Towards a Biodiversity Advisory Opinion

Andreas Buser

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Biodiversity loss is one of the central challenges of the "triple planetary crisis" alongside climate change and pollution. Scientific assessments suggest that humanity has already transgressed the planetary boundary relating to biosphere integrity and researchers discuss whether we are already within a sixth mass extinction event. Regardless of the precise terminology – which remains debated – the scale and pace of species loss, ecosystem degradation, and declining genetic diversity are unprecedented in human history, with the principal drivers being land- and sea-use change, overexploitation, climate change, pollution, and invasive species (see: here).

International law has taken up the challenge of halting human-induced biodiversity loss, but it has yet to deliver. The adoption of the Kunming–Montreal Global Biodiversity Framework (GBF) under the almost universally ratified Convention on Biological Diversity (CBD) in 2022 marked a renewed effort to halt and reverse biodiversity loss through an ambitious set of targets to be achieved by 2030 and long-term goals for 2050. This year, the CBD Secretariat initiated an interim evaluation to assess whether parties are on track to meet their collective targets for 2030. The first draft of the report already demonstrates that they are not. While states have increased their efforts, they remain collectively far off track to achieve many of the Framework's targets by 2030, including the prominent 30 by 30 targets to effectively conserve and manage at least 30% of all land, waters and seas and restore 30% of all degraded ecosystems.

This raises pressing questions not only about political ambition, but also about the legal obligations that states already owe under international law to "conserve" biodiversity and only "sustainably use" its components, as envisaged by Article 1 of the CBD. To clarify these legal questions and potentially strengthen the legal governance of the CBD, this post seeks to initiate a broader discussion on the promises and pitfalls of replicating successful climate advisory opinion initiatives for the integrity of the biosphere and biodiversity. To be clear, there are currently no official talks on initiating such proceedings that I know of. Yet, advisory opinions on climate change equally started off with a discussion among students and only after intense campaigning could garner state support – so let us get going.

Clarifying Legal Obligations to Halt Biodiversity Loss

The CBD was opened for signature at the 1992 Earth Summit together with the UN Framework Convention on Climate Change (UNFCCC). With 196 Parties and its broad scope – covering genetic diversity within species, diversity between species and of ecosystems, not only individual species or groups of ecosystems – it stands at the centre of the otherwise rather fragmented legal regime to govern biodiversity. However, when it comes to the substance of legal obligations on conservation and sustainable usage of biodiversity its provisions are characterised by many qualifications and vague formulations, such as "in accordance with its particular conditions and capabilities" (Article 6) or "as far as possible and as appropriate", "with a view to" (Article 8(c)), "promote" or "endeavour to" (Article 8(i)), or even "[s]ubject to its national legislation" (Article 8(j)). In addition, parties have increasingly sought to adopt what some qualify as mere policy-targets – such as the GBF and the earlier Aichi targets – leading to the criticism that international biodiversity governance has gone soft.

Recently, there has been some effort in scholarship to reverse this shift by promoting more robust legal interpretations. According to some scholars, the CBD already provides for a hard set of obligations aimed at halting human-induced biodiversity loss, and "conservation" must be understood literally as requir-

ing the restoration of biodiversity to the levels that existed when the CBD was signed in 1992. Others regard the GBF as subsequent practice and interpretative guidance for implementing the CBD. However, these progressive views are so far shared by only a small number of scholars.

The proposition that human rights – in particular the right to a clean, healthy, and sustainable environment – effectively require biodiversity protection garnered some support over the last years. As the biosphere provides for many ecosystem services it is also strongly related to the right to health and other economic, social, and cultural rights. This argument is also increasingly being tested in court through rights-based biodiversity litigation, which seeks to replicate strategies employed in rights-based climate framework litigation (see: here, here, and here).

