germany, BvR 2656/18/1 BvR 78/20/1 BvR 96/20/1 BvR 288/20 (Fed. Const. Ct. Apr. 29, 2021) (Ger.), *available at* http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210429_11817_judgment-2.pdf.

* University of Oxford.

https://doi.org/10.1017/amp.2021.97 Published online by Cambridge University Press

not, however, enough, since national contributions are not sufficiently ambitious to put us on a pathway to climate stabilization. There is a "tsunami" of national climate litigation, some of it challenging the adequacy of national ambition, but in an area of collective action on a global commons problem it runs into challenges. There is much that the ICJ could contribute in this area.

Question 2: The ICJ on the Link Between Human Rights and Climate Change

Jorge Viñuales

Christina, you had a prominent role in the negotiation of the preamble of the Paris Agreement, including its reference to human rights, which is the first explicit such reference in the climate agreements. How could the ICJ clarify, in your view, the link between human rights and climate change? What specific pronouncement on this issue could one expect in the context of an advisory opinion?

Christina Voigt

Yes, the Paris Agreement is the first international climate treaty that makes an explicit reference to human rights. In its preamble it says that parties "should, when taking action to address climate change, respect, protect and consider their respective obligations on human rights," before listing in a somewhat arbitrary manner "the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development." It is important to note that although the Agreement mentions these obligations and rights, it phrases them as states' "respective obligations," meaning that these are obligations that individual states already have under existing human rights treaty law to which they are a party or under international customary law. In other words, the Preamble "reminds" parties of those human rights obligations but does not establish new obligations or rights.

Human rights obligations are established by international or national human rights law. Here we have negative obligations to avoid direct interference with human rights, and positive obligations to take all adequate and necessary measures for their protection. This is also recognized by regional human rights courts, such as the European Court on Human Rights (ECtHR) or the Inter-American Court on Human Rights (IACtHR), as well as increasingly by national courts. This obligation must be discharged in keeping with the standard of due diligence, which must be appropriate and proportionate to the level of risk of environmental harm (see IACtHR, *Lakha Honhat v. Argentina*, Judgment, 2020).

Human rights are increasingly affected by climate change impacts and the corresponding obligations are being interpreted in light of climate law, especially the Paris Agreement, as well as climate science. In defining what "all appropriate and adequate measures" are, the Agreement needs to be taken into account when interpreting human rights norms. This applies, in particular to the Agreement's goals, parties' obligations, as well as the normative requirement that each party's nationally determined contribution (NDC) reflects its highest possible level of ambition (Article 4, paragraph 3, of the Paris Agreement) and progression. This is a standard of conduct (not of result) which informs the due diligence that states must exercise under human rights law.

If the ICJ, or a regional human rights court (nb: there are currently four cases pending before the ECtHR), were asked to clarify the link between human rights and climate change, this "wider normative environment" would need to be taken into account. However, I would expect the likelihood of the ICJ to rule on human rights and climate change to be rather limited, and consider a claim based on the customary obligation to prevent significant harm to other states or areas beyond national jurisdiction more likely.

https://doi.org/10.1017/amp.2021.97 Published online by Cambridge University Press

Jorge Viñuales

Thanks Christina. Lavanya, what about other aspects of rights-based approaches?

Lavanya Rajamani

Christina has indicated the ways in which the ICJ can clarify the link between human rights and climate change. I would just add here that the link between human rights and climate impacts must also be placed in the context of the emergence and growing acceptance of Earth jurisprudence and Rights of Nature. From the Whanganui river in New Zealand, to the Ganges in India and the Amazon basin in Colombia, these have been recognized in national legislation or by courts as subjects of rights in and of themselves.

