

CLIMATE CHANGE and THE RULE OF LAW: ADJUDICATING THE FUTURE IN INTERNATIONAL LAW

Some notes on a public lecture given in the United Kingdom Supreme Court on 17 September 2015 by Philippe Sands QC, Professor of Law, University College London.¹

1. In his Introduction (PART I), Professor Sands describes how three years ago he didn't favour a request for an Advisory Opinion from the International Court of Justice (ICJ) about the responsibilities of States under international law regarding the emission of greenhouse gases ("GHG"s). His view then was that he thought there was a serious risk that the Court's opinion might be "*unhelpful*": it might, for example, decline to give an opinion at all (implying that international law had nothing to say) or its Opinion might be "*unhelpful on the science*" or "*unhelpful on the law*". He considered that the possibility that the Court could make a contribution that "*might generate a greater political will to action by states*" to be "*an unlikely prospect*".

In these notes I hope, *inter alia*, to demonstrate that those concerns are as valid today as they were in 2012.

Although Professor Sands indicated various methods by which the relevant issues might be tested under international law, I will confine my comments to the possibility of this being achieved by means of an Advisory Opinion of the ICJ – the route Professor Sands appears to favour.

2. Professor Sands gives various reasons why his perspective on the ICJ's potential role on climate change has evolved (see Page 3 of his text version of the lecture). They are hardly compelling: there's little evidence for example that the public regards climate change as a key issue – indeed the opposite would appear to be more likely;² the Pope's recent encyclical is interesting, but his view on the ethics may be misplaced;³ as for China "acting" on climate change, in the 2014 joint announcement with President Obama, China's president Xi Jinping didn't say anything, as Professor Sands indicates, about a "cut", but only that "China intends to achieve the peaking of CO₂ emissions around 2030", with no mention of

¹ <https://www.youtube.com/watch?v=eef1tK8mtEI&feature=youtu.be> Text version: <http://tiny.cc/juag4x>

² For example, this UN survey of nearly 8.5 million people indicates that climate change is the least of their concerns: <http://data.myworld2015.org>.

³ See for example <http://tiny.cc/qg6g4x> and my comment below (p. 3) about how China has lifted over 600 million people out of poverty in the past 30 years.

the level at which it would peak or of what might happen thereafter’;⁴ and, regarding the science appearing to be “*ever more robust*” and the claimed “*global commitment*” to reduce emissions so as to restrict global temperatures below 2°C, see my comments below at Items 5 (p.6) and 6 (p.8).

3. In PART II, Professor Sands refers to the UN Framework Convention on Climate Change (UNFCCC) adopted at Rio in 1992.⁵ He refers in particular to its objective as set out in Article 2. The Convention is central to any legal consideration of States’ obligations regarding climate change and, of course, its Article 2 is most important. But, in my view, there is one feature of the Convention that – more than anything – is hampering current action. And that’s the distinction it makes between Annex I countries (referred to as “developed” countries) and non-Annex I countries (referred to as “developing” countries).

There’s little, if any, evidence that the undoubted disagreements about the science – the focus of Professor Sands’ concern in his lecture – are the reason it’s proving so difficult to come to an effective agreement to restrict GHG emissions. In contrast however, the Annex I / non-Annex I distinction has had huge consequences. These arise in particular from Article 4.7:

*“The extent to which developing country Parties will effectively implement their commitments under the Convention ... will take fully into account that economic and social development and poverty eradication are **the first and overriding priorities** of the developing country Parties.” [My emphasis]⁶*

When the Convention was enacted (1992) the effective exemption of developing countries from environmental constraint made some sense. But over the years Non-Annex I countries, which include major economies such as China, India, South Korea, Brazil, South Africa, Saudi Arabia and Iran, have become increasingly powerful: in 2012 responsible for 67% of global CO2 emissions.⁷ Today that’s likely to be about 70%. Nonetheless, they have resolutely refused to change the Annex I / Non-Annex I bifurcation. And that’s despite pressure for change from the US and EU – contrary to Professor Sands’ suggestion (Page 19 of his text) that “*the issue of climate change may no longer be one in which the great powers*

⁴ <http://tiny.cc/81ag4x>

⁵ The full text of the UNFCCC: <https://unfccc.int/resource/docs/convkp/conveng.pdf> (Note Article 4.7 is on page 8.)

