Symposium
Climate Justice

Judging climate change obligations: Can the World Court rise to the occasion?

Part II: What role for international adjudication?

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In Part I of this post, we sought to identify the core rules of international environmental law that needed evolution and clarification for a claim relating to climate change to succeed. We now turn to how international adjudication might help to achieve genuine legal change. The 1992 United Nations Framework Convention on Climate Change has been at the centre of the UN's various initiatives on the issue, and at the time of its conclusion the 2015 Paris Agreement on Climate Change was heralded as an innovation by some. Yet, with the responses to the Paris Agreement's strategy of nationally determined contributions remaining far short of what is necessary, the focus shifts more and more to strategic litigation.

At the domestic level, cases in Australia, New Zealand, India, and elsewhere have drawn on international norms and standards to achieve domestic legal change, with the most influential example to date being the *Urgenda* litigation in the Netherlands, hailed as a landmark for future climate change litigation, and discussed by Spijkers in his contribution to this symposium. But attention is growing also on the international level and the International Court of Justice (ICJ) as a possible venue for strategic adjudication on the climate. Vanuatu is reportedly seeking to build a coalition in favour of an ICJ Advisory Opinion on States' obligations, following an inspirational campaign by Pacific Islands Students Fighting Climate Change, a youth NGO with members across the Pacific region.

The idea of the ICJ as venue for strategic litigation—litigation aimed at establishing a point of law for the purpose of developing a legal regime—remains rooted in the faith that international law can make a positive difference. And it may have a great deal of potential in the field of climate change; but it is hardly without risks. Such an undertaking must be approached with caution; and as any challenges wend their way to The Hague, international lawyers have an urgent role to play in identifying and working to clarify the open questions and possible "danger points" in any future climate litigation, whether in the advisory capacity sought by Vanuatu, or in a contentious, State-State litigation. Strategic litigation, as we have seen in the human rights context, is necessarily a delicate balance between the potential for meaningful legal advances and the danger of holding back legal development through the rendering of an adverse opinion that authoritatively settles a legal question to the detriment of environmental considerations.

To date, the focus has largely been on the Hague Court's advisory function, but it is the contentious route which we wish to explore here: can the contentious jurisdiction also provide an avenue for strategic climate litigation? It is true that contentious jurisdiction has a number of disadvantages compared to the advisory function for strategic adjudication. Foremost, any State(s) seeking to bring a contentious case would need to establish jurisdiction. Given the deliberate absence of jurisdictional clauses in the majority of international environmental instruments, it is likely that it would only be possible to do so as between two States which have accepted the Court's jurisdiction as compulsory under Article 36(2) of the Statute (the 'Optional Clause'). Except when it comes to environmental law obligations that are of an *erga omnes (partes)* character —which may perhaps include damage to the atmosphere and other global common spaces—any applicant State(s) would also be required to demonstrate a direct legal interest.

Other obstacles that might surface in a contentious case include a possible invocation either of the clean hands principle (as virtually all States are net carbon emitters) and the so-called *Monetary Gold* rule. It is devilishly difficult to identify how the specific contribution of one State towards climate change can be

untangled from that of other States: see, for instance, the *Marshall Islands* cases, where respondent States argued that the Court would only be able to determine a breach of the common obligation to negotiate nuclear disarmament in the presence of all States bound by that obligation. Moreover, it may well be that an Advisory Opinion would be regarded as more authoritative by the international community as a whole, addressed as it would be to the issue of climate change *in toto* and not to the application of those principles to a dispute between two States. The advisory procedure also benefits from the opinion being addressed as legal guidance to the requesting organ, which can thus set a broad ambit for the process, and from the fact that any interested State may participate in the written and oral proceedings.

For all this, a contentious case would also have specific advantages, not least of which being the issuance of a judgment that is binding on the respondent State and makes clear determinations as to the legality—or otherwise—of its conduct, contributing to the clarification of climate change obligations. The contentious jurisdiction also gives access to the provisional measure procedure which, given the scientific urgency of climate change prevention, may be necessary. Above all, a contentious proceeding would require that the Court engages with questions of responsibility, attribution, causation and remedies, any or all of which could be absent from an advisory proceeding. These specific sub-questions in relation to climate change are of particular salience, given that in this context the impetus for strategic adjudication arises from the perceived failure of States to comply with their international obligations.

Seeking remedies before the ICJ

Any applicant State pursuing climate justice through a contentious case before the ICJ would presumably be interested in obtaining reparation or another form of remedy. It is one of the key differences between the contentious and advisory jurisdictions that a binding judgment is available in the former, resulting from a determination of responsibility of the respondent State. Here, too, however, the shared nature of responsibility for climate change significantly complicates the question of what remedies are or should be available. An obligation of cessation attaching to net positive emissions may be impossible for a State to achieve in the immediate term, and in the absence of action from other contributors to the harm, especially the major historical emitters, could be argued to be unreasonable. By contrast, an obligation of cessation attaching to emissions of GHG over and above a certain future share of global emissions, though more achievable and reasonable, runs the risk either of being unduly deferential to a State's own assessment of its position and prospects (and thus of recreating the weaknesses of the Paris Agreement), or of being subjected to the critique that in setting definite standards, the ICJ is straying into judicial legislation and overriding the treaty-making competence of States. It may well be that an advisory procedure (with its potential broad participation and discursive authority) is the more promising forum to advise on the content of that cessation obligation.

