

INTERNATIONAL COURT OF JUSTICE

**OBLIGATIONS OF STATES IN RESPECT OF
CLIMATE CHANGE**

CASE No. 187

WRITTEN STATEMENT OF THE REPUBLIC OF PALAU

March 2024

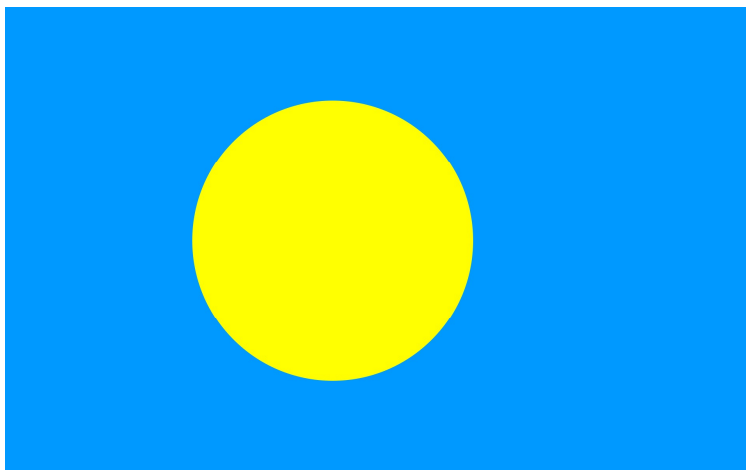


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Appendix:

Document 1: Patrick L. Colin & T.M. Shaun Johnston,
“Measuring Temperature in Coral Reef Environments:
Experience, Lessons, and Results from Palau”, 8 *Journal of
Marine Science and Engineering*, 2020, p. 680.

Document 2: Patrick L. Colin, “Ocean Warming and the
Reefs of Palau”, 32:2 *Oceanography*, 2018, p. 126.

Document 3: East-West Center, “Climate Change in Palau”,
Pacific Islands Regional Climate Assessment, 2020.

I. INTRODUCTION

1. Climate change presents tremendous, even existential, challenges for societies, economies, and ways of life across our planet. Recognizing the weight of these challenges, and the constructive role that international law can play in resolving them, the United Nations General Assembly *by consensus* is asking this Court for help.

2. This Court's task here is straightforward. The Court should issue an advisory opinion confirming that well-established principles of customary international law apply to climate change.

3. The first question posed by the General Assembly asks for elucidation of States' primary obligations under international law with respect to protecting the global environment from harm caused by greenhouse-gas emissions. This Court should find the answer to this question in the customary international law of **Transboundary Harm**: principally, that every State is "obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State." (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, *Judgment I.C.J. Reports 2015*, p. 706, para. 104, quoting *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Judgment, I.C.J. Reports 2010*, p. 56, para. 101.) A State that is not using all the means at its disposal in order to avoid greenhouse-gas emissions from its territory or jurisdiction, which cause significant damage to the environment of another State, would be in breach of the law of Transboundary Harm.

4. The General Assembly's second question asks about the "legal consequences" for breach of those primary obligations. This question invites the Court to acknowledge that the secondary rules of **State Responsibility** under customary international law apply to climate change. The law of State Responsibility requires cessation of the wrongful conduct, and "full reparation" for the harm caused. In environmental cases, "full reparation" includes "compensation ... for damage caused to the environment, in and of itself, in addition to expenses incurred by an injured State as a consequence of such damage." (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Compensation Judgment, I.C.J.*

Reports 2018, p. 28, para. 41.) Reparation should also cover any “moral” injury suffered (*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012*, p. 324), and damage to “the living space, the quality of life and the very health of human beings, including generations unborn” (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 241, para. 29). A State that tolerates harmful greenhouse-gas emissions from its territory or jurisdiction is required to use all the means at its disposal to stop those emissions, and to pay full reparation for any harm caused.

5. Climate change is a difficult problem, but it is not a special case for international law. The Court should answer the General Assembly’s request for an advisory opinion by confirming that the customary international law of Transboundary Harm and State Responsibility apply to climate change.