⁶ The omitted words are concerned with a different, but arguably equally important, issue: finance and technology transfer from developed to developing countries.

⁷ http://cdiac.ornl.gov/trends/emis/meth_reg.html (Go to ‘Preliminary 2011 and 2012 Global & National Estimates’.)

are at odds". For example, here are two extracts from recent news reports. The first refers to a pre-Paris meeting of powerful developing countries (a meeting that included India, China, Iran and Saudi Arabia):

*A strongly-worded joint statement issued at the end of a two-day meet hosted by India ... stressed that differentiation between developed and developing nations across each element is "essential" for enhanced effectiveness of the new agreement.*⁸

The second refers to a comment by India's Environment Minister:

*Prakash Javadekar told Reuters last week that India's peak year would be a "distant" one because it needed to fight poverty and give the more than 300 million Indians still living without power access to energy.*⁹

Such views mean that hopes of a binding and comprehensive emission reduction deal in Paris in 2015 are unlikely to be fulfilled: CO₂ emissions will continue their inexorable rise. It's true, as Professor Sands notes, that the UNFCCC has had some consequences: for example "*some emissions have been curtailed*". But overall emissions have grown massively since 1992 and that been almost entirely due to the actions of non-Annex I (developing) countries.¹⁰ And it's understandable: by providing access to affordable, reliable electric power derived from inexpensive fossil fuels, mainly coal, China has lifted over 600 million people out of poverty in the last 30 years.¹¹ So it's hardly surprising that other developing economies are determined to follow that example – something they're entitled to do under UNFCCC Article 4.7.

Therefore, if – as Professor Sands hopes – the ICJ is not "*to remain silent and consign itself to irrelevance*" (Page 19 of his text), it might helpful if it were to review this aspect of the Convention. For example, the Court might note that it makes little sense that China – the most industrialised country on earth, responsible for at least 29% of global emissions (more than the US and EU combined) and with per capita emissions exceeding the EU's¹² – should continue to be classed as "developing". However, it seems unlikely that the UN General Assembly would be able to make a request for an ICJ advisory opinion when many developing countries would be opposed to the idea. Perhaps there's another way to proceed?

⁸ <http://tiny.cc/63ag4x>

⁹ <http://tiny.cc/94ag4x>

¹⁰ This is a useful and comprehensive report – for a quick overview see Figures 2.1 (page 11) and 2.2 (page 14): <http://tiny.cc/96ag4x>

¹¹ <http://tiny.cc/7abg4x>

¹² <http://www.bbc.co.uk/news/science-environment-29239194> (Note: the figures here are for 2013 – China's and India's shares are probably greater by now.)

4. It would seem from the above that disputes about the science are at best only marginal to any consideration of why more is not being done to curtail emissions. Nonetheless Professor Sands believes that *“the single most important thing [the Court] could do is to settle the scientific dispute”* (Page 14 of his text).

That seems to me to be an extraordinary assertion: not just because of the relatively marginal importance of scientific disputes in this context – but in particular because of his view that a court of law should be the final arbiter of an unresolved and purely scientific question. Yet he goes further: having noted that some *“scientifically qualified, knowledgeable”* people, despite *“a broad emerging consensus”*, are unconvinced that mankind’s actions were the main cause of recent atmospheric warming, he says – and, interestingly, this is not in his text – *“the courts could play a role in finally scotching those claims”*. He added that a finding of fact on such a matter *“would be significant and authoritative”*.