The notion that the Earth has rights, and that every one of its inhabitants has rights that need to be balanced against each other in favor of ensuring the Earth stays in balance, has long been at the heart of Indigenous philosophy on the environment, but it is gradually taking hold of popular and legal imagination. Even the Paris Agreement offers a guarded hat tip to "Mother Earth" and the "ecosystem integrity" approach in a preambular recital. And, while I would not expect the ICJ to pronounce on the Rights of Nature, it is important to recall that less anthropocentric approaches to rights are emerging and gaining ground, not only in theory but also in practice.

Jorge Viñuales

Solomon, any other dimensions that could be identified?

Solomon Yeo

Further to Lavanya's intervention, I would also like to add a matter of equal importance, which is the recognition of the rights of the young people especially from the Global South considering the challenges that these marginalized groups are facing coupled with the barriers that they are confronted with when voicing out their concerns while also simultaneously advocating for solutions to advance climate justice.

Coming back to the question, I would just like to add the potential role ICJ can play in integrating areas of international law, specifically human rights and environmental law that have sometimes developed separately.

Question 3: Clarification of Climate Change Law by the ICJ

Jorge Viñuales

Lavanya, you have been closely involved in climate change negotiations over the years and your work on the international law of climate change is a standard reference, what could one expect the ICJ to say about this body of law in an advisory opinion?

Lavanya Rajamani

Thank you, Jorge. To answer the question of what the ICJ could helpfully say in this area, we need to first understand the gaps and ambiguities in international climate change law, which the ICJ could helpfully plug and clarify. There are at least three gaps in the climate change regime: ambition, accountability, and fairness. The ICJ could usefully plug these gaps and clarify the content of the legal obligations that fall on states in relation to addressing climate change and its impacts.

https://doi.org/10.1017/amp.2021.97 Published online by Cambridge University Press

In relation to the ambition gap: the centerpiece of the Paris Agreement is a binding procedural obligation placed on states to submit NDCs (Article 4, paragraph 2 of the Paris Agreement). Three things to note here. First, these contributions are "nationally determined," not multilaterally negotiated. States have tremendous autonomy in setting these contributions for themselves. Second, there is no mechanism to review the adequacy of national contributions in relation to either ambition or fairness. And, third, there is no obligation of result attached to the content of the nationally determined contributions that states undertake. This has resulted in national contributions that do not add up to what is necessary to achieve the "purpose" of the Paris Agreement—to hold temperature increase to "well below 2°C" and pursue "efforts to limit the temperature increase to 1.5°C above pre-industrial levels" (Article 2, paragraph 1 (a)). The first round of NDCs put us on track to an over 3°C temperature increase.[8] Current NDCs, including the updated ones (eighty-six NDCs submitted by 103 parties), are estimated to put us on track to 2.4°–2.6°C.[9] The UNFCCC recently released its interim synthesis report for the forty-eight NDCs that have come in, and it is not heartening news.[10] If the 131 net zero targets/announcements are taken at face value, as met, the increase would be limited to approximately 2°. It is worth keeping in mind, however, that many of these net zero targets are not reflected in the NDCs and the long-term strategies of states. In some cases, they are not even clearly aligned with short term 2030 climate actions.

This leads me to the second gap, an accountability gap. There is no mechanism in the Paris Agreement to generate individual accountability for the targets states undertake. Although states are required to provide information with their NDCs, they can choose the informational requirements that apply to them. There is an enhanced transparency framework that requires states to provide information necessary to track progress in achieving their NDCs. But the transparency framework was carefully negotiated to exclude a robust review function. And, indeed, some scholars argue that transparency takes the place of accountability in the UN climate regime. The facilitative compliance committee is limited to ensuring compliance with a short list of binding procedural obligations. Thus, the accountability for targets taken and their achievement has been demanded and checked by non-state actors, from outside the formal UN climate regime.

The third gap is a fairness and equity gap. A central question in the climate negotiations is that of burden sharing. This is and has been a deeply contentious issue, given the differences in contributions to climate harm, in particular the historical responsibility that many developed states bear, and the fact that many of those least responsible for greenhouse gas emissions are the most impacted, such as the small island states and least developed countries (LDCs). States also have dramatically different capacities, constraints and priorities. Even large developing countries such as India have enduring poverty and energy poverty challenges. Yet we are all in this together. How are we to determine whether each country is doing its "fair share" to address climate change?