II. CLIMATE CHANGE AND PALAU

6. Palau is living with climate change. Palau's seas are warming and rising, and its weather is getting uncomfortably warmer, causing damage to Palau's environment, economy, and society. There is no serious dispute that greenhouse-gas emissions are the cause.

7. Palau's oceans are where the most objective evidence of damage from climate change can be found. The ocean is life for Palau. Amongst its 300-plus coral-limestone islands, Palau's calm, tropical waters teem with marine life. Stingless jellies dazzle in marine lakes. Black tip sharks dart above giant purple clams. Tuna schools swirl beyond the rainbow-colored near-shore reefs. For 3000 years, Palauans have been the stewards of these waters.

8. But Palau is now living with climate change. Climate change is causing direct harm to Palau and its marine environment:

- a. Palau's waters are warming significantly, causing harm to Palau's reef ecosystems. Palau has the world's most comprehensive ocean-temperature-monitoring network. This network was established by Palau's Coral Reef Research Foundation in 1999, after Palau's first significant coral reef bleaching event occurred, in 1998.¹ Unlike ocean-temperature data generated by satellites, which measure only the surface temperature on the ocean's "skin", Palau's network measures water temperatures at depth. The data from Palau show a clear and worrying warming trend at all depths measured:

¹ Appendix Document 1: Patrick L. Colin & T.M. Shaun Johnston, "Measuring Temperature in Coral Reef Environments: Experience, Lessons, and Results from Palau", 8 *Journal of Marine Science and Engineering*, 2020, p. 680.

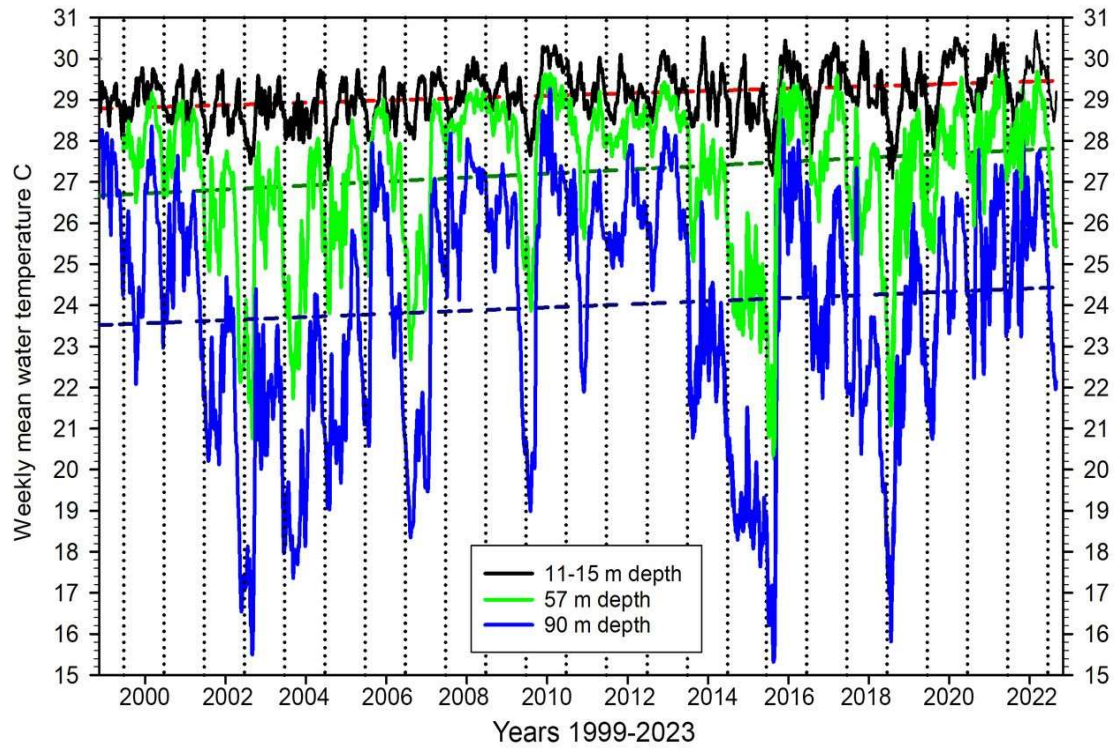


Figure 1: Outer reef weekly mean water temperatures measured at 3 different depths (courtesy Coral Reef Research Foundation)

