

ICJ Highlights: Tuesday, 10 December 2024

Adaptation and climate change-related displacement were two themes that emerged in countries' statements, with several underscoring impacts on children's rights. Major emitting developing countries were singled out repeatedly, with regard to both their mitigation obligations and their contribution to the provision of climate finance.

Statements

PALAU recalled its long history of colonial rule and said the freedom of independence comes with a basic responsibility: "Every State must ensure that its activities do not harm its neighbors." They illustrated the threat posed by climate change to Palau's right to self-determination, showing that the country's only port, hospital, and airport risk becoming inaccessible. They further decried the cultural and political effects of sea-level rise, lamenting that their children stand to inherit a country that no longer reflects the stories and values of their ancestors. They emphasized that internal, landward displacement creates additional pressure on biodiversity in the areas where displaced people resettle.

PALAU said the issue of climate change is straightforward as a matter of international law, noting that it is a basic principle of the international community that one's property may not be used to cause harm to others—known as nuisance in common law systems, as a servitude established by law in civil law systems, "and simply as a golden rule in most moral systems." They referenced the long-standing jurisprudence on this principle, and stressed that breaches must give rise to legal consequences under the law of State responsibility, including full reparation of, and compensation for, damage caused. They rebutted arguments that the no-harm principle should not apply to climate change based on:

- the complexity of attribution, affirming that practical difficulties in establishing causation should not rule out obligations in principle and that it is the responsibility of every advocate to meet the burden of proof; and
- the climate treaties superseding general international law as *lex specialis*, asserting there is no support for this argument in the negotiating history or the text of the treaties.

PALAU urged the Court to disregard some States' request to "rewrite" the climate treaties in ways that these States could not achieve during negotiations. They closed by narrating the traditional Palauan legend of the breadfruit tree as a warning against greed and overconsumption.

PANAMA highlighted these hearings as an opportunity for the Court to address the inadequacies of the UN Framework Convention on Climate Change (UNFCCC) process and inspire a stronger determination to tackle the global climate crisis. They lamented that high-emitting States, that are consequently responsible for transboundary pollution, are adversely affecting Panama's self-determination.

They described the increasing unpredictability of climate change, including rapid swings from severe drought to devastating floods, noting it continues to push the boundaries of what States can adapt to.

PANAMA recalled the UN Charter, where all peoples determined to, among other things, "reaffirm faith in fundamental human rights" and "practice tolerance and live together in peace with one another as good neighbors." They highlighted that human rights are universal and that the Charter's aims cannot be achieved if human-induced climate change is allowed to destroy the living conditions of millions all over the world. They further cited Articles 55 and 56 of the Charter, where all peoples: determine to promote, *inter alia*, higher standards of living and solutions for international economic, social, health, and related problems; and pledge to take joint and separate action to achieve these purposes. PANAMA urged the Court to take these far-reaching provisions into account and advise that they cannot be achieved without due respect to the global environment by all States under international law.

PANAMA affirmed the applicability of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) and called for reparation, including restitution, compensation, and satisfaction, as well as payment of interest on any amount due, in accordance with Articles 35-38 of ARSIWA.

The NETHERLANDS highlighted the unprecedented threat posed by anthropogenic greenhouse gas (GHG) emissions, emphasizing that climate change transcends borders and generations. They warned that further delays in mitigation and

adaptation will close the opportunity to secure a livable future for all and emphasized that greater levels of mitigation can reduce adaptation needs in the future.

They delineated the country's own experience fighting against submersion, building on, among others, coastal protection, maintaining open river connections, and floating infrastructure. They also addressed the different adaptation needs in their Caribbean territories arising due to higher temperatures, increased wind speeds, and more frequent droughts.

The NETHERLANDS stressed the obligation to implement mitigation policies has entered the general corpus of international law as a universally applicable *erga omnes* norm, requiring long-term strategies to achieve net-zero emissions by 2050 and phase out fossil fuels.

They noted human rights law obliges States to protect rights threatened by climate change through reasonable mitigation and adaptation measures. They lamented the absence of adequate legal protection for climate-displaced persons, calling for this issue to be placed on the agenda of the climate change negotiations, and urged the Court to consider the ongoing work of the International Law Commission on sea-level rise. They underscored obligations under the Convention on the Rights of the Child and States' responsibilities to prevent child mortality from climate impacts.