The Paris Agreement side-steps this contentious issue with the move toward self-differentiation and national determination, but it is a question that is now cropping up in national and regional climate litigation. There are only a few remaining avenues within the architecture of the Paris Agreement for equity and fairness to be addressed. The global stock take, the first of which is to be held in 2023, is to be undertaken in the light of equity (Article 14 of the Paris Agreement). However, given that the global stock take is intended to assess collective progress

[8] Climate Action Tracker, *CAT Climate Target Update Tracker*, *at* https://climateactiontracker.org/climate-target-update-tracker.

[9] Climate Action Tracker, *Temperatures*, *at* https://climateactiontracker.org/global/temperatures.

[10] UN Framework Convention on Climate Change (UNFCCC), Nationally Determined Contributions Under the Paris Agreement Interim Synthesis Report (Sept. 17, 2021), *at* https://unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributions-ndcs/nationally-determined-contributions-ndcs/ndc-synthesis-report.

https://doi.org/10.1017/amp.2021.97 Published online by Cambridge University Press

rather than individual contributions and progress, it is unclear how it will translate into fairer contributions from individual states. Further, the Paris Rulebook, i.e. the decisions of the parties that flesh out the provisions of the Agreement, requires states to regularly review, update, and provide narrative justification for the ambition and fairness of their NDCs.[11] Most states subjectively select indicators that serve their preferred notion of fairness, and these justifications are subject to limited formal international discipline or review. There is thus a fairness gap which needs to be addressed if states are to have a sense of ownership and investment in addressing the climate challenge.

The issue of fairness, which the Paris Agreement sought to side-step, is not going away. Issues of "fair shares" are being raised in national and regional climate litigation. In national and regional courts, including in the now-famous *Urgenda* case in the Dutch courts[12] and the more recent decision of the German Constitutional Court in *Neubauer et al. v. Germany*,[13] when claimants argue that national ambition is inadequate and needs to increase, the courts then sensibly ask against what concrete benchmarks the national effort is to be judged. In other words, in the context of a collective action problem how is each state's fair share to be determined, and against which adequacy standard can it be judged? This is also one of the central issues in the *Agostinho* case before the European Court of Human Rights.[14] A group of young Portuguese climate activists are demanding that thirty-three countries across Europe increase their ambition as they are not doing their "fair share" to address climate change.

What then can the ICJ do in the context of these three gaps—ambition, accountability, and fairness—in the international climate change regime? First, the ICJ could interpret the provisions of the Paris Agreement—in particular Articles 4.2 (NDCs) and 4.3 (progression and highest possible ambition)—in the light of the customary international law principle of prevention of significant environmental harm and the duty of due diligence that attaches to it. While states may not have obligations of result attached to their NDCs, they do have obligations of conduct in relation to the domestic mitigation measures that they are required to take to implement their NDCs. The duty of due diligence attaches to these obligations of conduct, which means they have an "obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result."[15] Although due diligence is an inherently variable standard, it is not infinitely malleable and if the ICJ fleshes out and concretizes the standard of due diligence in this context, it would constrain the discretion and autonomy that states have so far claimed in both choosing and implementing their NDCs. This is crucial if national contributions are to be sufficiently ambitious to put us on track to achieving the temperature goal identified in the Paris Agreement.

Second, the ICJ could identify and elaborate on other customary international law principles, such as good faith and cooperation, and apply them in the climate change context. Many of the Paris Agreement's core provisions place a "good faith" expectation on states rather than imposing binding obligations of result on them. The ICJ could usefully elaborate what good faith and cooperation requires in this context. This too has the potential to limit the autonomy that states have appropriated to themselves in the shift toward "national determination." Such a determination may help us assess for instance if Brazil's updated "new First NDC" is a downgrading of its

[11] UNFCCC, Decision 4/CMA.1 Further guidance in relation to the mitigation section of decision 1/CP.21. (Mar. 19, 2019), *available at* https://unfccc.int/sites/default/files/resource/cma2018_3_add1_advance.pdf.

