CLIMATE CHANGE & THE INTERNATIONAL COURT OF JUSTICE

Yale Center for Environmental Law & Policy

Photo Credit: Kike Calvo

EXECUTIVE SUMMARY

This Report, **Climate Change and the International Court of Justice: Seeking an Advisory Opinion on Transboundary Harm from the Court**, focuses on the international campaign, initiated by the Republic of Palau, to secure an advisory legal opinion from the International Court of Justice (ICJ) on climate change. Palau, with a growing coalition of nations, requests that the United Nations General Assembly seek an ICJ opinion on the question of state responsibility for transboundary harm caused by greenhouse gas emissions. The urgency of climate change, coupled with widespread frustration at the lack of binding international commitments secured through the United Nations Framework Convention on Climate Change (UNFCCC) process, inspired the multistate coalition.

The Report is the product of a course taught in Fall 2012 at Yale Law School in New Haven, Connecticut, by Ambassador Stuart Beck of the Permanent Mission of Palau to the United Nations; Aaron Korman, Palau's Legal Adviser; and Douglas Kysar, Joseph M. Field '55 Professor of Law at Yale Law School. Eighteen graduate students enrolled at Yale Law School, the Yale School of Forestry and Environmental Studies, and Yale University contributed to the final Report, which was compiled and edited by Halley Epstein, Yale Law School '14. The Report aims to outline the legal, political, and scientific justifications for the coalition's request and why the ICJ should issue an opinion on the matter.

Part I, **The Brief**, presents the advocacy components of a request for an advisory opinion from the ICJ. If and when the General Assembly votes to submit a request for an advisory opinion to the ICJ, all interested nations will have the opportunity to share their positions on the matter. The Brief aims to identify the most compelling arguments about state responsibility for transboundary climate harms, so that members of the campaign coalition can create a united front of representation before the ICJ. Drawing from Intergovernmental Panel on Climate Change (IPCC) reports and other sources, the Brief outlines the scientific evidence of climate change and its transboundary effects, with attention to the effects of a warming world on some of the most vulnerable nations—Palau included. After explaining how to frame the legal question presented to the ICJ, the Brief evaluates the proposed question in the context of prior ICJ advisory opinion requests and responses. Finally, the most authoritative sources of law are analyzed for their value as advocacy tools in this process.

Part II, **Background**, offers an array of contextual and supporting materials. It introduces the Justices serving on the ICJ and provides insight into their international law experience, prior judicial decisions, and scholarship that might inform their approach to the climate change responsibility question. Next, the Report traces the principle of transboundary harm generally, in U.S. and European courts and across international agreements and conventions. Its analysis suggests that legal authorities support the application of the well-established principle of transboundary harm to the climate change context. The final Background section focuses on policy arguments likely to be persuasive to one of the campaign's most vocal opponents, the United States, as a way of illustrating why all nations would stand to benefit from application of the rule of law to the climate change context.

TABLE OF CONTENTS

I. THE BRIEF

A. THE EVIDENCE OF DAMAGE AND POTENTIAL THREAT

1. INTRODUCTION

In 2012, the global concentration of carbon dioxide in the atmosphere exceeded 400 parts per million (ppm) for the first time, and the year was one of the warmest years on record.[1] Global warming is unequivocal, and the effects of a changing climate will severely threaten the existence of small island states. The combined effects of sea-level rise, acidic oceans, and increased storm surge intensity, will adversely affect the physical integrity of small islands as well as the vulnerable people that live on them.

2. BACKGROUND ON GLOBAL WARMING

The Intergovernmental Panel on Climate Change (IPCC), which is the most authoritative source of information on the science of climate change,[2] estimates that the average temperature of the Earth's surface has increased by 0.74 °C over the course of the past century. This has been caused mainly by the increased use of fossil fuels and their associated carbon dioxide emissions since the start of the industrialized era.[3] Global average temperatures are projected to increase by around 0.2°C per decade in the coming years, resulting in global temperature increases somewhere between 1.8 and 4.0 °C by the end of the twenty-first century. The lower end of the estimates range from 1.1 to 2.9 °C, and the higher end of the estimates range from 2.4 to 6.4°C. Different carbon dioxide emissions scenarios are used in the models to project future climate, generating variability in the estimates. These scenarios take into account different carbon dioxide change mitigation policy regimes, as well as a "business-as-usual" scenario. The current rates of emissions, however, are on track with the higher estimates, and the latest consensus is that an increase of 4 °C or more is a very real possibility.[4] This means that planning for the effects of a much warmer world is reasonable and necessary.

Sea-level rise poses the greatest general risk to coastal areas. Sea-level rise is caused by both the thermal expansion of water and the increased input of water into the world's oceans from the melting of glaciers—namely, the ice sheets in Greenland and Antarctica. On average, sea level rose by 1.7 millimeters (mm) per year during the 20th century[5] and more recent data shows that the rate has increased to about 3 mm per year over the past two decades.[6] The sea level is projected to increase anywhere from at least 0.2 to 0.5 meters through the year 2100, at a rate of about 4 mm per year,[7] meaning that the sea level will have risen by 38 mm between 1980

---

[1] Charlotte Porter, *2012 Expected to be Warmest Year on Record in U.S.*, BLOOMBERG NEWS (Dec. 6, 2012), www.bloomberg.com/news/2012-12-06/2012-expected-to-be-warmest-year-on-record-for-u-s-.html.
[2] *See* RODA VERHEYEN, CLIMATE CHANGE DAMAGE AND INTERNATIONAL LAW: PREVENTION, DUTIES, AND STATE RESPONSIBILITY 56-58 (2005).
[3] IPCC FOURTH ASSESSMENT REPORT (2007).
[4] POTSDAM INSTITUTE FOR CLIMATE IMPACT RESEARCH AND CLIMATE ANALYTICS, TURN DOWN THE HEAT: WHY A 4°C WARMER WORLD MUST BE AVOIDED (A Report for the World Bank), Nov. 2012.
[5] IPCC FOURTH ASSESSMENT REPORT, *supra* note 3.
[6] Climate Change Initiative, European Space Agency, *Early CCI Sea Level Products Unveiled*, http://www.esa-cci.org/ (last visited Sept. 26, 2012).
[7] IPCC FOURTH ASSESSMENT REPORT, *supra* note 3.

and 2080 compared to the baseline levels at 1990.[8] However, the IPCC models are admittedly limited and don't take into account all of the feedback cycle effects that could hasten the pace of sea level rise. Furthermore, the regional variations in sea-level rise will be very uneven in ways that are still unknown.[9] Observed sea level rise effects are delayed with regard to warmer planet, and so the IPCC will have to rely on future data points and impacts after the delayed effects start to manifest.[10] Thus, it's clear that the IPCC report underestimates the current and future rates of sea-level rise. The recent accelerated rates of melting ice observed in Greenland and the Antarctic are drivers for a currently more rapid rate of sea-level rise.[11] More recent estimates project a scenario of a 2.7-meter rise by the year 2300, compared to current levels.[12]

A related effect of rapid global warming is an increased acidity of the world's oceans. Overall, since the industrialized era began, the IPPC estimates that the ocean's pH has decreased by about 0.1 units, which means that it has become more acidic. The pH is projected to increase to between 0.14 and 0.35 units, on average, over the next century. This is expected to be detrimental to marine life, because more carbon dioxide in the atmosphere leads to a chemical process that dissolves calcium carbonate—which comprises the shells of many sea organisms, and the composition of coral.[13] The global losses of coral are projected to increase in the twenty-first century, which means that the many people who depend on corals and their associated fish stocks for subsistence reasons will lose their livelihoods. This also means that ecosystem-based tourism in coastal nations will become affected enterprises. In the Pacific region specifically, coral are expected to face annual die-off and bleaching events within the next 20 to 70 years, as well as regional extinctions, if the current climate trends hold.[14]

Furthermore, raised sea levels and altered climate patterns due to global warming will likely[15] increase tropical storm intensity, although not necessarily their frequency. This effect will occur in the tropics more than other regions, thus posing a threat to atolls and low-lying islands. The disproportionate impacts of tropical storms reflect, further, the heterogeneity of the effects of climate change.

3. IMPACTS ON PALAU

With GHG emissions at 0.0004% of world emissions (OERC, 2002), Palau, like other small islands, is at the lowest level of emitters around the globe. Unfortunately, a 1-meter rise in sea level (potentially projected to occur the end of this century) would cause massive destruction to the environmental resources of Palau (coral reef and coastline habitat, fish stock) and most importantly, would harm all the human settlements sitting on the coastline.

---

[8] *Id*.
[9] *Satellites trace sea level change*, BBC NEWS, (Sept. 24, 2012), http://www.bbc.co.uk/news/science-environment-19702450.
[10] Stefan Rahmstorf, *A new view on sea level rise*, 4 NATURE REPORTS CLIMATE CHANGE 44 (2010), *available at* http://www.nature.com/climate/2010/1004/pdf/climate.2010.29.pdf.
[11] Richard A. Kerr, *Experts Agree Global Warming is Melting the World Rapidly*, 338 SCI. 1138 (Nov. 2012).
[12] Irene Quaile Kerksen, *Sea levels rising faster than expected*, Deutsche-Welle (Nov. 28, 2012), http://www.dw.de/sea-levels-rising-faster-than-expected/a-16413179.
[13] IPCC FOURTH ASSESSMENT REPORT, *supra* note 3.
[14] O. Hoegh-Gulberg et al., *Pacific in Peril*, GREENPEACE (Oct. 2000), http://archive.greenpeace.org/climate/science/reports/GR249-CoralBleaching3.pdf.
[15] The IPCC uses "likely" to mean a 66-100% probability of occurring.

Climate change is impacting Palau in its own ability to produce local food and to be a source of sustainment for agriculture workers. As a result of the coral bleaching (due to ocean acidification), the decline of fish stock may lead to (a) scarcity of local available source of nutrition, and (b) increase in the market prices of the fish caught and sold on the market. What is worse, the salt water inundating Palau or spilling over as a result of increased extreme weather events (cyclones, tropical storms, winds and high tidal water) would render the local vegetation and agricultural cultivations unsuitable for consumption. And the increased salinity would also reduce the fertility of the local soil. Palau is therefore at high risk of losing part of the natural resource base necessary to sustain human life. Evidence of such a dramatic evolution is drawn by the exiting conditions in the nearby island nation of Tuvalu, as vividly described by witnesses:

> *When we talk about the impacts of climate change, it's important to remember that our people depend on land. **If we have land, we have life**. When our land is being gradually eroded by the sea, we are literally seeing our life being eaten away. We won't be able to give life to our children and grandchildren — that is how severe it is.*[16]

The concrete result of such a severe deterioration in the natural resources endowment for Palau is that the local farmers would be drawn out of business (and they represent 20% of the whole working population) and the entire population would be forced to rely primarily on imported food. This shift in the alimentary habits, as recent studies show, may trigger an increase in chronic diseases like obesity and diabetes.[17]

4. IMPLICATIONS

> *As we sit here in these negotiations, even as we vacillate and procrastinate here, the death toll is rising, there is massive and widespread devastation.*[18]

Naderev Saño made this powerful statement at COP 18, about the ongoing effects from Typhoon Bopha, which made landfall in his home country of the Philippines on Monday Dec 3, 2012 (the eighth day of COP 18). The lead negotiator for the Philippines continued an impassioned plea to the delegates of the 18th Conference of the Parties to the United Nations Framework Convention on Climate Change:

> I appeal to the whole world, I appeal to leaders from all over the world, to open our eyes to the stark reality that we face. I appeal to ministers. The outcome of our work is not about what our political masters want. It is about what is demanded of us by 7 billion people. I appeal to all, please, no more delays, no more excuses. Please, let Doha be remembered as the place where we found the political will to turn things around. Please, let 2012 be remembered as the year the world found

---

[16] Tafue Lusama, *From tiny Tuvalu: the island being destroyed by climate change*, CRIKEY BLOG (Mar. 7, 2011), http://blogs.crikey.com.au/rooted/2011/03/07/from-tiny-tuvalu-the-island-being-destroyed-by-climate-change/.

[17] DIABETES AND CLIMATE CHANGE REPORT, INTERNATIONAL DIABETES FOUNDATION (June 2012), *available at* http://www.idf.org/sites/default/files/31121_IDF_Policy_Report_21June.pdf.

[18] *Will Philippines negotiator's tears change our course on climate change?*, THE GUARDIAN POVERTY MATTERS BLOG, Dec. 6, 2012, video and commentary *available at* http://www.guardian.co.uk/global-development/poverty-matters/2012/dec/06/philippines-delegator-tears-climate-change (last visited May 26, 2013).

> the courage to find the will to take responsibility for the future we want. I ask of all of us here, if not us, then who? If not now, then when? If not here, then where?[19]

Unfortunately it appears that Naderev Saño's call for action fell on deaf ears. At this point in time there is clear scientific consensus for the fact that climate change is already having, and will continue to have, a significant impact on human life. The body of evidence is overwhelming and the consequences of inaction are dramatic. The world has been seeing an increase in the effects of climate change over the past few decades, consistent with the observations and predictions of the IPCC.

The year 2012 has been particularly illustrative of the consequences. In addition to being the hottest year in human history, 2012 also saw the second most destructive storm in U.S. history[20] and the effects extended far outside the United States. Climate related severe whether were reported on every continent and affected people living in virtually every region of the globe.

Several important findings have come from the IPCC, for example between 75 and 200 million people will experience extreme difficulty accessing water in Africa by 2020 due to the effects of climate change. Additionally, on the African continent there will be significant decreases in agricultural production resulting in significant food shortages effecting between 100 and 300 million people.

The unprotected, dramatic and record-setting Arctic sea ice melt that we saw in the summer of 2012 is example of the fact that we do not fully understand ocean ice melt patterns and have implications for land ice melt and sea level rice. It is certain that the world will experience sea level rise on the order of meters. What is not certain is whether that rise come over centuries or decades. Either way there will be significant pressure put on low-lying coastal regions and small island states.

Twenty to thirty per cent of species are at increased risk of extinction if increases in global average warming exceed 1.5 to 2.5°C above the 1980- 1999 temperature. Experiencing an increase in global average temperatures of 2°C is virtually guaranteed because of the lack of action on the international level. Evidence of this inaction can be seen when examining what did not get done at the 18th Conference of the Parties to the United Nations Framework Convention on Climate Change which concluded in Doha, Qatar. In the likely case that the average temperature increase exceeds 3.5°C, extinctions of 40 to 70 per cent of species assessed around the globe would occur.

It is virtually certain that increases in the frequency and magnitude of warm daily temperature extremes and decreases in cold extremes will occur in the 21st century on the global scale. As a result it is very likely that the length, frequency, and intensity of heat waves will increase over most of the globe. The best IPCC emissions scenarios show that a 1 in 20 year hottest day is likely to become a 1-in-2-year event by the end of the 21st century. In addition to

---

[19] *Id*.

[20] Note that 8 of the 10 most destructive storms in U.S. history have happened in the past 10 years.

an increase in the heat experienced by humans in their daily lives there will also be a significant increase in the precipitation humans experience. The frequency of heavy precipitation and the proportion of total rainfall from heavy storms will increase in the 21st century over most of the globe. The regions most effected by this increased rain and snowfall are the high latitudes and tropical regions, and in winter in the northern mid-latitudes.

These effects are not the effects that will happen absent action, these are the effects that will be felt as a result of the level of climate change we are already committed to. If there continues to be inaction on the international level these effects will be much more extreme. Neither adaptation nor mitigation can stop these effects from happening but there is still need for adaptation and mitigation efforts to insure that the climate debt owed by the developed countries to the developing countries does not extend further out of balance and that the most vulnerable nations are able to minimize the lass of life and property that will accompany these events. The consequences of climate change are most borne by those who are least responsible for the problem. This inherent inequity between the people producing climate change and the people feeling the effects of climate change is a universal wrong that needs to be righted. Between 1970 and today over 95% of deaths from natural disasters occurred in developing countries. This discrepancy between those responsible for causation and those who bear the consequences is a dissonant pattern that reappears every mapping of climate change consequences.

B. THE QUESTION PRESENTED

The question to be submitted to the ICJ for its advisory opinion is:

> *What are the obligations under international law of a State for ensuring that activities under its jurisdiction or control that emit greenhouse gases do not cause, or substantially contribute to, serious damage to another State or States?*

This question asks the ICJ to consider substantive issues of international law relating to transboundary harm and other international environmental law principles. The Court is asked to consider aspects of the obligations that States – the traditional subjects of international law – owe to one another. The language of 'obligations' asks the Court to express its opinion on the ongoing norms governing the present and future conduct of States. It does not ask about States' retrospective responsibilities for conduct that occurred in the past. It therefore does not require the Court to engage in highly politicized or politically controversial questions, such as those involving the attribution of causation for climate change-related harms that are now becoming apparent; or those requiring the calculation of the proportionate liabilities of different States for these harms. The Court is also not asked to consider questions of damages; either as a matter of principle or as a matter of quantification. The ICJ is instead asked to perform functions that fall squarely within its judicial competence and experience: to make a finding as to the content of norms of international law, and to provide advice in order to guide an organ of the United Nations system in the performance of its functions.

This section explains the following features of the question:

1. The relationship of the question to the mandate and functions of the United Nations General Assembly (UNGA)

2. The framing of the question

3. The nature of the obligations on which the ICJ is asked to render an opinion

1. RELATIONSHIP TO GENERAL ASSEMBLY MANDATE AND FUNCTION

The UNGA is the body requesting the advisory opinion from the ICJ. It is clear from the analysis presented in this part that it has a mandate to do so, and that consideration of the question of responsibility for climate change damages falls within its functions. Determining the parameters of the UNGA's mandate and functions with respect to climate change is important for two reasons:

1. The request for an advisory opinion is presented to the ICJ pursuant to the mechanisms provided by the U.N. Charter and the ICJ Statute, which specify the role of the UNGA in tendering such a request. The authority of the UNGA to formulate the request must be established in order for the request to be validly presented.

2. ICJ advisory opinions serve to assist UN organs, such as the General Assembly, in the performance of their functions.

These elements are explained below.

a) Mechanism for presenting questions

Article 65(1) of the ICJ statute[21] states that "the Court may give an advisory opinion on any legal question at the request of whichever body may be authorized by or in accordance with the Charter of the United Nations to make such a request." Article 96(1) of the U.N. Charter states "the General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question."

These provisions establish the *prima facie* competence of the UNGA to request an advisory opinion.[22] Scope for questioning this competence is limited: expert commentary suggests that the breadth of UNGA competence provided for in the Charter makes it difficult to conceive of a legal question that would fall outside it.[23] An attempt to assert incompetence was made in the *Nuclear Weapons* case, where it was argued before the Court that the UNGA and the Security Council may ask for advisory opinions only on those questions that fall within the scope of their activities.[24] The Court there considered that it did not ultimately matter whether this interpretation was correct, because the question presented fell within the scope of the UNGA's

[21] Statute of the International Court of Justice, June 26 1945, 59 Stat. 1055.
[22] The significance of the term 'any legal question' is discussed in subsection C.1 below.
[23] Karin Oellers-Frahm, *Article 96*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1975, 1980 (Bruno Simma et al, eds., 3d ed. 2012).
[24] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 11 (July 8), [hereinafter Nuclear Weapons].

competence in any event. As the following examination of both the U.N. Charter and the practice of the UNGA demonstrates, the same is true of the present question.

> Article 10 of the U.N. Charter concerns the competence of the UNGA and states:
>
> the General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided for in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or both on any such questions or matters.[25]

The term '*make recommendations*' in this Article encompasses making resolutions,[26] such as a resolution to present a request for an advisory opinion to the ICJ. The term 'scope of the present Charter' has been considered to cover "practically the whole field of international relations."[27] One limitation to this broad scope is provided in Article 2(7) of the Charter, which prohibits the United Nations from intervening in matters within the domestic jurisdiction of any state; yet even this has been narrowly interpreted as allowing interventions for the purpose of upholding international human rights.[28] There can be no real suggestion that dealing with the transboundary harms occasioned by greenhouse gases falls purely within any state's domestic jurisdiction. Additionally, since questions of responsibility for transboundary greenhouse gas damage are within 'the field of international relations,' there can be no compelling argument that the question falls outside the UNGA's mandate and functions. Further support for this view is provided by the history of the UNGA's consideration of the issue, discussed below; and by examining the ways in which developing a response to climate change falls within the scope of Article 11 of the Charter.

> Under Article 11, the General Assembly may:
>
> - Consider the general principles of co-operation in the maintenance of international peace and security … and may make recommendations with regard to such principles to the Members or to the Security Council or to both (Article 11(1));
> - Discuss any questions relating to the maintenance of international peace and security brought before it by any member of the UN… and may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both (Article 11(2)).

It has been argued that the relationship between Article 10 and Article 11 is simply that Article 11 describes, without any further restriction on Article 10, some matters of particular

---

[25] Article 12 restricts the General Assembly from making any recommendations with respect to a dispute or situation that is already, at that time, before the Security Council.
[26] Eckart Klein and Stefanie Schmal, *Functions and Powers: Article 10, in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 461, 478 (Bruno Simma et al, eds., 3d ed. 2012).
[27] *Id*. at 465.
[28] *Id*.

importance that fall within the purview of the Charter and thus are already covered by Article 10.[29]

That the harms causes by greenhouse gas emissions, most prominently through the impacts of climate change, can be considered relevant to the maintenance of international peace and security pursuant to Article 11(1), is confirmed by the ongoing practice of the UNGA. A 2009 UNGA Resolution invited relevant organs of the United Nations to intensify their efforts in considering and addressing climate change, including its possible security implications.[30] In April 2007, the Security Council held a debate on energy, security and climate. Secretary-General Ban Ki-moon stated that "issues of energy and climate change can have implications for peace and security."[31] Comments from a number of the delegates at the debate also supported this view,[32] though some considered it a topic not suitable for discussion at the Security Council.[33] At a further debate on climate change and security held at the Security Council in 2011, a number of Council members recognized a relationship between climate change and international peace and security.[34] Thus, even if the Security Council is not the appropriate forum to consider the issue of climate change, both the comments of Security Council members and the text of the resolution confirm the link between climate change and international peace and security, thus bringing it undeniably within the mandate of the UNGA under Article 11 of the UN Charter.

That the question of climate change falls within the UNGA's mandate and functions is further clarified through assessing the history of UNGA consideration of this issue. An agenda item, 'Conservation of Climate as Part of the Common Heritage of Mankind' was included in the

---

[29] Eckart Klein and Stefanie Schmahl, *Article 11*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 491, 506 (Bruno Simma et al, eds., 3d ed. 2012).
[30] G.A. Res. 63/281, U.N. Doc. A/RES/63/281.
[31] Secretary-General Ban Ki-moon, *Statement at the Security Council debate on energy, security and climate*, http://www.un.org/apps/news/infocus/sgspeeches/search_full.asp?statID=79 (Apr. 17, 2007); UN Security Council, 5663rd Meeting, 14, UN Doc S/PV.5663, 14 (Apr. 17, 2007).
[32] UN Security Council, 5663rd Meeting, U.N. Doc. S/PV.5663 (Apr. 17, 2007). The UK, as President of the UNSC during the debate, stated that "an unstable climate will exacerbate some of the core drivers of conflict, such as migratory pressures and competition for resources"; and that "today is about the world recognizing that there is a security imperative, as well as economic, development and environmental ones, for tackling climate change and for our beginning to build a shared understanding of the relationship between energy, climate and security" (at 2); China recognized that climate change has certain security implications, though it considered it fundamentally to be an issue of sustainable development (at 12); the delegate of Germany, who spoke on behalf of the European Union stated "today we know that there is a clear link between climate change and the need for conflict prevention" and that the "cost of action on climate change is far outweighed by the consequences of inaction. We need to give due consideration to the security implications of inaction and mitigate those risks" (Turkey, Croatia, Macedonia, Albania, Bosnia and Herzegovina, Montenegro, Serbia, Ukraine and Moldova also aligned themselves with the statement) (at 19-20).
[33] China, Indonesia, and South Africa, among other countries, took this view. *See id*. at 13-15. South Africa considered the issue better dealt with in the General Assembly.
[34] UN Security Council, 6587th Meeting, U.N. Doc. S/PV.6587 (July 20, 2011). Susan Rice, for the U.S., stated "climate change has very real implications for peace and security" (at 6). China again considered that although climate change may affect security, it is fundamentally a sustainable development issue (at 9). In recognizing a link between climate change and international peace and security, see also the comments of the delegates from Bosnia and Herzegovina (at 9-10); Nigeria (at 10); the United Kingdom (at 12); Colombia (at 14); France (at 14-15); Lebanon (at 16); Gabon (at 18); India (at 18); Portugal (at 20) and Germany (at 21).

agenda of the forty-third session of the UNGA in 1988 at the request of Malta,[35] and has recurred on the UNGA's agenda regularly since this time. The UNGA has concluded numerous resolutions on *Protection of Global Climate for Present and Future Generations of Mankind*. Since 2007, these have consistently recognized the seriousness of the threat posed by climate change, particularly for vulnerable nations.[36]

Since the practice of the UNGA demonstrates that the question of climate change is within its mandate and function, it is clear that an advisory opinion from the ICJ on State obligations with respect to climate change would assist the UNGA in the performance of its functions with respect to climate change. This is explored in greater detail in the following section.

b) Offering advice to the United Nations General Assembly

As the principal judicial organ of the United Nations, the ICJ is tasked with assisting the other UN organs in the exercise of their functions. In the *Western Sahara* advisory opinion, the Court stated in regard to responding to a request for an advisory opinion that by "lending its assistance in the solution of a problem confronting the General Assembly, the Court would discharge its functions as the principal judicial organ of the United Nations."[37] In the *Nuclear Weapons* advisory opinion, the Court stated that the "purpose of the advisory function is not to settle – at least directly – disputes between States, but to offer legal advice to the organs and institutions requesting the opinion."[38] In *Interpretation of Peace Treaties*, the Court referred to the giving of an advisory opinion which the "United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take."[39]

In delivering an advisory opinion on the present question, the Court would be assisting the UNGA to perform its functions. The analysis at Subsection B.1 above demonstrates that consideration of climate change falls within these functions. Further detail on how the UNGA would use the advisory opinion once received is not required. As the ICJ made clear in its *Nuclear Weapons* opinion,

---

[35] UNGA, *Request for the Inclusion of an Additional Item in the Agenda of the Forty-Third Session – Declaration Proclaiming Climate as Part of the Common Heritage of Mankind*, U.N. Doc. A/43/241 (12 September 1988).
[36] G.A. Res 43/53, U.N. Doc A/RES/43/53 (Dec. 6, 1988); G.A. Res 50/115, U.N. Doc. A/RES/50/50/115 (Dec. 20, 1995); G.A. Res. 51/184, U.N. Doc. A/RES/51/184 (Dec. 16, 1996); G.A. Res. 52/199, U.N. Doc. A/RES/52/199 (Dec. 18, 1997); G.A. Res. 54/22, U.N. Doc. A/RES/54/222 (Dec. 22, 1999); G.A. Dec 55/443, U.N. GAOR, 55thSess,.Supp. No. 49 (Vol II), U.N. Doc. A/55/49 (Vol II), at 20 (Dec. 20, 2000); G.A. Res. 56/199, U.N. Doc. A/RES/56/199 (Dec. 21, 2001); G.A. Res. 58/243, U.N. Doc. A/RES/58/243 (Dec. 23, 2003); G.A. Res. 59/234, U.N. Doc. A/RES/59/234 (Dec. 22, 2004); G.A. Res. 60/197, U.N. Doc. A/RES/60/197 (Dec. 22, 2005); G.A. Res. 61/201, U.N. Doc. A/RES/61/201 (Dec. 20, 2006); G.A. Res. 62/86, U.N. Doc. A/RES/62/86 (Dec. 10, 2007); G.A. Res. 63/32, U.N. Doc. A/RES/63/32 (Nov. 26, 2008); G.A. Res. 64/73, U.N. Doc. A/RES/64/73 (Dec. 7, 2009); G.A. Res. 65/159, U.N. Doc. A/RES/65/159 (Dec. 20, 2010); G.A. Res. 66/200, U.N. Doc. A/RES/66/200 (Dec. 22, 2011); G.A. Res. 67/210, U.N. Doc. A/RES/67/210 (Dec. 21, 2012).
[37] Western Sahara, Advisory Opinion, 1975 I.C.J. 12, at ¶ 23 (Oct 16).
[38] Nuclear Weapons, *supra* note 24, at ¶ 15.
[39] Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, 1950 I.C.J. 65, at 71 (March 30).

> it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs.[40]

2. THE FRAMING OF THE QUESTION

a) Any Legal Question

As noted in Subsection B.1, the ICJ may give an advisory opinion on 'any legal question.' The Court has held that it may give an advisory opinion on "any legal question, abstract or otherwise,"[41] and there is no requirement that there be a specific dispute in question.[42] Issues concerning abstract or political questions were raised in the *Nuclear Weapons* case. The arguments raised in that case will be examined in some detail here because they shed significant light on the scope of the present question. The question in *Nuclear Weapons* was: "is the threat or use of nuclear weapons in any circumstances permitted under international law?" The United States argued that the Court had been asked to provide its

> opinion on an abstract question, the answer to which could not reasonably be expected to provide practical guidance to the fulfillment of the functions of the requesting body. Unlike other requests for advisory opinions, the present request does not present a dispute or situation upon which specific legal advice can usefully be given. Rather, the request presents a very general and vague question that would of necessity involve complex legal, technical, political and practical considerations.[43]

The U.S. argued that the matters could not usefully be addressed in the abstract, without reference to the specific circumstances under which any use of nuclear weapons would be contemplated.[44] Germany made a distinction between legal and political questions, arguing that the question in the *Nuclear Weapons* case was a political one, even if at first glance it seemed legal.[45] Germany also argued that answering the question would require the Court to engage in a process of guesswork based on speculative hypotheticals relating to different kinds of nuclear

---

[40] Nuclear Weapons, supra note 24, at ¶ 16.
[41] Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 I.C.J. 57, at 61 (May 28).
[42] Nuclear Weapons, *supra* note 24, at ¶ 15.
[43] Written Statement of the Government of the United States of America, Request by the United Nations General Assembly for an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1995, 4, http://www.icj-cij.org/docket/files/95/8700.pdf.
[44] *Id*.
[45] Statement for the Government of the Federal Republic of Germany, Request by the United Nations General Assembly for an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1995, 2, *available at* http://www.icj-cij.org/docket/files/95/8704.pdf.

weapons and their uses, rather than judicial fact-finding.[46] The United Kingdom raised a similar concern.[47]

The Court did not decline to exercise its advisory jurisdiction with respect to the question. It did not consider that it would be required to enter into considerations of hypothetical scenarios, but rather that it would simply "address the issues arising in all their aspects by applying the legal rules relevant to the situation."[48] In addition, the Court found that the fact that the question had political aspects was not sufficient to deprive it of its character as a "legal question." Rather, as in the present proceeding, the question required the Court to discharge an "essentially judicial task"—namely, to assess the "legality of the possible conduct of States with regard to the obligations imposed upon them by international law."[49]

It is of particular relevance to the present question to also note that both Germany and the United Kingdom raised concerns that bringing the question before the Court could jeopardize international negotiations concerning treaty-based non-proliferation.[50] This is relevant because, as the Court is no doubt aware, negotiations regarding state responses to climate change are presently proceeding pursuant to the UNFCCC. Responding to this contention, the Court found that any conclusion would have relevance for continuing debates on disarmament in the UNGA, and on other negotiations. Nonetheless, varying perspectives were advanced on the issue, and the Court could not find criteria by which to assess one position against another. It therefore could not regard this factor as a compelling reason not to exercise its jurisdiction.[51] The Court is again in an identical position in respect to the present issue. Varying perspectives may be advanced on the effects that providing an advisory opinion might be expected to have on ongoing climate change negotiations under the UNFCCC, but this is not a question that the Court is equipped to, or should, consider.

