The Promise of Law

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1. I thank the Environmental Law Students Association for inviting me to give this address.

2. I was asked to speak about 'the role and importance of international environmental law', which sounds like tall undertaking. So I have titled my presentation 'The Promise of Law', a term which I borrow from a panel hosted by the UCLA Promise Institute last year titled 'The Promise of International Law in the Face of Ecological Crisis'.

3. I think the title is fitting for the AENC, because what are negotiations if not just an exchange of promises?

4. But to frame the bulk of negotiations as such is overly optimistic. Parties in negotiations bargain before they make promises. In my work with the World's Youth for Climate Justice, my colleagues and I have bargained with state counsels, diplomats, and civil society organisations. We have also witnessed such bargains in international forums, particularly those in the COPs and other UNFCCC intersessionals.

5. Amidst a triple planetary crisis of climate change, biodiversity loss, and pollution, it thus often feels like we are stuck bargaining: in negotiation purgatory. This is because negotiations for outcomes on environmental crises like climate change are getting increasingly drawn out, and when outcomes are achieved their positive impact is often disproportionate to the scale and speed in which the science foretells of imminent disaster. My dear colleagues and participants of this year's AENC, I'd like to pose three questions for you: (1) can law make a promise? (2) what kind of promise does it make? and (3) why should we care about law's promise?

6. To illustrate this point, consider one of the latest buzzwords in the climate space: just transition.

7. It will be common sensical for most of us that the term 'just transition' refers to to the holistic and equitable transition of a state's energy profile and economy away from fossil fuels. That was the gist of Decision 1/CMA.3 in 2021, one of the first instances in which the term just transition was expressly mentioned in the complex web of UNFCCC processes. Yet the Decision in 2021 is merely the start of negotiation purgatory.

8. The journey towards establishing meaningful outcomes for international law to provide substantial means for states to achieve a just transition has been beset by bargains over the following issues.

9. First, whether a 'fossil fuel transition' ought to be mentioned expressly. Such a matter will be familiar to those who read the headlines following each COP, where

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new language on fossil fuels always emerges. The rejection of a fossil fuel phase-out in favour of a fossil fuel transition was an exercise in compromise, but emblematic of a wider struggle to reckon with the fossil fuel industry in UNFCCC processes. Two years later in a draft decision, fossil fuels were no longer present in a text devoted to just transition. At COPs 28 and 29, no real outcome was achieved for just transition. Instead, per the process established by the draft decision in 2023, we have had two dialogues on the matter.

10. The second and third points can be addressed together. Should a just transition also require the protection of human rights, and respect for the principle of common but differentiated responsibilities and respective capabilities per the UNFCCC instruments? While it is instinctive to say yes, some states view human rights protections as an obstacle to achieve a just transition. For instance, they may not have the resources to engage local communities to protect procedural rights of participation. Recognising the importance of human rights may thus frustrate the principle of common but differentiated responsibilities and respective capabilities, as it fails to pay heed to the different responsibilities and lower capabilities of particular states in the climate crisis.

11. This ultimately challenges the fourth obstacle on climate finance, of which needs no explanation. The past COPs have demonstrated the challenge in establishing debt-free public finance initiatives, with just transition objectives being no exception. The $300B USD to be financed through a mix of development bank loans and public financing falls far shot of the estimated $1.3T required to address climate impacts.

12. Finally, a new challenger has approached the arena in the form of unilateral trade measures. Unilateral measures are a particular type of regulation where states impose requirements without the agreement of other states that are impacted by the measures. Such measures typically involve some level of carbon compliance for goods. The EU's proposed Carbon Border Adjustment Mechanism is of particular note, although the UK and Canada are expected to also introduce similar measures in due course. It places an additional carbon price for non-compliant goods which may effectively function as a tariff.

13. Developing states argue that such measures will frustrate their ability to achieve a just transition because of the negative economic impacts it is expected to have for their burgeoning industries. On the other hand, the imposers of unilateral measures argue that disagreements on these measures should be addressed through trade law and its related entities. But with the WTO's dispute resolution body remaining non-operational since 2019, it remains to be seen whether arbitral and regional courts can adequately plug the gap.

14. Of all these issues, it is not always clear whether these issues are red lines or mere bargaining chips for states. As mock negotiators here today, which of these issues do you think is most widely regarded as the bargaining chip?