[12] Urgenda v. Netherlands, ECLI:NL:HR:2019:2007 (Sup. Ct. Neth. Dec. 20, 2019) (Neth.) (English translation), *available at* https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf.

[13] *Neubauer*, *supra* note 7.

[14] Duarte Agostinho and Others v. Portugal and 32 Other States, App. No. 39371/20 (Eur. Ct. Hum. Rts.), *at* http://climatecasechart.com/climate-change-litigation/non-us-case/youth-for-climate-justice-v-austria-et-al.

[15] Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, para. 110 (ITLOS, Feb. 1, 2011).

https://doi.org/10.1017/amp.2021.97 Published online by Cambridge University Press

commitment, and therefore a breach of the good faith and non-regression requirements placed on States in relation to their contributions.

Third, the ICJ could identify, determine the legal status and operational relevance of, and elaborate on the equitable principles of international environmental law. Equity, both inter- and intra-generational, common but differentiated responsibilities and respective capabilities, and special circumstances. This could guide states in assessing whether they and others are doing their fair share to address climate change.

Jorge Viñuales

Thanks for this very detailed answer Lavanya. Solomon, would such pronouncements meet the expectations of youth movements?

Solomon Yeo

I agree with Lavanya's points, and I would also add that the youth movement would accept these pronouncements so long as we are promoting more ambitious and equitable actions that are cognizant of the plight of both young people and of the generations to come.

Jorge Viñuales

Thanks Solomon. Christina, what specific issues would particularly benefit from some additional clarity?

Christina Voigt

I agree with Lavanya and with Solomon. I think an ICJ Advisory Opinion could be very helpful in shedding light on some of the grey areas of customary international law as well as applying the established customary rules of risk prevention, precaution, carrying out an environmental impact assessment, cooperation, and consultation to the challenge of addressing climate change.

The ICJ has repeatedly stated that the duty to prevent the causing of significant harm to the environment of other states as well as to areas beyond national jurisdiction is part of the corpus of international law. What would be helpful to clarify is the specific standard of care under this customary rule, in the context of climate change. It is understood that the standard of care is to act with due diligence. This implies adopting all appropriate and reasonable measures to address and prevent the risk of harm, which in turn, needs to be seen in relation to risk at stake and the capacities of states.

The interesting question here is how the requirement that each party's NDC will reflect the party's highest possible ambition (Article 4.3 of the Paris Agreement) and progression in their successive NDCs informs the standard of care under the harm prevention principle. Article 4, paragraph 3 establishes for each party a due diligence standard to deploy its best efforts in setting its national mitigation target in its NDC and in pursuing domestic measures to achieve it in a manner that reflects its national circumstances, i.e., its responsibilities and capabilities.

An obligation of due diligence means that states must deploy all reasonable and appropriate means, to exercise best possible efforts, or simply to do their utmost. It also requires governments to act in proportion to the risk at stake and with foresight.[16] In the *Pulp Mills* case the ICJ pointed out "that the principle of prevention, as a customary rule, has its origins in the due diligence that is

[16] Int'l L. Comm'n, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, Art. 3(7), Y.B. Int'l L. Comm'n, Vol. II, pt. 2 (2001), *available at* https://legal.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf.

https://doi.org/10.1017/amp.2021.97 Published online by Cambridge University Press

required of a State in its territory."[17] The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS), in its *Seabed Mining Advisory Opinion*, emphasized that precaution is, in effect, part of due diligence[18] and recognized that "due diligence" may impose more rigorous requirements for riskier activities. It also means taking all appropriate and necessary measures to address private behavior, including adopting necessary regulatory measures, their monitoring and as well as their enforcement.[19]

In sum, as part of comprehensive environmental due diligence, the following elements are emerging in international (customary) law: (1) principles of prevention and precaution; (2) consultation and cooperation with other states in good faith (i.e. making a substantial efforts); (3) obligation to adopt appropriate rules and measures; (4) carrying out an environmental impact assessment; (5) applying best environmental practices; (6) effective monitoring and enforcement of these rules and measures; and (7) availability of/recourse to compensation.