A few observations:

(a) Of the possible *“first tier”* of *“central factual issues”* that Professor Sands suggests might be addressed by the Court (Page 14 of his text), it’s only about one – whether mankind’s actions were the main cause of recent atmospheric warming – that there is serious disagreement.¹³

(b) In December 2013, the House of Commons Energy and Climate Change Select Committee held an inquiry concerning the 5th Assessment Review (AR5) of the Intergovernmental Panel on Climate Change (the “IPCC”). (Its most recent report from which is derived the Synthesis Report referred to on Page 5 of Professor Sands’ text.) One of the Committee’s questions was this:

“To what extent does AR5 reflect the range of views among climate scientists?”

I provided written evidence to the Committee in a paper that covered (i) warming of the climate system, (ii) human influence on climate and (iii) the implications of continued GHG emissions.¹⁴ Since then I have seen nothing that challenges my conclusion that, despite claims of consensus, there is insufficient evidence of the views of climate scientists to give a reliable answer to the Committee’s question.

¹³ Thus Dr Judith Curry in her presentation to the US House of Representatives Committee on Science, Space and Technology (see footnote 21, p.6) said: *“Claims that the earth has been warming, that there is a greenhouse effect, and that man’s activities have contributed to warming, are trivially true, but they are essentially meaningless by themselves in terms of alarm.”*

¹⁴ <http://data.parliament.uk/writtenevidence/WrittenEvidence.svc/EvidenceHtml/4191>

(c) Scientists who consider that key aspects of climate science are uncertain may well be in the minority. So they should perhaps be encouraged that something that was a minority view at law (Lord Atkin's view in *Liversidge v Anderson*) "*is now widely accepted as correct*" (see Page 21 of Professor Sands' text). Surely lawyers would not deny to science something that they welcome for the law?

(d) In any case, science's escape from the tyranny of consensus and authoritative opinion was a major achievement of the Enlightenment. This is well illustrated by these quotations from Thomas Huxley ("Darwin's Bulldog" whose Oxford debate with Bishop Wilberforce in 1860 established the pre-eminence of the theory of Darwinian evolution):

The improver of natural knowledge absolutely refuses to acknowledge authority, as such. For him, scepticism is the highest of duties; blind faith the one unpardonable sin.

In science, as in art, and, as I believe, in every other sphere of human activity, there may be wisdom in a multitude of counsellors, but it is only in one or two of them.

The ultimate court of appeal is observation and experiment... not authority.

Based on these principles the scientific method became the indispensable tool of science.¹⁵ Should that now be subordinated to the authority of a court of law however distinguished? I really don't think so. And it's a principle that applies equally to the opinions of the IPCC – see Page 5 of Professor Sands' text.¹⁶

(e) Professor Sands suggests however that science's subordination to the authority of the ICJ may have been established by its ruling in 2014 regarding the dispute between Australia and Japan re whaling in the Antarctic (see page 15 of his text).¹⁷ But that case was concerned with the interpretation of a treaty (the International Convention for the Regulation of Whaling ("ICRW")) – something clearly within the province of the Court. And, although scientific issues were involved, as the case report records "The Court ... is not called upon to resolve matters of scientific or whaling policy" and "does not need to pass judgment on the scientific merit" of relevant research objectives. This is very different from a judicial attempt to settle a purely scientific disagreement such as the extent to which anthropogenic activity influences atmospheric temperature.

¹⁵ Probably no one has explained the scientific method better than Richard Feynman: <https://www.youtube.com/watch?v=OL6-x0modwY>

¹⁶ In any case the IPCC is essentially a political entity – as observed here: <http://tiny.cc/46bg4x>. Note for example the process by which each "Summary for Policymakers" (from which the Synthesis Report is derived) is produced.