15. Nonetheless, it is the combination of these disagreements that has resulted in the just transition workstream relying on two 'Dialogues' as its modus operandi in the

aftemath of the Decision in 2023. These dialogues are meant to establish what parties agree and disagree on in order to forge a way forward.

16. Dialogues. Bargains. Negotiations. Promises. Is one type of talking more productive than the other? At what point does law make a promise where we see outcomes?

17. The culmination of the dialogues on a just transition was seen at the recent 62nd meeting of the subsidiary bodies in Bonn last month, four years after the decision in 2021 to recognise the need for a just transition.

18. The result of two weeks of bargaining, the fruits of this negotiation, were in an informal note that will form the basis of negotiations on a just transition plan in COP30.

19. This informal note provides options on whether states will acknowledge the transition away from fossil fuels expressly at paragraph 11(g), and whether unilateral measures would be addressed through a mechanism on just transition in paragraph 25. This was hailed as a victory for the just transition workstream, and in some respects it was given the relative lack of outcomes in four years.

20. Other workstreams, like ones on mitigation ambition and implementation, had achieved less at SB62. Perhaps law can promise us something, it just takes time especially when reckoning with a multilateral process on polycentric environmental problems. That is to say, environmental problems of which the causes and impacts are not uniform across parties, and where the interest in and ability to address them varies widely and may be in conflict.

21. But what is law promising here? When state parties meet at COP30, they will decide which of these options makes it into the final text on just transition and what sort of mechanisms will be put in place to achieve a just transition. But the mechanisms presently suggested in the informal note do not propose anything new or innovative.

22. Instead, what measures were put down were invitations to include a just transition as a consideration in other workstreams, or to identify ways in which just transition may be achieved through other processes. However, those workstreams are also facing considerable obstacles in their negotiations. The impasses faced by the UNFCCC secretariat and states in the just transition workstream are shared across most major workstreams, from mitigation ambition to climate finance.

23. The promise of international law, and sometimes law more generally, is thus often piecemeal. It's a promise to keep dialoguing, bargaining, and negotiating, for the possibility of a real promise. A promise to limit GHG emissions. A promise to implement climate mitigation and adaptation measures. A promise to not inflict transboundary harm on another state, or to compensate for such.

24. Law's promise is thus not merely one of outcomes, it is one of process.

25. And the current Request for an Advisory Opinion on state obligations in respect of climate change before the International Court of Justice, or ICJ, is precisely a

movement that seeks out law's promise for process and answers. It is a movement built on negotiations. But unlike the UNFCCC intersessionals, the promise of law is not lost on the campaign behind the Advisory Opinion.

26. In 2019, a group of Pacific Island law students studying climate change and international law had asked themselves how international law could address the climate crisis. A crisis which posed an existential threat for the Pacific Islands in the form of rising sea levels, increasingly frequent and intense natural disasters, and erratic weather that affected their livelihoods and connection to the land. They would eventually form the Pacific Island Students Fighting Climate Change, a grassroots organisation that kickstarted the campaign to request for an Advisory Opinion before the ICJ to clarify state obligations on climate change. Later, they would partner with a new organisation, the World's Youth for Climate Justice, and together they took the fight to the rest of the world.

27. Both organisations have galvanised youth across the world campaign to their state representatives to support the Request, marking a shift in the global consciousness across both youths and the administration on thinking about the way law could substantively address the widespread impacts of climate change.

28. Negotiations started with the Pacific states but eventually worked its way to the rest of the world, particularly at the UN Offices in New York. The endorsement of the request to the ICJ at the Pacific Island Forum, under the leadership of Vanuatu, was a significant turning point. The Request was eventually co-sponsored by so many states that it was adopted by consensus at the UN General Assembly in 2023– the first for any Advisory Opinion.

29. Four years of negotiations had culminated in this Request. The preamble starts by listing instruments beyond the UNFCCC. The reference to human rights instruments, the law of the sea, and customary international law, paints a picture of ambition. Law's promise is in its ambition. We know that the causes and impacts of climate change intersect with almost all areas of governance. The debate surrounding unilateral measures evidences this. Law's promise here is underscored by an ambition to cohere the various regimes in international law to address the various causes and impacts of climate change.

30. The question the Request thus asks is whether legal regime in international law on climate change be confined to instruments that expressly mention climate change? That is the crux of the first question. It is a question that seeks a promise for a clear and certain answer. Clarity and certainty will be familiar to any law student. They are foundational standards by which we hold the law to. What use is the law if it cannot produce calculable and certain outcomes through the application of clear rules?