In *Nuclear Weapons*, Judge Oda was the only judge to consider that the ICJ should decline to answer the question posed. Judge Oda's principal reasons for this dissent were threefold. First, his Excellency considered that the question had been presented not to seek an advisory opinion, but to seek an endorsement of a legal axiom, since those posing the question clearly never expected that it would be answered in the affirmative.[52] Secondly, his Excellently also considered that there was a lack of clarity around the words 'threat of a nuclear weapon'.[53] Thirdly, his Excellency considered that the question was drafted without any adequate statement of reasoning to support the real need to ask the Court for an advisory opinion on the legality or illegality of nuclear weapons.[54]

---

[46] *Id*. at 5.
[47] Statement of the Government of the United Kingdom, Request by the United Nations General Assembly for an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1995, ¶¶ 1.3; 2.39, http://www.icj-cij.org/docket/files/95/8802.pdf.
[48] Nuclear Weapons, *supra* note 24, at ¶ 15.
[49] *Id*. at ¶13. *See also* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶¶ 25-27 (July 22) [hereinafter Kosovo].
[50] Statement for the Government of the Federal Republic of Germany, *supra* note 45 at 4-5; Statement of the Government of the United Kingdom, *supra* note 47, at ¶¶ 2.42-2.45.
[51] Nuclear Weapons, *supra* note 24, at ¶ 17; *see also* Kosovo, *supra* note 49, at ¶ 35.
[52] *Id*. at 332-33 (Dissenting Opinion of Judge Oda).
[53] *Id*. at 333.
[54] *Id*. at 341.

While emphasizing that Judge Oda's opinion is a dissent and not the majority view, it is worth noting that the issues raised by his Excellency do not arise in the present question. It is not worded as a yes/no question and therefore cannot be considered to presuppose an answer. Nor is there any similar ambiguity in the words used. As to the third issue raised by his Excellency, it centers on the unique circumstances of the drafting of the question in the nuclear weapons advisory opinion—circumstances that do not arise here. In addition, it is valuable to note that the court in the *Kosovo* advisory opinion upheld the finding of the majority in *Nuclear Weapons*, that individual states' motives for sponsoring or voting for a particular resolution are irrelevant to the Court's consideration of whether to exercise its discretion.[55]

b) Clarity of the Questions Posed

When presented with a request for an advisory opinion, the Court must answer the question that is presented to it, but it must ascertain 'what are the legal questions really in issue in questions formulated in a request'.[56] On some occasions the Court has reinterpreted the questions presented to it.[57] Thus, in the *Nuclear Weapons* opinion discussed extensively above, the Court found that the 'real objective' of the question that had been presented was 'to determine the legality or illegality of the threat or use of nuclear weapons'.[58] The Court has reformulated questions more directly on previous occasions. Thus, for instance, in *Reparations for Injuries Suffered in the Service of the United Nations*, the Court stated that by the use of the word 'responsible Government' referred to in the relevant request for advisory opinion, it would understand 'State' or 'defendant State'.[59] In a question of interpretation of a legal agreement between the World Health Organization and Egypt, the Court considered that the question that had been presented did not accurately reflect the 'legal questions really in issue', which were broader than the narrow terms formulated in the request.[60] In considering an application for review of a judgment of the United Nations Administrative Tribunal, the Court considered that the question put to it was 'infelicitously expressed and vague', and did not give effect to the intentions of the body asking the question.[61]

The Court is not required to undertake any such reformulation in the present case. Rather, the way is open to it to find that the scope and meaning of the present question are clear. The Court made a similar finding in the *Kosovo* advisory opinion. There, the question presented was 'is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?'. The Court considered that the question was

---

[55] Kosovo, *supra* note 49, at ¶ 33.
[56] Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 73, ¶35 (20 Dec.) [hereinafter WHO and Egypt]; see also Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 62, ¶ 14 (Apr. 29).
[57] *See* MOHAMED SAMEH M. AMR, THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE AS THE PRINCIPAL JUDICIAL ORGAN OF THE UNITED NATIONS 80-82 (2003).
[58] Nuclear Weapons, *supra* note 24, at ¶ 20.
[59] Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 177 (Apr. 11).
[60] WHO and Egypt, *supra* note 56. The Court held a similar view in Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151, 158 (July 20).
[61] Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, 1982 I.C.J. 325, ¶ 46, (July 20).

clearly, narrowly and specifically formulated. It did not ask about the legal consequences of the declaration, or whether Kosovo had achieved statehood.[62] Similarly, the present question asks the Court to spell out the international law obligations of states in respect to greenhouse gas emissions, arising from activities under their jurisdiction or control, that cause or substantially contribute to serious damage to another State or States. It does not ask the Court to go further, and elaborate on any consequences of these obligations. It does not, for instance, consider any questions of reparations or compensation for present or future harm. This distinction is elaborated upon in the following section.

3. NATURE OF THE OBLIGATIONS IN QUESTION

A distinction can be drawn between the primary and secondary obligations of States in relation to the obligations that they owe to other states. In this context, a primary obligation refers to the positive law that is being breached, or the substantive obligations of States in the subject areas of international law: for instance, a failure to comply with the provisions of the UNFCCC by a signatory state; or a breach of the transboundary harm principle. The content of these legal obligations is set out in other sections of the brief to the Court, and is therefore not assessed further here.

A secondary obligation refers to the mechanism by which a state can be held legally accountable for a breach of a primary obligation. Questions of state responsibility have been considered in various international contexts, notably in the International Law Commission's Draft Articles of State Responsibility. These proclaim, among other principles, that every internationally wrongful act of a state entails the international responsibility of that state, and that a responsible state must make full reparation for injuries caused by the internationally wrongful act.[63] As noted by various commentators, the attempt to attribute to states responsibility for climate change damages raises unique questions of causation; calculation of damages and division of responsibility between states.[64] The present question does not ask the ICJ to consider these issues. Instead, the Court is asked to rule only on the primary obligations owed by states to one another under international law, in their ongoing conduct as international actors whose activities have propensity to generate transboundary effects.

Breaking down the question to its constitutive elements illustrates more clearly the question that the Court is being ask to resolve. As noted, the question is:

---

[62] Kosovo, *supra* note 49, at ¶ 51.

[63] Rep. of the Int'l Law Comm'n, 55th Sess., April 23 – June 1 and July 2 – Aug 10, 2001, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), Vol. II, Part Two, 32 ff, Article 1 and Article 31(1). Similarly, the Institut de Droit International has also adopted a resolution that affirms in Art 1 that 'the breach of an obligation of environmental protection established under international law engages responsibility of the State… entailing as a consequence the obligation to reestablish the original position or to pay compensation': Institut de Droit International, Responsibility and Liability under International Law for Environmental Damage, Session of Strasbourg (1997).

[64] *See, e.g.*, VERHEYEN, *infra* note 76; Christina Voigt, *State Responsibility for Climate Change Damages*, 77 NORDIC J. INT'L L. 1, (2008).

> *What are the obligations under international law of a State for ensuring that activities under its jurisdiction or control that emit greenhouse gases do not cause, or substantially contribute to, serious damage to another State or States?*

The first element is 'obligations under international law of a State'. As noted, the Court is being asked to specify the content of international law norms relating to transboundary harms. These norms involve questions of both treaty and of customary international law. Emphatically, the question does not ask about 'responsibilities' under international law. The focus is on the ongoing obligations of States going forward – the Court is not asked to address any retrospective responsibilities for harms already generated. The question considers only the obligations of States; not of other transnational actors such as corporations or international organizations.

The second element is 'activities under its jurisdiction or control': again, the Court is asked to consider only those activities that can be directly linked to State obligations. Greenhouse-gas generating activities that do not fall within the jurisdiction or control of States – for instance, those activities that occur as a result of natural processes over which States do not have control, are not within the scope of the question.

The third element is 'emit greenhouse gases'. The Intergovernmental Panel on Climate Change assesses a list of greenhouse gases. These gases include primarily water vapour, carbon dioxide, nitrous oxide and methane.[65] The activities of concern in the present question are those that emit the enumerated greenhouse gases into the Earth's atmosphere – as noted above, however, the question concerns only anthropocentric processes.

The fourth element is 'ensuring … do not cause, or substantially contribute to'. Again, this wording makes it clear that the question is asking about the ongoing obligations of States, not their retrospective responsibilities. The Court is asked to consider what States should do to prevent transboundary damage from greenhouse gases, not to remedy past damages. The language of 'cause or substantially contribute to' makes clear that the threshold is a high one. The Court is not asked to consider *all* greenhouse gas emitting activities under the jurisdiction or control of States: only those that have a significant relationship with the fifth element of the question, discussed below. This recognizes that all States engage in greenhouse gas emitting activities, but that these activities have unequal impacts.

This fifth element is 'serious damage to another State or States'. Here, the Court is being asked to consider principles of transboundary harm. Again, the threshold is set high, at 'serious damage'. This element of the question recognizes that greenhouse gases have a variety of impacts, and that different countries have different vulnerabilities to these impacts and will therefore incur damage of differing levels of severity. Other sections of this brief set out the kinds of damage that are incurred by States as a result of greenhouse gases: it remains to emphasize here that the Court need not concern itself with those damages that are of a low order or easily surmountable.

---

[65] INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007 SYNTHESIS REPORT, ANNEX II, GLOSSARY 82 (2007).

4. CONCLUSION

The question presented in this request for advisory opinion is clearly worded and asks the Court to conduct its traditional functions: to outline the content of international law norms governing the ongoing conduct of States with respect to one another, concerning greenhouse gas emitting activities within their jurisdiction or control and to guide an organ of the United Nations in the performance of its functions. By responding to this request and providing clarity on the question, the Court will contribute to the ongoing maintenance of the international rule of law.

C. STATE RESPONSIBILITY AND CLIMATE CHANGE: THE LAW

1. INTRODUCTION

This section addresses the following question: What is the international law on state responsibility to avoid the harmful consequences of anthropogenic climate change?

In answering this question, our discussion proceeds in seven Sections. Section 2 presents a preliminary discussion of the sources of legal obligations under international law. In Section 3, we turn to treaty law that specifically governs the area of climate change. Section 4 considers declarations and other soft law that might have bearing on the issue of climate change, including the Stockholm Declaration[66] and the Rio Declaration;[67] it also examines the relevant resolutions of the United Nations General Assembly and Security Council, and considers the potential value of these as sources of legal norms regarding state responsibility for climate change. Beginning in Section 5, our discussion turns to general principles of international law; here we introduce the "no-harm" rule, tracing its history and development. In Section 6, we examine the applicability of this general principle to the issue of climate change. Finally, Section 7 considers other possible sources of international legal obligations, focusing primarily on international human rights law. Section 8 concludes.

2. SOURCES OF LAW

Article 38(1) of the Statute of the International Court of Justice is widely recognized as the definitive statement on the sources of international law. Article 38(1) holds that the Court, when deciding disputes, must apply law derived from the following sources:

a. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. International custom, as evidence of a general practice accepted as law;

c. The general principles of law recognized by civilized nations;

---

[66] United Nations Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, Declaration of the United Nations Conference on the Human Environment, princ. 21, U.N. Doc A/CONF.48/14/Rev.1 (June 16, 1972).
[67] United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, Rio Declaration on Environment and Development, princ. 2, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992).

> d. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[68]

In part because of their binding nature,[69] treaties, including covenants, statutes, protocols, and conventions, are usually considered to be the most authoritative source of international law; they are also legally binding on states that ratify or accede to them.[70] Often, tenets of these legally binding agreements become accepted principles of customary international law, a form of international common law, over time.[71] Declarations, principles, guidelines, standard rules, and recommendations, on the other hand, have no binding legal effect on their own; however, such instruments are seen to have moral force, serve as evidence of emerging customary law, and provide practical guidance to states in their conduct.[72]

3. TREATY LAW

a) UN Framework Convention on Climate Change

In the climate change context, there are several applicable treaties which contain strong affirmations of various international obligations and responsibilities of states. The United Nations Framework Convention on Climate Change ("UNFCCC") was opened for signature on May 9, 1992 and entered into force on March 21, 2004; currently it has been ratified by all UN member states, with the exception of South Sudan.[73] It is widely considered to be a foundational environmental treaty and the authoritative treaty on climate change. Article 2 sets out the ultimate objective of the UNFCCC:

> [T]o achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is

---

[68] Statute of the International Court of Justice, art. 38(1), 1948, http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0 (last visited Jan. 10, 2013).
[69] *See* Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith."), http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (last visited Jan. 10, 2013).
[70] Strauss, *Climate Change Litigation*, *infra* note 533.
[71] *International Law: The Core International Human Rights Instruments and their Monitoring Bodies*, OFFICE OF THE HIGH COMM'N FOR HUMAN RTS., http://www2.ohchr.org/english/law (last visited Jan. 10, 2013).
[72] *Id*.
[73] The total number of ratifying states is 195, including Niue and the Cook Islands (in addition to the European Union). The list of ratifiers includes all UN member states, with the exception of South Sudan. *Status of Ratification of the Convention*, UNFCCC, http://unfccc.int/essential_background/convention/status_of_ratification/items/2631txt.php (last visited Jan. 10, 2013).

> not threatened and to enable economic development to proceed in a sustainable manner.[74]

This objective has been interpreted as bestowing upon states a duty of prevention with regards to dangerous climate change.[75] Furthermore, "operationalising Article 2 is not contingent on further scientific evidence for climate change. Rather Article 2 expresses the consensus that there is anthropogenic interference with the climate system and that something must be done to *prevent* this interference from becoming dangerous"[76] (emphasis added). According to Roda Verheyen, Article 2 cannot be viewed merely as a non-binding policy statement and is therefore the source of a binding, long-term commitment for all Parties to the FCCC to prevent climate change.[77]

The subsequent Principles in Article 3 reaffirm the emphasis on prevention, specifically exhorting states to adopt a precautionary principle: "Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects."[78] Article 3.3 further states that "where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures."[79]

In addition to the emphasis on preventative measures regarding the potentially harmful release of greenhouse gas emissions ("GHGs"), Article 4.2(a) of the UNFCCC specifically commits developed countries to limit their anthropogenic emissions of greenhouse gases. The commitment urges developed country and Annex I Parties to "adopt national policies and take corresponding measures on the mitigation of climate change, by limiting . . . anthropogenic emissions of greenhouse gases and protecting and enhancing . . . greenhouse gas sinks and reservoirs."[80]

The FCCC's status as a framework agreement with seemingly aspirational "objectives" and "principles," and its almost universal acceptance and ratification among states is an indication to some that the treaty contains few actual legal obligations.[81] Even Article 4.2 and the

---

[74] U.N. Framework Convention on Climate Change, art. 2, May 9, 1992, 1771 U.N.T.S. 107, http://unfccc.int/essential_background/convention/background/items/1349.php (last visited Jan. 10, 2013) [hereinafter UNFCCC].
[75] Christina Voigt, *State Responsibility for Climate Change Damages*, 77 NORDIC J. INT'L LAW 1, 5 (2008).
[76] RODA VERHEYEN, CLIMATE CHANGE DAMAGE AND INTERNATIONAL LAW: PREVENTION, DUTIES, AND STATE RESPONSIBILITY 56-58 (2005).
[77] *Id*.
[78] UNFCCC art. 3.3.
[79] *Id*.
[80] UNFCCC art. 4.2.
[81] *See*, *e.g*., Strauss, *supra* note 533, at 354: "The extensive state adherence to the UNFCCC is the result of the general perception that the articles that I have referenced place no precisely definable legal limitations on states"; *see also* Rebecca Elizabeth Jacobs, *Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice*, 14 PAC. RIM L. & POL'Y J. 103, 114 (2005): "Inasmuch as the Convention on Climate Change is non-binding, it merely obligates developed countries to 'aim' towards returning to 1990 GHG emissions levels by the year 2000"; *see also* Voigt, *supra* note 75, at 4: "The history of negotiations shows that Parties decided to focus on *mitigation* provisions rather than on tackling potential damages to people, economies and ecosystems"; and at 5: "It has been claimed that the UNFCCC, being a framework agreement, is merely setting out a shared vision of the common goals and interests of the international community. The signatory States are left with a significant degree of discretion to define specific rights and obligations. Thus, it has been

provision for Annex I countries to reduce emissions below 1990 levels have been interpreted as goals, as opposed to legally binding commitments.[82] Moreover, the principle of state responsibility was specifically excluded from the main text of the FCCC,[83] leading some states to make the following declaration upon signature of the FCCC: "Signature of the Convention shall in no way constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change."[84]

However, international legal scholars maintain that the FCCC does establish various legal principles and several ways in which states can be in violation of their commitments under the treaty. According to Christina Voigt, Article 4.2 sets forth an "obligation of conduct" to reverse the long term trend of ever-increasing greenhouse gas emissions.[85] Accordingly, a breach of Article 4.2 would occur in cases in which a respective state does not sufficiently reduce its emissions so as to rectify damage caused by its actions, or where a country has increased its emissions continuously since its ratification of the FCCC.[86] Adaptation and adaptation funding are also not considered voluntary, but rather "a substantive obligation on all Parties with a view to reducing future climate change damage."[87] Verheyen engages in extensive legal analysis of the Convention and concludes that the following actions would need to be taken to comply with the obligations of the FCCC:

- A Party to the FCCC would have made real efforts to achieve the year-2000 target, even if this does not constitute a binding obligation of result;
- A Party to the FCCC would comply with the co-operation duties under the FCCC to find adequate regulatory solutions to reach the objective of Article 2 FCCC; and most importantly
- A Party to the FCCC would act on the basis of the scientific finding accepting that absolute emission levels have to be lowered in the medium and long term to achieve the objective

---

considered difficult to identify specific State obligations on the basis of general obligations enshrined in the UNFCCC."

[82] *See* Jana von Stein, *The International Law and Politics of Climate Change: Ratification of the United Nations Framework Convention and the Kyoto Protocol*, 52 JOURNAL OF CONFLICT RESOLUTION 243, 247 (2008): "Importantly – this commitment is not legally binding . . . the FCCC seeks to 'establish a set of principles, norms, and goals . . . for cooperation on the issue . . . rather than to impose major binding obligations."

[83] There is a reference in the Preamble, which recalls that States have "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." *Full Text of the Convention*, UNFCCC, http://unfccc.int/essential_background/convention/background/items/1349.php.

[84] *Declarations by Parties - United Nations Framework Convention on Climate Change*, UNFCCC, http://unfccc.int/essential_background/convention/items/5410.php (last visited Jan. 10, 2013) (presenting the declarations made by declarations made by the Governments of Nauru, Fiji, Kiribati, and Papua New Guinea).

[85] Voigt, *supra* note 75, at 6.

[86] *See* VERHEYEN, *supra* note 76, at 236; Richard S.J. Tola & Roda Verheyen, *State Responsibility and Compensation for Climate Change Damages—a Legal and Economic Assessment*, 32 ENERGY POL'Y 1109, 1115 (2004).

[87] Tola & Verheyen, *supra* note 86, at 1114.

> of the Convention, i.e. it would enact suitable legislation to pursue this aim.[88]

She concludes that given these obligations, "the activities and plans of the federal government of the USA . . . are not in compliance."[89]

b) Kyoto Protocol

Recognizing the need for an instrument with binding, quantified emissions reduction commitments for industrialized countries and the lack of concrete action to reduce greenhouse gas emissions since 1992, states met at the third session of the Conference of the Parties (COP 3) in Kyoto, Japan in December 1997 and negotiated the Kyoto Protocol.[90] The Protocol was opened for signature in March 1998 and entered into force on February 16, 2005 upon Russia's ratification.[91] It effectively requires developed countries to reduce emissions of carbon dioxide to five percent below 1990 levels from 2008 - 2012.[92] According to the UNFCCC website, there are currently 192 Parties (191 States and 1 regional economic integration organization) to the Kyoto Protocol to the UNFCCC, accounting for 63.7% of total Annex I Parties emissions.[93]

The U.S. signed the Protocol, but the Senate has not ratified it. Before the Protocol was fully negotiated, the U.S. Senate passed the Byrd-Hagel Resolution preventing the ratification of any international agreement that did not also require developing countries to make emission reductions and "would result in serious harm to the economy of the United States."[94] In 2010, Canada, Japan, and Russia said they would not accept new Kyoto commitments, and in 2011, Canada pulled out of the Protocol entirely, invoking its "legal right to withdraw."[95]

Although Canada does have a right to withdraw under Article 27 of the Kyoto Protocol,[96] Canada, the U.S., and other signatories have an obligation as signatories under the Vienna

---

[88] VERHEYEN, *supra* note 76, at 283.
[89] *Id*.
[90] *Status of Ratification of the Kyoto Protocol*, UNFCCC, http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php.
[91] *Id*. The Kyoto Protocol entered into force in accordance with Article 23, "the ninetieth day after the date on which not less than 55 Parties to the UNFCCC, incorporating Parties included in Annex I which accounted in total for at least 55 % of the total carbon dioxide emissions for 1990 of the Parties included in Annex I, have deposited their instruments of ratification, acceptance, approval or accession." *Id*.
[92] Jacobs, *supra* note 81, at 114.
[93] *Id*.
[94] *See* Byrd-Hagel Resolution, 105th Congress, 1st Session, S. RES. 98, http://www.nationalcenter.org/KyotoSenate.html.
[95] *Canada Pulls out of Kyoto Protocol*, THE GUARDIAN (U.K.), Dec. 13, 2011, http://www.guardian.co.uk/environment/2011/dec/13/canada-pulls-out-kyoto-protocol (last visited Jan. 10, 2013).
[96] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22, http://unfccc.int/essential_background/kyoto_ protocol/items/1678.php (last visited Jan. 10, 2013) ("At any time after three years from the date on which this Protocol has entered into force for a Party, that Party may withdraw from this Protocol by giving written notification to the Depositary."). This is consistent with the Vienna Convention on the Law of Treaties, which states that "[a]t any time after three years from the date on which this Protocol has entered into force for a Party, that Party may withdraw from this Protocol by giving written notification to the Depositary." Vienna Convention on the Law of Treaties art. 54, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (last visited Jan. 10, 2013).

Convention on the Law of Treaties not to contravene the purposes of the treaty, along with their general obligations under the FCCC to reduce emissions and prevent dangerous anthropogenic interference with the climate system.[97]

As for legal obligations, the Kyoto Protocol sets legally enforceable targets for countries, with somewhat ambiguous accounting of emissions. Since the Protocol is now in force, any country that does not meet its target at the end of the first commitment period in 2012 has breached its international law obligations.[98] However, the Protocol also sets up a complex compliance and enforcement mechanism in which states that do not meet their targets are subject to a penalty rate for excess emissions. Tola and Verheyen note that the existence of this mechanism "might even preclude the application of general law on state responsibility, depending on the will of the parties to the Protocol."[99] However, they also claim that since the agreement does not tackle the issue of damage, damage claims based on the infringement of the treaty obligation are not formally precluded from being brought outside the compliance system.[100]

Unfortunately, the U.S., as a non-ratifying state, and developing country emitters such as China and India who have ratified the Protocol but are exempt from any reduction obligations, cannot be held responsible for noncompliance with the reduction targets under the Protocol.[101] On the other hand, some have argued that through its failure to ratify Kyoto, the U.S. has failed to meet its obligation to cooperate and participate in effective responses required to achieve the aims of the FCCC.[102]

The Kyoto Protocol is thus useful as additional support for establishing state responsibility for climate change damage, even while it does not directly include provisions on damage. Its widespread acceptance by almost every member of the international community provides legitimacy to the notion of international law norms on the prevention of climate change, even while its binding provisions only pertain to Annex I countries.

c) United Nations Convention on the Law of the Sea (UNCLOS)

Given not just projected sea level rise but ocean acidification, coral reef bleaching, species extinction, and the generally disastrous effects of climate change on the world's oceans, there is a significant likelihood that inclusion of measures to protect ocean environments will overlap with measures to reduce climate change. The United Nations Convention on the Law of

---

[97] Vienna Convention, *supra* note 96, art. 18 ("A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty.").
[98] Tola & Verheyen, *supra* note 86, at 1115.
[99] *Id*.; *see also* VERHEYEN, *supra* note 76, at 116 ("It is possible that the Kyoto Protocol prescribes the exclusive use of legal consequences foreseen by the Protocol itself and therefore offers a justification not to apply the law of state responsibility.").
[100] *Id*.
[101] Voigt, *supra* note 75, at 5.
[102] VERHEYEN, *supra* note 76, at 285.

the Sea, a 1982 treaty,[103] defines the rights and responsibilities of nations in their use of the world's oceans, establishing guidelines for the management of marine natural resources. To date, 163 countries and the European Union have ratified the Convention.[104]

A number of provisions contribute to the body of international environmental law codifying marine protections and implicated by climate change. Articles 192-206 of UNCLOS set forth general obligations of the parties to prevent, reduce, and control marine pollution, to cooperate on a global or regional basis, to notify other parties of imminent or actual damage to the oceans, and to adopt contingency plans and provide technical assistance to developing countries in combating marine pollution.[105] Articles 207-211 and 213-221 contain more specific obligations with respect to pollution from land-based sources, seabed activities, ocean dumping and maritime vessels and the obligations of parties to enforce their respective laws and any applicable international rules and standards relating to such activities.[106]

Perhaps the most relevant provision for climate change is Article 212, which requires parties to adopt laws and regulations to prevent, reduce, and control pollution of the marine environment "from or through the atmosphere, applicable to the air space under their sovereignty and to vessels flying their flag or vessels or aircraft of their registry, taking into account internationally agreed rules, standards and recommended practices and procedures and the safety of air navigation."[107] Article 222 provides the enforcement of 212, requiring states to take "measures necessary to implement applicable international rules and standards established through competent international organizations or diplomatic conference to prevent, reduce and control pollution of the marine environment from or through the atmosphere, in conformity with all relevant international rules and standards concerning the safety of air navigation."[108]

According to Stephen Kass, "the purpose of these provisions is clearly to require parties to regulate emissions from aircraft and marine vessels, which were seen in 1982 as the most significant sources of atmospheric pollution affecting the oceans."[109]

Roda Verheyen finds additional support for state responsibility for climate change and the no-harm rule in UNCLOS Article 194.2, which obliges states to "ensure that activities under their jurisdiction and control are so conducted as to not cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights."[110] Taken with Article 192 which sets forth states' "obligation to protect and preserve the

---

[103] United Nations Convention on the Law of the Sea (UNCLOS), Dec. 10, 1982, 21 I.L.M. 1261 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

[104] *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements as at 07 November 2012*, UNITED NATIONS, http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm (last visited Jan. 10, 2013).

[105] Stephen Kass, *United Nations Convention on Law of the Sea and Climate Change*, N.Y.L.J., Aug. 31, 2012, http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202569335882&United_Nations_Convention_on_Law_of_the_Sea_and_Climate_Change&slreturn=20130421093836.

[106] *Id*.

[107] UNCLOS art. 211.

[108] *Id*. art. 222.

[109] Kass, *supra* note 105.

[110] VERHEYEN, *supra* note 76, at 193; UNCLOS art. 194.

marine environment,"[111] these two articles are seen as the embodiment of the precautionary principle.[112]

Article 235 provides for state responsibility to be triggered through breach of any environmental duties under UNCLOS: "States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law."[113]

UNCLOS therefore provides "additional primary rules obliging States to prevent or minimize climate change damage."[114]Its definition of pollution includes not only "substances" introduce into the marine environment but "energy" as well.[115] There is no absolute prohibition on pollution, but due diligence measures are required.[116]

As an environmental treaty, UNCLOS has been in existence and in force for a relatively long time,[117] providing additional support for the notion that many of its provisions either represent or are gradually becoming customary international law. U.S. refusal to ratify the Convention would make it difficult to apply the Convention's provisions to a theory of U.S. liability for climate change; however, its widespread acceptance by almost every other major emitter (including Japan, China, Russia, and India) and nation bodes well for an international law argument of state responsibility for the effects of climate change on the world's oceans.

d) Straddling Fish Stocks Agreement

The Straddling Fish Stocks Agreement[118] is a United Nations treaty created to enhance the cooperative management and conservation of straddling and migratory fisheries and their ecosystems, which are of economic and environmental concern to many nations and extend to areas beyond national jurisdiction (i.e. the high seas). The Agreement was adopted in 1995, and came into force in 2001. It currently has 80 state parties, including the U.S.