The NETHERLANDS stressed that international collaboration is critical for capacity building, technology transfer, and climate finance. They called for a significant increase in mitigation and adaptation financing, highlighting the need for both public and private contributions. They stressed, "there is no room for free riders on this planet."

PERU underscored that climate change constitutes an unprecedented threat to present and future generations, and affects countries and people differently. They emphasized intergenerational equity, which requires States and present generations to take measures to mitigate and adapt to the effects of global warming to prevent impacts on the well-being and rights of future generations.

They recalled that States decided that the Paris Agreement "will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC), in the light of different national circumstances," arguing that this supports a dynamic and evolving interpretation of States' obligations. PERU emphasized taking into account the specific needs and special circumstances of developing countries, especially those particularly vulnerable to the adverse effects of climate change. They lamented that the new climate finance goal falls short of what is needed in this decade and urged enhanced, non-debt-inducing financial support to unlock climate action in developing countries. They also highlighted: the precautionary principle; the principle of cooperation; and the general obligation to protect and conserve the marine environment.

PERU further underscored the interlinkages between climate change and the enjoyment and realization of human rights. They called for the Court to consider the risks faced by people in

vulnerable situations, such as Indigenous Peoples, local and rural communities, children, women, older persons, people living in extreme poverty, minorities, persons with disabilities, migrants, refugees, and internally displaced persons.

As examples of financial mechanisms established as forms of reparation, they pointed to the Loss and Damage Fund and the International Oil Pollution Compensation Funds. PERU noted that the Court will help set out a path to a balanced climate system and asserted that the Court is not limited to assessing commitments, but may also develop them in line with the need for effective reparation to third States.

The DEMOCRATIC REPUBLIC OF THE CONGO (DRC) argued that States may fully comply with the Paris Agreement and still be in breach of their human rights obligations. The climate regime alone, they said, will not prevent significant harm to the climate system, and underscored the "complementary" obligations of due diligence and prevention. They asserted that States' standard of due diligence must be informed by other international norms, including the ones contained in the Paris Agreement, as well as by the best available science, including the Intergovernmental Panel on Climate Change reports.

On State responsibility, DRC pushed back against the claim that GHG emissions are too remote for other States to be held accountable. They noted that the requisite causal link is grounded in the foreseeability of harm, and that it is not required to know with "full certainty which State will suffer which harm and when" because the harm emanating from GHG emissions is indiscriminate in nature. They asserted that the matter is akin to "hunters firing blindly in the woods, fully aware that there are vulnerable people at risk." In terms of legal consequences, DRC underlined the importance of full reparations and stressed that, in situations of multiple causes to a single injury, any single contributor may be required to compensate for the entire harm. As such, they said, any high emitter may be held individually responsible for harm incurred by vulnerable States, noting this is both "necessary and proportionate" to ensure effective relief for victims of climate harm.

On CBDR-RC, DRC recalled Article 3.2 of the UNFCCC on the specific needs of developing countries and said it would be "absurd" to exclusively focus on the formal equality and joint responsibility of States in light of different historical and current contributions to, and capabilities to address, climate change. They called for the provision of technical and financial assistance, *inter alia*, to allow countries in the Global South to preserve carbon sinks. DRC invited the Court to break up the traditional distinction between developed and developing countries, taking into account the evolving economic and environmental characteristics of emerging economies in particular, and clarifying that all main emitters incur legal responsibilities, "whoever they may be."

PORTUGAL highlighted that States' duty to cooperate in the context of climate change arises from: the international climate change regime; the human right to a clean, healthy, and sustainable environment; and the need to protect persons affected by climate change.

They reiterated that the UNFCCC recognizes the need for international cooperation and effective participation by the entire international community in addressing climate change, based on States' differentiated responsibilities and varying capacities. They further identified cooperation requirements under the Paris Agreement, noting, for instance, that the Agreement's temperature goals are collective goals which no single party can achieve on its own. They urged the Court to clarify the specific content of the duty to cooperate in the context of the climate change regime and the benchmarks for assessing whether this duty has been satisfied, taking account of evolving science, risk of harm, and urgency, as well as the current state of implementation of the Paris Agreement.

PORTUGAL affirmed that environmental degradation directly and indirectly affects the enjoyment of a broad range of human rights, including the right to life and the rights of the child.