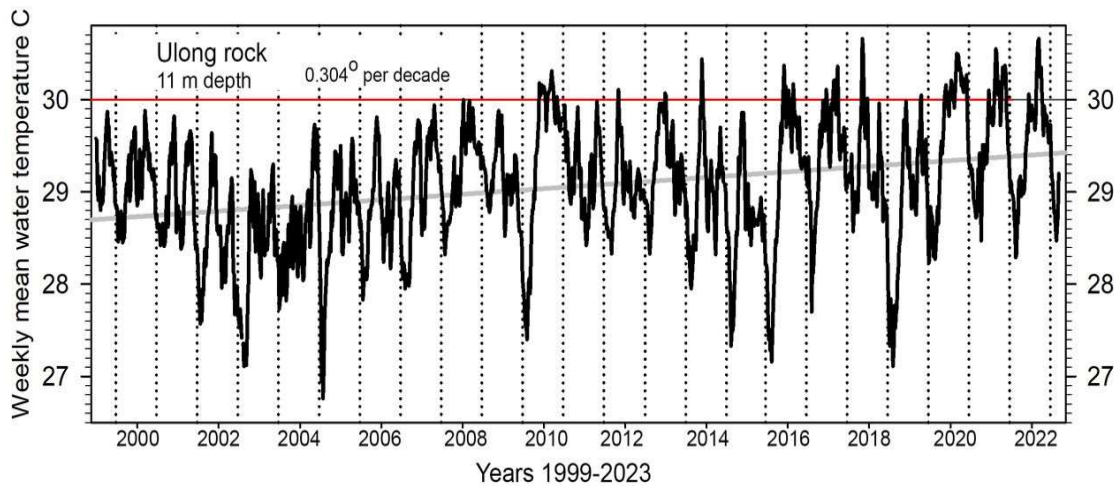


Figure 2: Ulong rock weekly mean water temperature at 11m depth, with 30°C reference line (courtesy Coral Reef Research Foundation)

Warming waters are particularly concerning for Palau's coral reefs. Water temperatures at or above 30°C may cause coral "bleaching" in which the coral polyps' symbiotic algae are "expelled" and may lead to the death of the coral colony:

Current ocean warming concerns for coral reefs largely focus on bleaching, the condition where the symbiotic zooxanthellae algae found inside the cells of coral polyps are expelled, leaving the tissue largely colorless and the white coral skeleton visible. Thermal stress is usually the cause of bleaching, and without their symbionts, the colonies die within a few days to weeks. If thermal stress is relieved by water temperatures decreasing below a threshold level, the corals can reacquire their zooxanthellae and recover.²

As ocean temperatures have warmed, coral reef bleaching is becoming "more frequent", leaving reefs with "less time to recover" between bleaching events. After Palau's first bleaching event in 1998, it has experienced subsequent bleaching events in 2010 and again in 2014-2016.³

² Appendix Document 2: Patrick L. Colin, "Ocean Warming and the Reefs of Palau", 32:2 *Oceanography*, 2018, p. 127. Figure 1 in this submission is an update to Figure 3.a in this publication.

³ *Id.*

- b. The seas are rising in Palau. Palau has been gathering daily sea-level data since 1969. That data show a clear and worrying trend of rising sea levels:

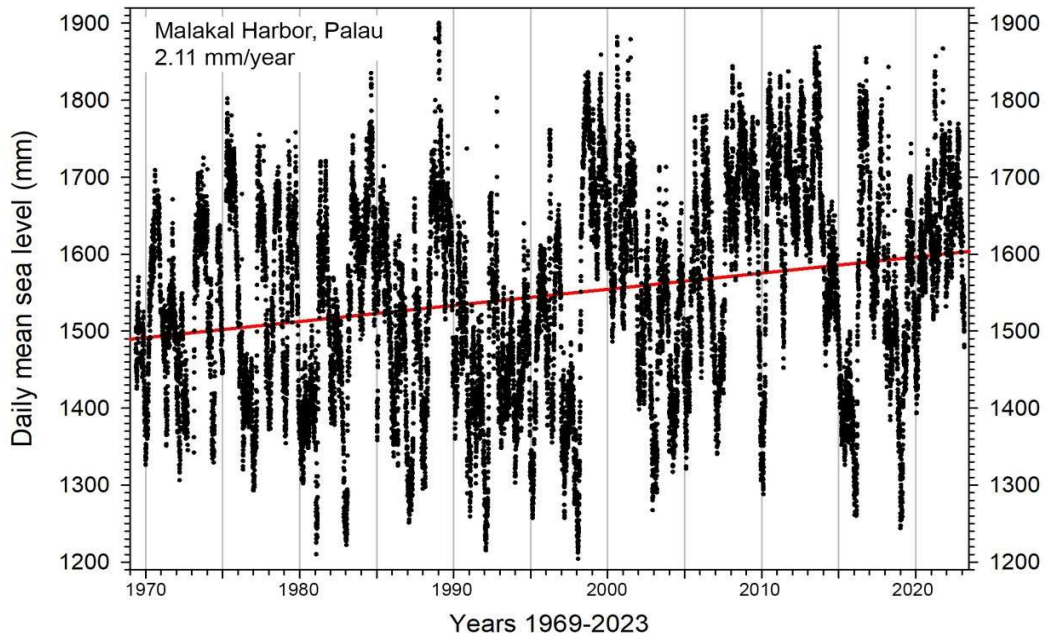


Figure 3: Daily mean sea level in Malakal Harbor (courtesy Coral Reef Research Foundation)

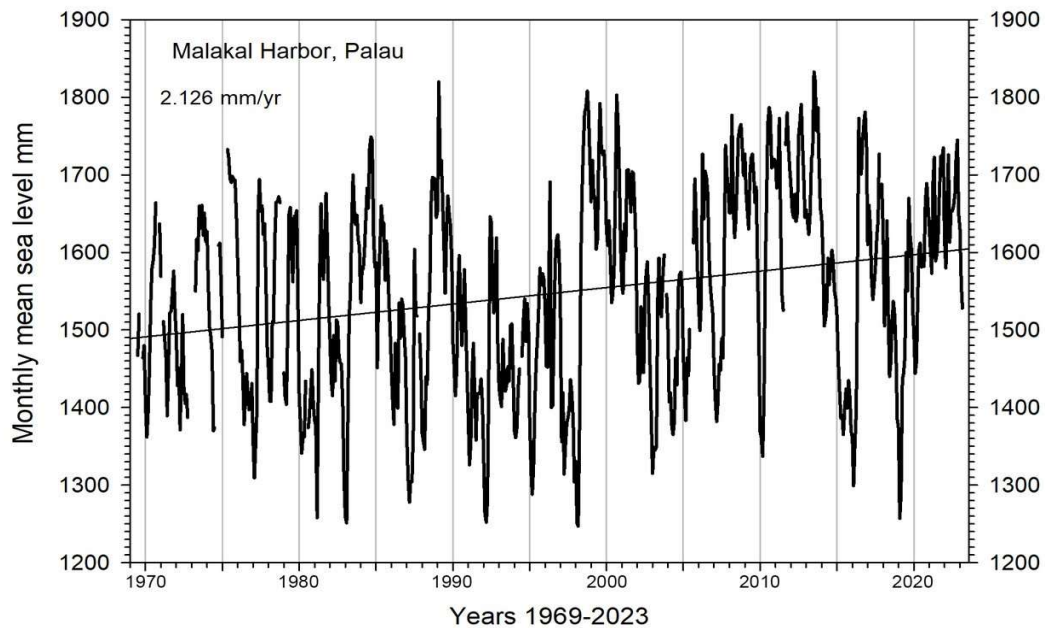


Figure 4: Weekly mean sea level in Malakal Harbor (courtesy Coral Reef Research Foundation)

If the high-end sea-level rise scenarios (2.0m-2.5m) come to pass, large portions of several Palauan states will be underwater by 2100:

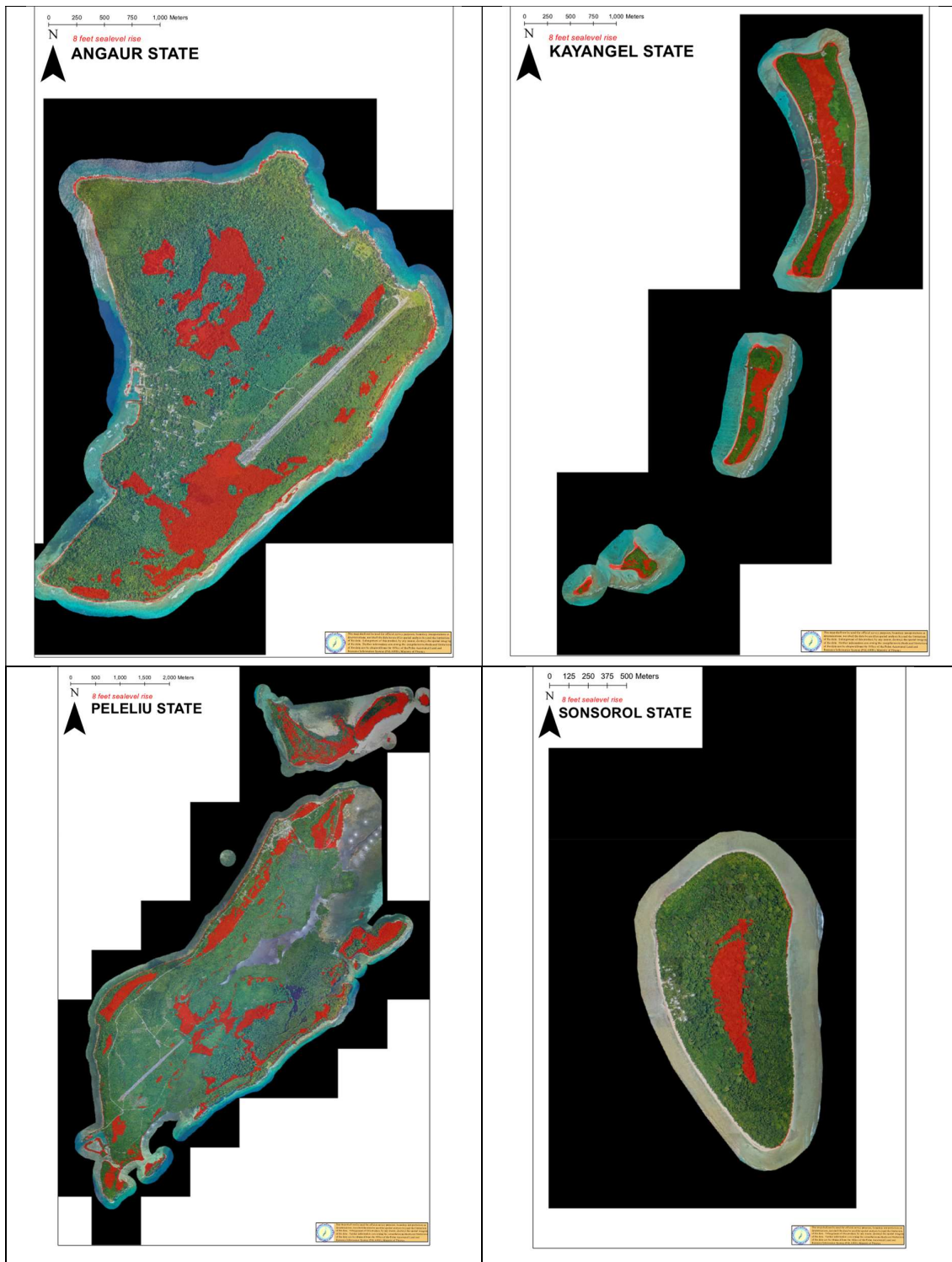


Figure 5: The effect of 8 feet of sea-level rise on 4 Palauan states
(courtesy Office of the Palau Automated Land and Resource Information System)

- c. It is also getting hotter in Palau. The number of hot days (above 90°F/32°C) has increased from an average of 46 days per year, from 1952-1961, to 100 days per year, in 2009-2018; while the number of cool nights (below 74°F/23.5°C) has decreased from 40 to just 13, respectively.⁴ Extreme heat can be lethal to vulnerable populations and is quite uncomfortable for everyone else.