However, what "acting with due diligence" means in the context of preventing harm from climate change is not entirely clear. This issue has been addressed in academic work, but an authoritative judgment or advisory opinion is still missing. In this situation, a statement by the ICJ would be very useful to clarify these issues.

In light of this, the ICJ could, for example, clarify the due diligence standard expressed in customary law and in Article 4, paragraph 3, of the Paris Agreement and whether it requires as an obligation of conduct that each party sets its climate change mitigation target at the highest level that is not disproportionately burdensome or impossible to achieve. Such a target would have to be set in light of the overall long-term temperature goals of the Paris Agreement, be comprehensive and based on a thorough assessment of all mitigation options and potential in all relevant sectors. States would need to deploy all political, legal, socioeconomic, financial, and institutional capacities and possibilities in defining such target. It also requires parties to have domestic measures in place that are necessary, meaningful and, indeed, effective to achieve that target.

In light of science,[20] this would also imply taking effective measures with the objective of globally reducing greenhouse gas emissions, so as to achieve *global* net zero emissions by 2050. This requires deep reductions already in this decade to ensure that the achievement of global net zero emissions around mid-century remains possible. In order to achieve *global* net zero emissions, those parties that are in a position to do so, according to their responsibilities and capabilities, will need to reach net-zero targets much earlier than 2050, in order to enable parties that might need longer, to also get there around 2050.

States also have to ensure that public and private investments and actions are consistent with a pathway toward low carbon emissions and climate resilient development, according to Article 2, paragraph 1(c), of the Paris Agreement. In their regulatory framework, they need to ensure that their own "climate neutrality" measures do not lead to rising emissions in other parts of the world, due to "exported" emissions or so-called "leakage." This occurs where the production processes of goods that are consumed within a state are outsourced to other third states and lead to increasing emissions in those states. It also occurs through the export of fossil fuels or fossil fuel-products, such as plastics, which increase greenhouse gas emissions in third parties when combusted or incinerated.

[17] Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 ICJ Rep. 14, para. 101 (Apr. 20).

[18] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, *supra* note 15.

[19] *Pulp Mills on the River Uruguay*, *supra* note 17, para. 187; *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, *supra* note 15.

[20] IPCC 2018 Report, *supra* note 4.

https://doi.org/10.1017/amp.2021.97 Published online by Cambridge University Press

All in all, an authoritative statement from the ICJ on the legal requirements for states' prevention and liability duties for harm from climate change, in light of science and informed by the Paris Agreement, would be a helpful and much needed complement to the international legal framework on climate change.

Question 4: Scientific Dimensions of Climate Change and Their Legal Implications

Jorge Viñuales

One key aspect of a judicial pronouncement on climate change under international law would concern the handling of the scientific dimension, including causality/attribution, the associated diligence in preventing harm, and of course the possibly ensuing responsibility of some states. How in your view would these matters feature in an advisory opinion? If I can continue with Christina perhaps.

Christina Voigt

Causality and attribution are very challenging aspects when it comes to climate change. As a collective action problem, it has accumulated over space and time. Although there has been significant progress in attribution science, it is difficult to attribute responsibility for specific weather events affecting specific countries/individuals at a certain point in time to specific states or companies. Responsibility for historical emissions leaves to a different result than responsibility for current or future emissions, or the capability to apply financial, technological, or human resources to address climate change. As the climate negotiations show, the bottom-up approach adopted in the Paris Agreement basically arose from the fact that no single parameter is readily applicable to determine with certainty who is responsible for the problem and who can and should apply their capacity to solve it. In a potential case or advisory opinion, the focus should in my view not be to establish sine-qua-non causality; rather on the *contribution to increase* the risk of harm.