They noted in particular that cooperation is required in relation to persons displaced as a consequence or in anticipation of climate change impacts, and asserted that States might have a duty to: facilitate cross-border movement of people; offer possibilities of temporary or permanent residence in their territories; make bilateral or regional arrangements to manage migratory displacement patterns; and coordinate to find sustainable and durable solutions, considering that sea-level rise may make it impossible for displaced persons to return to their original locations.

The DOMINICAN REPUBLIC argued that a compelling opinion from the Court could drive stronger and immediate climate action, particularly in the context of nationally determined contributions (NDCs) to be submitted in 2025. They underscored that high-emitting States have breached their international obligations, which should be derived from the entire corpus of international law.

They explained that between 1971 and 2010, the Ocean absorbed 90% of the excess heat energy stemming from anthropogenic GHG emissions, underscoring that this contributes to sea-level rise, Ocean acidification and deoxygenation, with devastating effects on marine ecosystems and the livelihoods and identity of Caribbean peoples. They noted sea-level rise will persist for centuries, with nearly 50% of Caribbean islands at risk of submersion.

Equating the existential threat of climate change to that of nuclear weapons, the DOMINICAN REPUBLIC emphasized the "fundamental right of every State to survival" and urged the Court to recognize this right. Complementing the obligation under customary international law not to cause transboundary harm, they said States must comply with mitigation obligations under the Paris Agreement, halt wrongful conduct, and provide reparations under the law of State responsibility where breaches of obligations lead to harm. They added that while loss of statehood has not yet materialized, the mere threat to survival constitutes significant harm. They requested the Court to endorse the International Law Commission's recommendation of a "strong presumption in favor of continuing statehood" for States affected by sea-level rise.

ROMANIA underscored that all States, regardless of size, economic power, or level of development, must take climate action and meet their commitments under international law. They argued

against considering historical responsibility in the context of CBDR-RC, saying it is an "oxymoron" for some States to invoke this principle or the global carbon budget in support of their right to pursue carbon-intensive development. They highlighted that equity must guide the interpretation of States' obligations under the climate regime and characterized these as *erga omnes* obligations to "foster greater solidarity."

On the link between climate change and human rights, ROMANIA supported the European Court of Human Rights' ruling in *Klimaseniorinnen*, which found that States must undertake measures in pursuit of substantial and progressive reduction of their GHG emissions, and that these must be incorporated in a binding national framework. They also asserted that the climate treaties do not form *lex specialis* but apply alongside general international law, including the due diligence principle. They argued that the Paris Agreement sets a "subjective standard" of due diligence that must guide the duty to prepare, communicate, and maintain NDCs. ROMANIA also underscored the need for a certain "level of vigilance" in enforcing climate measures, and emphasized the "equitable balance of interests" in assessing States' compliance with the duty of prevention, referencing the International Law Commission's Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities in this respect.

ROMANIA also emphasized the Pacific Islands Forum's Declarations on the continuity of statehood and maritime zones in the face of sea-level rise, pointing to existing State practice and scholarship on this topic, and argued all States have a duty to cooperate for the benefit of those States most affected by sea-level rise.

The United Kingdom (UK) affirmed that the most effective way to address climate change is through the legally binding obligations contained in the climate change treaties—most importantly the Paris Agreement—and complementary treaties, such as on substances that deplete the ozone layer or long-range transboundary air pollution. They outlined States' obligations under the Paris Agreement, including those relating to NDCs, the temperature goals, and domestic mitigation measures, among others. Highlighting these as obligations of conduct governed by the due diligence obligation, they asserted that while parties are not obliged to achieve the content of their NDCs, they must perform the Agreement's obligations in good faith and in accordance with the best available evidence.

The UK rejected the claim that the second question before the Court is about States' responsibility for breaching international obligations, arguing this would require the Court to assess the conduct attributable to a given State against the content of an obligation binding that State at the time of the impeached conduct. They affirmed that, rather, the Paris Agreement itself sets out the relevant legal consequences where States have caused significant harm to the climate system and other parts of the environment, and outlined two key principles in this context: those that can, must do more; and cooperation is essential to address climate change.