9. The Intergovernmental Panel on Climate Change (IPCC) concludes that it is “unequivocal that human influence has warmed the atmosphere, ocean and land”, and greenhouse gas emissions are “the main driver” of this warming.⁵

10. The IPCC identified these key risks for small islands:

- a. “loss of terrestrial, marine and coastal biodiversity and ecosystem services”;
- b. “loss of lives and assets, risk to food security and economic disruption due to destruction of settlements and infrastructure”;
- c. “economic decline and livelihood failure of fisheries, agriculture, tourism and from biodiversity loss from traditional agroecosystems”;
- d. “reduced habitability of reef and non-reef islands leading to increased displacement”; and
- e. “risk to water security in almost every small island”.⁶

11. Palau strongly supports this request for an advisory opinion from the International Court of Justice about States’ obligations and responsibilities with respect to harm caused by climate change. Palau, together with other Pacific small island countries, has been a leader of this effort for more than a dozen years.⁷ Palau looks forward to the Court’s advisory opinion.

⁴ Appendix Document 3: East-West Center, “Climate Change in Palau”, *Pacific Islands Regional Climate Assessment*, 2020, p. 14.

⁵ Intergovernmental Panel on Climate Change, “Synthesis Report of the IPCC Sixth Assessment Report (AR6): Longer Report”, 2023, at p.11 section 2.1.2.

⁶ Intergovernmental Panel on Climate Change, “Climate Change 2023: Synthesis Report”, 2023, at p. 76.

⁷ “Palau seeks UN World Court opinion on damage caused by greenhouse gases”, *UN News*, 22 September 2011, <https://news.un.org/en/story/2011/09/388202>.

III. QUESTION ONE:
THE PRIMARY OBLIGATION
TO PREVENT TRANSBOUNDARY HARM
FROM GLOBAL WARMING EMISSIONS

12. The General Assembly's first question to this Court, in Resolution 77/276, is best understood as a straightforward request for an explication of States' primary obligations with respect to harm caused by anthropogenic climate-changing emissions:

What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations?

13. This question asks about the *content* of States' international obligations with respect to climate change: what are the "obligations" of States "to ensure the protection" of the environment from harm, now or in the future, from human "emissions" of greenhouse gases? The content of States' international obligations is the domain of the primary rules of international law. (See generally *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001*, Vol. II, Part Two, p. 31, paras 1-2 of the General commentary.)

14. The well-established primary obligations of the customary international law of Transboundary Harm provide a complete answer to the General Assembly's first question. Under that law, every State is "obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State." (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, *Judgment I.C.J. Reports 2015*, p. 706, para. 104, quoting *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Judgment, I.C.J. Reports 2010*, p. 56, para. 101.)

15. The law of Transboundary Harm is foundational to the modern international legal order and this Court's jurisprudence:

- a. In *Island of Palmas*, the arbitrator had to decide whether the United States or The Netherlands had sovereignty over an island, and in so doing explained the basic consequences for the international order of sovereignty. “Sovereignty in the relations between States signifies independence.” (*Island of Palmas case (Netherlands/U.S.A.) RIAA 1928 (II)*, p. 838.) Independence has both internal and external, or negative and positive, components. Internally, independence means “the right to exercise therein, to the exclusion of any other State, the functions of a State.” (*Id.*) Externally, independence “has as corollary a duty: *the obligation to protect within the territory the rights of other States*, in particular their right to integrity and inviolability in peace and in war”. (*Id.* at 839, emphasis added.) “Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it [sovereignty] serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.” (*Id.*) Put another way: sovereignty entails both the State’s right to be left alone in its internal affairs, and a corresponding duty to ensure that internal activities do not negatively affect the outside world.
- b. In *Trail Smelter*, the tribunal considered Canada’s obligations under international law with respect to sulphur dioxide emissions from a smelter in Canada that caused harm to agricultural lands in the United States. The tribunal looked to several decisions by the United States Supreme Court, involving damage to one U.S. state caused by activities in another U.S. state, “as a guide in this field of international law, for it is reasonable to follow by analogy, in international cases, precedents established by that court in dealing with controversies between States of the Union or with other controversies concerning the quasi-sovereign rights of such States”. (*Trail Smelter (United States/Canada) RIAA 1941 (III)*, p. 1964.) The tribunal quoted at length from the U.S. Supreme Court’s decision in *State of Georgia v. Tennessee Copper Company*,