¹⁷ The report on the whaling case can be found here: <http://tiny.cc/9dbg4x>

(f) Likewise the decision of the Dutch court (the Rechtbank Den Haag) – now under appeal¹⁸ – to which Professor Sands refers (see PART I, Page 3 of his text, PART IV, page 10 and PART V, page 20) was about the alleged inadequacy of government climate policy, not about a disagreement on climate science. (The case may be important in terms of legal interest (“standing”), although that would seem unlikely to be an issue for the IJC provided it had an appropriate request from the UN General Assembly or other relevant body.)

In any case, the Netherlands (responsible for only about 0.5% of global GHG emissions¹⁹) has at least accepted the need for a binding reduction. Contrast that with the world’s greatest emitters: number one (China at 29%) and number three (India at 7%) are not planning any reduction and the plans of number two (the USA at 15%) are non-binding and probably inadequate.²⁰ Yet I’m unaware of any suggestion that they should be challenged: it’s hard, for example, to imagine such a challenge to Chinese government policy.

5. I believe it would help to put my Item 4 (above) into perspective if I were to refer to the position of one of the “*scientifically qualified, knowledgeable*” persons to whom Professor Sands refers (Page 14) – and whose views he suggests “*the courts could play a part in finally scotching*”. From many distinguished candidates I’ve chosen Dr Judith Curry, Professor and former Chair of the School of Earth and Atmospheric Sciences at the Georgia Institute of Technology. I thought a reference to Dr Curry might be particularly helpful because she has made two presentations this year to US Government committees – presentations that are readily understandable by persons without scientific training.²¹

The first includes in particular a detailed examination of evidence provided by the most recent IPCC AR5 report – evidence that she believes weakens the case for human factors dominating recent climate change.²²

¹⁸ <http://tiny.cc/gfbg4x>

¹⁹ *op. cit.*, footnote 7, p.2.

²⁰ *op. cit.*, footnote 11, p.4. And see <http://tiny.cc/wdcg4x>

²¹ Her statement to the Senate Committee on Environment and Public Works: <http://tiny.cc/llbg4x> And to the House of Representatives Committee on Science, Space and Technology: <http://tiny.cc/gnbg4x> Here’s a recent example of Dr Curry’s peer-reviewed work: “*The implications for climate sensitivity of AR5 forcing and heat uptake.*” -<http://link.springer.com/article/10.1007%2Fs00382-014-2342-y#page-1>

²² Note: she’s referring here to evidence from the main (scientific) body of the report, not to the opinion of the IPCC as expressed for example in the Synthesis Report. (And see footnote 16, p.5)

Here's her summary:

- *The science of climate change is not settled, and evidence reported by the IPCC AR5 weakens the case for human factors dominating climate change in the 20th and early 21st centuries*
- *With the 15+ year hiatus in global warming, there is a growing appreciation for the importance of natural climate variability*
- *The IPCC AR5 and SREX find little evidence that supports an increase in most extreme weather events that can be attributed to humans, and weather extremes in the U.S. were generally worse in the 1930's and 1950's than in recent decades.²³*

The second presentation is more general. Her position is summarised by this extract from her introductory comments:

Scientists agree that surface temperatures have increased since 1880, humans are adding carbon dioxide to the atmosphere, and carbon dioxide and other greenhouse gases have a warming effect on the planet. However there is considerable disagreement about the most consequential issues:

- *Whether the warming since 1950 has been dominated by human causes*
- *How much the planet will warm in the 21st century*
- *Whether warming is dangerous*

And here are two extracts from the conclusion of her second presentation:

There is reason to be concerned about climate change. However, effectively responding to the possible threats from a warmer climate is made very difficult by the deep uncertainties surrounding the risks both from the problem and the proposed solutions. Uncertainty is a two edged sword; future climate outcomes might be better or worse than currently believed. However, recent research has sharpened the blade of the sword in the direction of less impact from human-caused climate change and greater political and economic infeasibility of meaningful reductions in CO₂ emissions.