Article 5 of the Agreement states that there is a need to address marine ecosystems as a whole and obliges states to "adopt measures to ensure long-term sustainability of straddling fish stocks and highly migratory stocks and promote the objective of their optimum utilization."[119] As a means of achieving this, the Agreement requires states to "minimize pollution" and protect biodiversity in the marine environment.[120] Although the Agreement does not define pollution or

---

[111] UNCLOS art. 192.
[112] Lawrence A. Kogan, *What Goes Around Comes Around: How UNCLOS Ratification Will Herald Europe's Precautionary Principle as U.S. Law*, 7 SANTA CLARA J. INT'L L. 1, 27 (2009).
[113] UNCLOS art. 235.
[114] VERHEYEN, *supra* note 76, at 194.
[115] UNCLOS art. 1.1(4).
[116] VERHEYEN, *supra* note 76, at 204.
[117] UNCLOS was created in 1982 and entered into effect in 1992.
[118] Agreement for the Implementation of the Provisions of the U.N. Convention on the Law of the Sea of December 10, 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Aug. 4, 1995, U.N. Doc. A/CONF. 164/38 (Aug. 12, 1992),*reprinted in* 34 I.L.M. 1542 [hereinafter Straddling Fish Stocks Agreement].
[119] Straddling Fish Stocks Agreement art. 5.
[120] *Id*.

the necessary measures to be taken to conserve, manage and promote the sustainability of living marine resources, it is an implementing agreement of UNCLOS and therefore would be expected to rely on the same definitions and wording implicit in UNCLOS (including that treaty's inclusion of "energy" and vessel pollution). Article 6 also calls for the application of the precautionary approach, stating

> 1. States shall apply the precautionary approach widely to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment.
>
> 2. States shall be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.[121]

Finally, Article 35 of the Straddling Fish Stocks Agreement mirrors Article 235 of UNCLOS, providing for state "liability in accordance with international law for damage or loss attributable to [states] in regard to this agreement."[122]

e) UN Convention on Biological Diversity

The Convention on Biological Diversity (CBD)[123] is another treaty which emerged from the 1992 Rio Earth Summit. It has support comparable to the FCCC, with 193 parties (excluding the U.S., Andorra, the Holy See, and South Sudan); it entered into force on December 29, 1993.[124]

It reiterates several principles of the FCCC, including the precautionary principle and state responsibility. The preamble of the CBD states that the contracting parties are "aware of the general lack of information and knowledge regarding biological diversity" and notes that "where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat."[125]

Article 3 of the CBD reiterates both the sovereign right to exploit resources and state responsibility as expressed in Principle 2 of the Rio Declaration and Principle 21 of the Stockholm Declaration, stating:

---

[121] *Id*. art 6.
[122] *Id*. art 35.
[123] Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 143, http://www.biodiv.org/convention/articles.asp (last visited Jan. 10, 2013).
[124] *List of Parties*, CONVENTION ON BIOLOGICAL DIVERSITY, http://www.cbd.int/information/parties.shtml (last visited Jan. 10, 2013).
[125] *Id*.

> States have . . . the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[126]

Scholars note an increased synergy between the CBD and FCCC regime as the link between conservation and biological diversity and climate change mitigation becomes more evident.[127] Others note that the existence of the precautionary principle in the CBD provides additional support for the principle as a component of customary international law.[128]

4. DECLARATIONS

As mentioned before, declarations have no binding legal effect on their own; however, they still serve an important purpose in expressing the will of the international community, and providing evidence of emerging customary law and guidance to states in their conduct.[129] Two declarations in particular are said to express elements of the precautionary principle and provide additional support for the notion of state responsibility for climate change.

a) Stockholm Declaration

As early as 1972, the Stockholm Declaration established important universal principles in international environmental law. The product of the first global environmental conference, the United Nations Conference on the Human Environment in Stockholm, June 5-16, 1972, the Stockholm Declaration "represented a first taking stock of the global human impact on the environment, [and] an attempt at forging a basic common outlook on how to address the challenge of preserving and enhancing the human environment."[130] The Declaration was adopted by a vote of 103 countries to 0 with 12 abstentions.[131] Günther Handl notes that the Stockholm Declaration includes "provisions which at the time of their adoption were either understood to already reflect customary international law or expected to shape future normative expectations."[132]

For instance, Stockholm Principle 21 establishes a state's "responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other

---

[126] *Id*. art. 3.
[127] *See, e.g*., Frederic Jacquemont & Alejandro Caparros, *The Convention on Biological Diversity and the Climate Change Convention 10 Years After Rio: Towards a Synergy of Two Regimes?*, 11 RECIEL 169 (2002); Harra van Asselt, Joyeeta Gupta, and Frank Biermann, *Advancing the Climate Agenda: Exploiting Material and Institutional Linkages to Develop a Menu of Policy Options*, 14 RECIEL 255 (2005).
[128] Owen McIntyre & Thomas Mosedale, *The Precautionary Principle as a Norm of Customary International Law*, 9 J. ENVTL. L. 221 (1997).
[129] *International Law: The Core International Human Rights Instruments and their Monitoring Bodies*, OFFICE OF THE HIGH COMM'N FOR HUMAN RTS., http://www2.ohchr.org/english/law (last visited Jan. 10, 2013).
[130] Günther Handl, *Introduction: Declaration of the United Nations Conference on the Human Environment, Rio Declaration on Environment and Development*, AUDIOVISUAL LIBRARY OF INT'L L., http://untreaty.un.org/cod/avl/ha/dunche/dunche.html.
[131] Strauss, *infra* note 533, at 354.
[132] *Id*.

States or of areas beyond the limits of national jurisdiction."[133] Although this obligation is qualified by states' sovereign rights to exploit their own resources pursuant to their own environmental policies, today "there is no doubt that this obligation is part of general international law."[134] The no-harm principle as expressed in the Stockholm Declaration has been enshrined in many international environmental treaties, including the FCCC and the UN Convention on Biological Diversity, and cited in numerous international courts and tribunals, including the International Court of Justice.[135] It "is now part of the corpus of international law relating to the environment."[136]

Additionally, Principle 22 states:

> States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.[137]

Thus, the issue of liability for environmental damage caused by states has been included in the development of international environmental law for over forty years.[138]Both Principles 21 and 22 have been endorsed by the UN General Assembly as the basic rules on the international responsibility of states in regard to the environment.[139]

b) Rio Declaration

In 1992, twenty years after Stockholm, the second major global environmental conference, the Earth Summit, officially the United Nations Conference on the Environment and Development, took place in Rio de Janeiro. One of the principal outcomes of Earth Summit was the Rio Declaration which was adopted by consensus.[140]

The Rio Declaration also contains provisions which reflect customary international law; moreover by expressly reaffirming and building upon the Stockholm Declaration, the Rio

---

[133] Declaration of the United Nations Conference on the Human Environment, 1972, Principle 21, http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503.
[134] Handl, *supra* note 130. Handl adds: "Thus in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* first, and again more recently in the *Case concerning Pulp Mills on the River Uruguay,* the International Court of Justice expressly endorsed the obligation as a rule of international customary law. Moreover, the *Pulp Mills* decision clearly confirms that the State's obligation of prevention is one of due diligence." *Id*.
[135] *See*, *e.g*., Legality of the Threat or Use of Nuclear Weapons, *supra* note 24.
[136] *Nuclear Weapons*, ICJ Report 241, 1996, ¶ 29; re-stated in *Gabcikovo-Nagymaros Project*, ICJ Report 7, 1997, 41.
[137] Declaration of the United Nations Conference on the Human Environment, 1972, Principle 22, http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503.
[138] *See also* VERHEYEN, *supra* note 76, at 232 ("There is no lack of political statements regarding the importance of a more effective law of State responsibility or liability.").
[139] UNGA Res. 2996 (XXVII), 27th session, UN Doc. A/8730 (1972), http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/2996%28XXVII%29&Lang=E&Area=RESOLUTION.
[140] Strauss, *infra* note 533, at 355.

Declaration "reinforces the normative significance of those concepts common to both instruments."[141]

Principle 2 of the Rio Declaration reiterates the rule of customary international law enshrined in Principle 21 of the 1972 Stockholm Declaration outlawing transboundary environmental injury.[142] The wording of Principle 2 "obliges states to ensure that no damage is done from their territory to other states, and does not differentiate between state and private conduct."[143]

Similarly, Principle 13 mirrors Principle 22 of the Stockholm Declaration, affirming the responsibility of states to develop domestic and international liability and compensation law for the adverse effects of environmental damage caused by activities within their jurisdiction.[144]

Importantly, the Rio Declaration enshrines a new principle not present in the Stockholm Declaration, the precautionary principle. Principle 15 provides that

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[145]

The precautionary principle has gained widespread acceptance in international practice; yet some states, including the United States, continue to "question its status as both a 'principle of international law' and *a fortiori* a rule of customary international law."[146] However, in a 2011 Advisory Opinion, the Seabed Chamber of the International Tribunal of the Law of the Sea noted "a trend towards making this approach part of customary international law."[147]

Handl concludes that recent developments, taken with the principles from the Declarations, "can provide a basic frame of reference for issues related to environmental liability

---

[141] *Id*.

[142] U.N. Conference on Environment and Development, Rio Declaration on Environment and Development, U.N. Doc.A/CONF. 151/5/REv. 1 (1992) [hereinafter *Rio Declaration*]. The exact Principle states:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Id. Principle 2 Rio is identical to Principle 21 of the Stockholm Declaration, except that the words "and developmental" are inserted between "environmental" and "policies."

[143] Tola & Verheyen, *supra* note 86, at 1111.

[144] *Rio Declaration*, *supra* note 142, at princ. 13.

[145] *Id*. princ. 15.

[146] Handl, *supra* note 130.

[147] Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Request for Advisory Opinion Submitted to the Seabed Disputes Chamber), International Tribunal of the Law of the Sea, Advisory Opinion,Feb. 1, 2011, ¶ 135, http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf (last visited Jan. 10, 2013).

and compensation, be that at national or international level" and that "[t]hese developments include, in particular, the work of the International Law Commission, especially its draft Principles on Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities; and the 2010 UNEP Guidelines for the Development of Domestic Legislation on Liability, Response Action and Compensation for Damage Caused by Activities Dangerous to the Environment."[148]

Thus, the Declarations have led at least in part to the development of the very legal and legislative processes they held to be essential to environmental protection and accountability.

5. GENERAL ASSEMBLY/SECURITY COUNCIL RESOLUTIONS

UN resolutions occupy a somewhat amorphous area of international law often referred to as "soft law," with occasional binding effects depending on the content and type of resolution.[149] While General Assembly resolutions are typically considered to be non-binding under the UN Charter,[150] the ICJ recognized in its Nuclear Weapons Advisory Opinion that "General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an opinion juris."[151]

As early as 1972, a General Assembly Resolution 2995 entitled "Cooperation Between States in the Field of the Environment" emphasized that in their "exploration, exploitation and development of their natural resources, States must not produce significant harmful effects in zones situated outside their national jurisdiction . . . with a view to avoiding significant harm that may occur in the environment of the adjacent area."[152] The International Law Commission has since defined the term significant harm or damage as something more than detectable or appreciable, but not necessarily serious or substantial.[153]

In 1988 and 1989, the General Assembly produced resolutions in which it recognized that "climate change is a common concern of mankind" and that "necessary and timely action should be taken to deal with climate change within a global framework."[154] Other Resolutions similarly relating to the protection of the global climate include Resolutions 61/201 of December 20, 2006, 62/86 of December 10, 2007, 63/32 of April 3, 2009, and 65/159 of December 20, 2010, calling upon states to take urgent action to implement their commitments under the FCCC, Kyoto Protocol, and other international instruments.

---

[148] Handl, *supra* note 130.
[149] Christine M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L. Q. 850, 851 (1989).
[150] They are referred to as "recommendations" in Art. 10 of the United Nations Charter.
[151] Nuclear Weapons, *supra* note 24, at 254–55, ¶ 70.
[152] UN General Assembly Resolution 2995 of Dec. 15, 1972.
[153] Voigt, *supra* note 75, at 9.
[154] UN General Assembly Resolution 43/53 of Jan. 27, 1989.

In 2009, the GA adopted a Resolution noting the possibly security implications of climate change and referring the issue to the relevant UN organs.[155] As a result, the Security Council held a day-long debate on the issue, producing a statement which admitted that "climate issues drove conflict, challenged implementation of Council mandates [. . . and] endangered peace processes." The inclusion of climate change on the Security Council's agenda emphasizes the growing importance of the issue in all international bodies, even while such a statement likely does not produce any binding effects.

However, clear support for compensation for environmental damage is arguably provided by another UN Security Council Resolution, specifically SC Resolution 687, which, in 1991, affirmed that Iraq was "liable under international law for any direct loss, damage, including environmental damage and the depletion" in its war against Kuwait. According to Christina Voigt, resolutions such as these support the general acceptance of the principle of ecological damages in international law.[156]

6. THE GENERAL PRINCIPLE OF TRANSBOUNDARY HARM IN INTERNATIONAL LAW

We turn next to general principles of international law—specifically, the "no-harm" principle, alternately referred to by the Latin maim "sic uteretuoutalienum non laedas," or "use your property in a way that does not harm others." The no-harm principle—which has its origin in the traditional common law of nuisance—has become, through its inclusion in case law, international declarations, and learned restatement of the law, a core part of the general principles of international law and, indeed, of customary international law. We discuss the development of this principle, and its potential application in the climate change context.

a) Trail Smelter

In most accounts, the story of the development of the transboundary harm principle in international law begins with the *Trail Smelter* arbitration of 1941.[157] Indeed, in the words of one author, "any analysis" of liability for transboundary harms "necessarily begins with the landmark Trail Smelter case."[158] The facts of this case are as follows. A large smelter located in Trail, British Columbia, Canada, approximately seven miles from the U.S.-Canada border emitted smoke and other particulate which spread into Washington State, damaging crops and forests. Complaints from the United States government led to the matter being submitted to arbitration in

---

[155] GA Resolution 63/281, A/RES/63/281, Sixty-third session, http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/63/281&Lang=E.

[156] Voigt, *supra* note 75, at 19.

[157] Trail Smelter Case (U.S./Can.), 3 R.I.A.A. 1905 (1941), reprinted in 35 AJIL 684 (1941):

[158] Linda A. Malone, *The Chernobyl Accident: A Case Study in International Law Regulating State Responsibility for Transboundary Nuclear Pollution*, 12 COLUM. J. ENVTL. L. 203, 208 (1987); *see also*, Austen L. Parrish, *Trail Smelter Deja Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes*, 85 B.U. L. REV. 363, 364 (2005) (describing the case as "a landmark decision in international environmental law"); TUOMAS KUOKKANEN, INTERNATIONAL LAW AND THE ENVIRONMENT: VARIATIONS ON A THEME 89 (2002) ("The Trail Smelter case is one of the landmarks of the traditional period to which scholars constantly refer . . . ."); JAN SCHNEIDER, WORLD PUBLIC ORDER OF THE ENVIRONMENT: TOWARDS AN INTERNATIONAL ECOLOGICAL LAW AND ORGANIZATION 50 (1979) (describing *Trail Smelter* as a "milestone").

1935.[159] In its preliminary decision, released in 1938, the ad hoc arbitral panel concluded the following:

> [U]nder the principles of international law, as well as of the law of the United States, 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 . . . when the case is of serious consequence and the injury is established by clear and convincing evidence.[160]

Essentially importing the traditional notions of common law nuisance liability into the international context, the panel affirmed the applicability of the "polluter pays" principle in the international law context.[161] In the years since Trail Smelter, the *sic uteretuo* maxim has been repeatedly reaffirmed; indeed, as one author notes, "[t]hrough repeated enumeration of the Trail Smelter Arbitration dictum in succeeding international law cases, the sic uteretuo maxim has emerged as an international legal principle."[162]

We begin with a brief consideration of the Stockholm Declaration and Rio Declaration. Although we have discussed the content of the Stockholm and Rio Declarations previously,[163] and so will not focus on these extensively in this section, it bears repeating that both declarations explicitly restate the "no-harm" principle in clear language. As the Stockholm Declaration proclaims, states have the "responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."[164] The legal status of these declarations has been bolstered by the

---

[159] For an extensive discussion of the facts of this case, see John E. Read, *The Trail Smelter Dispute*, 1CAN. Y.B. INT'L L. 213 (1963). *See also* J.D. Wirth, *The Trail Smelter Dispute: Canadians and Americans Confront Transboundary Pollution*, 1 ENVTL. HIST. 34 (1996) (same).

[160] Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1905, 1965 (1938).

[161] It is true that the extent to which the Trail Smelter case itself articulates a binding norm of customary international law is not entirely uncontested. *See, e.g.*, Shashank Upadhye, The International Watercourse: An Exploitable Resource for the Developing Nation Under International Law?, 8 CARDOZO J. INT'L & COMP. L. 61, 86 (2000) (suggesting that Trail Smelter "creates no unequivocal customary international law"); *see also* Timothy J. Heverin, Legality of the Threat or Use of Nuclear Weapons: Environmental and Humanitarian Limits on Self-Defense, 72 NOTRE DAME L. REV. 1277, 1297 (1997) ("Trail Smelter is not binding international law; the tribunal was formed by a specific treaty and applied international and United States law. The holding is also limited in scope: the tribunal addressed injury caused by fumes and required clear and convincing evidence of serious harm. Although Trail Smelter has minimal precedential value in international law, the decision paved the way for the duty not to cause transboundary harm declared at the United Nations Conference on the Human Environment at Stockholm."). The majority view, however, is that the basic principle articulated in Trail Smelter has nonetheless evolved to become a fundamental norm of customary international law, particularly as the principle has been repeated reaffirmed—as we will discuss in the coming sections—in restatements of the law, declarations, and subsequent case law.

[162] Guive Mirfendereski, *Book Review: World Climate Change: The Role of International Law and Institutions*, 8 B.C. INT'L & COMP. L. REV. 267, 271 (1985).

[163] *See* discussions *supra* Subsections 4a. and 4.b.

[164] United Nations Conference on the Human Environment, Stockholm Declaration on the Human Environment, June 16, 1972, princ. 21, 11 ILM 1416, 1420 (1972) (emphasis added); *accord* United Nations Conference on Environment and Development, Rio Declaration on Environment and Development, June 14, 1992, princ. 2, 31 ILM 874, 876 (1992) ("States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and

incorporation of analogous principles in numerous judicial opinions which followed in the wake of *Trail Smelter*.[165]

Although we do not aim to provide a comprehensive catalogue of all subsequent invocations of this principle here, the following sections provide an overview of particularly relevant case law.

b) Corfu Channel

We begin our analysis of these opinions with the *Corfu Channel* case,[166] which the International Court of Justice decided in 1949. The *Corfu Channel* case involved a claim brought by the United Kingdom against Albania for damage to British ships associated with mines in Albanian waters.[167] The ICJ, which found for the UK, stated that it premised its conclusion "on certain general and well-recognized principles, namely, elementary considerations of humanity, even more exacting in peace than in war, the principle of freedom of maritime communication, and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."[168]

Thus, as one scholar notes, "Under reasoning similar to that used in Trail Smelter, although not in an environmental context, the ICJ determined that if a nation knows that harmful effects may befall other nations due to its actions or its failure to act, and it does not disclose this knowledge, then that nation will be responsible to those who suffer damage."[169]

c) Lake Lanoux

The Lake Lanoux arbitration of 1957 provides another instructive example. This arbitration[170] occurred following a French attempt to redirect water away from Lac Lanoux (a French lake). The Spanish government claimed that this diversion of water, which threatened the supply of water to Spanish towns, was in violation of an 1866 treaty between the two

---

developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.").

[165] Handl, *supra* note 130.

[166] Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4.

[167] *Id*.

[168] *Id*. at 22.

[169] Brian R. Popiel, *From Customary Law to Environmental Impact Assessment: A New Approach to Avoiding Transboundary Environmental Damage Between Canada and the United States*, 22 B.C. ENVTL. AFF. L. REV. 447, 452 (1995). On the significance of the case, see, for example, Jon M. Van Dyke, *Liability and Compensation for Harm Caused by Nuclear Activities*, 35 DENV. J. INT'L L. &Pol'y 13, 15 (2006), noting that "[t]his case is particularly significant because it speaks in terms of an 'obligation' on the part of Albania to ensure that others are not injured by dangers within its jurisdiction, and because the United Kingdom vessels knew that dangers lurked in the Corfu Channel when they sailed through." Thus, "[t]he Court ruled that the responsibility of Albania was not in any way reduced because the U.K. ships may have been contributorily negligent in sailing through these waters." *Id*.

[170] The Lake Lanoux arbitration was "[s]et up under a *Compromis* dated November 19, 1956, pursuant to an Arbitration Treaty of July 10, 1929, between France and Spain." Lake Lanoux Arbitration (Fr. v. Spain), 12 R. Int'l Arb. Awards 281 n.1 (1957).

countries.[171] Although the arbitral tribunal ultimately found in favor of France, and although the opinion was largely grounded on treaty interpretation issues,[172] the opinion nevertheless highlighted the importance of notice-giving and consultation as an international legal principle.[173] The tribunal emphasized "the duty not to injure the interests of a neighbouring State; the convenience of informing a neighbouring State of contemplated projects, of discussing them with it, If need be; the opportunity of seeking an agreement, including, if appropriate, guarantees of execution."[174]

d) Gut Dam

Another high-profile dispute between Canada and the United States provides a further illustration of the development and application of the sic uteretuo principle in international jurisprudence. After Canada "constructed a dam . . . span[ning] the international boundary of the St. Lawrence River," a dispute arose when the government of the United States sought compensation for the resulting property damage.[175] Although the case was ultimately settled,[176] the tribunal's acceptance of the settlement, in the words of one commentator, "implicitly affirmed, in the context of transboundary waterways, the principle that one nation cannot use its territory in a way that significantly harms another."[177] Consequently, the Gut Dam dispute is also regularly referred to by commentators as an important case;[178] indeed, authors have often referred to these four cases collectively to stand for the principle of the incorporation of the sic uteretuo maxim into the international legal corpus.[179] This process has continued in recent

---

[171] For further discussion of the facts of the case, see *id*. *See also* Erica J. Thorson, *Sharing Himalayan Glacial Meltwater: The Role of Territorial Sovereignty*, 19 DUKE J. COMP. & INT'L L. 487, 504-05 (2009) (discussing the case).

[172] *See* Lake Lanoux Arbitration (Fr. v. Spain), 12 R. Int'l Arb. Awards 281, 315-16 (1957) (citing the Treaty of Bayonne, Dec. 1, 1856; Apr. 14, 1862; and May 26, 1866; Additional Act, May 26, 1866, Arts. 8-19).

[173] *See, e.g*., Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259, 265 (1992) (suggesting that Lake Lanoux should be seen to stand for the broad proposition that "[a] nation is not entitled to ignore the interests of another").

[174] Lake Lanoux Arbitration (Fr. v. Spain), 12 R. Int'l Arb. Awards 281, 315-16 (1957);*see also, e.g*., NiveenTadros, *Shrinking Water Resources: The National Security Issue of This Century*, 17 NW. J. INT'L L. & BUS. 1091, 1131 (1997) ("Notwithstanding its holding for France, . . . the Permanent Court of Justice also endorsed the principle of limited territorial sovereignty. It held that states undertaking work on an international waterway should take into account interests of other states."); Brian R. Popiel, *From Customary Law to Environmental Impact Assessment: A New Approach to Avoiding Transboundary Environmental Damage Between Canada and the United States*, 22 B.C. ENVTL. AFF. L. REV. 447, 452-53 (1995) ("The appointed tribunal determined that the treaties, together with customary international law principles, mandated that one state has a duty to notify other states when its actions may impede their environmental enjoyment. Additionally, the tribunal determined that, when planning to take action, one state must take into account the considerations of the other state.").

[175] Popiel, *supra* note 169, at 453.

[176] *See* Settlement of Gut Dam Claims (U.S. v. Can.), 8 I.L.M. 118 (Lake Ontario Claims Trib. 1969).

[177] Shiloh Hernandez, *Mountaintop Removal at the Crown of the Continent: International Law and Energy Development in the Transboundary Flathead River Basin*, 32 VT. L. REV. 547, 572 (2008).

[178] *See generally* FRED L. MORRISON & RÜDIGER WOLFRUM, INTERNATIONAL, REGIONAL, AND NATIONAL ENVIRONMENTAL LAW 28 (2000) (characterizing the Gut Dam case as a "leading case" for the sic uteretuo principle); Popiel, supra note 169, at 453 (same). *But see* David B. Hunter, *Toward Global Citizenship in International Environmental Law*, 28 WILLAMETTE L. REV. 547, 563 (1992) (noting that *"Dam* . . . arose from traditional water use disputes, not [an] environmental pollution problem").

[179] *See, e.g*., Sompong Sucharitkul, *State Responsibility and International Liability Under International Law*, 18LOY. L.A. INT'L & COMP. L.J. 821, 829 (1996) ("The theory of international liability finds expression in State

decades, as illustrated by an examination of the International Court of Justice's landmark 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*.[180]

e) Legality of the Threat or Use of Nuclear Weapons

The "no-harm" principle found further expression in the ICJ's *Legality of the Threat or Use of Nuclear Weapons* advisory opinion.[181] This opinion, issued in 1996, concluded that "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law"; however, "in view of the current state of international law, and the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."[182] Of particular relevance for our purposes, the Court—referring to the transboundary harm principles of the Rio and Stockholm declarations—held the following:

> The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. 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.[183]

The opinion thus represented a clear endorsement of the "no-harm" principle in international law—not just as an aspirational or precatory norm, but as "part of the corpus of international [environmental] law."[184] Although some authors have questioned the precise legal significance of the Court's choice of words here,[185] most commentators—including the

---

practice, as exemplified in the *Trail Smelter Case*, the *Lake Lanoux* Arbitration, the *Corfu Channel* Case, and the Settlement of Gut Dam Claims. In these cases, the primary rule, which provides that a State must refrain from harming its neighbors, received further application with far wider implications.") (footnotes omitted); Francois A. Mathys, *International Environmental Law: A Canadian Perspective*, 3 PACE Y.B. INT'L L. 91, 92 (1991) ("The trilogy of the *Trail Smelter*, *Corfu Channel* and *Lake Lanoux* cases established the principles: (1) that states have an obligation to avoid transboundary harm; (2) that environmental harm may be wrongful; and (3) that victim states have the legal right to insist on the prevention and abatement of such harm. These cases are often cited for the sic utere principle . . . .").

[180] 1996 ICJ Rep. 226.

[181] *Id*.

[182] *Id*. For extensive discussions of the case, its background, and potential doctrinal implications generally, see, for example, Sean Michael Howley, *Legality of the Threat or Use of Nuclear Weapons*, 10 N.Y. INT'L L. REV. 237 (1997); Stefaan Smis & Kim Van Der Borght, *The Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 27 GA. J. INT'L & COMP. L. 345 (1999); Timothy J. Heverin, *Legality of the Threat or Use of Nuclear Weapons: Environmental and Humanitarian Limits on Self-Defense*, 72 NOTRE DAME L. REV. 1277 (1997); Note, *The Changing Posture of the International Community Regarding the Threat or Use of Nuclear Weapons*, 22 SUFFOLK TRANSNAT'L L. REV. 529 (1999).

[183] 1996 ICJ Rep. 226, 242, ¶¶ 27-29 (July 8).

[184] *Id*.

[185] *See, e.g.*, John H. Knox, *The Myth and Reality of Transboundary Environmental Impact Assessment*, 96 AM. J. INT'L L. 291, 295 (2002) ("Although some authorities have cited this language as conclusive support for the

International Law Commission[186]—have recognized the importance of this case in affirming the existence of the no-harm principle as customary international law.

f) Pulp Mills on the River Uruguay

The 2010 ICJ case of *Pulp Mills on the River Uruguay (Arg. v. Uru.)*[187] is also of significance in reaffirming the existence of the no-harm principle as customary international law. In that case, which involved a dispute between Argentina and Uruguay, the Court was required to consider claims by Argentina "that by authorizing the construction of two pulp mills on the banks of the River Uruguay, in front of the Argentine town of Gualeguaychú, Uruguay has incurred international responsibility by reason of its violation of the Statute of the River Uruguay of February 26, 1975."[188] The case thus primarily involved the interpretation and application of a bilateral treaty governing the Uruguay River (the Statute of the River Uruguay). However, in interpreting this treaty, the Court emphasized that it was construing the treaty in light of the background norms of customary international law, and that these require states, inter alia, "to ensure that activities within their jurisdiction and control respect the environment of other States."[189] Described as a "landmark opinion" in international environmental law,[190] this case represents a further strengthening and delineation of the nature of state responsibility pursuant to the "no-harm" principle under customary international law.

7. TRANSBOUNDARY HARM AS APPLIED TO CLIMATE CHANGE

Having provided an overview of the "no-harm" principle, its development, and its current status as a fundamental norm of customary international law, we next turn to the issue of how this principle might be applied in the global climate change context.

a) International Law Commission (ILC) Draft Articles

Of relevance are the *Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities* promulgated by the International Law Commission (ILC), a group of international law experts focused on the progressive codification of the international legal corpus.[191] Under the *Draft Articles*, published in 2001, the ILC proposes to codify an

---

proposition that Principle 21 is part of customary international law, the key term 'respect' is so vague that it avoids clarifying any of the issues raised above, including which version of Principle 21 the ICJ believes reflects custom.").

[186] International Law Commission (ILC), Draft Articles on Prevention of Transboundary Harm from Hazardous Activities [with commentary], *in* REPORT OF THE INTERNATIONAL LAW COMMISSION, Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 370, 378, UN Doc. A/56/10 (2001).

[187] Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, (Apr. 20, 2010), http://www.icj-cij.org/docket/files/135/15877.pdf.

[188] Andrea Laura Mackielo, *Core Rules of International Environmental Law*, 16 ILSA J. INT'L & COMP. L. 257, 288 (2009). For an extensive recitation of the facts of the case, see Cymie R. Payne, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*,105 AM. J. INT'L L. 94, 97-98 (2011).

[189] Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, (Apr. 20, 2010), http://www.icj-cij.org/docket/files/135/15877.pdf.

[190] Jessica L. Rutledge, *Wait A Second—Is That Rain or Herbicide? The ICJ's Potential Analysis in Aerial Herbicide Spraying and an Epic Choice Between the Environment and Human Rights*, 46 WAKE FOREST L. REV. 1079, 1081-82 (2011).

[191] *Introduction*, INT'L L. COMM'N, www.un.org/law/ilc (last visited Jan. 14, 2013).

international law version of traditional common law nuisance. Three articles are of particular interest for our purposes. First, under Article 3 (entitled "Prevention"), it is provided that "[t]he State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof." According to Article 9 ("Consultation on Preventative Measures"), it is established that "[t]he States concerned shall seek solutions based on an equitable balance of interests." The relevant interests—delineated in Article 10—include the following: "risk of significant transboundary harm," "importance of the activity," environmental risk, the "economic viability of the activity in relation to the costs of prevention," and "the standards of prevention which the State likely to be affected applies to the same or comparable activities and the standards applied in comparable regional or international practice."

The Draft Articles are an important attempt to develop a version of the earlier Rio and Stockholm principles that is more capable of judicial application. Although the Draft Articles do not have the binding effect of law,[192] the International Court of Justice has, in the words of one author, "referred to the highly respected work of the ILC in declaring new norms of customary international law."[193] Consequently, it can be expected that the Draft Articles may be of significant persuasive authority. In short, we focus our discussion on the applicability of the law of transboundary harms on an application of the Draft Articles test. We do this both because of the likely adoption of these principles by international jurists (at least as persuasive authority) and because this is the most concrete test in the extant corpus of law on transboundary harms.