The UK also rejected the assertion that the prevention principle applies to GHG emissions, arguing that neither State practice nor *opinio juris* support this assertion. They pointed out that the principle was articulated in limited circumstances such as transboundary air or river pollution, and maintained it is not applicable to anthropogenic climate change, which is the result of GHG emissions from all States over time accumulating in the global atmosphere. They pointed to the fact that those who assert the applicability of the prevention principle also claim that a significant number of States are in long-standing breach, and submitted this as proof of insufficient State practice to support the principle's applicability to climate change. They further contended that even if the prevention principle covered GHG emissions, its content does not require more than the substantive provisions of the climate change and complementary treaties.

SAINT LUCIA warned that global warming will lead to catastrophic consequences, including irreversible coral reef loss, island submersion, and population displacement. They highlighted that small island developing States (SIDS) face mounting debt exacerbated by climate disasters, and paid 18 times more in debt servicing than they received in climate finance from 2016 to 2020.

They denounced major emitters for ignoring science, evading responsibilities, and downplaying their historical cumulative emissions, which they described as the very conduct this Court must address. They argued that major emitting States owe SIDS heightened obligations under both climate treaties and customary international law. Under climate treaties, they asserted, these include obligations for climate finance, loss and damage assistance, mitigation, and technical support. Under customary law, they cited stringent due diligence standards affirmed in the Advisory Opinion of the International Tribunal for the Law of the Sea.

SAINT LUCIA advocated for a holistic approach that considers the entire corpus of international law. They cautioned that limiting obligations to the climate treaties would imply that harmful conduct by major emitters—who had known since the 1960s about the impacts of their activities—was unregulated and unaccountable. Rejecting claims that the Paris Agreement supersedes other obligations, they stressed that it does not excuse failures to meet customary law standards, obligations under the law of the sea, human rights commitments, or peremptory norms such as the right to self-determination. They urged the Court to clarify that principles of systemic integration and harmonious interpretation allow for obligations to apply autonomously.

On human rights, SAINT LUCIA pointed to the Paris Agreement's preamble, which provides that when addressing climate change, parties must respect, promote, and consider their respective obligations related to human rights, including intergenerational equity and the rights of women, children, and Indigenous Peoples. They highlighted the Escazú Agreement, the world's first treaty that includes protection for environmental

human rights defenders, as part of the broader international human rights framework.

Countering arguments that climate treaties are self-contained regimes, SAINT LUCIA cited the *Gabčíkovo-Nagymaros* case, where the ICJ confirmed the enforceability of ARSIWA in environmental cases. They noted that major emitters have conspicuously failed to meet treaty obligations, particularly on mitigation and finance, emphasizing that the Loss and Damage Fund remains “an empty promise.”

On legal remedies, SAINT LUCIA called for the cessation of wrongful acts through immediate GHG emissions reductions and the elimination of fossil fuel subsidies, which distort markets and hinder low-carbon technologies. They emphasized the importance of restitution, including through ecosystem restoration and, where restitution is inadequate or impossible, compensation for damages, including income loss, infrastructure damage, and displacement costs. Referencing the Bridgetown Initiative, they also identified debt relief and equitable climate finance as critical compensation tools. They stressed that the Loss and Damage Fund complements, but does not replace, compensation obligations. They called for satisfaction through formal acknowledgment of wrongdoing by responsible States to restore dignity and address the moral and structural dimensions of the climate crisis.

In the Corridors

As the world celebrates Human Rights Day, a number of submissions highlighted the rights of one particularly vulnerable group: children. Speakers highlighted the dire situation of young people, whose future and heritage are “slipping through their fingers with every centimeter of sea-level rise, with every increment of global warming,” as one observer put it. Saint Lucia projected a painting of a girl submerged by the sea up to her neck—a metaphor for the fate of the country as a whole.

Noting that the Peace Palace stands only six meters above sea level, the Netherlands warned participants that they one day may find themselves on “Peace Palace Island,” if the international community fails to intensify mitigation efforts. Multiple submissions from both developed nations and particularly vulnerable States took aim at major emitting developing countries, dismissing their attempts to shirk mitigation. “It cannot be that some are fighting for their survival while a small number of rogue States continue to steer the world towards climate catastrophe,” summarized one stakeholder.

In a rare instance of direct confrontation, Saint Lucia's legal team passionately dismantled the legal arguments by the United Kingdom and other major emitters. The energetic performance left an impression, with one long-time observer admitting they had never seen such a lively plea before the Court. “Today, the hearings finally lived up to expectations,” concluded another, quipping they had waited all year for the “Taylor Swift concert of international law.”