

CLIMATE CHANGE LAW NETWORK BLOG POST #5

(2022)

PRELIMINARY THOUGHTS ON ENVIRONMENT-RELATED JURISPRUDENCE OF THE INTERNATIONAL COURT OF JUSTICE FROM A CLIMATE LAW PERSPECTIVE

In this short blog post, [Petros Patronos](#), a member of the network shares his thoughts and analysis of the decisions of the International Court of Justice specifically through the climate change law lens. This blog is written for the Climate Change Law Network, WCEL IUCN.

This blog post is part of a series of other blog posts that aims to map the different conferences, events, and panels related to Climate Change Law around the year.

As it is widely known, Vanuatu is calling for an advisory opinion from the International Court of Justice (ICJ) on countries' legal obligations to protect people from climate harm. Vanuatu needs a simple majority of countries at the UN General Assembly to give the ICJ a mandate to act¹. In this respect, a key factor is the formulation of the question that will be put to the UN General Assembly for a vote. Several distinguished scholars and experienced international law practitioners have already published their comments on the issue. In this respect, rules, principles and rights such as the no-harm rule, precaution, common but differentiated responsibilities, common concern of mankind, equity, just transition, sustainable development, the human right to a clean environment and various interconnected human rights have been thoroughly discussed.

In a rather modest approach it seems reasonable to assume that the ICJ, when developing its respective legal reasoning, independent of the precise question to be posed, will take seriously into consideration its own environment-related observations, references and conclusions. Some of these highly acclaimed and beneficial ICJ statements are presented below. In addition, suggested possible links to the climate issue are put in brackets and italics, as a minor, practice-oriented contribution to the discourse. The aim is to provide some preliminary thoughts on how the initial phrases could eventually be further supplemented and enriched with the climate aspect.

ICJ Advisory Opinion 1996, Legality of the Threat or Use of Nuclear Weapons

“The Court recognizes that the environment [*the climate system*] is under daily threat and that the use of nuclear weapons [*that the increase in the global average temperature beyond the temperature goals of the Paris Agreement*] could constitute a catastrophe for the environment [*would lead to climate catastrophe*]. The Court also recognizes that the environment [*climate*] is not an abstraction but represents [*influences*] the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control [*and specifically the climate*] is now part of

¹See Aditi Shetye, 77th UNGA and discussions on Vanuatu's ICJAO Initiative, WCEL-Climate Change Law Network Blog Post #4 (2022)

the corpus of international law relating to the environment [*and the climate*]" (para. 29). "Respect for the environment [*and the climate*] is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality" (ibid., para. 30).

ICJ Gabčíkovo-Nagymaros Case 1997

"The Commission [ILC], in its Commentary, indicated that one should not, in that context, reduce an "essential interest" to a matter only of the "existence" of the State, and that the whole question was, ultimately, to be judged in the light of the particular case (see Yearbook of the International Law Commission, 1980, Vol. II, Part 2, p. 49, para. 32); at the same time, it included among the situations that could occasion a state of necessity, "a grave danger to ... the ecological preservation of all or some of [the] territory [of a State]" (ibid, p. 35, para. 3) [*such as the situation with the particularly vulnerable small island developing States*]; and specified, with reference to State practice, that "It is primarily in the last two decades that safeguarding the ecological balance has come to be considered an 'essential interest' of all States." (Ibid., p. 39, para. 14.)" (para. 53).

"The Court recalls that it has recently had occasion to stress, in the following terms, the great significance that it attaches to respect for the environment [*and now explicitly also for the climate*], not only for States but also for the whole of mankind: ..." (ibid.).

"The Court is mindful that, in the field of environmental [*and climate*] protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment [*and of climate disruption*] and of the limitations inherent in the very mechanism of reparation of this type of damage [*and disruption*]." (Ibid., para. 140).

"... Owing to new scientific insights and to a growing awareness of the risks for mankind - for present and future generations - of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades [*and more recently in the Paris Agreement*]. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities [*that negatively affect the climate system*] but also when continuing with activities begun in the past [*and having negative effects on climate*]." (Ibid.)

ICJ Pulp Mills Case 2010

"The Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" (Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949, p. 22). A State is thus obliged to use all the means at its disposal in order to avoid activities that take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State [*or contributing significantly to climate change, thus posing a threat to the very existence of particularly vulnerable States*]. This Court has established that this obligation "is now part of the corpus of international law relating to the environment" [*and the climate*] (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I), p. 242, para. 29)." (para. 101).

"... In this sense, the obligation to protect and preserve, ..., has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an

environmental impact assessment [*containing a climate change chapter*] where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary [*or global*] context, in particular, on a shared resource [*and on climate*]. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters [*or the global climate system*] did not undertake an environmental impact assessment [*with a climate change chapter*] on the potential effects of such works.” (Ibid., para. 204).

“To begin with, the Court observes that the obligation to prevent pollution and protect and preserve the aquatic environment ... [*and protect the climate*], and the exercise of due diligence implied in it, entail a careful consideration of the technology to be used by the industrial plant to be established, particularly in a sector such as pulp manufacturing [*or oil and gas production*], which often involves the use or production of substances which have an impact on the environment [*or involves the release of huge amounts of GHG, which contribute to climate change*].” (Ibid., para. 223).

ICJ Costa Rica-Nicaragua Cases 2015

“Thus, to fulfil its obligation to exercise due diligence in preventing significant transboundary [*or global*] environmental harm [*or in preventing significant contributions to climate change*], a State must, before embarking on an activity having the potential adversely to affect the environment of another State [*or to release huge amounts of GHG*], ascertain if there is a risk of significant transboundary harm [*or significant contribution to climate change*], which would trigger the requirement to carry out an environmental impact assessment [*with a climate change chapter extending to Scope3 emissions*].” (para. 104).

“If the environmental impact assessment confirms that there is a risk of significant transboundary harm [*or significant contribution to climate change*], the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State [*and the competent international organizations, bodies and mechanisms*], where that is necessary to determine the appropriate measures to prevent or mitigate that risk.” (Ibid.)

“The Court recalls (see paragraph 104 above) that a State’s obligation to exercise due diligence in preventing significant transboundary harm [*or preventing dangerous anthropogenic interference with the climate system*] requires that State to ascertain whether there is a risk of significant transboundary harm [*or significant GHGs emissions*] prior to undertaking an activity having the potential adversely to affect the environment of another State [*and/or the climate system*]. If that is the case, the State concerned must conduct an environmental impact assessment [*with a climate change chapter including Scope3 emissions*]. The obligation in question rests on the State pursuing the activity.” (Ibid., para. 153).

“The Court reiterates its conclusion that, if the environmental impact assessment confirms that there is a risk of significant transboundary harm [*or significant GHGs emissions*], a State planning an activity that carries such a risk is required, in order to fulfil its obligation to exercise due diligence in preventing significant transboundary harm [*or in preventing further significant contribution to climate change*], to notify, and consult with, the potentially affected State [*and the competent international organizations, bodies and mechanisms*] in good faith, where that is necessary to determine the appropriate measures to prevent or mitigate that risk (see paragraph 104 above).” (Ibid., para. 168).