Under the test articulated by the Draft Articles, it is certainly possible that a finding of liability for damage associated with climate change might be made. However, the unweighted nature of the balancing test and the vague nature of some of the factors themselves render the outcome of an application of this test uncertain: it is surely beyond doubt that climate change poses a significant risk of transboundary harm; however, such harms must, under the Draft Articles test, be considered alongside such factors as "the importance of the activity" involved.

b) Lex Specialis and the Issue of Applicability

An important gateway issue that must also be addressed is the issue of the applicability of the doctrine of *lex specialis*; under basic doctrines of international law, it is necessary to examine

---

[192] As one commentator notes, "The development of the Draft Articles on Transboundary Harm represents a significant step forward at the international level in the recognition of the legal obligation of nations to avoid causing environmental harm within another nation. If incorporated into a convention and ratified by nations, it would indeed be major progress in the legal framework designed to prevent transboundary harm." However, "No such convention has been negotiated, let alone approved, however, and the ILC proposals generalized language provides little assurance that it would be effectively implemented and enforced in practice." Jameson Tweedie, *Transboundary Environmental Impact Assessment Under the North American Free Trade Agreement*, 63 WASH. & LEE L. REV. 849, 893-94 (2006).

Moreover, the extent to which the Draft Adoption gains widespread acceptance among states may, as one author points out, be limited by an important collective-action problem: "the ILC Draft Articles might have difficulty attracting a large number of countries initially; many countries might not want to join without some assurance that their neighbors would join as well." John H. Knox, *Assessing the Candidates for a Global Treaty on Transboundary Environmental Impact Assessment*, 12 N.Y.U. ENVTL. L.J. 153, 159-61 (2003).

[193] Robert Esposito, *The ICJ and the Future of Transboundary Harm Disputes: A Preliminary Analysis of the Case Concerning Aerial Herbicide Spraying (Ecuador v. Colombia)*, 2 PACE INT'L L. REV. ONLINE COMPANION 1, 31 (2010).

whether general principles of international law are applicable in any given circumstance. As one author notes, "The existence of . . . specialized treaty systems in international law leads to the need to question the applicability of other rules of treaty law as well as of rules and principles of customary international law."[194] This analysis is somewhat analogous to the doctrine of common law displacement, a well-known issue in municipal common law legal systems, or (to a lesser extent) the notion of federal field preemption in domestic U.S. law.[195] If an international legal system is intended to constitute a self-contained regime, then general principles of international law might not apply.[196] Under this doctrine, it is necessary to look to the intent of the parties of the specialized legal system so as to determine whether they intended to exclude general principles of law. Given the inchoate and nonbinding nature of much of "international climate change law"[197] it is likely that general principles of law will be said to apply in this context. The most extensive discussion of the climate change/*lex specialis* issue in the extant literature is found in Verheyen's *Climate Change Damage and International Law*.[198] Verheyen concludes:

> [N]othing in the negotiation history or the structure of the existing [climate change] treaties indicates that the rules of the regimes are *lex specialis* vis a vis other rules of international law. This applies both to the level of primary rules and the level of legal consequences for breach (secondary rules).[199]

8. HUMAN RIGHTS LAW AND OTHER POTENTIAL SOURCES OF LEGAL RESPONSIBILITY

a) Human Rights

In recent years, it has become clear that climate change is an enormous threat to the human rights of people all over the planet. Climate change threatens lives and livelihoods of members of affected communities, in addition to food security, public health, water supplies, property, and culture.[200] It has a disproportionate effect on the poor, and those in areas particularly vulnerable to climate shocks and extreme weather, especially low-lying coastal areas. Climate change also poses a risk to global security, as it is expected to increase the risk of violent conflict and the population of global refugees and internally displaced peoples.[201]

The increasingly apparent connection between climate change and human rights has received additional attention over the past several years. Following an Inuit petition to the Inter-American Commission on Human Rights (IACHR) in 2005 seeking relief "from human rights violations resulting from the impacts of global warming and climate change caused by acts and omissions of the United States," the Human Rights Council ("HRC") issued a number of

---

[194] *Id*. at 138.
[195] *See generally* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000).
[196] Perhaps the leading case in this area of international law is *Case Concerning United States Diplomatic and Consular Staff in Teheran (US v. Iran)*, ICJ Rep. (1980) 3.
[197] *See* discussion *supra*.
[198] VERHEYEN, supra note 76.
[199] *Id*. at 143.
[200] Pamela Stephens, *Applying Human Rights Norms to Climate Change: The Elusive Remedy*, 21 COLO. J. INT'L ENVTL. L. &POL'Y 49, 50 (2010).
[201] Jon Barnett and W. Neil Adger, *Climate Change, Human Security and Violent Conflict*, 26 POL. GEOGRAPHY 639, 639-40 (2007).

resolutions noting the threat that climate change poses to human rights.[202] In March 2008 at the bequest of the Maldives, the Council requested that the UN Office of the High Commissioner on Human Rights (OHCHR) conduct a study examining the effects of climate change on human rights.[203]

The OHCHR subsequently released its report in January 2009. The OHCHR report had four main conclusions. First, climate change threatens the enjoyment of a broad array of human rights. Second, the physical impacts of climate change cannot easily be classified as human rights violations. Third, human rights law nevertheless places duties on states concerning climate change; and fourth, those duties include an obligation of international cooperation, which complements that required by the FCCC.[204]

In 2010, the Conference of Parties to the UNFCCC reproduced the HRC's language identifying the relationship between human rights and climate change in its report on the Cancun Conference on climate change, emphasizing that "Parties should, in all climate change related actions, fully respect human rights."[205] Various UN Special Rapporteurs on human rights have also issued reports and statements on the damaging effects of climate change on a number of rights.[206]

---

[202] *See* "Human Rights and Climate Change: Action by the Human Rights Council," http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HRClimateChangeIndex.aspx.
[203] Resolution 23/7, Human Rights Council.
[204] Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, A/HRC/10/61, 15 Jan. 2009, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/103/44/PDF/G0910344.pdf?OpenElement/ [hereinafter OHCHR Report].
[205] Conference of the Parties (Mar. 15, 2011). FCCC/CP/2010/7/Add.1, Report of the Conference of the Parties on its sixteenth session, held in Cancun from Nov. 29 to Dec. 10, 2010, Addendum, Part Two: Action taken by the Conference of the Parties at its sixteenth session.
[206] These include the UN Special Rapporteurs on Food, Water/Sanitation, Internally Displaced Peoples, Extreme Poverty, Housing, and Migrants. The following is a selection of quotes from some of these experts: SR for safe water/sanitation: "Climate change presents a serious obstacle to the realisation of the rights to water and sanitation. . . . The rights to water and to sanitation impose specific legal obligations, which climate change policy responses must take into account." Climate Change and the Human Rights to Water and Sanitation, Position Paper, http://www.ohchr.org/Documents/Issues/Water/Climate_Change_Right_Water_Sanitation.pdf.
[206] Special Rapporteur on migrants: "While it is true that environmental conditions have always influenced migration patterns, in the context of climate change, the rate and scale of this migration may be multiplied. . . migration opportunities may in fact be least available to those who are most vulnerable to climate change, resulting in people becoming trapped in locations vulnerable to environmental hazards." Report of the Special Rapporteur on the human rights of migrants, Aug. 13, 2012, A/6/299, http://oppenheimer.mcgill.ca/IMG/pdf/Report_of_Special_Rapporteur_to_General_Assembly_-_A-67-299_English.pdf. SR on food: "Consider climate and agricultural policies together to effectively address climate change and its disastrous impact on the right to food." *Cancun Summit must lead to a 'Green Marshall Plan for Agriculture,'* Olivier de Schutter, UN Special Rapporteur on the Right to Food, http://www.srfood.org/index.php/en/component/content/article/1014-cancun-summit-must-lead-to-a-green-marshall-plan-for-agriculture. SR for housing: Climate change has severe implications for the human right to adequate housing, "particularly for low-income groups and those living in countries that lack the resources, infrastructure and capacity necessary to protect their populations." Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Aug. 6, 2009, A/64/255 http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/446/64/PDF/N0944664.pdf?OpenElement.

The question of how and whether human rights law can be applied to assess state responsibility for climate change is a complex one that has only just begun to receive analysis in the international law community. It is relatively undisputed that major human rights are affected by the impacts of climate change: these include first generation civil and political rights (right to life, privacy, property, family life, freedom from discrimination, self-determination) encapsulated in texts such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR); and second and third generation socioeconomic and indigenous people's rights (right to food, shelter, health, water, culture, development, and natural resources) encompassed in instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Declaration on the Rights of Indigenous Peoples.

Bringing a legal claim which attempts to make such a connection has, thus far, met with little success. The IACHR declined to proceed with the 2005 Inuit Petition, although the Commission did hold hearings and receive testimony on the relationship between human rights and climate change from representatives for the Inuit in 2007.[207] Climate change cases brought in U.S. courts, such as the recent *Kivalina v. ExxonMobil Corporation* case, have been dismissed on the grounds that plaintiffs lacked standing based on their inability to establish causation and under the political question doctrine – i.e. that climate change is a political rather than a legal issue that needs to be resolved by Congress and the Administration rather than by courts.[208] On the other hand, there are instances of successful challenges, mostly regarding non-climate-change related environmental degradation cases[209]; however, in one case, an injunction was won by communities in the Niger Delta in a lawsuit against Shell and the Nigerian National Petroleum Company claiming that the climate change impacts of "gas flaring" constitute a human rights violation.[210]

Part of the difficulty with using a human rights law framework to address climate change is that the right to environment is still inherently theoretical. According to William Shutner, the right to environment (healthy, secure, or otherwise) is currently only reflected in article 24 of the African Charter of Human and Peoples Rights and in various state constitutions, with the result that "the human right to a healthy environment does not constitute well-established international law."[211] Thus, despite the corollary rights implicated by climate change, no environmental right exists as either "positive international law or general principles of the type envisaged by article 38 of the Statute of the International Court of Justice."[212] This does not, however, preclude the

---

[207] Richard Sieg, *At International Commission, Inuit Want to See Change in U.S. Policy on Global Warming*, VT. J. ENVTL. L., News (Mar. 2, 2007), http://www.vjel.org/news/NEWS100058.html.
[208] Order Granting Motion to Dismiss, Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009) *aff'd*, 696 F.3d 849 (9th Cir. 2012).
[209] *See, e.g., Budayeva v. Russia*, in which the European Court of Human Rights found that Russia had not implemented policies to protect the inhabitants of a region prone to deadly mudslides. The Court concluded that Russia had failed to "discharge the positive obligation to establish a legislative and administrative framework designed to provide effective deterrence against threats to the right to life as required by Article 2" of the European Convention on Human Rights, and had thereby violated the Convention. Budayeva v. Russia, Application No. 15339/02, (Eur. Ct. H.R. Mar. 20, 2008).
[210] Amy Sinden, *Climate Change and Human Rights*, 27 J. LAND RESOURCES & ENVTL. L. 255, 258 (2007).
[211] William Shutkin, *International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment*, 31 VA. J. INT'L L. 479, 505 (1990-1991).
[212] *Id*.

future development of a right to environment, nor the merging of the human rights legal regime with the existing climate change regime.[213]

According to John Knox, the first HRC-appointed Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, there are other complications involved in assigning culpability for the human rights violations that occur as a result of climate change. Knox asserts that while it is possible to determine those states most responsible for the greatest shares of current emissions, it is more difficult to determine culpability for past emissions.[214] It is perhaps not surprising that the U.S., the world's biggest historical emitter, is opposed to moving towards a human rights-based approach to climate change, calling such a move "impractical and unwise."[215] It is also sometimes difficult to isolate the causes of a particular environmental phenomenon and attribute them solely to climate change.[216]

Despite the difficulties in assessing causation and allocating responsibility, commentators and the OHCHR Report note that states still have a duty under international law to address *the effects* of climate change on human rights, both extraterritorial and internal, as well as a general obligation to cooperate on such issues.[217] As more conceptual work continues to be done on the intersection of human rights law and climate change, the possibility of bringing successful human rights claims stemming from climate change effects comes increasingly within reach.

b) Other Possible Sources of Liability

Although this Section has largely limited the scope of its analysis to (1) international legal obligations relating specifically to climate change, (2) the transboundary harm principle, (3) and international human rights law, other possible theories of liability may exist. For example, rising sea levels implicate issues of state survival, which may involve various legal doctrines above and beyond the principle of transboundary harm. In addition, we recognize that a claim of climate change liability might potentially be premised on a theory of liability grounded in unjust enrichment. Unjust enrichment, which is a general principle of international law[218] as well as a fundamental legal principle in many common law domestic legal systems, could represent an

---

[213] *Id*. at 506.
[214] John H. Knox, *Linking Human Rights & Climate Change at the U.N*., 33 HARV. ENVTL. L. REV. 477, 489 (2009).
[215] Submission of the United States to the OHCHR under Human Rights Council Res. 7/23, at 4 (2008) http://www2.ohchr.org/english/issues/climatechange/docs/submissions/USA.pdf.
[216] Knox, *supra* note 214, at 488.
[217] *Id*. at 491; OHCHR REPORT, *supra* note 204.
[218] *See generally* Charles Manga Fombad, *The Principle of Unjust Enrichment in International Law*, 30 C.I.L.S.A. 120, 121 (1997).

independent basis of liability.[219] Finally, to the extent that the process of climate change triggers refugee flows, further international legal obligations may be implicated.[220]

9. CONCLUSION

In this Section, we have attempted to provide a systematic survey of potential sources of state obligations regarding the issue of climate change. Our basic conclusions are twofold. First, a significant body of international sources of law, including both treaties and general principles of law, supports the existence of state responsibility to prevent and mitigate actions that cause substantial transboundary harm to other states. While the current character of state legal obligations with respect to climate change remains somewhat unclear, there does appear to be an increasing trend towards recognizing environmental rights in international tribunals, as well as growing recognition of the detrimental effects of climate change on various human rights. While an advisory opinion from the International Court of Justice could help to clarify the law significantly,[221] we believe that the law will continue to develop in this forward direction, with growing support for state responsibility to prevent and mitigate dangerous, anthropogenic climate change.

II. BACKGROUND

A. THE COURT

This section introduces the judges serving on the International Court of Justice ("ICJ") and provides insight into their international law experience, knowledge, and prior judicial

---

[219] *See generally* Aura Weinbaum, Comment, *Unjust Enrichment: An Alternative to Tort Law and Human Rights in the Climate Change Context?*, 20 PAC. RIM L. & POL'Y J. 429, 454 (2011) ("Unjust enrichment may be used as an independent basis of liability when a defendant has been enriched at the plaintiffs' expense, enabling the plaintiffs to avoid specific proximate cause, cause-in-fact, and sanction requirements associated with torts, and the legal obligation and enforcement problems associated with the process of developing and clarifying human rights law. Thus, the principle of unjust enrichment has the potential to be particularly useful to Tuvalu and other SIDS in the climate change context.").

[220] *See* Shaina Stahl, *Unprotected Ground*, 23 N.Y. INT'L L. REV. 1, 4 (2010) ("Up to 25 million islanders might become refugees as global climate changes cause the sea levels to rise."); Jessica B. Cooper, *Environmental Refugees: Meeting the Requirements of the Refugee Definition*, 6 N.Y.U. ENVTL. L.J. 480, 524-25 (1998) (making the case for broadening the definition of "refugee" to encompass "environmental refugees"); Tiffany T.V. Duong, *When Islands Drown: The Plight of "Climate Change Refugees" and Recourse to International Human Rights Law*, 31 U. PA. J. INT'L L. 1239, 1264-65 (2010) (suggesting that "climate change refugees" might constitute "refugees" within the meaning of extant refugee law); *see generally* Margaux J. Hall & David C. Weiss, *Avoiding Adaptation Apartheid: Climate Change Adaptation and Human Rights Law*, 37 YALE J. INT'L L. 309 (2012) (highlighting the problem).

[221] In the words of two recent authors on this topic:

> [A]uthoritative advice could help create a new international norm against transboundary harm caused by greenhouse gas emissions and could clarify the principles against which state action could be measured. As states work towards an inclusive, binding agreement at the UNFCCC, the ICJ's opinion could further provide a helpful baseline for negotiations that applies to all states. Those are very compelling reasons to seek the Court's advice for all members of the international community--not just for those threatened with losing their land, their home, their culture, and their way of life.

Aaron Korman & Giselle Barcia, *supra* note 506, at 42.

decisions that might inform their approach to the question of transboundary harms from climate change.

1. INTRODUCTION: WHO'S WHO ON THE INTERNATIONAL COURT OF JUSTICE

The judges serving on the International Court of Justice ("ICJ") share a deep knowledge of international law, reflected in their impressive collective body of scholarship and experience. From speeches expounding on the importance of the rule of law, to legal analyses of state responsibility for transboundary harms, many of the ICJ judges have considered the international law issues Palau hopes to bring before the Court. Their writings and their experiences as international advocates, diplomats, and representatives provide some useful indicators for how they might reason and rule in an advisory opinion about transboundary harms in the climate change context.

Many of the judges have written on the importance of the Court's advisory opinion function. In fact, the Court has never refused to provide an advisory opinion when requested. Presuming this trend continues, the judges may draw on their human rights, environmental, and general international legal insight in issuing an opinion addressing the question of state responsibility for transboundary harms caused by climate change.[222]

Knowing the background and experiences of those serving on the International Court of Justice also will enable the Palau advisory opinion coalition to tailor its main brief as well as any supplementary briefs submitted by individual countries, assuming the General Assembly eventually votes to submit the question of transboundary harm to the Court and the Court accepts jurisdiction. Common threads we identified among the judges include strong international human rights experiences—such as serving as judges on the European Court of Human Rights—and extensive diplomatic experience in maritime disputes and the law of the sea. These areas represent rich examples from which we can extend principles of international law to the climate change context. The transboundary harm caused by climate change not only presents significant human rights concerns but also represents another example of regulating a "global commons" similar to the high seas. To the extent the ICJ judges have worked in these fields, they may respond positively to the connections the Palau coalition can make between the climate change situation and other, more developed contexts that have demanded international cooperation.

Of course, the Court is comprised of fifteen judges with distinct personalities, backgrounds, experiences, and interests. A number of the judges have backgrounds tailored most closely to intellectual property or warfare issues in international law, which means their experiences shed less light on how they might approach the question at hand. For newer judges to the bench, the catalogs of information on their jurisprudence also is relatively lacking.

We have chosen to profile each of the fifteen judges, in varying degrees of specificity based on our analysis of their backgrounds, experiences, and scholarship. Those judges with

---

[222] Interestingly, the International Court of Justice created a Chamber for Environmental Matters in 1993, but "no State ever requested for a case to be deal with through this Chamber." Therefore, "[i]n 2006, the Court decided not to elect judges to that Chamber." http://www.icj-cij.org/court/index.php?p1=1&p2=4.

experiences we believe align best with the issues captured in Palau's campaign are discussed in more detail than those judges for whom information was either limited or whose experiences we determined are least likely to instruct the Palau coalition on shaping its argument before the Court. We discuss each of the judges in the order of their seniority on the Court.

2. THE JUDGES OF THE ICJ: BACKGROUNDS, EXPERIENCES, AND SCHOLARSHIP

Judge Peter Tomka of Slovakia (President of the ICJ)

Judge Peter Tomka of Slovakia currently serves as President of the International Court of Justice. He has served on the Court since 2003 and, while his term as president expires in 2015, he will remain on the Court until 2021. Born in 1956, Judge Tomka earned his LL.M. in 1979, his doctor *juris* in international law in 1981, and a Ph.D. in international law in 1985, all from Charles University, Prague.

In 2005, he served as an Arbitrator for the Belgium/Netherlands Iron Rhine Tribunal. Relevant diplomatic positions he has held include member of the Ambassadorial Panel of Experts to advise the Division for Ocean Affairs and the Law of the Sea of the United Nations Secretariat (2002), President of the Ninth Meeting of the States Parties to the United States Convention on the Law of the Sea (1999), and Representative of Czechoslovkia to the Preparatory Commission for the International Sea Bed Authority and the International Tribunal for the Law of the Sea (1987-1992). Judge Tomka also headed the delegation of Slovakia to the Assembly of the International Sea Bed Authority from 1994-1996.

President Tomka recently spoke about the centrality of the rule of law in international law. In September, in remarks before the United Nations at the High-Level Meeting on the Rule of Law, President Tomka emphasized the importance of "the existence of effective, and possibly compulsory, adjudicative mechanisms" to the rule of law.[223] President Tomka further explained that the Court "has the important and noble role of determining existing law and rendering justice between States."[224] In addition, he noted that the Court has rendered more judgments (including advisory opinions) in the last 22 years of its existence, compared with its first 44 years.[225] In these September 2012 remarks Judge Tomka concluded by praising Secretary-General Moon's decision "to launch a campaign to increase the number of Member States that accept as compulsory the jurisdiction of the International Court of Justice."[226] While an advisory opinion does not bind any state to take any action, if the Court issued such an opinion favorable to the Palau campaign, states could use the opinion to bring adversarial cases before the Court. Increasing the number of states that accept the compulsory jurisdiction of the Court would impact the number of parties who could be subject to an adversarial proceeding regarding liability for climate change.

---

[223] Statement by H.E. Judge Peter Tomka, President of the International Court of Justice, at the High-Level Meeting on the Rule of Law (Sept. 24, 2012), *available at* http://www.icj-cij.org/presscom/files/0/17100.pdf.
[224] *Id*. at 2.
[225] *Id*.
[226] *Id*. at 3 (citing Delivering justice: programme of action to strengthen the rule of law at the national and international levels, Report of the Secretary-General, UN doc. A//66/749, p. 5, ¶ 15(*b*)).

Like other judges on the Court, President Tomka has discussed the *Nuclear Weapons* case, highlighting the development in that case that "a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity'…," and that they "are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law." While these remarks were made in the humanitarian context, the Palau campaign organizers should consider adapting them to the climate change issue, especially as it implicates fundamental human rights questions of displacement, refugee status, territorial conflict, and food and water security, among others.

Selected Publications

1. "Are States Liable for the Acts of their Instrumentalities?," *State Entities in International Arbitration* (E. Gaillard, ed.), 2006.

Judge Bernardo Sepúlveda Amor of Mexico (Vice-President)

Judge Sepúlveda Amor, born in December 1941 in Mexico City, earned a law degree from the National University of Mexico (1964), as well as an LL.M. (1966) and Diploma in International Law (1965) from the University of Cambridge.[227] An academic with a storied career at El Colegio de Mexico, Judge Sepúlveda Amor also served in a number of important diplomatic roles for his country. These roles include Ambassador of Mexico to the United States in 1982, Secretary of Foreign Relations of Mexico from 1982-1988, Ambassador of Mexico to the United Kingdom and to Ireland from 1989-1993, and President of the Mexican delegations to the General Assembly of the United Nations from 1982-1988.[228] In 2010 he was elected President of the Latin American Society of International Law.[229] Judge Sepúlveda Amor has served as a member of Mexican delegations to the United Nations Conference on the Law of the Sea in addition to other United Nations conferences.[230] His other activities and experiences focus on transnational investment and corporations, though his extensive writings range from the law of the sea to Mexican foreign policy to defense, security, and human rights. Judge Sepúlveda Amor is also a member of the UNESCO High Panel on Science and Technology for Development, which released a report in 2011 about "its vision for the sciences to achieve sustainable development," including among its goals dealing with the realities of climate change.[231]

[227] Current Members: Vice-President Bernardo Sepúlveda Amor, International Court of Justice, http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1&judge=158.
[228] *Id*.
[229] *Id*.
[230] *Id*.
[231] Report by the Director-General On the First Meeting of the UNESCO High Panel On Science and Technology Development, 187 EX/INF.13 (Sept. 27, 2011), *available at* http://unesdoc.unesco.org/images/0021/002120/212079e.pdf.

Judge Sepúlveda Amor delivered a message of peace in honor of the Hague's "Day of Peace" this year.[232] The theme was "Sustainable Peace for a Sustainable Future." In his message, Judge Sepúlveda Amor noted that "[l]ast, but not least, it is about economic progress which does not come at the expense of a healthy environment."[233] The judge's participation in the Day of Peace, as well as his remarks, suggest a nuanced understanding of at least some of the political and development issues tied up with climate change action and shifts to low-carbon economies.

In a speech before the Rhodes Academy of the Aegean Institute of Maritime Law, Judge Sepúlveda Amor discussed the *Corfu Channel* case, in which the Court "acknowledged the existence of 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.'"[234] Highlighting this principle in written and oral arguments before the Court might strike a chord with Judge Sepúlveda Amor. Of course, this would require the Court to confirm that a state's emission of greenhouse gases constitutes an "act[] contrary to the rights of other States."

Selected Publications

1. "Contribution of the International Court of Justice to the Development of the Law of the Sea", *Aegean Review on the Law of the Sea*, Aegean Institute of the Law of the Sea and Maritime Law, Springer, 2009.
2. México y su compromiso con la protección de los derechos humanos (Mexico and its commitment to protecting human rights). *Revista de la Facultad de Derecho de México*, Nos. 205-206. México, UNAM, January-April 1996.
3. Derechos humanos: México en la perspectiva internacional (Human rights: Mexico from an international perspective. *Iurisdictio*, bulletin of the High Court of Justice of the State of Querétaro, January 2005.

Judge Hisashi Owada of Japan, former President of the ICJ

A member of the Court since 2003, Judge Owada served as its President from 2009-2012. His term ends in 2021. Born in Japan in 1932, Judge Owada completed his undergraduate studies at the University of Tokyo and earned an LL.B. from Cambridge University in 1956.[235] He spent part of his career as a law professor, with visiting professorships at Harvard Law School, New York University Law School, and Columbia Law School. He served as President of the Asian Society of International Law.[236]

---

[232] Message of Peace from H.E. Judge Bernardo Sepúlveda Amor, Vice-President of the International Court of Justice, "Day of Peace" in The Hague (Sept. 21, 2012), *available at* http://www.icj-cij.org/presscom/files/8/17098.pdf.
[233] *Id*. at 1. In additional, Judge Sepúlveda Amor expressed his hope that the "Day of Peace" "stand . . . as a reminder of our collective and individual responsibilities in the world community." *Id*. at 2.
[234] Bernardo Sepúlveda -Amor, Contribution of the International Court of Justice to the development of the international law of the sea, 1 Aegean Rev. Law Sea 5, 12 (2010).
[235] Current Members: Hisashi Owada, International Court of Justice, http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1&judge=13.
[236] *Id*.

Judge Owada is a member of the Board of Directors of the United Nations Foundation, which lists climate change as one of its priorities.[237] From 1968-1972, he served as head of the Japanese Delegation to the Committee on Peaceful Uses of the Sea Bed and Ocean Floor.[238] As President of the ICJ, Judge Owada emphasized "the contribution that the Court has made to international law through its advisory procedure."[239] Advisory opinions, in Judge Owada's opinion, are incredibly important to the development of international law. Topically, Judge Owada noted that "[a] request for an advisory opinion from [a UN organ] very often relates to a *politically sensitive subject matter . . .*"[240] Judge Owada expressly identified the area of international environmental law as an area "that the Court is increasingly called upon to consider in its advisory opinions,"[241] citing the *Nuclear Weapons* case, in part:

> 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.[242]

Judge Owada quoted another significant portion from the *Nuclear Weapons* case [in which the Court "found that certain provisions of the 1977 Additional Protocol I to the Geneva Convention of 1949, taken together"]:

> embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals.[243]

Palau and its coalition should include citations to this case, and to these citations in particular, as they seem naturally suited to application to the current campaign. The Court should be prepared to analyze the scientific aspects of the campaign: In October 2010, in his speech at the Sixty-Fifth Session of the United Nations General Assembly, then-President Owada predicted that "As the Court is expected regularly to consider environmental cases in the future, it will increasingly have to consider complex scientific evidence."[244] This prediction--and seeming willingness to take on complex scientific issues--bodes well for the aspect of the Palau campaign that seeks to imbue the IPCC reports and scientific consensus about climate change with even greater legitimacy on the world stage through an ICJ advisory opinion.

---

[237] United Nations Foundation, What We Do: Energy & Climate—Tackling the Global Climate Challenge, http://www.unfoundation.org/what-we-do/issues/energy-and-climate/tackling-global-climate-challenge.html.
[238] Current Members: Hisashi Owada, *supra*.
[239] Speech by H.E. Judge Hisashi Owada, President of the International Court of Justice, to the Legal Advisers of United Nations Member States, *Introductory remarks at the Seminar on the Contribution of the International Court of Justice to International Law* (Oct. 25, 2011), *available at* http://www.icj-cij.org/presscom/files/9/16739.pdf.
[240] *Id*. at 3.
[241] *Id*. at 9.
[242] *Id*. at 9 (citing *I.C.J. Reports 1996 (I)*, p. 241-42, ¶ 29.
[243] *Id*. at 9 (citing *I.C.J. Reports 1996 (I)*, p. 242, ¶ 31 (citing Art. 35, ¶ 3 and Art. 55 of Additional Protocol I)).
[244] Jacob Katz Cogan, *The 2010 Judicial Activity of the International Court of Justice*, 105 AM. J. INT'L L. 477, 489 (2011) (citing Hisashi Owada, ICJ President, Speech at the 65th Session of the United Nations General Assembly 2 (Oct. 28, 2010) (quoting Pulp Mills on the River Uruguay, ¶ 167)).

Judge Mohamed Bennouna of Morocco

Mohamed Bennouna, a Moroccan judge, was elected to the Court in 2006.[245] His term ends in 2015. Judge Bennouna worked as a professor of international law and has both a doctor of international law and a diploma from the Hague Academy of International Law.[246] He was the Kingdom of Morocco's Ambassador to the United Nations from 2001 to 2006.[247] Judge Bennouna chaired the G77 in 2003, a diplomatic coalition group that includes such developing countries as China and India. In 2003, then-Ambassador and G77 Chairman Bennouna addressed the International Environment Forum's North American Workshop in New York City, on the subject of "The G77's Path to Sustainability."[248] The workshop was titled "Global Corporate Citizenship: Multi-Sector Partnerships for Progress." He also served as a member of the Moroccan delegation at the United Nations Conference on the Law of the Sea from 1974-1982 and as a member of the UNESCO World Commission on the Ethics of Scientific Knowledge and Technology from 2002-2006.[249] Prior judicial experience includes his service as a judge on the International Criminal Tribunal for the former Yugoslavia, the Hague (1998-2001).[250]

Judge Sir Kenneth Keith (New Zealand)

Sir Kenneth Keith has been a member of the Court since 2005, and his term expires in 2018.[251] Born in 1947 in Auckland, New Zealand, he studied law at the University of Auckland, Victoria University of Wellington, and Harvard Law School, earning LL.B. and LL.M. degrees between 1956 and 1965.[252] Keith served as a member of the legal team for New Zealand in the *Nuclear Weapons* test case, in which he argued against the French nuclear testing.[253] He was a Barrister and Solicitor of the High Court of New Zealand, as well as a professor and dean at Victoria University of Wellington.[254] Serving on both the New Zealand Court of Appeal and the Supreme Court of New Zealand, he has experience both as a national and international jurist.