31. The challenge for the law here is how clarity and certainty can be achieved when climate change is scientifically complex, and the rules that govern it potentially various. The answer to this first question thus has the potential to reshape the entire landscape of international law and politics even though the Advisory Opinion itself is not a binding document. If the highest court in the world were to hold that instruments beyond the UNFCCC and its related instruments were relevant to

climate change, states may no longer be able to rely on their attendance at COPs and publication of Nationally Determined Contributions as having complied with their climate change duties.

32. There would be a new legal and moral imperative established by the Advisory Opinion. Clear rules on how a failure to take adequate climate mitigation action would breach a state's obligations in human rights or the principle of prevention in customary international law can open possibilities for litigation.

33. The authority of law as a legitimate, rational set of rules is a result of its promise to deliver clear rules and certain outcomes. Even in the face of complex challenges like climate change, it does not mean that the pursuit of clarity and certainty is meaningless.

34. The same applies to our pursuit of clear rules and certain outcomes where rules on liability are concerned. The Request breaks new ground by expressly asking the Court to contemplate the legal consequences for causing significant harm to the climate system. Contrast this question against the Paris Agreement, which does not establish a system of liability or compensation. Law's promise is that others will be held responsible for the harm they cause. Of course, the question then turns to whether it can be said that parties are the cause of particular climate impacts.

35. One might then be quick to point out that the promise of law here is as weak as that of the UNFCCC instruments. The Advisory Opinion is not legally binding on states. Climate science does not establish, with sufficient certainty, that certain states or companies are responsible for the climate crisis. Or that climate impacts like increased extreme weather events are not solely the result of GHG emissions. One might also argue that states could simply leave the relevant instruments or UN as a whole.

36. I do not have easy answers for these concerns. Law's promise of outcomes is heavily dependent on the rule of law. Yet the rule of international law has not always delivered.

37. And to such pessimism I have this to say: a decision is only as good as the advocacy behind it. This is both a statement of warning and encouragement that my colleagues had repeated during the Bonn conference. Here, I hope it is a banner of hope to those skeptical of the impact of the ICJ's Advisory Opinion.

38. The advocacy behind the Advisory Opinion can be thought of as a series of powerful and relentless negotiations. The very text of the Request was the result of creative legal thinking amidst negotiations between the youths that have started this campaign and the states responsible for submitting and sponsoring the Request. Negotiations continued as the campaign engaged states across the world to make written submissions to the ICJ as part of the Advisory Proceedings. We saw states think about international law's role in the climate crisis for the first time. We connected them with resources that we had created and experts all over the world. We negotiated for a space in those submissions: in the form of arguments on youth and future generations, the inclusion of youth Statements as evidence of climate

impacts, and for the opportunity to speak alongside states and regional organisations during the oral hearings.

39. The promise of law is one of process. It was a promise that there existed an objective, legitimate platform and procedure in which concern over climate inaction could be heard. The mobilisation of states and civil society organisations to participate in such a process was overwhelming for the ICJ. Over ninety written submissions were made. The collective concerns and experience of the global majority could be felt in full force: the majority of submissions looked beyond the UNFCCC, considered human rights, and argued that there were legal consequences for climate change. States that argued to the contrary were in the minority, and were often high-emitting states.

40. In this legal process, the division between most of the high emitting states and the rest of the world was made public yet again. Importantly, it has moved this division from merely one of economics and politics to one of law. It forces states to reckon with the real loss and damage faced by frontline communities and demands a legal reason as to why states are not held accountable for climate inaction when the law, science, and social movements demonstrate otherwise.

41. Law can and does make a promise. It makes a promise of due process. That we are to rely on reason in our efforts to address climate change. It also makes a promise of outcomes. That we may have clear rules that address the various causes and impacts of climate change.

42. That brings me to the final question on the promise of law. Why should we care about law's promise? Particularly when all the action seems to be contained in the negotiations, bargaining, and dialogue that precede law's conclusion.

43. I think that law's promise, its importance, whether in the realm of the international law on climate change, or private law regimes that underpin the negotiation of specific environmental projects, is the same. We care about law's promise because it promises justice. A type of justice where parties can be satisfied with their negotiated outcomes. A promise of just problem solving. A vision of climate justice where no one is left behind. Law's promise is justice. Difficult negotiations don't change that.