206 U.S. 230, 237 (1907), in which that court granted an injunction against a company in the U.S. state of Tennessee, whose sulphur dioxide emissions were harming the environment of the U.S. state of Georgia: the “quasi-sovereign” state of Georgia, not an outside company from Tennessee, “has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.”

Recognizing the U.S. Supreme Court’s analysis as also reflecting the relevant “principles of international law” for transboundary pollution, *Trail Smelter* gave its classic formulation of the rule of Transboundary Harm: “no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.” (*Trail Smelter* at p. 1965.) The tribunal ultimately granted an injunction and indemnity for damages in favor of the United States and against Canada.

- c. In *Corfu Channel*, this Court applied similar “general and well-recognized principles ... of humanity”, arising from “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”, to find Albania liable for damage caused by mines to British Navy vessels operating legally in Albanian waters. (*Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22.)
- d. In *Legality of the Threat or Use of Nuclear Weapons*, this Court also recognized, in an advisory opinion, that the international law principles of Transboundary Harm apply to protect from harm the “environment” of States, which includes “the living space, the quality of life and the very health of human beings, including generations unborn.” (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 241, para. 29.) “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 is now part of the corpus of international law relating to the environment.” (*Id.* at p. 242.)

- e. In *Gabčíkovo-Nagymaros Project*, this Court quoted that passage from *Legality of the Threat of Nuclear Weapons*, about the Transboundary Harm principle, and noted its relevance for the “implementation” of a treaty provision requiring “that the quality of the water in the Danube is not impaired”. (*Gabčíkovo-Nagymaros Project (Hungary v. Slovakia) Judgment, I.C.J. Reports 1997*, p. 38, para. 53, p. 78, para. 140.)
- f. In *Pulp Mills on the River Uruguay*, this Court considered claims of alleged environmental harm to Argentina caused by discharges from pulp mills in Uruguay. The Court cited *Corfu Channel* and *Legality of the Threat or Use of Nuclear Weapons* for the customary rule of international law—the Transboundary Harm principle—that every State is “obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State.” (*Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 56, para. 101.)
- g. In *Certain Activities Carried Out by Nicaragua in the Border Area*, the Court considered claims by Costa Rica for compensation for environmental harm caused by Nicaragua’s unlawful dredging of a canal. To resolve those claims, the Court again applied the Transboundary Harm principle: it is “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States” (quoting *Corfu Channel*), and “[a] State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State” (citing *Pulp Mills on the River Uruguay*). (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San*

Juan River (Nicaragua v. Costa Rica), Judgment I.C.J. Reports 2015, p. 706, para. 104.) The Court ultimately found Nicaragua liable and ordered that “full reparation” be made. (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation Judgment, I.C.J. Reports 2018, p. 28, para. 41.)

- h. Finally, in *Dispute over the Status and Use of the Waters of the Silala*, the parties and the Court all accepted the Transboundary Harm principle: it is “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States” (quoting *Corfu Channel*), and “[a] State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State” (quoting *Pulp Mills on the River Uruguay* and *Certain Activities Carried Out by Nicaragua in the Border Area*). (*Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*, Judgment, I.C.J. Reports 2022, p. 38, para. 99.)

16. The law of Transboundary Harm has obvious application to States’ primary obligations to prevent anthropogenic greenhouse-gas emissions from causing harm to other States. Every emission originates from within the territory or jurisdiction of a State. Emissions are causing harmful climate change across the planet. Every State has the duty to use all the means at its disposal to prevent those emissions, individually or cumulatively, from causing climate-change-related harm to the environment of other States. Transboundary Harm applies to climate change.