A prolific international law scholar and writer, Judge Keith published an article in 1996 analyzing the importance of the advisory jurisdiction of the International Court of Justice.[255]Keith discussed the contention that issuing advisory opinions is "obviously not a judicial function."[256] He noted that advisory opinions issued by the ICJ have special

---

[245] Current Members: Mohamed Bennouna, International Court of Justice, http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1&judge=151.
[246] *Id*.
[247] *Id*.
[248] International Environment Forum (IEF), *Global Corporate Citizenship: Multi-Sector Partnerships for Progress* (Apr. 24-25, 2003), agenda *available at* www.wec.org/docs/IEF_NYC%20Agenda.doc.
[249] Current Members: Mohamed Bennouna, *supra*.
[250] *Id*.
[251] Current Members: Kenneth Keith, International Court of Justice, http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1&judge=157.
[252] *Id*.
[253] *Id*.
[254] *Id*.
[255] Sir Kenneth Keith, *The Advisory Jurisdiction of the International Court of Justice: Some Comparative Reflections*, 17 AUSTL. YBIL 39 (1996).
[256] *Id*. at 41.

characteristics that differentiate them from advisory opinions issued by domestic courts, for at least 3 reasons:

(1) "[T]he opinion in practice is seen as having greater force than a simple opinion of a legal adviser. A court of pre-eminent authority in the international system has stated the law, in exercise of a major function of all senior courts additional to that of resolving disputes: to declare and develop the law for which they are responsible."

(2) "T]he court, a 'judicial organ', in exercising its advisory jurisdiction must remain true to its judicial character. It must follow a judicial procedure. It must be properly informed. It must give those interested in the issues presented to it a full opportunity to present their cases and to be heard --in practice in an adversary way. That process which is very different from that ordinarily followed by a legal adviser such as the Attorney-General adds greatly to the authority of the ruling."

(3) This reason "concerns the importance in the particular case of the facts from which the question arises. It is relatively rare for a request to the International Court for an opinion to be considered detached from its facts. The judicial process, including argument based on the facts, helps avoid some of the fears expressed by the critics of advisory processes."

Through this article, Keith establishes himself as an advocate of the court's independent exercise of its advisory jurisdiction, considerate of political sensitivities and ongoing conflicts but not swayed by popular international opinion. Yet, he understands that "the opinion in practice is seen has having greater force than a simple opinion of a legal adviser;" part of the function of the international court is "to declare and develop the law for which they are responsible."[257]Thus, in considering whether to consent to answer the question posed by Palau, if the General Assembly refers a request for an advisory opinion to the Court, Keith likely would closely scrutinize any opposition and state motives. Given that "a general answer given by way of an advisory opinion which looks to future activities in a complex situation may well have within it very appropriate elements of flexibility," the judges may find it is "not…possible to adopt an absolute position."[258] The court might choose this route given the nature of the question posed by Palau, and Keith recognizes this route as a legitimate means for explaining the applicability of international law.

Selected Publications

1. *The World Community and its Law*, 22 New Zealand Universities Law Review 2 (2006)
2. *The Extent of the Advisory Jurisdiction of the International Court of Justice* (1971)
3. *The Advisory Jurisdiction of the International Court of Justice: Some Comparative Reflections*, 17 Aust. YBIL 39 (1996)
4. *The ICJ - Some Reflections on my First Year*, 5 NZJPIL 201 (2008)

[257] *Id*. at 42.
[258] *Id*. at 51.

Judge Ronny Abraham

Judge Abraham was appointed to the Court in 2005 and will serve through 2018.[259] Hailing from France, Judge Abraham was born in Egypt in 1951 but is a French national.[260] He earned a Diploma in Advanced Studies in Public Law from the University of Paris I in 1974, among other degrees.[261] Judge Abraham served as Agent for France before many international courts, including contributing to the French Republic's written statement in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[262] He also headed the French Delegation to the Sixth Committee of the General Assembly from 1998-2004.[263] Other relevant experience includes serving as the Director of Legal Affairs at the French Ministry of Foreign Affairs from 1998-2005, advising the Government on legal matters that included the law of the sea and the Antarctic.[264]

Selected Publications

1. L'articulation du droit interne et du droit international (The articulation of law and international law), *La France et le droit international*, Cahin, Poirat, Szurek (dir.), éd. Pedone, 2007.

Judge Leonid Skotnikov

Judge Skotnikov was born in Russia in 1951.[265] He received a Diploma in International Law from the Moscow Institute of International Relations in 1974, and was a Fellow with the Center for International Affairs at Harvard University in 1990.[266]Selected to join the Court in 2006, he will conclude his term in 2015.[267] His relevant diplomatic background includes his service as Head of the Russian delegation to trilateral negotiations with Iceland and Norway concerning fisheries cooperation (1999), Chairman of the XXIV Antarctic Treaty Consultative Meeting in St. Petersburg in 2001, and as Acting Head of the Russian delegation to the UN Commission on Human Rights from 2002-2005.[268]

Additional research has not yielded other relevant information about Judge Skotnikov's background, experiences, and scholarship, though he did contribute to a 2001 article on the rule of law.

---

[259] Current Members: Ronny Abraham, International Court of Justice, http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1&judge=136.
[260] *Id*.
[261] *Id*.
[262] *Id*.
[263] *Id*.
[264] *Id*.
[265] Current Members: Leonid Skotnikov, International Court of Justice, http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1&judge=159.
[266] *Id*.
[267] *Id*.
[268] *Id*.

Selected Publications

1. "Entering the 21st Century: Towards the Rule of Law in International Relations", International Affairs, No. 12, 2000 (in Russian) and No. 1, Vol. 47, 2001 (in English).

Judge Antônio Augusto CançadoTrindade

Judge Trindade, the Brazilian member of the bench, was born on September 17, 1947, in Belo Horizonte.[269] Judge Trindade, serving the 2009-2018 term, was educated in Brazil and the United Kingdom.[270] He received his LL.B. from the Federal University of Minas Gerais and his LL.M. and PhD. in International Law from the University of Cambridge.[271]

Judge Trindade has served in a variety of roles in the international environmental arena. Most notably, he was an elected member of the International Council of Environmental Law (Bonn), the former legal adviser to the United Nations Environment Programme Projects from 1990 to 1992, and a member of the Advisory Committee of Experts in International Environmental Law of the United Nations University from 1984 to 1987.[272]

Aside from serving the aforementioned positions, Judge Trindade has written extensively on international environmental rights, most notably in *Human Rights, Sustainable Development and the Environment*.[273] In that book, Judge Trindade contributed with his article, "Environment and Development: Formulation and Implementation of the Right to Development as a Human Right."[274] Judge Trindade has been interested in outlining the parallels of human rights and environmental protections in the international arena. According to Judge Trindade, "the right to a healthy environment appears as a natural extension of the right to life, in so far as it safeguards human life itself under the two aspects of the physical existence and health of human beings, and the dignified conditions and quality of life. The right to a healthy environment thus encompasses and enlarges the right to health and the right to an adequate standard of living."[275]

He continued that "[i]f the right to a healthy environment is taken not as the – virtually impossible—right to an ideal environment but rather as the right to the conservation – i.e., protection and improvement—of the environment, it can then be implemented like any other individual right: it is then taken as a 'procedural' right, the right to a due process before a competent organ, and thus assimilated to any other right guaranteed to individuals and groups of individuals. This right entails, as corollaries, the right of the individual concerned *to be informed* of projects and decisions which could threaten the environment (the protection of which counting

---

[269] Current Members: Judge Antônio Augusto Cançado Trindade, International Court of Justice, http://www.icj-cij.org/court/?p1=1&p2=2&p3=1&judge=167.
[270] *Id*.
[271] *Id*.
[272] *Id*.
[273] HUMAN RIGHTS, SUSTAINABLE DEVELOPMENT AND THE ENVIRONMENT (ANTONIO AUGUSTO CANCADO TRINDADE, ED., 1992) 39-65.
[274] Antonio Augusto Cançado Trindade, *Environment and Development Formulation and Implementation of the Right to Development as a Human Right*, *in* HUMAN RIGHTS, SUSTAINABLE DEVELOPMENT AND THE ENVIRONMENT (ANTONIO AUGUSTO CANÇADO TRINDADE, ED., 1992) 39-65.
[275] *Id*. at 41.

on preventive measures), and the right of the individual concerned *to participate* in the taking of decisions which may affect the environment (active sharing of responsibilities in the management of the interest of the whole collectivity)."[276] However, it should be noted that Judge Trindade's shift from the right to environmental conversation to a procedural right of information and participation is a relatively weak formulation.

Judge Trindade also noted that "[t]he 1982 World Charter for Nature . . . provide[s] (§ 23) that all persons are to have the opportunity to participate – individually or with others – in the formulation of decisions of direct concern to their environment, and furthermore are to have access to means of redress when their environment has suffered damage or degradation."[277]

Judge Abdulqawi Ahmed Yusuf

Judge Abdulqaqi Ahmed Yusuf is the Somalian member of the bench and is serving the 2009-2018 term.[278] Judge Yusuf was born in Eyl, Somalia on September 12, 1948.[279] He received his *Laurea di Dottore in Giurisprudenza* (Dr. Juris) at the Somali National University in 1973.[280] He then received a certificate at the Centre for Studies and Research in International Law at the Hague Academy of International Law in 1974.[281] He also completed post-graduate studies in International Law and Relations at the University of Florence, Italy in 1976-1977.[282] He received his *Docteures sciences politiques* in International Law from the Graduate Institute of International Studies at the University of Geneva in 1980.[283]

Prior to serving as a judge on the International Court of Justice bench, Judge Yusuf had extended experience in intergovernmental institutions and advised on multilateral negotiations.[284]For example, he served as the Somali representative to the Third United Nations Conference on the Law of the Sea (1975-1981).[285]

Judge Christopher Greenwood

Sir Christopher Greenwood, born on May 12, 1955 in Wellingborough, United Kingdom, is the British member of the International Court of Justice and serving the 2009-2018 term.[286] He was educated at the Raeburn Park School in Singapore and the Wellingborough School in the UK# He eventually studied law at Magdalene College, Cambridge, receiving his BA in 1976, LL.B in 1977, and MA in 1980.[287]

---

[276] *Id*. at 43.
[277] *Id*.
[278] Current Members: Judge Abdulqawi Ahmed Yusuf, International Court of Justice, http://www.icj-cij.org/court/?p1=1&p2=2&p3=1&judge=168.
[279] *Id*.
[280] *Id*.
[281] *Id*.
[282] *Id*.
[283] *Id*.
[284] *Id*.
[285] *Id*.
[286] Current Members: Judge Christopher Greenwood, International Court of Justice, http://www.icj-cij.org/court/?p1=1&p2=2&p3=1&judge=169.
[287] *Id*.

Judge Greenwood was a prominent barrister earlier in his career.[288] He served as counsel before the International Court of Justice in *Aerial Incident at Lockerbie (Libya v. United Kingdom); Advisory Opinions on Nuclear Weapons; Legality of Use of Force (Yugoslavia v. United Kingdom); Legality of Use of Force (Serbia and Montenegro v. United Kingdom); Armed Activities on the Territory of the Congo(Democratic Republic of Congo v. Rwanda); Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*.[289]He also was a member of the Panels of Arbitrators for the Law of the Sea Treaty.[290]

Judge Xue Hanqin

Judge Xue Hanqin is the Chinese member of the court, serving from 2010-2021.[291] She was born in Shanghai, China on September 15, 1955.[292] She received a B.A. from the Beijing Foreign Language Studies University in 1980 and received a diploma of International Law from Beijing University's Department of Law in 1982.[293] She finally completed her education at Columbia University's School of Law with a LL.M. in 1983 and a J.S.D. in 1995.[294]

Before becoming a judge on the International Court of Justice, Judge Xue had an extended career as a diplomat, most notably serving as the Ambassador of China to the Kingdom of the Netherlands, Chairman of the International Law Commission, and head of the Chinese delegation in a variety of international negotiations.[295]

Judge Xue has been a prolific writer in the transboundary damage realm. Her most important contribution is *Transboundary Damage in International Law* (2003).[296] The book, which began as a project for her doctoral dissertation, reads more like a treatise than legal argument. In the book, the judge remarks that there is a "threshold criterion" for transboundary damage cases.[297] She notes that "[i]nternational law only tackles those cases where transboundary damage has reached a certain degree of severity. Both in theory and in practice, the need for a threshold criterion has never been doubted, but what that should be has long been debated, along with the dilemma of how strict international liability rules should."[298] She argues that "severity is a factual inquiry which changes with the circumstances of a given case."[299]

Judge Xue analyzes the legal issues relating to damage to the global commons. She notes that under international law, to make a valid claim for reparation for injury, two requirements

---

[288] *Id*.
[289] *Id*.
[290] *Id*.
[291] Current Members: Judge XueHanqin, International Court of Justice, http://www.icj-cij.org/court/?p1=1&p2=2&p3=1&judge=170.
[292] *Id*.
[293] *Id*.
[294] *Id*.
[295] *Id*.
[296] Xue Hanqin, TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW (2003).
[297] *Id*. at 7.
[298] *Id*.
[299] *Id*.

must be met: "First, the source States must have violated its international obligation towards the injured State. Secondly, on the assumption that each and every obligation of a State corresponds to a right of at least one other State, only that party to whom the international obligation is due is entitled to invoke the new legal relationship entailed by the internationally wrongful act of the source State under the rules of State responsibility."[300]

Regarding common areas, Judge Xue noted that "it is generally recognized and accepted that States are under a legal obligation to protect and preserve the global environment, including the global common areas."[301] She underlined the presence of this obligation in the law of the sea, polar regions, outer space, etc.[302] Unlike in the state to state context (e.g., a state directly causes damage to another state's territory), Judge Xue states that it is not necessary that "each State has legal standing to invoke the responsibility of the State whose activity has caused adverse effects to the commons."[303] Specifically, Judge Xue found that "[s]tates have committed themselves to protect the world environment, but the duty of such protection has to be substantiated in concrete terms before any obligation of responsibility can be measured in the case of damage."[304]

On the topic of environmental damage, Judge Xue states that the main form of reparation is restitution-- "the obligation to restore the area to the condition it would have been in if such damage had not occurred."[305] She recognizes that "the extent to which a State should be held responsible for the injurious consequences caused by legal entities under its jurisdiction and control cannot be easily answered."[306] She states that the best principle to operate by is perhaps "only when a State fails to fulfill its international obligation to exercise control over activities carried out by entities under its jurisdiction and control, should it be held accountable for the legal consequences thereof."[307]

Judge Joan E. Donoghue

Judge Donoghue is the American member of the court, serving the 2010-2015 term.[308] Judge Donoghue received her B.A. with honors in Russian Studies and Biology in 1978 from the University of California, Santa Cruz.[309] She then received her J.D. from the Boalt Hall School of Law at University of California, Berkeley in 1981.[310]

Judge Donoghue has a distinguished career in diplomatic relations, first serving as the assistant legal adviser for oceans, environment and science from 1989-1991.[311] She was a legal adviser for the negotiation of the United Nations Framework Convention on Climate Change, the

---

[300] *Id*. at 236.
[301] *Id*. at 246.
[302] *Id*.
[303] *Id*.
[304] *Id*.
[305] *Id*. at 252.
[306] *Id*. at 259.
[307] *Id*.
[308] Current Members: Judge Joan E. Donoghue, International Court of Justice, http://www.icj-cij.org/court/?p1=1&p2=2&p3=1&judge=171.
[309] *Id*.
[310] *Id*.
[311] *Id*.

negotiation of Protocol Concerning Specially Protected Areas and Wildlife to the Cartagena Convention, and Meeting of the Consultative Parties to the Antarctic Treaty.[312] She also made a submission to the United States Senate on the United States-USSR treaty on maritime boundary and was a representative to legal expert groups on liability for environmental damage and was head of the delegation and legal adviser in fisheries negotiation from 1986-1989.[313]

From 2007-2010, Judge Donoghue served as principal deputy legal adviser as the senior career attorney of the Department of State.[314] She was the acting legal adviser, from January to June 2009, providing advice to Secretary of State Hillary Clinton and President Barack Obama on all aspects of international law.[315]

Judge Giorgio Gaja

Judge Giorgio Gaja is the Italian member of the court, serving the 2012-2021 term.[316] Judge Gaja was born in Lucerne, Switzerland on December 7, 1939 but is an Italian citizen.[317] He received his degree in law from the University of Rome in 1960.[318] He received an honorary Doctor of Law from Dickinson Law School in 1985.[319]

Judge Gaja served as judge *ad hoc* in the cases concerning *Legality of Use of Force (Yugoslavia v. Italy)*; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*.[320] Judge Gaja has held numerous academic positions prior to his current judgeship, including serving as Visiting Professor at University of Michigan School of Law, Columbia School of Law, and University of Paris I.[321]

Judge Julia Sebutinde

Judge Sebutinde is the Ugandan member of the International Court of Justice panel, serving the 2012-2021 term.[322]Judge Sebutinde was born in Entebbe, Uganda, on February 28, 1954.[323] She received her Doctorate of Laws, *honoris causa*, from the University of Edinburgh for distinguished service in the field of international justice and human rights in 2009.[324]

---

[312] *Id*.
[313] *Id*.
[314] *Id*.
[315] *Id*.
[316] Current Members: Judge Giorgio Gaja, International Court of Justice, http://www.icj-cij.org/court/?p1=1&p2=2&p3=1&judge=140.
[317] *Id*.
[318] *Id*.
[319] *Id*.
[320] *Id*.
[321] *Id*.
[322] Current Members: Judge Julia Sebutinde, International Court of Justice, http://www.icj-cij.org/court/?p1=1&p2=2&p3=1&judge=194.
[323] *Id*.
[324] *Id*.

She also received her LL.M. with distinction from the University of Edinburgh in 1990); Bachelor of Laws Degree (LL.B.) Makerere University, Uganda (1977); Post-Graduate Diploma in Legal Practice, Law Development Centre, Uganda (1978).[325] Judge Sebutinde previously served as a judge of the Special Court for Sierra Leone and various academic positions.[326]

Judge Dalveer Bhandari

Judge Bhandari, born on October 1, 1947, is the Indian and most junior member of the bench, serving the 2012-2018 term.[327] He acquired degrees in humanities and law from Jodhpur University and an LLM from Northwestern University. Prior to being a judge on the International Court of Justice panel, Judge Bhandari served as a judge in the higher Indian judiciary for more than 20 years.[328] He also served as the President of the India International Law Foundation.[329]

3. JUDGES AND POTENTIAL BIAS?

The most authoritative article on the topic of national bias and the International Court of Justice is Eric Posner and Miguel de Figueiredo's *Is the International Court of Justice Biased?*.[330] In that 2005 article, Posner and de Figueiredo used statistical methods to test the claim that ICJ judges vote according to the interest of the state that appoints them rather than enforcing international law in an unbiased manner.

Posner and de Figueiredo work from the idea that a "judge votes in an unbiased way if he or she is influenced only by the relevant legal considerations -- such as the proper interpretation of a treaty-- and not by legally irrelevant considerations such as whether a judge is unbiased."[331] Their simple methodology was to find the " proper legal outcome of a dispute" and then see if the judge's vote is in line with that outcome, while taking into account the "legitimate difference" in the legal cultures in which judges are educated.[332] However, as they admit, finding the proper legal outcome is "rarely obvious" and judges also make errors and vote incorrectly even when they are unbiased.[333]

The Article's simplest test was to find if judges voted in favor of their home state when that state appeared as a party. Posner and de Figueiredo found that while judges vote in favor of a party about 50 percent of the time when they have no relationship with that party, that statistic rises to 85-90 percent when the judge's home state is a party.[334]

---

[325] *Id*.
[326] *Id*.
[327] Current Members: Judge Dalveer Bhandari, International Court of Justice, http://www.icj-cij.org/court/?p1=1&p2=2&p3=1&judge=197.
[328] *Id*.
[329] *Id*.
[330] Eric A. Posner & Miguel F.P. de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599 (2005).
[331] *Id*. at 600.
[332] *Id*. at 601.
[333] *Id*.
[334] *Id*.

Posner and de Figueiredo also explored the voting behavior of judges when their home state is not a party. They hypothesize that even when the judge's home state is not a party, his or her home state may still have an interest in having one party prevail, so that judge's vote may reflect his or her native state's interest.[335] While previous studies have not found evidence for this hypothesis, Posner and de Figueiredo argue that the studies are flawed as they do not rely on statistical techniques that control for relevant factors.

In terms of methodology, Posner and de Figueiredo classified states into blocs that were based on region, wealth, culture, military and political alliances, etc., to determine whether judges are biased in favor of state parties that belong to the same bloc as the judges' home state.

Posner and di Figueiredo argue that national identity may affect judicial decisionmaking in three ways: (1) psychologically, (2) economically, or (3) via selection effects.[336] Judges who are psychologically affected often have "strong emotional ties with their country," having had careers as diplomats, legal advisors, administrators, and politicians.[337] Posner and di Figueiredo argue that "[e]ven with the best intentions, they may have trouble seeing the dispute from the perspective of any country but that of their native land."[338] Judges may fear penalization if they defy their governments, and thus are economically impacted. The ability of governments to choose their judges also ensures that there is a selection effect, wherein governments "can ensure that their judges are not too independent-minded by drawing from the pool of officials who have shown reliability and the appropriate attitudes."[339]

From their data analysis, Posner and di Figueiredo conclude that "national bias has an important influence on the decisionmaking of the ICJ."[340] From their data sets, they observed that judges voted for their home states about 90 percent of the time, and when their home states are not involved, judges vote for states that are similar in terms of wealth, culture, and political regime.[341] Certainly, their study does not prove that "judges are consciously biased," but instead that "judges, on the margin, don't vote impartially in the manner prescribed by the null hypothesis."[342]

We conducted our own research on more recent advisory opinions to ascertain the voting patterns of the current judges on the ICJ. The metric includes the three advisory opinions issued since 2003, the year the first judges in the court's current composition started their service on the court. Since none of the judges' home states were directly involved as parties, we determined how the judges voted in relation to their home states, if their home states filed written statements on the issues. Unfortunately, the available sample size is too small to draw any conclusions on the voting patterns of the current judges and their propensities to vote with or against their states on issues in which the states are involved or have taken a position through formal written statements submitted to the ICJ.

---

[335] *Id*. at 601-02.
[336] *Id*. at 608.
[337] *Id*.
[338] *Id*.
[339] *Id*.
[340] *Id*. at 609.
[341] *Id*. at 624.
[342] *Id*.

For the first opinion, issued in 2004,[343] only two judges, Tomka and Owada, were then on the court. Tomka's home state of Slovakia did not file a written statement. Japan, Owada's home state, filed a written statement, and Owada's vote corresponded with Japan's position on the issue. Ten of the court's current fifteen judges were on the court when the second advisory opinion was issued in 2010.[344] Of those ten, four judges' home states (Mexico, New Zealand, Morocco, and Somalia) did not file written statements. Four of the remaining six voted with their states—Tomka (Slovakia), Owada (Japan), Skotnikov (Russian Federation), and Greenwood (United Kingdom). Brazilian Judge Trindade voted against his state, and French Judge Abraham voted with his state on the substantive question of whether there was a violation of international law, but against his state on the issue of whether the court should consent to hear the case. For the final advisory opinion, issued in 2012,[345] none of the judges' home states filed written statements.

While the judges' past votes and potential alignment with their home country's views do not predetermine the outcome of the current campaign, they provide insight about the prior reasoning, processes, and experiences that each judge on the International Court of Justice will bring to bear on the question of transboundary harm caused by greenhouse gas emissions.

B. TRACING THE PRINCIPLE OF TRANSBOUNDARY HARM

To understand how to apply the international law principle of transboundary harm to climate change in an advocacy position before the ICJ, this part explores the principle outside of the ICJ across two dimensions: (1) by geography, and (2) by the instruments, including but not limited to, conventions, treaties, tribunals, and courts that define, regulate, and enforce laws, soft laws, and obligations around this principle.

Section 1 outlines research on the principle of transboundary harm in American federal and state law, and finds that generally, U.S. courts do not appear to have embraced transboundary harm as a specific principle. U.S. courts have recognized for more than a century, however, that actors in one state cannot cause harm to neighboring states.

Section 2 examines the principle of transboundary harm in European treaties, the European Court of Justice, and international arbitral tribunals that operate in Europe. There is a significant dearth of case law and case studies supporting the principle in Europe. Nevertheless, the grave consequences of climate change provide a basis for Palau to invoke legal and moral values, such as the precautionary principle, limited territorial sovereignty, and community theory in support of the campaign against transboundary harms caused by greenhouse gas emissions.

---

[343] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (July 9, 2004), *available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=5a&case=131&code=mwp&p3=4.
[344] Accordance with international law of the unilateral declaration of independence in respect of Kosovo (July 22, 2010), *available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=4.
[345] Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development (Feb. 1, 2012), *available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=ad&case=146&code=fida&p3=4.

Section 3 studies the incorporation of climate change impacts into international agreements and conventions. These conventions lend substantial support to Palau's transboundary harm claim. They establish an international regime against transboundary harm, including transboundary pollution, and lend support to universal application of the precautionary principle.

Section 4 demonstrates that greenhouse gases are viewed as a harmful pollutant and that greenhouse gas emissions are being treated akin to pollution. This section also provides examples of international agreements that apply the principle of transboundary harm.

1. TRANSBOUNDARY HARM IN U.S. COURTS

This Section looks at U.S. court cases involving transboundary environmental harm. Several provisions of the Clean Air Act address transboundary harm, and these provisions are included in Appendix 1. Several of the cases in this section pertain to climate change. Others deal with interstate air pollution, interstate water pollution, and special standing rules for American states.

Liability for transboundary climate change harm is still largely foreign in American law. Subsection A looks at suits against greenhouse gas emitters to recover damages for climate change harm. These cases have so far failed in U.S. courts. Most recently, the Ninth Circuit ruled that the Alaskan village of Kivalina's public nuisance claim against ExxonMobil and other greenhouse gas emitters could not stand.[346] Earlier high profile cases in which plaintiffs sought damages under nuisance and trespass for climate change harms also failed.[347]

Subsection A then examines earlier Supreme Court cases that addressed interstate pollution. American law has recognized that pollution does not respect political boundaries for more than a century. Early cases involved river pollution and air pollution from industrial facilities.[348] These cases established an important standing doctrine called *parens patriae*. *Parens patriae* gives U.S. states stronger standing to bring lawsuits than that afforded to private citizens. Because the states are "quasi-sovereign," they do not always have to meet the same criteria to bring a lawsuit that an individual plaintiff would. The doctrine derives in part from the idea that when a dispute arises between U.S. states that might lead to war if it occurred between independent nations, the states take the more peaceable route of suing in federal court. The same doctrine could, theoretically, apply to members of the United Nations in the modern international system.

Subsection B builds on the idea that states, whether quasi-sovereign American states, or independent countries, need peaceful ways to resolve disputes.[349] American jurisprudence includes many instances of U.S. states litigating over water rights. Typically, downriver states file suit to enjoin upriver states from diverting so much water from a river that citizens in

---

[346] *See* Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012).
[347] *See* American Electric Power v. Connecticut, 131 S.Ct. 2527, and Comer v. Murphy Oil, 839 F.Supp.2d 849.
[348] *See* Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907), Missouri v. Illinois, 180 U.S. 208 (1901) (*Missouri I*), and Missouri v. Illinois, 200 U.S. 496 (1906) (*Missouri II*), discussed in Subsection A.
[349] The alternative to peaceful dispute resolution, historically, has often been war.

downriver states suffer from shortages as a result.[350] In one important case, Illinois sued the city of Milwaukee and four other Wisconsin municipalities, over pollution in Lake Michigan.[351]

Subsection C examines the federal doctrine of "occupying the field." Under U.S. law, federal statutes can "displace" federal common law if the statute sufficiently covers a given area of law. The Supreme Court has held that the Clean Water Act occupies the field of interstate water pollution.[352] More recently, the Court ruled that the Clean Air Act, and the regulations it enables, displace federal common law nuisance claims for climate change harm.[353] While these decisions went against domestic environmental interests, Part Three will demonstrate that the Court logic in both cases works in Palau's favor as an analogue to the climate change context.

Finally, Subsection D looks at cases that specifically correlate to international transboundary climate change harm. In 2007 the Supreme Court held that Massachusetts had standing to sue the Environmental Protection Agency (EPA) over the agency's failure to regulate greenhouse gases.[354] This case, though a major victory, also gave the Court footing to deny common law nuisance claims in *AEP*. Earlier U.S. Supreme Court cases, including *Georgia v. Tennessee Copper* and *Missouri v. Illinois I*, however, provide strong support to Palau's arguments.