So far there remain, however, many open legal questions leading to legal uncertainty. Does the CBD provide for a due diligence obligation of individual states to conserve all of biodiversity within their jurisdiction – and possibly even beyond – or only for a vague commitment to some sort of biodiversity protection? Is there any legal significance of highly alarming scientific assessments by the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) – the equivalent of the IPCC in biodiversity governance? What is the relationship between the CBD, human rights law, customary law, and provisions on the protection of marine ecosystems under the law of the sea? Is the GBF only a policy document or some form of subsequent practice concretising what is required of parties in implementing the agreement?

These are just some of the most important legal questions advisory opinions could address to increase legal certainty and improve the governance of biodiversity at the international level. Authoritative findings on these questions could provide domestic courts and policymakers with guidance as to the requirements under international law. In doing so, they could also draw on the extensive practice that has emerged over recent years in relation to climate advisory opinions.

Drawing on and Going Beyond Climate Advisory Opinions

The recent wave of climate-related advisory opinions demonstrates the considerable potential of such procedures. Advisory proceedings before the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), and the Inter-American Court of Human Rights (IACtHR) have authoritatively clarified – if not fully resolved – many questions that were hotly debated within academia and among states, ranging from the qualification of CO_2 emissions and global warming as "pollution" under UNCLOS, to the applicability of the customary obligation to prevent significant harm, and the existence of stringent due diligence obligations under climate treaty law to set, update, and implement nationally determined contributions based on the "primary" 1.5°C goal and Common but Differentiated Responsibilities and Respective Capabilities (CBDR-RC). In practical terms, AOs reshaped "what is sayable in legitimate legal argument" – including within COP negotiations – and have been cited in several ongoing climate litigation proceedings (see: here and here).

Understandably, courts have discussed biodiversity only at the margins of climate advisory opinions as questions raised focused on obligations of states with regard to climate change which is only one driver of biodiversity loss. To date, only the IACtHR has been tasked with providing a broader Advisory Opinion on the Environment and Human Rights (2017). This important milestone addressed the matter in a relatively general manner and referred to biodiversity only occasionally. The IACtHR's Advisory Opinion on the Climate Emergency arguably devoted greater attention to biodiversity concerns, but ultimately approached biodiversity loss primarily through the lens of climate change. While important, this is insufficient because climate change constitutes only one among several major drivers of biodiversity loss.

However, some of the more general and progressive findings in climate advisory opinions may prove essential for strengthening the legal governance of biodiversity protection. Of particular importance in

this regard are the ICJ's findings concerning the legal relevance of COP decisions as subsequent practice (see: here).

Given that the GBF was adopted as a COP decision as well and parties explicitly "decided" that "the Kunming-Montreal Global Biodiversity Framework should be used as a strategic plan for the implementation of the Convention and its Protocols", could it be that the GBF is not merely a policy document – as it is most commonly characterised – but also constitutes subsequent practice? Must states therefore legally aim to halt biodiversity loss by 2050 (Goal A) and adopt ambitious transformative domestic policies, or even biodiversity framework legislation, diligently contributing to achieving the 23 concrete targets for 2030 set within the GBF, such as the 30 by 30 targets?

Which Forum Could Provide Such Clarification?

This question raises both legal and strategic concerns. For clarifying the content of the CBD, the most obvious candidate is the ICJ because other courts that may render advisory opinions, such as ITLOS, the IACtHR, and the African Court on Human and Peoples' Rights, must focus on the treaties they are mandated to interpret. However, ITLOS remains a viable option for clarifying legal obligations relating to marine biodiversity, while regional human rights courts in South America and Africa may be attractive forums because many biodiversity hotspots are located within the territories of their parties and because they could contribute to the emerging debate on the relationship between biodiversity protection and human rights.

As regards the ICJ, the Security Council and the General Assembly may initiate advisory proceedings before the Court on any legal question (Article 96(1) UN Charter). Other organs and specialised agencies may request an advisory opinion on legal questions "arising within the scope of their activities" if authorised to do so by the General Assembly (Article 96(2) UN Charter). This requirement has been interpreted rather narrowly by the ICJ in the past and none of the authorised organs or specialised agencies appears particularly well suited to initiate a biodiversity advisory opinion, as the relevant legal questions would clearly extend beyond the scope of their activities. Since the Security Council is unlikely to initiate such proceedings, this effectively leaves the General Assembly, which also initiated the ICJ advisory proceedings on climate change.