17. In the context of this advisory opinion, this Court need not, and should not, decide how the Transboundary Harm principle applies to the emissions from any particular State, or to the harm alleged to have been caused by any other State. Those questions can be answered in specific cases in the political realm or in future adjudication. To answer the General Assembly’s first question here, this Court can and should simply affirm that the Transboundary Harm principle applies to climate change.

IV. QUESTION TWO: STATE RESPONSIBILITY FOR HARMFUL GLOBAL WARMING EMISSIONS

18. The General Assembly's second question, in Resolution 77/276, asks for an explanation of the "legal consequences" for States where they, "by their actions and omissions", have caused "significant harm to the climate system and other parts of the environment" for States, including small island developing States, and for people of the "present and future generations".

19. The well-established secondary rules of State Responsibility provide a complete answer to this second question. When a State, through its actions or omissions, breaches its primary obligations, international responsibility accrues to that State. (See generally *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001*, Vol. II, Part Two, p. 32, para.1 of the Commentary on Article 1.) This is known as State Responsibility.

20. State Responsibility applies to breaches of the primary obligations under customary international law relating to Transboundary Harm. When a State fails to "use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State", it may be ordered to comply with an injunction or pay reparations—as in *State of Georgia v. Tennessee Copper Company, Trail Smelter*, and *Certain Activities Carried Out by Nicaragua in the Border Area*.

21. The rules of State Responsibility focus first on getting the State into compliance with its primary obligations. As expressed in Articles 29 and 30 of the International Law Commission's *Draft Articles on Responsibility of States for Internationally Wrongful Acts*:

Article 29: The legal consequences of an internationally wrongful act ... do not affect the continued duty of the responsible State to perform the obligation breached.

Article 30: The State responsible for the internationally wrongful act is under an obligation:

- a. to cease that act, if it is continuing;
- b. to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

22. State Responsibility relating to climate change should likewise focus first on getting the breaching State into compliance with its primary Transboundary Harm obligations to use all means at its disposal to prevent its territory or jurisdiction from being used for emissions that cause significant environmental damage to another State.

23. State Responsibility also requires “full reparation” for the harm caused. In environmental cases, “full reparation” includes “compensation ... for damage caused to the environment, in and of itself, in addition to expenses incurred by an injured State as a consequence of such damage.” (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Compensation Judgment*, *I.C.J. Reports 2018*, p. 28, para. 41.) Reparation should also cover any “moral” injury suffered (*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *Compensation, Judgment*, *I.C.J. Reports 2012*, p. 324), and damage to “the living space, the quality of life and the very health of human beings, including generations unborn” (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, *I.C.J. Reports 1996 (I)*, p. 241, para. 29).

24. In the context of climate change, full reparation would include compensation by the breaching State to the injured State for expenses, for damage to the environment and to the quality of life of present and future generations, and for any additional moral injury suffered.

V. CONCLUSION

25. The first question of the advisory opinion request should be answered as follows:

The obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations are to use all the means at their disposal in order to avoid activities which take place in their territories, or in any area under their jurisdictions, causing significant damage to the environment of another State.

26. The second question of the advisory opinion request should be answered as follows:

The legal consequences for States where they, by their actions and omissions, have caused significant harm to the climate system and other parts of the environment for States, including small island developing States, and for people of the present and future generations, are: (i) to come into compliance with their obligations to use all the means at their disposal in order to avoid activities which take place in their territories, or in any areas under their jurisdiction, causing significant damage to the environment of another State; and (ii) to pay full reparation for the harm caused, including compensation for expenses, for damage to the environment and to the quality of life of present and future generations, and for any additional moral injury suffered.

27. An advisory opinion by this Court confirming that the well-established principles of Transboundary Harm and State Responsibility apply to climate change would be a significant building block for States as they continue to develop national policies and international agreements to address the causes and consequences of climate change. This advisory opinion should also help future courts and tribunals that may be called upon to

adjudicate liability, and craft remedies, in specific cases for the harm that has been caused, and will be caused, by climate change.

Respectfully submitted.

REPUBLIC OF PALAU



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