This Section concludes by showing that current international efforts on climate change—namely, the United Nations Framework Convention on Climate Change (UNFCCC)—do not meet even the low bar set in *AEP* for "occupying the field" and displacing judicial actions. The UNFCCC does not give Palau an adequate remedy—or, at present, any meaningful remedy—to enjoin the harm that climate change is inflicting on the island nation. While the American cases do not specifically create liability for transboundary climate change harm, they do point towards a set of standards that support the campaign to request an advisory opinion from the ICJ, which hopefully would recognize state responsibility for transboundary climate change harm caused by greenhouse gas emissions. Quasi-sovereign states have enhanced standing in federal court. Similarly, sovereign states should have enhanced standing to protect the rights of their citizens before the ICJ. Furthermore, the UNFCCC is not an adequate framework for addressing climate change. Therefore, even cases like *AEP* and *Kivalina*, which at first seem to work against climate victims, actually support the ICJ campaign.

a) Standing and *Parens Patriae*

In 2008 the village of Kivalina, on the coast of Alaska, filed suit in U.S. federal court against various energy companies and utilities to recover damages for climate change harm.[355] Kivalina sits on a barrier reef north of the Arctic Circle.[356] The village is protected by Arctic sea

[350] Examples include Nebraska v. Wyoming, 325 U.S. 589 (1945), Kansas v. Colorado, 206 U.S. 46 (1907), and Arizona v. California, 373 U.S. 546 (1963), Colorado v. New Mexico, 467 U.S. 310 (1984), South Carolina v. North Carolina, 558 U.S. 256 (2010), and New Jersey v. New York, 283 U.S. 805 (1931).
[351] Milwaukee v. Illinois, 406 U.S. 91 (1972) (*Milwaukee I*).
[352] *See* Milwaukee v. Illinois, 451 U.S. 304 (1981) (*Milwaukee II*).
[353] American Electric Power Co. v. Connecticut, 131 S.Ct. 2527 (2011).
[354] Massachusetts v. EPA, 549 U.S. 497 (2007).
[355] Native Village of Kivalina v. ExxonMobil Corp., 663 F.Supp.2d 863 (N.D. Cal. 2009).
[356] *Kivalina*, 663 F. Supp. 2d at 868.

ice; "[a]s a result of global warming, however, the sea ice now attaches to the Kivalina coast later in the years and breaks up earlier and is thinner and less extensive than before, thus subjecting Kivalina to coastal storm waves and surges."[357] The village probably cannot survive in its current location. In its suit, Kivalina alleged four causes of action, including state and federal public nuisance.[358] Defendants moved to dismiss for lack of jurisdiction, citing, among other reasons, the political question doctrine.[359]

The District Court for the Northern District of California granted the motions to dismiss for lack of jurisdiction. The Court, like the Defendants, cited the political question doctrine from *Baker v. Carr*, 369 U.S. 186 (1962), as one of the reasons justifying dismissal. *Baker* laid out a six-factor test for determining whether an issue is "political," and therefore, unsuited for adjudication. Any one of the factors, if present in a given case, renders the issue non-justiciable.[360] The district court in *Kivalina* held that there was no clear judicially discoverable and manageable standard for the case.[361] The district court also held that the case would demand the court to make initial policy determinations.[362] Furthermore, the Court said the plaintiffs lacked Article III standing.[363]

The Court of Appeals for the Ninth Circuit affirmed the lower court's ruling in *Kivalina*, for somewhat different reasons.[364] The Ninth Circuit decided the appeal in 2011. In the two-year intervening period, the Supreme Court ruled on another pivotal case, *AEP v. Connecticut*.[365] Part Three of this Section discusses *AEP* at greater length. The focus of the Supreme Court's ruling, however, was "that the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants."[366] Federal law and regulatory action displace federal common law governing public environmental nuisances.[367] The Ninth Circuit cited *AEP* as one of its reasons for affirming the District Court's decision in *Kivalina*: "In sum, the Supreme Court has held that federal common law addressing domestic greenhouse gas emissions has been displaced by Congressional action. That determination displaces federal common law public nuisance actions seeking damages, as well as those actions seeking injunctive relief."[368] *AEP* and *Kivalina* were disappointments for environmental advocates. The rulings blocked a potentially useful route for reducing America's greenhouse gas emissions. Part Three of this section will demonstrate, however, that these cases can be marshaled in Palau's favor.

---

[357] *Id*. at 869.
[358] *Id*.
[359] *Id*. at 870.
[360] *See* Baker v. Carr, 369 U.S. 186 (1962).
[361] *Kivalina*, 663 F. Supp. 2d 863, 876 (N.D. Cal. 2009) ("Consequently, the Court concludes that application of the second *Baker* factor precludes judicial consideration of Plaintiff's nuisance claim.").
[362] *Id*. at 877 ("The Court thus concludes that the third *Baker* factor also militates in favor of dismissal.").
[363] *Id*. at 883.
[364] *Kivalina*, 696 F.3d 849 (9th Cir. 2012).
[365] AEP v. Connecticut, 131 S.Ct. 2527.
[366] This case came after yet another critical climate change opinion, *Massachusetts v. EPA*, also discussed in Part Three.
[367] *See also* City of Milwaukee v. Illinois and Michigan, 451 U.S. 304 (1981) (*Milwaukee II*).
[368] *Kivalina*, 696 F.3d at 858.

Although U.S. courts have been reluctant to extend liability for transboundary harm to climate change, the principle of transboundary harm goes back more than a century in American jurisprudence. In 1907, the Supreme Court decided a case in which Georgia sued the Tennessee Copper Company and several other companies alleging damage from air pollution.[369] The corporations were emitting pollution in Tennessee, and causing damage across the border in Georgia. The court held that the corporations—which were "foreign" insofar as they were from another state—could not emit pollution that harmed Georgia.[370] *Georgia v. Tennessee Copper* established the basic doctrine that entities within a state cannot cause environmental harm in another state with impunity.

The case is better known for a different principle, however. *Georgia* held that an American state is a "quasi-sovereign." One key part of the Court's ruling noted:

> When the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interest; the alternative to force is a suit in this court.[371]

The Court further stated: "[S]ome peculiarities necessarily mark a suit of this kind. If the state has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be."[372] This principle, termed *parens patriae*, is a form of enhanced standing for American states. The states of the Union, when they adopted the Constitution, gave up many of their sovereign powers. One of these abandoned powers was the right to use force against one another. The Court reasoned that since the states relinquished force as a method to seek redress, other avenues must be available. The avenue the Court prescribed was to file suit before the Supreme Court. Furthermore, the *parens patriae* doctrine entails that American states are entitled to more deferential standing requirements than are private actors:

> It is a fair and reasonable demand on the part of sovereign that the air over its territory should not be polluted on a great scale by sulfurous acid gas, that the forest on its mountains . . . should not be further destroyed or threatened by the acts of persons beyond its control . . . If any such demand is to be enforced this must be notwithstanding the hesitation that we might feel if the suit were between private parties, and the doubt whether, for the injuries which they might be suffering to their property, they should not be left to an action at law.[373]

The Court in *Georgia* relied on two additional cases between Missouri and Illinois.[374] In those cases, Missouri sued Illinois and the sanitary District of Chicago to prevent them from polluting Mississippi River tributaries. The first case overruled demurrers to Missouri's bill of

---

[369] Georgia v. Tennessee Copper, 206 U.S. 230.
[370] Georgia v. Tennessee Copper, 206 U.S. at 239 ("If the State of Georgia adheres to its determination, there is no alternative to issuing an injunction . . .").
[371] *Id*. at 237, (citing Missouri v. Illinois, 180 U.S. at 241).
[372] *Id*.
[373] *Id*. at 238.
[374] *Missouri I*, 180 U.S. 208; *Missouri II*, 200 U.S. 496 (1906).

complaint. In the second case, the Court characterized the earlier overruling of the demurrer: "The only question presented was whether, as between the states of of [sic] the union, this court was competent to deal with the situation which, if it arose between independent sovereign entities, might lead to war."[375] The Supreme Court dismissed Missouri's bill of complaint without prejudice.[376] Nevertheless, the two *Missouri* cases and *Georgia* set down an important principle: when American states face a dispute that might cause independent nations to go to war, the correct form of redress is through the Supreme Court. This principle arises in the water cases discussed in Subsection A, and *Massachusetts*, discussed in Subsection D.

b) Peaceful Redress in a Union of Sovereigns

The United Nations is a looser group of sovereign entities than is the United States. Nevertheless, U.N. members agree to extensive restrictions on the legal use of force. Detailed discussion of the rights of U.N. member states to use force against one another is beyond the scope of this paper.[377] Nevertheless, U.N. members are similar to American states in that they have legally agreed to severely curtail the right to use force against one another to prevent or redress harm. *Parens patriae*, therefore, could arguably be extended by analogy to U.N. members. Enlightened principles of civilized national conduct indicate that Palau's redress when another country causes it harm should be through the U.N. and the International Court of Justice.

Parens patriae is a doctrine of standing, not a doctrine of transboundary harm, but the doctrine still plays a critical role in much of American interstate environmental harm litigation. In *Milwaukee I*, Illinois filed a motion for leave to file a bill of complaint in the Supreme Court.[378] The Court held: "[W]e deny, without prejudice, the motion for leave to file. While this original suit normally might be the appropriate vehicle for resolving this controversy, we exercise our discretion to remit the parties to an appropriate district court . . ."[379] Although the Supreme Court decided not to exercise original jurisdiction, the Court also strongly supported the idea that one state may sue another over interstate water pollution. The *Milwaukee I* Court cited an entire paragraph from *Georgia v. Tennessee Copper*, including the language quoted in Subsection A that "the alternative to force is a suit in this court."[380]

Milwaukee I laid out another important principle: that federal common law is not inconsistent with federal statutory power.[381] Federal common law is not replaced by, and can go beyond, federal statutory law with respect to environmental protection: "It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution."[382] This principle is discussed further in Subsection C.

---

[375] *Missouri II*, 200 U.S. at 518.
[376] *Id*. at 526.
[377] Member states retain a right of self-defense. *See* U.N. Charter art. 51.
[378] *Milwaukee I*, 406 U.S. 91.
[379] *Id*. at 108.
[380] *Milwaukee I*, 406 U.S. at 104 (quoting *Georgia*, 206 U.S. 230, and *Missouri I*, 180 U.S. 208).
[381] *Milwaukee I*, 406 U.S. at 104.
[382] *Id*. at 107.

The Court in *Milwaukee I* also pointed out that "Equitable apportionment of the waters of an interstate stream has often been made under the head of our original jurisdiction."[383] While these water rights cases have no direct relationship with liability, climate change, or transboundary harm, they do support the idea that sovereign and quasi-sovereign entities should resolve disputes in front of competent judicial bodies.

c) Occupying the Field

Milwaukee I held that federal statutory law did not displace federal common law nuisance remedies. However, the Court did not mean that federal statutes could never displace the common law.[384] Nine years later, the Court held that new federal laws regulating water pollution did in fact displace federal common law.[385] After the Supreme Court declined to exercise jurisdiction in *Milwaukee I*, Illinois filed with the District Court for the Northern District of Illinois ruled in favor of Illinois, which ruled in the state's favor. The Court of Appeals for the Seventh Circuit affirmed in part.[386] The Supreme Court granted certiorari.

Meanwhile, in 1972 Congress had passed the Federal Water Pollution Control Act Amendments of 1972, more commonly known as the Clean Water Act.[387] These amendments passed just months after the decision in *Milwaukee I*. The *Milwaukee II* Supreme Court, in an opinion by Justice Rehnquist, held that the new law had displaced the federal common law of nuisance:

> We conclude that, at least so far as concerns the claims of respondents, Congress is not left the formulation of appropriate federal standards to the courts to replication of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, rather has occupied the field to the establishment of a comprehensive regulatory program supervised by an expert administrative agency.[388]

Federal law "occupies the field" in a given area of law when a statute is so comprehensive as to leave little or no room for federal common law. The *Milwaukee II* Court repeatedly cited to the "comprehensive" nature of the Clean Water Act: In discussing the legislative history of the law, the Court said, "No Congressman's remarks on the legislation were complete without reference to the 'comprehensive' nature of the Amendments."[389] The Court went on to support its conclusion that the field was occupied.[390, 391]

---

[383] *Id*. at 106 (the Court lists Nebraska v. Wyoming, 325 U.S. 589 (1945), Kansas v. Colorado, 206 U.S. 46 (1907), and Arizona v. California, 373 U.S. 546 (1963)). *See also* Colorado v. New Mexico, 467 U.S. 310 (1984), South Carolina v. North Carolina, 558 U.S. 256 (2010), and New Jersey v. New York, 283 U.S. 805 (1931).
[384] *Id*. at 107 ("It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance.").
[385] *See Milwaukee II*, 451 U.S. 304 (1981).
[386] *See* Illinois and Michigan v. Milwaukee, 599 F.2d 151 (1978).
[387] Federal Water Pollution Control Amendments of 1972, 33 U.S.C. §§1251-1387 (2011).
[388] *Milwaukee II*, 451 U.S. at 317.
[389] *Id*. at 318.
[390] *Id*. at 320 ("Federal courts lack authority to impose more stringent effluent limitations under federal common law than those imposed by the agency charged by Congress with administering this comprehensive scheme.").

Domestically, *Milwaukee II* closed off an avenue for victims of environmental harm to seek redress or enjoin polluters. Internationally, opponents of Palau's motion might argue that the UNFCCC is the only appropriate avenue for dealing with climate change—in other words, that the UNFCCC has "occupied the field." *Milwaukee II*, as well as *AEP*, discussed *infra*, expose the weakness of such arguments. *Milwaukee II*, an opinion written by a conservative Justice that appears to work against environmental concerns, actually works in Palau's favor.

The Supreme Court relied on *Milwaukee II* in its more recent opinion in *AEP v. Connecticut*. In that case, various states, municipalities, and nonprofit land trusts filed suit against five major electric power companies. The plaintiffs asserted that the defendants' carbon dioxide emissions substantially and unreasonably interfered with public rights, "in violation of the federal common law of nuisance, or, in the alternative, of state tort law."[392] The Court refused to address whether or not the plaintiffs "could state a federal common law claim for curtailment of greenhouse gas emissions because of their contribution to global warming. Any such claim would be displaced by the federal legislation authorizing EPA to regulate carbon-dioxide emissions."[393] Four years earlier, the Supreme Court had ruled that carbon-dioxide falls within the definition of an air pollutant under the Clean Air Act.[394] The Supreme Court's holding in that case led the EPA to issue regulations on greenhouse gases. The Court's ruling in *Massachusetts v. EPA*, while an important environmental victory, also cleared the way for the (domestically) less progressive rulings in *AEP* and *Kivalina*.

In *Kivalina*, the Ninth Circuit held that *AEP* controlled: "The Supreme Court has already determined that Congress has directly addressed the issue of domestic greenhouse gas emissions from stationary sources and has therefore displaced federal common law."[395] The Ninth Circuit further cited to *Milwaukee II* in support of its ruling.[396] However, that court cautioned that "[t]he existence of laws generally applicable to the question is not sufficient; the applicability of displacement is an issue-specific inquiry."[397] Merely having a law that deals with a given issue, in other words, does not necessarily displace federal common law.

Domestically, *AEP* shuts the door on federal public nuisance law as a tool to address climate change. For Palau, however, *AEP* actually is advantageous. The *AEP* ruling focused on displacement of federal common law: "*Massachusetts* made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the [Clean Air] Act. And we think it equally plain that the Act 'speaks directly' to emissions of carbon dioxide from the defendants'

---

[391] *Id*. at 322-323 ("It is quite clear . . . that the state agency duly authorized by the E.P.A. to issue discharge permits under the Act has addressed the problem of overflows from petitioners' sewer system.").
[392] *AEP*, 131 S.Ct. at 2529.
[393] *Id*. at 2537.
[394] *See* Massachusetts v. EPA, 549 U.S. 497 (2007), discussed in Subsection D.
[395] *Kivalina*, 696 F.3d at 858 (citing *AEP*, 131 S.Ct. 2527).
[396] *Id*. at 858 ("Nor does the Supreme Court's displacement determination pose retroactivity problems. The Supreme Court confronted this theory in the *Milwaukee* cases, holding in *Milwaukee II* that amendments to the Clean Water Act, passed after the decision in *Milwaukee I*, displaced the previously recognized common law nuisance claim because Congress had now 'occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency.'" (quoting *Milwaukee II*, 451 U.S. at 316)).
[397] *Id*. at 856.

plants."[398] By this reasoning, the Court indicated that regulatory authority, plus the ability to use the judicial process to enforce regulatory mandates, means that this federal statute "occupies" the field. Although this argument was unconvincing to many commentators and scholars,[399] fortunately, this line of reasoning works in Palau's favor.

Internationally, the field of climate change law is in no way "occupied." There is no international enforcement body with the power to issue binding regulations. There is no international statute directing such a body to regulate carbon dioxide as an air pollutant. No one country or international body can issue administrative or criminal penalties, and there is no international law granting individual citizens the power to drag a recalcitrant regulator into court. Even by the limited standards of *AEP*, the UNFCCC does not come close to occupying the field. The UNFCCC cannot issue penalties, cannot send violators to jail, cannot be sued for failing to regulate, and has yet to issue a single globally binding emissions target. At the international level, therefore, *AEP* can serve to contrast the supposed "occupation" of U.S. domestic environmental law with the open, unoccupied nature of international law on the climate change issue.

d) Climate Change and International Transboundary Harm

As discussed above, *AEP* held that the Clean Air Act and EPA regulations occupied the field of climate change law in the U.S.[400] The Court made this ruling by building upon its earlier decision in *Massachusetts*. In an opinion by Justice Stevens, the *Massachusetts* Court brought *parens patriae* to bear on climate change litigation. The Court favorably cited to *Georgia*,[401] then later said:

> When a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India, and in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted.[402]

The Court gave strong weight to evidence of climate change: "A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related."[403] The Court even used language implying that climate change, and the harms it is causing, are beyond doubt: "The harms associated with climate change are serious and well recognized."[404] The Court criticized EPA for refusing to dispute the reality of climate change, yet also refusing to regulate carbon dioxide, without offering any reasoned justification. "EPA does not dispute the existence of a causal connection between manmade greenhouse gas emissions and global warming. At a

---

[398] *AEP*, 131 S.Ct. 2537 (citing *Massachusetts*, 549 U.S. at 528) (internal citations omitted).
[399] In the view of some, the Court contorted its reasoning to conclude that the Clean Air Act and the EPA regulations it enables are a robust means of enforcement and a suitable remedy, and therefore displace federal common law.
[400] *See id*.
[401] *Massachusetts*, 549 U.S. at 518 (citing Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592 (1982)).
[402] *Id*. at 519.
[403] *Id*. at 504.
[404] *Id*. at 521.

minimum, therefore, EPA's refusal to regulate such emissions 'contributes' to Massachusetts' injuries."[405] Later in the opinion, the Court concluded: "In short, EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change."[406]

This line of reasoning could potentially apply to advocacy efforts before the ICJ, and could be persuasive to lawyers in state departments and embassies weighing Palau's motion. Granted, international law lacks a Clean Air Act. Nevertheless, the Supreme Court's logic in *Massachusetts* could be useful in convincing countries in the General Assembly to vote with Palau in requesting an advisory opinion. The U.S. government does not deny that climate change is occurring. Furthermore, under *Massachusetts*, climate change is causing identifiable harm, particularly to coastal states and countries. By the reasoning of *Massachusetts*, the United States government may have an obligation to mitigate climate change.

Granted, this line of argument is not directly related to transboundary harm in the conventional sense of the phrase. In broader terms, however, American law already contains the elements of a system that could apply the principle of transboundary harm to climate change. American domestic law recognizes that pollution crosses boundaries. Domestic environmental statutes, particularly the Clean Air Act, recognize the problems of interstate pollution.[407] The fact that pollution does not recognize political boundaries is familiar to American courts. The Supreme Court has been aware of this problem since before the First World War. The doctrine established in *Georgia* with regard to pollution is on point:

> On the evidence the pollution of the air and the magnitude of the pollution are not open to dispute. Without any attempt to go into details immaterial to the suit, it is proper to add that we are satisfied, by a preponderance of the evidence, that the sulfurous fumes cause and threaten damage on so considerable a scale to the forests and vegetable life, if not to health, within the plaintiff state, is to make out a case within the requirements of *Missouri v. Illinois* . . . Whether Georgia, by insisting upon this claim, is doing more harm than good to her own citizens, is for her to determine. The possible disaster to those outside the state must be accepted as a consequence of her standing upon her extreme rights.[408]

Note the various references to certainty contained within the quote. The magnitude of the pollution is "not open to dispute." "By a "preponderance of the evidence" the Court was convinced "that the sulfurous fumes cause and threaten damage on so considerable scale," that the state of Georgia had standing. *Georgia*, therefore, essentially turns on two issues. The first is standing. The second issue is the certainty of harm caused by the pollution. The Court was convinced that the magnitude of the pollution was beyond debate. Furthermore, the Court was adequately convinced, by a preponderance of the evidence if not by complete proof, that the pollution was harming the state of Georgia.

---

[405] *Id*. at 523.
[406] *Id*. at 534.
[407] *See* Appendix II.
[408] *Georgia*, 206 U.S. at 238-239 (citing *Missouri*, 200 U.S. 496).

The last sentence of the above-quoted excerpt is also important: "The possible disaster to those outside the state must be accepted as a consequence of her standing upon her extreme rights." The Court presumably referred to the economic "disaster" to Tennessee Copper and the other emitters if they had to close down in order to stop harming Georgia. The same logic easily transfers to climate change. The nation of Palau has a right to exist. Furthermore, it has a right to exist free from harm caused by other nations. As of the time of this writing, the U.N. Security Council had not approved the use of force against Palau. Climate change is causing massive, and perhaps irreparable, harm to Palau. It is within Palau's "extreme rights," then, to force the nations causing this harm to stop, even at significant economic cost to them.

Few dispute that humans are releasing massive amounts of carbon dioxide into the air. The magnitude of the pollution in the case of climate change, then, is beyond doubt. The more difficult problem is causation. Causation has been a sticking point for climate change litigation.[409] The causal chain between greenhouse gas emissions and actual harm from climate change to an identifiable party is much longer and more attenuated than the traditional tort law models would allow. Nevertheless, as cases like *Massachusetts* demonstrate, the Supreme Court at least recognizes a causal chain between greenhouse gas emissions and climate change related damage to states.

e) Conclusion

The path from *Georgia v. Tennessee Copper* to international liability for transboundary climate change harm is complex, but plausible. *Georgia* and the *Missouri* and *Milwaukee* cases involve localized harm with a clear causal chain linking to (relatively) small amounts of pollution. By contrast, climate change occurs on a global scale over a longer time horizon. Nevertheless, the leap from existing American laws to international climate change liability for transboundary harm is not far. Under the *Missouri* cases and *Georgia*, states that enter into a union surrender the right to go to war with one another. The same logic carried through a century later in *Massachusetts*. If the international system is going to function peacefully, nations need nonviolent ways to protect themselves and seek redress for harms suffered. Thus far, the UNFCCC has not fulfilled that goal.

In *Missouri II*, the court stated, "It may be imagined that a nuisance might be created by a state upon a navigable river like the Danube, which would amount to a casus belli for a state lower down, unless removed. If such a nuisance were created by a state upon the Mississippi the controversy would be resolved by the more peaceful means of a suit in this court."[410] Palau is

---

[409] *Kivalina*, 663 F. Supp. 2d at 880 ("In view of the Plaintiffs' allegations as to the undifferentiated nature of greenhouse gas emissions from all global sources and their worldwide accumulation over long periods of time, the pleadings makes (sic) clear that there is no realistic possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person, entity, [or] group at any particular point in time."). *See also* Comer v. Murphy Oil USA, 839 F. Supp. 2d 849, 862 (2012) ("As this Court stated in the first *Comer* lawsuit, the parties should not be permitted to engage in discovery that will likely cost millions of dollars, when the tenuous nature of the causation alleged is readily apparent at the pleadings state of the litigation. The Court finds that the plaintiffs have not alleged injuries that are fairly traceable to the defendants' conduct, and thus, the plaintiffs do not have standing to pursue this lawsuit.").

[410] *Missouri II*, 200 U.S. at 520-21.

sinking. Climate change is a threat to some American citizens, and an economic nuisance for the country as a whole, but it is an existential threat to the entire nation of Palau.

2. TRACING THE PRINCIPLE OF TRANSBOUNDARY HARM IN INTERNATIONAL COURTS, TRIBUNALS, AND CONVENTIONS

This Section provides a brief summary of the leading case law, including case studies, pertaining to transboundary environmental damage in Europe. The examples explained below illuminate the role of international treaties, tribunals, and the European Court of Justice (ECJ) in adjudicating cases of trans boundary harm. Some of these examples are of cases where the plaintiff and defendant are nation-states, while in others, the defendant is a private entity. Issues surrounding shared rivers and waterways mark the cases of transboundary harm and pollution in Europe.

The first example provides a detailed analysis of customary law and international treaties that could apply to cases of transboundary pollution caused by rivers flowing across multiple countries and the various shortcomings of these law and treaties that discourage downstream countries from starting legal proceedings against upstream, polluting countries. The second example clarifies the powers and influence of an international treaty based court such as ITLOS in matters of transboundary harm. The third example touches upon a case of transboundary harm tried in the European Court of Justice in the matter of potential nuclear pollution. And the fourth example returns to the rivers and the detrimental impact of one state's activities on another.

In conclusion, a brief analysis indicates that although international law fails to provide clear and unequivocal support to Palau's campaign of transboundary harm, the sustained, irreversible, and widespread nature of damage caused by global warming should allow Palau to counter some past unfavorable decisions of the European courts and tribunals and at the same time invoke certain legal prescriptions and moral recommendations in favor of its campaign.

a) Understanding the Role of International Treaties and Conventions in International Law

Case Study: Sandoz Chemical Spill from Switzerland into the Rhine (1987)

On Nov. 1, 1987 about 200 kilograms of mercury and 30 tons of agricultural pesticides[411] washed into the Rhine when firemen fought to extinguish a fire at a Sandoz chemical company warehouse in Basel, Switzerland. It is assumed that the water used by the firemen to fight the flames washed the chemicals into the river, turning it entirely red. Often cited by media as one of the worst European ecological disasters, an estimated 500,000 fish were killed, several smaller organisms that fish fed on were wiped out, and many lower-level river microbes that keep a river alive were severely affected. The Sandoz spill affected water supplies in France, the Netherlands, Switzerland, and West Germany as water-processing plants were shut down. It also caused air pollution, with a foul-smelling red cloud settling on the city of Basel. This environmental disaster resulted in widespread public outrage and prompted the Rhine

[411] Aaron Schwabach, *The Sandoz Spill: The Failure of International Law to Protect the Rhine from Pollution*, 16 ECOL. L.Q. 443, 454-71 (1989).

Action Program of 1987; one of its primary stated goals was to achieve the return of salmon to the Rhine by the year 2000.[412]

A typical case of transboundary pollution caused by the occurrence of a particular incident, the Sandoz Chemical spill provides insight into how customary law and treaties can (or rather cannot) apply in such cases, and why afflicted downstream countries did not seek to redress the damages they suffered under this regime.

Under customary law, there are four major legal approaches to trans-boundary river pollution (1) absolute territorial sovereignty, (2) absolute territorial integrity, (3) limited territorial sovereignty, and (4) the community theory.[413]

I. **Absolute territorial sovereignty**: The absolute territorial sovereignty theory provides a riparian state with free reign over the use and treatment of waters flowing through its territory without concern for the downstream or other riparian states.[414] It is evident that this theory works only to the advantage of the upstream states. While its biased approach has been critically condemned and no state actually abides by it, literature review suggests that states do take advantage of this principle when wastes are dumped into rivers without regard for downstream states.

II. **Absolute territorial integrity**: In this approach downstream states can demand the flow of rivers from upstream states with no detriment to its quality and quantity. While this a more balanced approach, this approach and the previous one are both constrained in their strength by the fact that upstream states can also be downstream states and vice versa.[415]

III. **Limited Territorial Sovereignty**: This theory holds that states can use waters flowing through its territory in such a manner that it is not harmful or interferes with the use of the water by downstream states. The emphasis in this theory is the supposition of a moral obligation and responsibility towards a downstream state by the upstream state. This moral obligation was best exemplified in the *Trail Smelter* case where an international arbitral panel brought attention to one state's use of its natural resources manifesting as pollution in a third state. [416] The Limited Territorial Sovereignty approach finds resonance in several other international conventions such as Principle 21 of the United Nations' Stockholm Declaration on the Human Environment which reads as follows "[states have the] sovereign right to exploit their own resources pursuant to their own environmental policies but along with this right comes the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limit of national jurisdiction."[417]

---

[412] *On This Day—November 1, 1986: Chemical Spill Turns Rhine Red*, BBC NEWS, http://news.bbc.co.uk/onthisday/hi/dates/stories/november/1/newsid_4679000/4679789.stm (last visited Nov. 14, 2012).
[413] Albert E. Utton, *International Water Quality Law*, *in* INTERNATIONAL ENVIRONMENTAL LAW 154, 155 (1974).
[414] *See* Astrid Boos-Hersberger, *Transboundary Water Pollution and State Responsibility: The Sandoz Spill*, ANN. SURV. INT'L & COMP. L. 103, 111 (1997); Schwabach, *The Sandoz Spill*, *supra* note 411, at 454-55.
[415] Schwabach, *The Sandoz Spill*, *supra* note 411, at 454-71.
[416] *Id*.
[417] Report of the United Nations Conference on the Human Environment, U.N. Doc.A/CONF.48/14/Rev. 1 (1972).

IV. **Community Theory** – Calls for an approach of shared responsibility and commitment towards the management of a communal river basin. And while this might be most ideal as a goal, it is still aspirational and has found little application by the states.

The two primary treaties that could protect the Rhine river from pollution caused from incidents such as the Sandoz Spill and provide adequate compensation for affected parties are a) the Convention Concerning the International Commission for the Protection of the Rhine Against Pollution (Berne Convention) and b) the Convention for the Protection of the Rhine Against Chemical Pollution (Rhine Chemical Convention).[418]

A) Berne Convention: The Commission for the Protection of the Rhine Against Pollution (the Berne Convention) was signed in Berne on April 29, 1963, by Switzerland, West Germany, the Netherlands, France, and Luxembourg, and entered into force in 1965.[419] The Convention instituted an International Commission for the Protection of the Rhine against pollution and gave the Commission the responsibility to make all inquiries to ascertain the "nature, origin and scope" of pollution, identify the sources of pollution, recommend measures for pollution control, and finally define preventative actions that would be obligatory on all commission parties.[420] However, the Commission operates on a system of unanimous decision-making that makes consensual rule making very difficult. The EU has a single vote and is precluded from voting in case one of its member states votes. Switzerland is the only non-EU state and can therefore assume veto powers against the entire EU community.

B) The Rhine Chemical Convention:[421] The Berne Convention did not prove to be very effective in reducing the pollution levels of the Rhine. The level of chemicals in the Rhine continued to rise. The Rhine Chemical Convention further amended the Berne Convention by placing emphasis on two specific goals, to be achieved by the International Commission and the parties: "elimination of pollution of the Rhine by certain highly dangerous substances, enumerated in the *black list*, and reduction of pollution of the Rhine by substances listed in the *grey list*." All parties share responsibility to setting safe limits for chemical emissions and setting up a monitoring system and "emergency warning system." However, these amendments are once again weakened by the requirement of unanimous decision-making.