With regard to ITLOS, there would need to be an international agreement related to the purposes of UNCLOS that specifically provides for the submission of a request (Article 138(1) of the Rules of the Tribunal). An example is the agreement establishing the Commission of Small Island States on Climate Change and International Law to initiate the ITLOS climate advisory proceedings. In the case of the mentioned regional human rights courts, in addition to relevant treaty organs, individual state parties are able to initiate advisory proceedings, meaning that procedural requirements may be easier to satisfy than before the ICJ.

Who Might Want to Initiate Such Proceedings?

The strategic questions involved in initiating such proceedings are more complex and range from asking the right questions to who might want to ask them. As to the latter, it boils down to identifying which states may have an interest in clarifying and potentially strengthening international biodiversity governance and can credibly champion the issue. In the case of the ICJ, such states would also need sufficient diplomatic influence within the General Assembly.

I can only sketch a few thoughts on these strategic issues here, but I encourage readers – especially the many diplomats and policymakers who will hopefully read this post – to offer further ideas in the comments, contact me directly, or publish their thoughts elsewhere.

States in the Global South that contain biodiversity hotspots may be interested in strengthening legal obligations relating to technical and financial assistance, but perhaps less keen on limiting their policy space when it comes to exploiting natural resources. In the end, clarifying obligations could result in stronger conservation duties without generating equally robust obligations concerning financial and technical assis-

tance – which remain rather vaguely phrased within the CBD and GBF.

States that present themselves as environmental champions in the Global North may have an interest in strengthening biodiversity protection abroad, but they may also be concerned about safeguarding the supply chains of their companies often contributing to biodiversity loss abroad. Moreover, they might not be able to garner enough support in the UNGA if unable to form a regionally broader alliance of supporters.

What appears to be missing is a group of states that can credibly defend biodiversity and would benefit from stronger international biodiversity protection while gaining relatively little economically from continued overexploitation – the biodiversity equivalent of small island states in the climate context. However, it could actually be attractive for exactly those small island states to use their experience and momentum to push for a biodiversity AO because of its manifold interactions with climate change (e.g. deforestation). It is also thinkable that states home to biodiversity hotspots with progressive international environmental agendas, such as Colombia, could be convinced to initiate such proceedings either regionally (IACtHR) or internationally.

Moving Forward in Times of Turmoil

The final strategic question concerns timing. In the climate context, advisory opinions have progressively developed international law at a time when the conditions for compliance – which arguably have never been great – may have further deteriorated significantly. Multilateral cooperation is under strain across numerous issue areas, exemplified in the climate regime by the second Trump administration's withdrawal from the Paris Agreement, its notification of withdrawal from the UNFCCC, and its dismantling of domestic climate policies. Moreover, I am not aware of any industrialised state or emerging economy pursuing a fair transition pathway towards net-zero that is aligned with the 1.5°C target and CBDR-RC, and many are currently considering weakening domestic climate policy and legislation. More generally, one may question what the purpose is of clarifying the content of international biodiversity law and potentially contributing to its progressive development at a time when prospects for compliance with courts' findings are low. Is it not counterproductive to raise the bar further when it is clear that states will not comply anyways?

Well yes, but actually no. Beyond the clarification of legal questions raised, AOs serve a much broader purpose. They allow many voices to be heard and can strengthen the commitment to international law. The language of international law must be spoken, otherwise it may become extinct – just like the many species currently under threat. Biodiversity and the integrity of the biosphere are no luxuries which can be abandoned in times of turmoil. The biosphere is both the zone of life and the basis for such life on Earth. If there is even a slight chance that initiating an advisory opinion on legal obligations to halt biodiversity loss could increase accountability by clarifying legal commitments and reminding states of their existence – is it not worth trying?

ABOUT THE AUTHOR

Andreas Buser

Dr. Andreas Buser is a research associate at the Department of Law at the Free University of Berlin.

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