This approach would be somewhat unprecedented for the ICJ. The environmental cases it has decided so far concerned direct causality, e.g. *Nauru*, *Gabčíkovo-Nagymaros*, *Pulp Mills*, and *Construction of Road*. In a climate case, however, the focus should be on whether the state in question has acted with due diligence and has taken all adequate and necessary measures to reduce the risk. If not, liability might be established with the consequences following from the instrument of State responsibility, including compensation for damages.

In order to determine whether "all adequate and necessary measures" were adopted, account needs to be taken of the reports by the IPCC. The IPCC stated that for holding warming to 1.5°C *global* net-zero CO_2 emissions around 2050 (1.5). The IPCC does not break this down to national targets; but rather establishes a global pathway. As suggested above, in order to show that a state has taken all adequate and necessary measures, it has to apply its best efforts to achieve its highest possible climate ambition. States therefore need to have a long-term (and short-term) plan in place on how to reach global CO_2 neutrality by 2050, including effective measures, their implementation, compliance and enforcement; including private actors.

Jorge Viñuales

Thanks Christina. Lavanya, what are your views on this question?

https://doi.org/10.1017/amp.2021.97 Published online by Cambridge University Press

Lavanya Rajamani

The IPCC's Sixth Assessment Report assessing the state of the scientific literature is due to be released over the next year. As an authoritative assessment of the science coproduced by over seven hundred authors representing ninety countries, 44 percent of whom are from developing countries, it could form an unassailable basis for a possible ICJ advisory opinion. It builds on previous reports, in particular the IPCC 1.5°C Special Report, which was prepared in response to a mandate by COP-21 in Paris. The IPCC's Sixth Assessment Report, especially the Report of Working Group 1 (the physical science), reflects advances in attribution science, that is, the ability of models to attribute the chances of particular weather events occurring, and their intensity, to anthropogenic climate change.

Further, "due diligence," that both Christina and I have already alluded to, is closely linked to science. As the ITLOS noted in its advisory opinion on *Responsibilities and Obligations in the Area*, "due diligence" is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity.[21] In the field of international climate change law, the nature and extent of due diligence required from States is influenced and shaped by several factors, including the objective, purpose and goals of the climate change regime, in particular it's temperature goal, and the nature and extent of harm suffered in the absence of due diligence. In the absence of due diligence, the IPCC has already determined that there will be "severe, pervasive and irreversible impacts."[22]

Jorge Viñuales

Thanks Lavanya. Solomon?

Solomon Yeo

One example of how an ICJ advisory opinion could potentially assist the world in understanding the legal implications of climate science is by clarifying the legal obligations on which the 1.5°C target rests under international law.

Jorge Viñuales

Thank you Solomon. Indeed, that target was first mentioned in the 2009 Copenhagen Accord, which although often presented as the embodiment of the failure of COP-15, is in many ways the conceptual template of the Paris Agreement. The target is now expressly stated in Article 2(1)(a) of the Paris Agreement but, given scientific developments in the understanding of how dire the current situation is, that quantified target is now required by the most basic due diligence requirements under international law, whether as a stand-alone duty of due diligence or as a component of numerous other obligations, customary or treaty-based.

I would like to thank the three panelists for sharing with us their knowledge and insight. As I mentioned in my introductory remarks, climate change is an epoch-defining challenge, and the ICJ, with its unique positioning as the World Court, should certainly have a say on the international law relevant to it.

[21] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, *supra* note 15, para. 117.

[22] IPCC, Climate Change 2014 Synthesis Report (2015), *available at* https://www.ipcc.ch/site/assets/uploads/2018/02/SYR_AR5_FINAL_full.pdf.

https://doi.org/10.1017/amp.2021.97 Published online by Cambridge University Press