*The wickedness of the climate change problem provides much scope for **disagreement among reasonable and intelligent people**. [My emphasis]*

Both papers are worth reading in full: they are clearly argued and provide an excellent illustration of how so-called "sceptical" scientists see the climate problem. Like Professor Sands, I'm "a non-scientist" – so ineligible to judge whether or not Dr Curry is right about the science. But I suggest that, although no doubt some climate scientists would disagree with her

²³ Here's an interesting review by Dr Roger Pielke Jr of extreme weather events (referring to both IPCC AR5 and IPCC SREX (2012)):
http://sciencepolicy.colorado.edu/admin/publication_files/2013.38.pdf

conclusions, her arguments demonstrate that the scientific evidence is not “*ever more robust*” (see Page 3 of Professor Sands’ text), that “*the burden of legal proof, whether it be balance of probabilities, or beyond reasonable doubt, or the [French] standard of ‘conviction intime’*” (see his Page 6) is far from being satisfied and that it’s not true that “*the room for real doubt has disappeared*” (see his Page 15).

In my view, if the ICJ were to act on the belief that it had a duty to “*play a role in finally scotching*” Dr Curry’s and other serious scientists’ views, it would be in danger of appearing rather foolish. But, far worse, it might risk bringing international law into disrepute.

6. Professor Sands suggests (PART III, Page 9 of his text) that a possible focus for the ICJ might be the legal content of what he describes as “*the commitment agreed at Cancun in 2010 to limit global temperature increases to less than 2 degrees Celsius*” (Page 9).²⁴ But an examination of the circumstances of that “commitment” indicates that such a focus is unlikely to make much progress.

The matter is referred to in section I paragraph 4 of the Report of a working group meeting held in March 2011: three months after the referenced meeting in Cancun.²⁵ But it was referred to, not as something that was agreed (“the Conference of the Parties ... *Agrees*”), but as a something only recognised (“the Conference of the Parties ... *Further recognizes*”). In other words, a commitment was not agreed. In any case, the Report goes on to describe the matter as a “long-term goal”. But arguably at least as significant is the agreement (paragraph 6) that the Parties should bear in mind “that social and economic development and poverty eradication are the first and overriding priorities of developing countries”: almost exactly the words of UNFCCC Article 4.7. So it seems that, however interpreted, the 2° C “commitment” would not counter the major obstacle to progress contained in that Article (see my Item 3, p.2). Moreover, the matter was deferred (paragraph 6) for further consideration at the next Conference of the Parties (COP 17: Durban, November 2012). Yet, so far as I can determine, no real progress was made at that Conference towards turning a goal into an agreed commitment.²⁶

²⁴ It should perhaps be noted here that there is no serious scientific basis for the 2° target: <http://tiny.cc/2tbg4x>

²⁵ <http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf>

²⁶ The full list of decisions made at Durban can be found here: http://unfccc.int/meetings/durban_nov_2011/meeting/6245/php/view/decisions.php

CONCLUSION

Professor Sands believes that climate change is “*one of the greatest and most vital challenges of our age*” and asserts that in view of its “*real and imminent challenges ... the international courts shall not be silent*”.

These are honourable sentiments. However, he also believes the way for the courts to make a contribution – the “*single most important thing [they] could do*” – would be “*to settle the scientific dispute*”. And to do so by “*finally scotching claims*” that he thinks are not based on established fact.

But, for the courts to purport to settle a legitimate scientific disagreement, would strike at the essence of the Scientific Method – the basis of scientific practice for over 150 years. It would risk bringing international law into disrepute.

Professor Sands may consider that a risk worth taking. However he might perhaps note that it's not disputes about science that are making it so difficult to reach a global agreement to reduce GHG emissions. The problem derives from the understandable wish of the developing countries – responsible for about 70% of global GHG emissions and comprising 82% of the world's population (including virtually all the world's poorest people) – to develop their economies and to eradicate poverty. Following China's example, they believe that the provision of reliable, affordable energy, derived largely from fossil fuels, is the best way of achieving these goals. And the UN Framework Convention on Climate Change specifically entitles them to give such action overriding priority.

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