None of the affected states filed a case against Sandoz or Switzerland for the severe environmental and economic damages caused by the spill. A literature review suggests three reasons for the lack of legal action: 1) Sandoz's willingness to compensate; 2) complicity of the other downstream states in also causing pollution of the Rhine through other incidents; and 3) political and economic considerations.

However, the failure of the treaty regime in protecting the Rhine arises from the "toothless and feel-good"[422] nature of the convention. While conventions do prescribe limits on

---

[418] Schwabach, *The Sandoz Spill*, *supra* note 411, at 454-71.
[419] Alexandre Kiss, *The Protection of the Rhine Against Pollution*, 25 NAT. RESOURCES J. 613, 621 (1985).
[420] *Id*.
[421] Schwabach, *The Sandoz Spill*, *supra* note 411, at 454-71.
[422] *Id*.

the level of chemical pollutants, and ask parties to deploy early warning systems and institute safety mechanisms to prevent and respond to pollution, they lack both incentives for compliance and sanctions for noncompliance.[423] The lack of sanctions does not deter both states and private parties from continuing in a business-as-usual mode and fails to place any additional pressure on them to change their behavior. The requirement for consensus decision-making also gives rise to several structural challenges with the implementation of the conventions.[424] Finally, the Sandoz spill raises several questions regarding the nature of responsibility towards transboundary harm caused by one-off accidents versus harm caused by the ongoing and sustained actions of a group of states. This viewpoint and its applicability to Palau's efforts will be discussed in greater detail in the discussion section of this part.

b) International Tribunals – ITLOS

Case Study: MOX Plant Case (ITLOS—UK v. Ireland), Request for Provisional Measures, ITLOS—2001

This dispute finds its origins in UK's decision to set up a MOX facility in Sellafield, near the coast in Cumbria, England. This facility would reprocess spent nuclear fuel into a new fuel, known as mixed oxide fuel, or MOX, which could then be used for other light water energy generation reactors. Marine transport of radioactive waste that would be required from this plant potentially affected the Irish sea coast, prompting Ireland to start two international arbitrations against the UK – one under the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and the second under the 1992 Convention for the Protection of the Marine Environment of the North East Atlantic (OSPAR). The primary allegation was negligence by the UK with respect to environmental concerns. The OSPAR arbitral tribunal rejected Ireland's claims on July 2, 2003.

Specifically, Ireland alleged that the UK had failed to "carry out a proper assessment of the potential effects of the MOX Plant on the marine environment of the Irish Sea (Article 206 UNCLOS); a failure to cooperate with Ireland as its neighbor (Articles 123 and 197 UNCLOS) and a failure to take all the steps necessary to protect the marine environment of the Irish Sea (Articles 192–4, 207, 211, 213 and 217 UNCLOS)."[425] Ireland submitted a request in October 2001 for the prescription of provisional measures under article 290, paragraph 5, of the Convention to the International Tribunal for the Law of the Sea pending the constitution of the arbitral tribunal. [426]

The International Tribunal for the Law of the Sea is an independent judicial body established by the United Nations Convention on the Law of the Sea to adjudicate disputes arising out of the interpretation and application of the Convention. [427] ITLOS's order in the MOX Plant Case comprised of the following –

---

[423] *Id*.
[424] *Id*.
[425] Paul James Cardwell and Duncan French, *Who Decides? The ECJ's Judgment on Jurisdiction in the* MOX Plant *Dispute*, 19 OXFORD J. ENVTL. L. 121 (2007).
[426] ITLOS/Press 62: Order in The MOX Plant Case (Ireland v. United Kingdom) (last visited Oct. 28, 2012).
[427] *Id*.

1) It addressed UK's view that the tribunal was not competent to hear the case. The court responded that the dispute "concerns the interpretation and application of the Convention and no other agreement."[428]

2) According to article 290 of the Convention, the Tribunal may prescribe provisional measures if it considers them appropriate to "preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment" and if it considers the urgency of the situation so requires.[429] As the UK had provided assurance that no more marine transportation of radioactive waste would be carried out until 2002, the tribunal noted that the urgency of the situation and the short period up to the institution of the arbitral tribunal did not require the prescription of the provisional measures.

3) However, the tribunal found that it could still invoke article 290 of the Convention as well as "general international law"[430] that holds international cooperation to be vital to preventing pollution in the marine environment. Further, "prudence and caution"[431] would necessitate that the UK and Ireland take a discussion-based approach to sharing more information, monitoring marine pollution and implementing measures to preventing pollution.

Applying the argument to Palau's situation would imply that Palau should be able to take a "discussion-based" approach to addressing the severe impact of other states' greenhouse-gas emissions to its survival. Better still, major emitters of carbon dioxide should discuss the impact of their actions with Palau before going ahead and polluting. Unfortunately, this has not happened. Or, are negotiations at the UNFCCC illustrative of this discussion-based approach? The words "prudence" and "caution" are both found in the texts, speeches, dialogues and reams of documents that the UNFCCC negotiations generate, but the applicability of the discussion-based approach is largely suspect. This case still might provide some guidance to nation-states to consultatively arrive at solutions to problems of transboundary pollution.

c) European Court of Justice

(1) Case Study: Republic of Austria and the Czech Republic Concerning the Nuclear Power Plant in Temelín—2001

The Czech Republic's nuclear power plant in Temelín placed considerable strain on the relationship between the Czech Republic and Austria, culminating with the ECJ delivering a landmark decision. The Temelín nuclear plant is owned by the Czech energy-supply undertaking, ČEZ, a limited company incorporated under Czech law in which the Czech State holds a majority share. Czech authorities approved the construction and operation of the Temelín nuclear power plant in 1985 and it began operating on a trial basis on October 9, 2000.

---

[428] *Id*.
[429] *Id*.
[430] International Tribunal for the Law of the Sea, http://www.itlos.org/index.php?id=15 (last visited Oct. 28, 2012).
[431] *Id*.

In the aftermath of the Chernobyl disaster, Austria questioned the CR's decision to open a nuclear power plant close to its borders. In 2001, concerned about possible nuclear pollution and radioactivity, Land Oberösterreich, owner of an agricultural research land, located approximately fifty kilometers from the Temelín plant, referred the matter to Landesgericht Linz (Linz Regional Court in Austria) in 2001. Oberösterreich requested that the court stop the "actual or potential nuisance" from radioactivity by forcing the plant to adopt stringent technical standards or even shut it down if these improved safety measures would prove difficult to implement.[432]

The Czech Republic contested this situation, responding that the Temelín power plant had been authorized in 1985 by a Czech administrative decision and had been recognized by Austria in a protocol signed by both countries in 2000 and appended to the 2003 Act of Accession.[433]

To understand the case brought against the plant by Linz, it is useful to understand Section 364(2) of the Austrian Civil Code (ABGB), which states that "[t]he owner of land may prohibit his neighbor from producing effects, emanating from the latter's land, by effluent, smoke, gases, heat, odors, noise, vibration and the like, in so far as they exceed normal local levels and significantly interfere with the usual use of the land. Direct transmission, without a specific legal right, is unlawful in all circumstances." Also, Section 364a of the ABGB provides: "[h]owever, if the interference is caused, in excess of that level, by a mining installation or an officially authorized installation on the neighboring land, the landowner is entitled only to bring court proceedings for compensation for the damage caused, even where the damage is caused by circumstances which were not taken into account in the official authorization process."[434]

Landesgericht Linz ruled that since the plant had been officially authorized, Section 364a would apply. However, another higher Austrian court, the ObersterGerichtshof observed that only official authorizations by Austria would hold good in the case of Section 364a, and there was no necessity for the court to protect foreign interests against private Austrian interests. The Austrian Court therefore took the case to the ECJ and asked whether authorization granted by the Czech authorities for the Temelín nuclear power plant should be recognized in Austria in the framework of such judicial action.

The ECJ began by "recalling" that industrial activity carried out by the Temelín plant comes under the field of application of the EAEC [European Atomic Energy Community] Treaty. Companies operating an industry within any EU member state usually do so with the authorization of the state and therefore have the status of a state national. Hence, any discrimination against the company would constitute discrimination against a national (this privilege would also extend to CEZ) and the general principle of community law.

---

[432] Sophie Mosca, *ECJ: Austrian courts cannot shut down Temelín plant*, EUROPOLITICS, Nov. 5, 2009, http://www.europolitics.info/ecj-austrian-courts-cannot-shut-down-temelin-nuclear-plant-art253598-32.html.
[433] *Id*.
[434] Wolf-Georg Schärf, *The Temelín-Judgement of the European Court of Justice*, 2010 NUCLEAR L. BULL. 79, 79-91 (2010).

The ECJ then noted that the European Commission had found the plant to be compliant with all required safety standards and hence competent to run the plant. And, since the accession of the Czech Republic to the EU, checks had been periodically carried out at the Temelín plant and the commission had cleared the plant and indicated that "both in normal operation and in the event of an accident of the type and magnitude considered in the General Data, is not liable to result in radioactive contamination, significant from the point of view of health, of the water, soil or airspace of another Member State."[435] The ECJ therefore concluded that not recognizing the rights of the plant and the company implied discrimination under community law and since the plant posed no serious threat " public health, environment or property rights";[436] the plant cannot be shut down.

The *Temelín* case provides one of the rare examples of a government-backed private law suit brought against a public company in the matter of transboundary harm. The ECJ rendered a judgment in favor of the nuclear power plant, as the European Commission had found the plant compliant with all safety regulations and therefore posing no serious threat of transboundary harm. How this might apply to an ICJ advisory opinion, which would not rule on a specific conflict between nations, remains to be seen.

(2) Case Study: Mines de Potasse d'Alsace (1975)

This case deals with the pollution of the Rhine through discharges of salt waste by the Mines de Potasse d'Alsace (MDPA), a potash-mining corporation. Affected victims of the pollution—mostly Dutch gardening companies—took the MDPA to French and Dutch national courts. They alleged that MDPA had caused the salinization of the Rhine due to the discharges carried out by the company and sought compensation to repair the damages caused to their plantations. The Court of Rotterdam, however, claimed that it had no jurisdiction to try the case, stating that case has to be tried in the country where the discharges took place; in this case, France. The judgment was appealed against and the Court of The Hague referred the question to the ECJ, citing the interpretation of Article 5(3) of the Brussels Convention. Article 5(3) of the Convention reads: "A person domiciled in a Contracting State may, in another Contracting State, be sued in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred."[437]

The ECJ, while not providing any significant judgment on the case of transboundary pollution itself, did clarify that the plaintiff could sue the defendant either in the courts of the country where the pollutions occurred or in the country where the pollution emanated where. This judgment led to the ECJ clarifying the issues of jurisdiction in transboundary pollution cases and provided the plaintiff with the flexibility to choose a more favorable legal option. [438]

---

[435] *Id*.
[436] Mosca, *supra* note 432.
[437] Convention on Biological Diversity: Summary of Case Law and Case Studies Pertaining to Transboundary Environmental Damage, Meeting Document, UNEP/CBD/EG-L&R/1/INF/2 (2005), *available at* http://www.cbd.int/kb/record/meetingDocument/15853?Subject=LR.
[438] *Id*.

d) Arbitral Awards

Case Study: Lake Lanoux Arbitration (Spain v. France) (1957)

Lake Lanoux is situated in southern France near the border of Spain. The lake is fed by several streams that all originate in France. Water flows out of the lake in a single stream that joins the Carol River before crossing into Spain. In the 1950's, France began developing a hydroelectric power plant, which required the diversion of water from Lake Lanoux.[439] Despite France's promise to not alter the volume of water that would enter Spain through Carol River, Spain alleged that the power plant would unfavorably impact its rights to the waters and this would be inconsistent with the 1866 Treaty of Bayonne, which oversees the joint use the transboundary river.

The arbitration tribunal noted that Spain did not have a legitimate grievance as the 1866 treaty could not supersede the sovereign right of a state to exploit its own resources and therefore France had not violated the treaty. State sovereignty could be restricted only in exceptional cases. It also noted "there was no need of a prior consent or agreement of the interested states, but only a procedural right of the affected state to be heard in advance." [440] Finally, it noted that France had taken adequate measures to prevent damage to Spain and Spanish users by guaranteeing to restore the original water flow.

e) Discussion

The basis of several judgments of the ECJ, conventions and arbitral tribunals as regards transboundary harm highlight the following issues and doctrines:

a) Principle of territorial sovereignty
b) Degree of harm caused by transboundary pollution
c) Unintended or accidental nature of transboundary pollution and
d) Non-recurrent or "one-off" nature of transboundary pollution

In several cases of international disputes on shared waterways, the principle of territorial sovereignty finds most resonance. In the case of Lake Lanoux, regarding Spain's complaint that France had not discussed the construction of the power plant with them before going ahead, the arbitral tribunal noted that doing so would impinge on the territorial sovereignty of France:

> " [t]o admit that jurisdiction in a certain field can no longer be exercised except on the condition of, or by way of, an agreement between two States, is to place an essential restriction on the sovereignty of a State, and such restriction could only be admitted if there were clear and convincing evidence…… this amounts to 'admitting a 'right of assent', 'a right of

[439] Food and Agriculture Organization of the United Nations, Summary of Decisions by International Tribunals Including Arbitral Awards, Lake Lanoux Case—Award of 16 November 1957 rendered by an Arbitral Tribunal, http://www.fao.org/docrep/005/w9549e/w9549e07.htm#bm07.2.7 (last visited May 25, 2013).
[440] Convention on Biological Diversity: Summary of Case Law and Case Studies Pertaining to Transboundary Environmental Damage, *supra* note 437.

> veto', which at the discretion of one State paralyses the exercise of the territorial jurisdiction of another." [441]

Additionally, if the benefits that a state derives from carrying out certain activities far outweigh the harm caused to a third state, then the activity is not "unlawful" and the state is under no obligation to seek the consent of the third state. [442] Extending this rationale to the present challenge of GHG emissions one could infer that the developed and polluting states can never be held accountable for their contribution to global warming, as they could argue (as they do) that the diminution of economic activities carried out by them would adversely impact the quantum of benefits that their nation derives from these activities.

However, having placed the primary emphasis on the territorial jurisdiction of a state to decide how it exploits its resources, the tribunal also made reference to the obligations of a state towards the international community and third states:

> "[t]erritorial sovereignty plays the part of a presumption. It must bend before all international obligations, whatever their source, but only for such obligations"[443]

As alluded to earlier in Section 1, the principle of "Limited Territorial Sovereignty" is found in other international conventions such as Principle 21 of the United Nations' Stockholm Declaration on the Human Environment which reads as follows: "[States have the] sovereign right to exploit their own resources pursuant to their own environmental policies but along with this right comes the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limit of national jurisdiction."[444]

Other than territorial sovereignty, the reason often cited for the lack of potency of international law in the cases of transboundary harm is the degree of harm caused by activity. "A state is only protected against environmental interference that causes significant harm."[445]

The *Temelín* case reinforces this viewpoint, wherein the ECJ found the nuclear power plant in compliance with all safety regulations and thus refused Austria's request to shut the plant down. In essence, the court did not find threat of considerable harm to Austria from the operations of the nuclear power plant. The Trail Smelter case also brings to light the degree of transboundary interference, i.e., the assertion that some pollution is bound to take place as a result of a state's activities:

> "[s]mall amounts of sulphur dioxide will necessarily escape from the blast furnace and other operations in the Smelter, but these have never been

---

[441] RENÉ LEFEBER, TRANSBOUNDARY ENVIRONMENTAL INTERFERENCE AND THE ORIGIN OF STATE LIABILITY (1996).
[442] *Id*.
[443] *Id*.
[444] REPORT OF THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT, U.N. Doc. A/CONF.48/14/Rev. 1 (1972).
[445] *Id*.

> specifically designated in any of the regimes which we have laid down, simply because they are insignificant in amount." [446]

Other courts and tribunals have also emphasized the accidental or unintended nature of transboundary harm from an activity. There are cases of willful transboundary harm such as the *Trafigura* case, in which a British oil company was fined by a Dutch court for transporting toxic waste to a developing country, Ivory Coast. Although, in this case, the polluter was a private entity and not a state.

Transboundary pollution may occur during the "normal course of an activity's operations."[447] Any such inadvertent occurrences of harm could be redressed via compensation rather than a complete cessation of that activity. This is one of the reasons why the downstream states in the case of Sandoz and the Rhine did not pursue legal action against Sandoz. The fire at the Sandoz chemical plant and the subsequent pollution of the Rhine was deemed accidental. Additionally, the downstream states found themselves on shaky ground to bring proceedings against Sandoz and Germany given that that their own activities could result in unintended pollution.

With regards to the GHG emissions of developed and polluting states causing severe climate related impacts to small island states, the emissions have taken place over several decades and represents a case of sustained pollution rather than one-off instance of pollution. While there is little precedent in international law for cases of this nature, if transboundary environmental harm was and is being caused through the ongoing and unceasing actions of a state, then Palau could use that fact to refute the idea that GHG emissions are "accidental", "one-off" or "unavoidable."

Furthermore, the consequences of climate change are graver, longer lasting, and, at least in some cases, irreparable. The seriousness of sea-level rise obliterating the territory of low lying island states and destroying entire communities and economies is no comparison to an act of river or air pollution. These damages also cannot be easily redressed via compensation. The quantum of compensation required is much too significant for one state or even several states to commit to. The outcome of COP 18 at Doha only strengthens this assertion where negotiators have failed to commit to a roadmap that will take global climate finance to at least a $100 billion per year mark by 2020. Therefore cessation of activities that will avoid exacerbating climate change and protect Palau and other island states becomes imperative.

Lastly, the provocations for invoking international law in instances of transboundary harm are not just environmental in nature. There could be perceived threats to the values or principles of one state from another state's activities. The ban of atmospheric nuclear testing, for instance, was motivated by environmental concerns but also by principles of arms control. What finally pushed Australia and New Zealand to take France to court seems to have been the environmental impact of France's nuclear testing in the Pacific oceans. [448] In the case of Palau's campaign, the

---

[446] *Id*.
[447] *Id*.
[448] REPORT OF THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT, U.N. Doc. A/CONF.48/14/Rev. 1 (1972).

right to exist and imminent dissolution of state sovereignty provide strident *non*-environmental reasons to claim support from the international courts.

In sum, should one conclude that there exists a paucity of case law and case studies pertaining to transboundary environmental damage in Europe that could provide clear and unequivocal support to Palau and other small island states in bringing grievances of transboundary harm against large GHG emitting states or entities? Although it might appear so at first glance, on going deeper, the following factors provide ample basis to Palau to invoke legal and moral values such as the principle of precautionary approach, limited territorial sovereignty, and community theory in support of its campaign against transboundary harm:

1) The uniquely pervasive, significant, and irreversible damage threatened by climate change;

2) The inability of the emitters to financially redress the consequences of climate change; and

3) The sustained and on-going influence of GHG emissions across several generations.

3. AGREEMENTS AND CONVENTIONS ADDRESSING TRANSBOUNDARY HARM

In addition to the conventions discussed above in relation to transboundary river pollution, there are numerous other international and regional agreements that reaffirm the principle of transboundary harm. While these conventions and agreements address varying parts of the environment, ranging from outer space to the oceans, they all prohibit states from using their environment or international commons in such a way as to cause significant harm to other states. These conventions may serve as a basis for a claim based on transboundary harm in the climate change context.

It may also be useful to look at these conventions in relation to the precautionary principle. The precautionary principle has been gaining prominence in international environmental law and may lend further weight to these international agreements. The precautionary principle states that, in the face of scientific uncertainty, states must err on the side of caution when conducting actions that may impact the environment. It "requires restraint of any human activity that may adversely affect biodiversity"[449] and "lowers the burden of proof required for blocking proposed or existing activities that may have serious long-term harmful consequences."[450]

The precautionary principle is well established and may even be considered to be customary international law. At the very least it is "becoming customary international law."[451] It has been incorporated into several international agreements and documents that pertain to fishing, such as the FAO Code of Conduct for Responsible Fisheries, Principle 15 of the Rio

[449] Catherine Tinker, *Responsibility for Biological Diversity Conservation Under International Law*, 28 VAND. J. TRANSNAT'L L. 777, 779 (1995).
[450] *Id*.
[451] *Id*. at 806.

Declaration, and the Convention on Biological Diversity.[452] Since there is a clear responsibility for states to prevent transboundary harm, paired with the precautionary principle the following transboundary harm precedents will carry even greater weight with regards to climate change.

The following conventions support the international standard of preventing transboundary harm. They also demonstrate how pervasive the precautionary principle is in international law:

a) Stockholm Declaration on the Human Environment[453] Principle 21:

The Stockholm Declaration brought environmental issues into the realm of international law and reinforced environmental principles that were gaining traction around the world.[454]Principle 21 is perhaps the Declaration's most important contribution. It has been incorporated into several later conventions, including the LRATP Convention, the 1985 Vienna Convention for the Protection of the Ozone Layer, and the CBD.[455] Principle 21 states:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Principle 21 is regarded by Canada and U.S. as a principle of customary international law.[456]

b) Convention on Biological Diversity[457]

The Convention on Biological Diversity (CBD) was signed in 1992. Its primary purpose is to promote the conservation of biodiversity through mechanisms such as sustainable use and marine protected areas. The CBD is future-oriented, emphasizing that the present population should not exhaust the earth's resources for the future. This is similar to the principle against transboundary harm, except from a temporal standpoint rather than a geographic one. The CBD also rearticulates the principle of geographic transboundary harm in Article 3. Article 3 states:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

---

[452] Fredric M. Serchuk, Denis Rivard, John Casey, & Ralph K. Mayo, *A Conceptual Framework for the Implementation of the Precautionary Approach to Fisheries Management Within the Northwest Atlantic Fisheries Organization* (NAFO). 1999. NOAA Tech. Memo. NMFS-F/SPO-40. P. 106.
[453] U.N. Doc. A/Conf.48/14/Rev. 1(1973); 11 ILM 1416 (1972).
[454] PHILLIPPE JOSEPH SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 36-37 (2003).
[455] NICOLAS DE SADELEER, ENVIRONMENTAL PRINCIPLES: FROM POLITICAL SLOGANS TO LEGAL RULES 63 (2002).
[456] Bret Benedict, *Transnational Pollution and the Efficacy of International and Domestic Dispute Resolution Among the NAFTA Countries*, 15 L. & BUS. REV. AM. 863, 871 (2009).
[457] 1760 UNTS 79; 31 ILM 818 (1992)

Article 3 is the first instance that the language of Principle 21 of the Stockholm Declaration appears in binding form rather than as "soft law" or as customary international law.[458] It therefore places an express limitation on the sovereignty of nations in exploiting their natural resources. While there are no affirmative actions States have to take under the CBD, they have an unequivocal obligation to prevent harm to the environment of other States. Much of the Convention is seen as toothless because it provides states with great leeway in how strictly they abide by its provisions. Article 3, in contrast, is a strong reaffirmation of the principle of transboundary harm with which states must strictly comply.

c) UN Charter of Economic Rights and Duties of States[459]

The UN Charter of Economic Rights and Duties of States was the first convention to clearly articulate a state's right to sovereignty over its own natural resources. First proposed by Mexico, this Charter was supported by developing countries whose development was limited by their limited economic power.[460] It emphasized the principle of equality, especially as it pertains to trade and development.[461] Additionally, in Article 30 it addresses the equal right to enjoy the environment. It states, in part:

> All States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction….

d) The ECE Convention of 1979 on Long-Range Transboundary Air Pollution[462]

The ECE Convention on Long-Range Transboundary Air Pollution (LRTAP) was drafted to address acid rain after it was discovered that sulfur emissions were contributing to the acidification on lakes in Europe.[463] The LRTAP Convention spurred eight additional protocols pertaining to specific pollutants.[464]

It has since been learned that greenhouse gases contribute significantly to ocean acidification. As with anthropogenic climate change, the effects of the atmospheric pollutants addressed by the Convention were widespread and had to be addressed globally.[465] The

---

[458] John Charles Kunich, *Losing Nemo: The Mass Extinction Now Threatening the World's Ocean Hotspots*, 30 COLUM. J. ENVTL. L. 1, 61 (2005); Tinker, *supra* note 449, at 806-08.
[459] UN General Assembly, *Charter of Economic Rights and Duties of States: resolution / adopted by the General Assembly*, 17 Dec. 1984, A/RES/39/163.
[460] Peter VerLoren van Themaat, THE CHANGING STRUCTURE OF INTERNATIONAL ECONOMIC LAW: A CONTRIBUTION OF LEGAL HISTORY, OF COMPARATIVE LAW, AND OF GENERAL LEGAL THEORY TO THE DEBATE ON A NEW INTERNATIONAL ECONOMIC ORDER 273 (1981).
[461] *Id*. at 273.
[462] The ECE Convention of 1979 on Long-Range Transboundary Air Pollution, 18 I.L.M. 1442 (1979) [hereinafter ECE Convention].
[463] *Reduction of Long-Range Transboundary Air Pollution*, MINISTRY OF ENVIRONMENTAL PROTECTION AND DEVELOPMENT, http://www.varam.gov.lv/eng/darbibas_veidi/transboundary_air_pollution/.
[464] SANDS, *supra* note 454, at 326.
[465] *Id*.

Convention obligates parties to limit the emission of long-range transboundary air pollution through policies, strategies, and improved technology.[466] The Convention defines "long-range transboundary air pollution" in a way that could apply to greenhouse gases. It defines it as:

> air pollution whose physical origin is situated wholly or in part within the area under the national jurisdiction of one State and which has adverse effects in the area under the jurisdiction of another State at such a distance that it is not generally possible to distinguish the contribution of individual emission sources or groups of sources."[467]

Greenhouse gases seem plainly to fall under this definition. Article 2 then requires states to reduce their long-range transboundary air pollution:

> The Contracting Parties, taking due account of the facts and problems involved, are determined to protect man and his environment against air pollution and shall endeavour to limit and, as far as possible, gradually reduce and prevent air pollution including long-range transboundary air pollution.

e) Nordic Environmental Protection Convention[468]

The Nordic Environmental Convention (NEPC) was signed on 19 February 1974, and it entered into force on 5 October 1976.[469] The NEPC confers procedural rights on the signers to prevent and respond to transboundary harm.[470] The NEPC essentially allows the signatory States to legally address outside pollution as they would internal pollution.[471] Article 1 is relevant to transboundary harm and states:

> For the purpose of this Convention environmentally harmful activities shall mean the discharge from the soil or from buildings or installations of solid or liquid waste, gas or any other substance into water courses, lakes or the sea and the use of land, the seabed, buildings or installations in any other way which entails or may entail environmental nuisance by water pollution or any other effect on water conditions, sand drift, air pollution, noise, vibration, changes in temperature, ionizing radiation, light etc. The Convention shall not apply insofar as environmentally harmful activities are regulated by a special agreement between two or more of the Contracting States.

---

[466] *Id*.
[467] ECE Convention, *supra* note 118, Art.1(b).
[468] Nordic Environmental Protection Convention, 8 *I.L.M*. 591 (1974).
[469] Timo Koivurova, *The Future of the Nordic Environment Protection Convention*, 66 NORDIC J. INT'L L. 505 (1997).
[470] *Id*. at 508-09.
[471] Ellen Margrethe Basse, *Environmental Liability—Modern Developments*, 41 SCANDINAVIAN STUD. L. 31, 40 (2001).

f) United Nations Convention on the Law of the Sea[472]

Under the UN Convention on the Law of the Sea (UNCLOS), Party States are required "to prevent, reduce and control pollution of the marine environment from any source," including "the release of toxic, harmful or noxious substances, especially those that are persistent**...** from land-based sources, [or] from or through the atmosphere ...States are also required under UNCLOS to take "all measures necessary" to ensure that activities under their jurisdiction are conducted in a manner that does not cause pollution damage to other States and their environment.

g) Convention on International Liability for Damage Caused by Space Objects[473]

The UN endorsed the Space Objects Convention in November 1971. Since that time, it has only been applied once—when Canada brought a claim against the Soviet Union for the crash of Cosmos 954.[474] The Convention lays out a scheme of unlimited, strict international liability rather than one based on negligence responsibility.[475] It also provides for joint liability where more than one State has launched the object.[476] Article VIII reads:

> 1. A State which suffers damage, or whose natural or juridical persons suffer damage, may present to a launching State a claim for compensation for such damage.
>
> 2. If the State of nationality has not presented a claim, another State may, in respect of damage sustained in its territory by any natural or juridical person, present a claim to a launching State.
>
> 3. If neither the State of nationality nor the State in whose territory the damage was sustained has presented a claim or notified its intention of presenting a claim, another State may, in respect of damage sustained by its permanent residents, present a claim to a launching State.

h) Agreement Between the Government of the United States of America and the Government of Canada on Air Quality (1991)[477]

This Agreement was signed between President George H.W. Bush and Prime Minister Brian Mulroney in March 1991[478] in response to the problem of acid rain. The purpose of the

---

[472] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.
[473] Mar. 29, 1972, 24 U.S.T. 2389, T.I.A.S. No. 7762, 961 U.N.T.S. 187.
[474] Joseph A. Burke, Note, *Convention on International Liability for Damage Caused by Space Objects: Definition and Determination of Damages After the Cosmos 954 Incident*, 8 FORD. INT'L L.J. 255, 255-6 (1985).
[475] *Thomas Gehring & Markus Jachtenfuchs*, *Liability for Transboundary Environmental Damage: Towards a General Liability Regime?*, 4 ENVTL. J. INT'L L. 92 (1993).
[476] *Id*.
[477] Agreement Between the Government of the United States of America and the Government of Canada on Air Quality (1991), http://www.epa.gov/airmarkets/progsregs/usca/agreement.html [hereinafter Air Quality Agreement].

Agreement was to require both parties to limit sulfur dioxide and nitrogen oxide emissions and to improve air quality by establishing "a practical and effective instrument to address shared concerns regarding transboundary air pollution."[479] The EPA's 1996 Progress Report determined that the Agreement was a success.[480] This marked a turning point in the collaboration between Canada and the U.S. in addressing transboundary environmental issues and led to a number of other cooperative actions such as merging environmental data and establishing means of jointly addressing air quality research and solutions.[481] It is also noteworthy that greenhouse gases appear to fall under the Agreement's definition of "air pollution."