Beyond cessation, however, a contentious case could have a valuable role to play in clarifying obligations of reparation, particularly as the issue of compensation has been deliberately avoided by States in climate negotiations and before the ILC. Since under the international law of responsibility, States are obliged to make full reparation for the injury caused by their internationally wrongful act, here too the complex issue of causation rears its head. How should the Court take account of the fact that injury is likely caused by the failure of not one but many States to fulfil their climate change obligations? And yet, some form of compensation or reparation must surely be part of the long-term solution to climate change, given the demands of justice involved.

Ultimately a choice between the jurisdictions need not be made. These are—and must be—parallel, and not competitor strategies. Both have strengths and weaknesses, and they have the potential to be mutually reinforcing. In consort, then, with the Vanuatuan effort to secure an advisory opinion, we believe it apposite to consider the legal gaps that could be filled by a judgment in a contentious dispute on a State's responsibility for climate change, and so where work should be focussed by academics wishing to support that goal.

The way forward

With less than ten years until the IPCC's estimated deadline of 2030 for emissions to peak and decline rapidly, and with the scientific consensus on the human origins of climate change virtually uniform, there can no longer be any reasonable doubt that climate change is an urgent issue of justice and human rights, both

within and between States. Yet reasonable (and far from worst-case) estimates based on the current policies of States suggest that the world is on course for between 2.3° and 3.2°C of warming by 2100.

These major and foreseeable harms of a warming world—sea level rise and land inundation; increases in severe storms; the harmful effects of heat; crop failures, drought and famine; and the ensuing forced migrations—will disproportionately affect the Global South: States that have contributed little to the causes of the crisis. Though developed States, too, will not escape unscathed, these dangers threaten developing States to an even higher degree, and the threat is compounded because these States are less able to finance the adaptation and recovery measures that will be necessary. Moreover, without collective solidarity structures, such foreseeable harms will disproportionately affect the poorest and most vulnerable members of our societies within States, developed or otherwise. Without wealth and technology transfers in volumes never seen before, or intensive investment by developed States into mechanisms to reverse the effects of carbon emissions, the demands of decarbonisation will be just another example of the developed States kicking away the ladder, as economist Ha-Joon Chang puts it. It is no surprise that 2019's UNFCCC COP25 drew sharp condemnation from environmentalists and campaigners, as States failed yet again to reach agreement on vital questions, including elements of the Paris Rulebook needed to bring that agreement into full effect. These are questions which must be faced now. Just weeks ago, and almost unnoticed in the deluge of COVID-19 news, Tropical Cyclone Harold cut a swath of destruction through Vanuatu, Fiji and Tonga. One of the strongest storms ever recorded in the region, Harold is a terrible reminder that the harmful impacts of climate change are not some far distant future of slowly rising waters, but are immediate, unpredictable, and utterly devastating.

Both between and within States, it is the most vulnerable who are at most risk of the harmful impacts of a warming world, and who are least able to cope with the threatened impact of climate change. Climate justice demands an answer to this urgent question: who should bear which burdens? (A question Auz has addressed in his excellent post in this symposium). It is in this respect that international adjudication offers a unique forum for lending clarity to State obligations, and perhaps for driving meaningful legal advances. That States consistently fail meaningfully to discuss issues of compensation and reparation in international negotiations should not result in the most vulnerable shouldering the highest costs, either in human or financial terms. Nor, as a matter of justice, is it tolerable for the vast debts of carbon colonialism to be recast as voluntary aid given in benevolence by the rich world which has developed at the expense of the environment and former colonies alike. Judicial processes at the international level offer an opportunity to recast the discussion on these questions, and to refocus on the immediate and future harms of climate change within the historical context of developmental justice. There is no doubt that such a conversation will be difficult, and a good outcome is far from certain. It is, though, a task worth attempting.

We have here highlighted only a small subset of the many intriguing legal questions which stand to be resolved by a contentious case on climate change. Academic legal work is needed to further clarify these – and the many other – issues in preparation for such an eventuality, offering researchers not only a highly meaningful but also truly fascinating set of questions around which to focus our future work. The authors are embarked on a project—in collaboration with the Global Legal Action Network—which will contribute to that task, with the aim to prepare a model memorial for future ICJ climate cases.

Making a success of strategic climate litigation at the international level is, though, a labour which will demand many hands, and the combined work of researchers, activists and practitioners across the international environmental law field will be needed to prepare the groundwork for a successful appeal to the Hague, whether to the ICJ's contentious or advisory jurisdictions. Let us begin.

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