Article I of the Agreement defines the following terms:

1. "Air pollution" means the introduction by man, directly or indirectly, of substances into the air resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems and material property and impair or interfere with amenities and other legitimate uses of the environment, and "air pollutants" shall be construed accordingly**;**

2. "Transboundary air pollution" means air pollution whose physical origin is situated wholly or in part with the area under the jurisdiction of one Party and which has adverse effects, other than effects of a global mature, in the area under the jurisdiction of the other Party.

i) Conclusion

These conventions show that in many instances the international community has already committed to preventing substantial transboundary harms. In some cases, such as the Agreement Between the Government of the United States of America and the Government of Canada on Air Quality, countries have already implicitly agreed to regulate GHG emissions since greenhouse gases meet the definition of "transboundary air pollution." In addition, these conventions show the prevalence of the precautionary principle, which, as discussed above, may serve as a compelling basis for arguing Palau's case.

4. GREENHOUSE GASES AS POLLUTION

Over the past decade, as the implications of climate change have become more apparent, some States have begun to consider this harm in their environmental impact assessments. States have taken pollution, habitat destruction, erosion, and other damage to the environment into consideration in their project approval processes since the 1970s. Many are now considering greenhouse gas emissions before allowing projects to commence since climate change resulting

---

[478] Leslie R. Alm, *Scientists and the Acid Rain Policy in Canada and the United States*, 22 SCI., TECH. & HUMAN VALUES 349 (1997).
[479] Air Quality Agreement, *supra* note 477, art. II.
[480] Alm, *supra* note 478, at 350-51.
[481] *Id*. at 351.

from these emissions is perhaps the most devastating result of human impact in our species' history. This shows that countries are increasingly treating greenhouse gas emissions as they would any other pollutant and therefore supports the argument that greenhouse gases fit into the existing transboundary harm legal framework like any other pollutant.

a) Australia

In Australia, Environmental Impact Assessments (EIAs) are required under the Environment Protection and Biodiversity Conservation Act of 1999. These EIAs are meant to "ensure activities that are likely to have significant impacts on the environment are properly assessed."[482] Courts have found that these EIAs and state planning statutes must include climate change considerations.[483]

In *Australian Conservation Foundation &Ors v. Minister for Planning*,[484] the Victorian Civil and Administrative Tribunal (VCAT) held that International Power Hazelwood, a power company developing a coal field to extend its supply until 2031, had to include in its EIA a report on the increased greenhouse gas emissions from the burning of that coal. The VCAT found that permitting development of the coal field would "make it more probable that the Hazelwood Power Station will continue to operate beyond 2009; which, in turn, may make it more likely that the atmosphere will receive greater greenhouse gas emissions than would otherwise be the case which may be an environmental effect of significance."[485]

The New South Wales (NSW) Land and Environment Court held in *Gray v. Minister for Planning*[486] that EIAs must incorporate the impact of greenhouse gas emissions from coal-fired power plants. The court relied on the principle of intergenerational equity and the precautionary principle to find that the New South Wales Director General of Planning could not accept an EIA that failed to consider the long-term greenhouse gas emissions of a project. It reasoned that:

> The fact that there are many contributors [to greenhouse gas emissions] globally does not mean the contribution from a single large source such as the Anvil Hill Project…should be ignored in the environmental assessment process…That the impact from burning the coal will be experienced globally as well as in NSW, but in a way that is currently not able to be accurately measured, does not suggest that the link to causation of an environmental impact is insufficient.[487]

---

[482] EPBC Act, ch. 1, §3(2)(d) (quoted in Bach & Brown, *infra* note 483).
[483] Tracy Bach & Justin Brown, *Recent Developments in Australian Climate Change Litigation: Forward Momentum from Down Under*, 8 SUST. DEV. L. & POL'Y 39 (2007).
[484] *Austl. Conservation Found. & Ors v. Minister for Planning*, [2004] VCAT 2029 (Austl.).
[485] *Id.* (quoted in Bach & Brown, *supra* note 483, at 42).
[486] *Gray v. The Minister for Planning, Dir.-General of the Dep't of Planning & Centennial Hunter Pty Ltd.,* [2006] NSWLEC 720 (Austl.).
[487] *Id.* at ¶ 98 (quoted in Bach & Brown, *supra* note 483, at 42).

b) Canada

Canada is one of the leaders in incorporating climate change impacts into Environmental Impact Assessments.[488] In 2003, the Canadian government began working toward integrating Greenhouse Gas Impact Assessments into the general environmental impact assessment framework.[489] Canada now requires the consideration of project GHG emissions for all major development projects. In 2004 the Canadian government created the Greenhouse Gas Emission Reporting Program (GHGRP). The GHGRP requires all industries that emit 50,000 tons or more of greenhouse gases in carbon dioxide equivalent units per year to submit a report.[490]

n *Pembina Institute for Appropriate Development v. Canada (Attorney Genera,)*,[491] Canada's Federal Court struck down the Joint Review Panel's decision to approve an oil sands mine in northern Alberta. The Panel, which consisted of Canadian and Albertan government officials, was in error, according to the Court, because it failed to explain why the mine's greenhouse gas emissions were acceptable. According to the EIA drafted by Imperial Oil Company Ltd., the company constructing the mine, the mine would emit 3.7 million tons of CO_2 equivalent each year.[492] The Court agreed with the plaintiffs that the Panel "fail[ed] to provide a cogent rationale for its conclusion that the adverse environmental effects of the greenhouse gas emissions of the Project would be insignificant."[493] The Panel should not have "dismissed as insignificant the greenhouse gas emissions without any rationale as to why the intensity-based mitigation would be effective to reduce the greenhouse gas emissions…to a level of insignificance."[494] Ultimately, the Court determined, "given the amount of greenhouse gases that will be emitted to the atmosphere and given the evidence presented that the intensity based targets will not address the problem of greenhouse gas emissions, it was incumbent upon the Panel to provide a justification for its recommendation on this particular issue."[495]

c) Brazil, Denmark, France, and South Africa

In June 2012, Brazil, Denmark, France, and South Africa formed a group, "Friends of Paragraph 47," to advance corporate sustainability reporting, as emphasized in Paragraph 47 of the Rio+20 outcome document.[496] The group held their first meeting in August 2012.[497]

---

[488] Shardul Agrawala, Arnoldo Matus Kramer, Guillaume Prudent-Richard, & Marcus Sainsbury, *Incorporating Climate Change Impacts and Adaptation in Environmental Impact Assessments: Opportunities and Challenges*, 24 OECD ENVTL. WORKING PAPER 14 (2010).
[489] *Greenhouse Gas Impact Assessment*, http://webarchive.nationalarchives.gov.uk/+/http://www.bis.gov.uk/policies/better-regulation/policy/scrutinising-new-regulations/preparing-impact-assessments/specific-impact-tests/greenhouse-gas-impact-assessment (last visited Nov. 7, 2012) .
[490] *Facility Greenhouse Gas Reporting: Greenhouse Gas Emissions Reporting Program*, http://www.ec.gc.ca/ges-ghg/default.asp?lang=En&n=040E378D-1 (last visited Nov. 8, 2012).
[491] *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302, 323 F.T.R. 297
[492] *Id*. at ¶70.
[493] *Id*. at ¶70.
[494] *Id*. at 78.
[495] *Id*. at 79.
[496] *Leading Governments Join Together To Commit To Corporate Sustainability Reporting*, Global Reporting Initiative, (Jul. 4, 2012), https://www.globalreporting.org/information/news-and-press-center/Pages/Leading-governments-join-together-to-commit-to-corporate-sustainability-reporting.aspx.

Individually these countries have already initiated corporate sustainability reporting.[498] Greenhouse gas emissions are becoming a centerpiece of these reports.[499] South Africa's King III Code, for example, requires all companies listed on the Johannesburg Stock Exchange to report their sustainability performance.[500] These companies are increasingly incorporating their gas emissions into their reports.[501]

d) United Kingdom

Since 2003, the United Kingdom's Department of Energy and Climate Change has worked toward integrating Greenhouse Gas Impact Assessments into their EIA process. At the Rio+20 Earth Summit in 2012 the Prime Minister announced that, starting in April 2013, all companies listed on the London Stock Exchange's main market will be required to report their greenhouse gas emissions. The government leaves open the possibility of extending this requirement to all large companies in 2016.[502]

e) The United States

In December 2011 the EPA established mandatory GHG reporting for large sources and suppliers in the U.S.[503] Many courts have held that greenhouse gas emissions are an essential factor to be considered in environmental impact assessments under the National Environmental Protection Act (NEPA), which requires assessments whenever a federal agency proposes "legislation [or] other major [f]ederal actions significantly affecting the quality of the human environment."[504] The following cases relate to requiring impact assessments for greenhouse gases:

---

[497] *First Meeting of the Group of Friends of Paragraph 47 on Corporate Sustainability Reporting*, FRANCE DIPLOMATIE (Sept. 17, 2012), http://www.diplomatie.gouv.fr/en/global-issues/sustainable-development-1097/climate-change/rio-20-united-nations-conference/events-7693/article/first-meeting-of-the-group-of.

[498] *Id*.

[499] *Integrated Reporting: The Influence of King III on Social, Ethical and Environmental Reporting*, AACA, www.accaglobal.com/content/dam/acca/global/PDF-technical/integrated-reporting/tech-tp-iirsa.pdf p. 34. (2012).

[500] *Id*. at 6.

[501] *Id*. at 34.

[502] *Firms on London Stock Exchange Will Be Forced to Report CO2 Data*, http://www.environmentalleader.com/2012/06/20/firms-on-london-stock-exchange-will-be-forced-to-report-CO2-data/.

[503] Sarah E. White, The Rising Global Interest in Sustainability and Corporate Social Responsibility Reporting, THOMSON REUTERS, http://sustainability.thomsonreuters.com/2012/10/05/the-rising-global-interest-in-sustainability-and-corporate-social-responsibility-reporting/.

[504] National Environmental Policy Act of 1969, Pub. L. 91-190, § 102, 83 Stat. 852 (1970)

[504] 17 (codified as amended at 42 U.S.C. § 4321 (2006)) (quoted in Kevin T. Haroff, *On Thin Air: Standing, Climate Change, and the National Environmental Policy Act*, 46 VALPARAISO U. L. REV. 411, 415).

***(1) Border Power Plant Working Group v. Department of Energy*, 260 F. Supp. 2d 997 (S.D. Cal. 2003):** This case concerned the construction of transmission lines from power plants in Mexico to the United States. The court held that the Department of Energy (DOE) failed to adequately complete an EIA for the lines because it did not analyze GHG emissions from the power plants in Mexico that were going to supply power to the U.S. The court ruled that it did not matter that carbon dioxide was not regulated as a pollutant under federal or California law. The impact assessment should have examined the resulting GHG emissions nevertheless.

***(2) Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F. 3d 1172 (9th Cir. 2008)(NHTSA):** This ruling held that the Bush Administration failed to complete an adequate impact assessment by not considering the effects its new, relaxed gas-mileage standards for pickup trucks and SUVs would have on global warming.

***(3) Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520 (8th Cir. 2003):** The Eighth Circuit held that increased coal consumption from construction of new and upgraded railroad lines to transport coal from Wyoming to Midwestern power plants required consideration of GHG emissions.

(4) California: California now requires its impact assessments to include greenhouse gases. California law states, "After initial litigation and uncertainty, subsequent legislation and issuance of amendments to the CEQA Guidelines for analyzing GHG emissions have made clear that climate change impacts are subject to CEQA analysis."[505]

5. CONCLUSION

These cases, statutes, and regulations demonstrate that the world has begun including greenhouse gas emissions in the definition of pollution and environmental harm. Since, to date, no transboundary harm case has been brought regarding greenhouse gases specifically, these cases would provide support to the argument that greenhouse gas emissions do constitute harmful transboundary pollutants. Both the effects, and the greenhouse gases themselves, are treated as environmental harms that must be regulated. Palau's campaign would simply be a means of enforcing this emerging legal view and holding states accountable.

GHG emissions and the harm they cause challenge traditional models of liability and national sovereignty. In Anglo-American law, plaintiffs can only file a lawsuit over harms that are relatively easy to identify. The injury, the causal chain, and the wrongdoer must be fairly clear. Climate change does not fit this model. Similarly, the modern nation-state system is built on the idea of territorial sovereignty. Countries have sovereign power over their own territory. International law has been, at best, slow and sporadic in recognizing that actions, say, on French

[505] 14 Cal. Code Regs.21083.05 (SB97) and 15000-15387 (CEQA Guidelines).

territory can lead to environmental harm in Spain or Germany. Furthermore, even when international law does recognize the possibility of such harm, judges and arbitrators may still be reluctant to impinge on sovereign rights. Furthermore, international law so far has focused more on individual incidents of pollution, rather than on sustained long-term pollution.

Nevertheless, legal systems are catching up to the reality of transboundary environmental harm. America's Clean Air Act contains provisions regarding both interstate pollution within the United States and international pollution. Principle 21 of the Stockholm Declaration clearly obligates countries to prevent activities within their borders from causing environmental harm in other nations. The UN Charter of Economic Rights and Duties of States imposes similar restrictions. The American Supreme Court has all but said that climate change harm is beyond dispute. While none of these precedents give incontrovertible support to Palau, they demonstrate that both domestic and international legal systems already recognize transboundary environmental harm in a variety of guises. Extending these principles to climate change is a natural step in the evolution of international environmental law.

C. MAKING THE CASE TO THE UNITED STATES

Negotiations under the United Nations Framework Convention on Climate Change (UNFCCC) have development somewhat in recent years, especially regarding climate change financing mechanisms, but no significant progress has been made towards achieving the necessary international agreement to keep average global temperature rise within a range that would prevent severe damage. An ICJ Advisory Opinion would help to accelerate international negotiations by providing a clearer legal framework for the negotiations within UNFCCC, which seeks a global solution for climate change. In particular, this Section focuses on the benefits of the resolution initiative for the United States by highlighting four main reasons why it serves the national interest of the United States to promote this initiative. Although this Section focuses on the United States, the arguments apply more broadly to any large emitting nation that believes at present that significant GHG emissions reductions are not in its interest.

First, there is overarching consensus among high-level U.S. officials, research institutions, and the United Nations (U.N.) that furthering the international rule of law contributes to peace and prosperity on a global level, which is in the interest of all individual nations. An Advisory Opinion from the ICJ would bolster the international rule of law by providing a legal baseline that clarifies international law on climate change, which is arguably the most serious challenge currently facing the international community.

Second, climate change causes direct economic damage to the United States, which is likely to increase in the long run. Extreme weather events such as hurricanes and heat waves will become more frequent and severe; the risk of forest fires will increase in areas already at risk; floods and droughts will intensify; and vulnerability to sea level rise and storms will be amplified. In addition to such direct costs of climate change, there are also significant secondary effects, including rising health costs. It is imprudent to wait until the costs of climate change become insurmountable when action may be taken now at a much lower cost.

Third, climate change poses a direct threat to the national security of the United States due to the likely impacts of climate change in other countries. For example, food insecurity in

other nations will destabilize populations and may contribute to political instability. The consequences of such instability include creating power vacuums in which criminal and terrorist activity can thrive. An illustrative example is the case of piracy and terrorism in Somalia, where the lack of a functioning central government allows pirates and Al-Shabaab to operate. These conditions impact the national interests of the United States directly. Furthermore, climate change will affect a myriad of countries around the world, exponentially increasing such insecurity and also affecting the accessibility of natural resources by the United States.

Finally, by supporting the resolution initiative, the United States would improve international relations generally and the country's role as a global leader more specifically. Opposing the resolution initiative despite the broad coalition that has formed between Small Island Developing States (SIDS) and many European, African, and Asian countries (including some of the closest allies of the United States) is a step towards international isolation on what may be the most critical global issue of our time.

1. INTRODUCTION

In 2011, the former President of the Republic of Palau, Johnson Toribiong, initiated a campaign at the U.N. General Assembly to seek an Advisory Opinion from the ICJ on State responsibility for transboundary harm resulting from anthropogenic climate change.[506] Specifically, the resolution initiative seeks clarification on State responsibility for emissions of GHGs within domestic jurisdictions that contribute to serious harms in other countries.

Although commendable in theory, in reality international negotiations to reduce emissions that contribute to climate change have not progressed significantly since they began in 1992 under the auspices of the UNFCCC. Unless urgent action is taken by the international community to reduce GHG emissions, it will be impossible to prevent a greater than 2°C increase in average global temperatures. The potential consequences of rising GHG levels are immense and far-reaching, including melting polar icecaps, rising sea levels and coastal flooding, more frequent heat waves, and food insecurity that disproportionately affects some of the world's most vulnerable communities.[507] In short, global warming is "the most pressing environmental challenge of our time"[508] and climate change presents a "realistic threa[t] of unlimited harm" to the entire world.[509]

This section argues that an Advisory Opinion from the ICJ will accelerate slow-moving international negotiations by providing much needed clarification on the international rule of law as it pertains to climate change. In addition, the Section highlights some of the ways in which the

---

[506] *See* Aaron Korman & Giselle Barcia, *Rethinking Climate Change: Towards an International Court of Justice Advisory Opinion*, 37 YALE J. INT'L L. 40 (2012) (assessing the implications of an ICJ Advisory Opinion on State responsibility for emissions of greenhouse gases within domestic jurisdictions that contribute to serious harms in other countries).

[507] IPCC, CLIMATE CHANGE 2007: SYNTHESIS REPORT, SUMMARY FOR POLICYMAKERS 2 (2007). *See also* R.K. Pachauri, Nobel Lecture (2007) ("By 2020, in some African countries, yields from rain-fed agriculture could be reduced by up to 50%"), *available at* http://www.nobelprize.org/nobel_prizes/peace/laureates/2007/ipcc-lecture_en.html.

[508] Massachusetts v. EPA, 549 U.S. 497, 505 (2007) (quoting Pet. For Cert. 22).

[509] Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 352 (2011).

United States will be strongly affected by climate change to demonstrate that it is also in the U.S. national interest to support international action on climate change. The remainder of this section is structured as follows: Subsection 2 addresses how climate change implicates the international rule of law and therefore merits consideration by the ICJ in the form of a non-binding Advisory Opinion. Subsection 3 illustrates the economic costs that the United States will likely bear as a result of inaction on climate change. Subsection 4 discusses how climate change adversely impacts international security, which presents a direct risk to the U.S. national interest, and the position of the United States in international relations.

2. ADVISORY OPINIONS AND THE INTERNATIONAL RULE OF LAW

When nations gathered in Rio de Janeiro in 1992 to negotiate the UNFCCC, they recognized anthropogenic climate change as an issue of common concern for the international community; however, the twenty-year absence of serious action to address the issue and a related absence of enforcement indicates that rule of law is far from established. As the sole forum for questions related to international law, the ICJ is in the best position to provide a means of legal clarification on State responsibility for the transboundary harm caused by the production of greenhouse gases under its jurisdiction or control. Such clarification can help guide the negotiation process along a more meaningful path. The United States, as a member of the international community committed to the advancement of the international rule of law and to which climate change is already causing significant adverse impacts (*see* Part II), stands to benefit from more concerted action at the international level for a variety of economic, environmental, political, and security reasons, as further discussed in Parts II and III.

The United States' written comments to the promoters of the ICJ campaign argue that international negotiations are the best way to address climate change obligations under international law and that these negotiations will be negatively impacted by the question of legal responsibility.[510] We counter, however, that current international negotiations are already floundering, and this is due to the lack of clarification of international law with respect to reducing greenhouse gas emissions.

The only international legal instruments negotiated to address climate change are the UNFCCC and the Kyoto Protocol. The UNFCCC was created for the purpose of "stabilization of greenhouse gas concentrations in the atmosphere" at a level that would "prevent dangerous anthropogenic interference with the climate system."[511]The Kyoto Protocol was created in 1997 in order to set binding targets for Annex I (developed) countries to reduce greenhouse gas emissions by five percent below 1990 levels between 2008-2012.[512] Thus far, 37 industrialized countries and the European Union have ratified the Protocol. The United States has not ratified it. The Protocol is primarily a mitigation mechanism that places emissions caps on Annex I

---

[510] United States Written Comments to the Ambassadors for Responsibility on Climate Change, New York, Apr. 27, 2012 (on file with authors).

[511] *The United Nations Framework Convention on Climate Change*, art. 2, New York, May 9, 1992, 107 U.N.T.S. 1771, *available at* http://unfccc.int/essential_background/convention/background/items/1349.php [hereinafter *UNFCCC*].

[512] *Kyoto Protocol to the United Nations Framework Convention on Climate Change*,art. 3(1), Kyoto, Japan, Dec. 11, 1997, 148 U.N.T.S. 2303, *available at* http://unfccc.int/resource/docs/convkp/kpeng.pdf [hereinafter *Kyoto Protocol*].

countries. By the time the Protocol went into effect in 2005, a prominent study revealed that full compliance would only reduce global warming by 0.03°C by 2100.[513] At the 2011 UNFCCC Conference of the Parties (COP) 17 in Durban, South Africa, the Durban Platform noted with "grave concern" the "significant gap" between UNFCCC Parties' greenhouse gas mitigation pledges and the chance of holding the increase in global average temperature below 2°C or 1.5°C above pre-industrial levels.[514] This legal gap between the UNFCCC's stated goal to "prevent dangerous anthropogenic interference with the climate system" and the enforcement of negotiated greenhouse gas reduction targets highlights why a clarification of international law is needed: despite references in numerous international legal instruments to State responsibility to ensure that activities within its jurisdiction do not cause significant harm or damage to other States, it is unclear whether this transboundary pollution principle applies to GHGs.

Considering the emissions gap between Parties' mitigation pledges under the Kyoto Protocol and keeping global average temperature below 2°C, international climate change negotiations have thus far failed in their objective. The "excruciatingly slow" pace of negotiations is due in part to the lack of a clear norm under international law regarding climate change responsibility.[515] Parties have already acknowledged that climate change involves common but differentiated responsibilities, so the likelihood that a finding of responsibility from the ICJ will cause Parties to "walk back from cooperation" reads more as a threat than a valid argument against an Advisory Opinion.[516] On the contrary, a positive Advisory Opinion is the best way to interrupt the status quo and provide the impetus for faster-paced and equitable negotiations. International law exists, not to produce a particular outcome as the United States suggests, but to govern peaceful and equitable relations between nations. Given the contrasting fast pace of climate change, no country can afford, in economic or human terms, to promote the status quo. As the ARC Concept Note states, climate change is "an urgent global threat" with serious, negative implications for international peace, security, human rights, and development.[517] Hence, nations should not and will not be able to easily abandon existing commitments and walk away from negotiations for future commitments.

According to the preamble of the U.N. Charter, the peoples of the U.N. are determined "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained."[518] One of the foremost advantages of an Advisory Opinion from the ICJ is clarification and guidance with respect to the international rule of law.

States agree that international law is the governing principle of international relations. In the 2012 Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, States reaffirmed their commitment to "the rule of law and

---

[513] William D. Nordhaus & Jospeh Boyer, WARMING THE WORLD: ECONOMIC MODELS OF GLOBAL WARMING 152-153, (2001).
[514] Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, Draft decision CP.17 (2011).
[515] Interview with the authors, Sept. 26, 2012.
[516] United States Written Comments to the Ambassadors for Responsibility on Climate Change, *supra* note 5.
[517] *A Resolution Seeking an Advisory Opinion from the International Court of Justice on Climate Change*, Ambassadors for Responsibility on Climate Change, 2012 (on file with authors).
[518] U.N. Charter pmbl., ¶ 2 (Oct. 24, 1945).

its fundamental importance for political dialogue and cooperation among all States and for the further development of the three main pillars upon which the United Nations is built: international peace and security, human rights and development."[519] States further agreed to be guided by the rule of law in the collective response to challenges and opportunities, since it is the "foundation of friendly and equitable relations between States and the basis on which just and fair societies are built."[520] In addition, States recognized the "positive contribution" of the ICJ for the promotion of the rule of law.[521] During the Meeting, U.S. Attorney General Eric Holder said that establishing the rule of law was "essential" and "vital" for many endeavors, including justice, peace, human rights, and development.[522] He stated, "The greatest threat to development is weak rule of law."[523] The United States, therefore, in accord with the international community, is committed to the international rule of law as the guiding force for both international relations and responding to challenges and opportunities of collective concern.

The international rule of law is often called upon to establish a clear, normative framework in order to address transnational threats related to international peace and security, human rights, and development. Climate change poses serious transnational threats related to peace and security, human rights, and development that require just as clear a normative framework in order to enforce responsibility and compliance with international law. In fact, the U.N. Security Council expressed concern that the possible adverse effects of climate change could "aggravate existing threats to international peace and security."[524] In a statement to the Security Council, Secretary-General Ban Ki-Moon stated that climate change "not only exacerbates international peace and security; it is a threat to international peace and security."[525]

Climate change has serious human rights implications as well. The Draft Principles on Human Rights and the Environment declare that "[a]ll persons have the right to a secure, healthy and ecologically sound environment" as well as the right to an environment "adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet equitably their needs."[526]

Finally, climate change hinders progress toward sustainable social and economic development and the eradication of poverty. The "Climate Vulnerability Monitor," an independent report commissioned by twenty governments and released in September 2012, found that climate change and a carbon-intensive economy are leading global causes of death and cost the world economy 1.6% of global GDP each year.[527] Additional adverse impacts of climate change such as sea level rise, extreme weather, desertification, increasing temperatures,

---

[519] Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, G.A. Res. 66/102, U.N. Doc.A/67/L.1 (Sept. 19, 2012).
[520] *Id*.
[521] *Id*. ¶ 31.
[522] World Leaders Adopt Declaration Reaffirming Rule of Law as Foundation for Building Equitable State Relations, Just Societies, Sixty-seventh General Assembly Plenary, GA/11290, Sept. 24, 2012, *available at* http://www.un.org/News/Press/docs/2012/ga11290.doc.htm.
[523] *Id*.
[524] S.C. Res. 10332, U.N. Doc. SC/10332 (July 20, 2011).
[525] *Id*.
[526] *Id*.
[527] *Climate Vulnerability Monitor: A Guide to the Cold Calculus of a Hot Planet*, 2d ed., DARA AND THE CLIMATE VULNERABLE FORUM, Sept. 17, 2012.

and decreasing Arctic sea ice create stresses related to health, food security, displacement, and conflict over diminishing resources that further hinders development. In sum, the failure to take action to address climate change undermines each pillar of the United Nations: international peace and security, human rights, and development, with consequences for the entire international community.

The current patchwork of nonbinding international legal instruments is not sufficient to stabilize GHGs at a level that mitigates severe transboundary harm. The International Law Commission (ILC), a group of international lawyers established by the UN General Assembly who attempt to codify and "progressively develop" international law, wrote the Draft Articles on the Prevention of Transboundary Harm with the understanding that the prevention of transboundary harm to the environment, persons, and property has already been accepted as a principle in many multilateral treaties related to environmental protection, nuclear accidents, space objects, international watercourses, management of hazardous wastes and prevention of marine pollution.[528] The ILC recommends a comprehensive framework convention on the protection of the atmosphere as a "*single global unit* for the purpose of environmental protection," similar to Part XII of the U.N. Law of the Sea Convention on the Protection and the Preservation of the Marine Environment.[529] There is no logical reason why the production of greenhouse gases, an activity with a high probability of causing significant transboundary harm to persons, property, and the environment in the territory under the jurisdiction or control of another State, should be treated differently under international law.

The ICJ is the only judicial forum for States to resolve any question or dispute concerning international law. Secretary General Ban Ki-moon has requested all States to accept compulsory jurisdiction of the ICJ and recommended that the General Assembly, Security Council, and other U.N. organs and specialized agencies make greater use of their ability to request Advisory Opinions from the ICJ. The request for an Advisory Opinion must be made in compliance with Article 96 of the U.N. Charter, which provides that "[t]he General Assembly or the Security Council may request the [ICJ] to give an Advisory Opinion on any legal question."[530] A question is legal if "it is by its nature susceptible of a reply based on law."[531] The Court does not "delve into the motivation that leads a duly authorized organ to request an Advisory Opinion on a legal question falling within the jurisdiction of that organ even when that question relates to an issue that involves important political facts or is itself essentially political."[532] The question presented in the resolution, "What are the obligations under international law of a State for ensuring that activities under its jurisdiction or control that emit

---

[528] Draft Articles on the Prevention of Transboundary Damage from Hazardous Activities, International Law Commission, 53rd Sess., Supp. No. 10, ch. V.E. 1, art. I, U.N. Doc.A/56/10 (2001). The ILC summarized two principles of customary international law regarding state responsibility and liability for environmental harm: "(1) States have a duty to prevent, reduce and control pollution and environmental harms; and (2) States have a duty to cooperate in mitigating environmental risks and emergencies, through notification, consultation, negotiation, and in appropriate cases, environmental impact assessment." *Id*.

[529] *Id*. (emphasis in original).

[530] Timo Koivurova, *International Legal Avenues to Address the Plight of Victims of Climate Change: Problems and Prospects*, 22 J. ENVTL. L. & LITIG.267, 276 (2007).

[531] MOHAMED SAMEH M. AMR, *The Advisory Role of the International Court of Justice*, in THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE AS THE PRINCIPAL JUDICIAL ORGAN OF THE UNITED NATIONS, 87 (2003).

[532] *Id*. at 89.

greenhouse gases do not cause, or substantially contribute to, serious damage to another State or States?" presents a clear legal question for the ICJ. The advantage of the advisory approach is its simplicity and ability to articulate a "clear legal standard applicable to all states."[533] Even though an Advisory Opinion is non-binding, it can establish a new baseline of common understanding for climate change negotiations.

In conclusion, climate change is "a common concern of humankind" requiring global cooperation.[534] An Advisory Opinion would not only help to clarify international climate change law, but would also foster a sense of "mutual understanding, contribution, and responsibility" on behalf of the entire international community.[535] Currently, the legitimacy of the UNFCCC is undermined by its lack of progress in climate change mitigation. When negotiations alone are incapable of mitigating the adverse impacts of climate change, the rule of law is the only way of establishing a clear standard applicable to all nations. The rule of law is therefore fundamental to promoting political dialogue and cooperation, and the ICJ is the proper body to advise on questions related to the international rule of law.

The current pace of negotiations coupled with the more frequent occurrence of disastrous weather events like Hurricane Sandy (see Part II) is unacceptable. Given (1) the reality of climate change as an international threat; (2) the fundamental role of the rule of law to promote international cooperation; (3) the acceptance of the principle of transboundary harm in a number of international instruments; and (4) the jurisdiction of the ICJ to clarify questions of international law, an Advisory Opinion on responsibility for transboundary harm due to climate change is both a legitimate and necessary complement to international climate change negotiations. An Advisory Opinion will provide a critical legal and ethical foundation that will guide the political process and good faith negotiations.

3. THE ECONOMIC COSTS OF INACTION

Although small island states are at particular risk from the negative effects of climate change,[536] climate change is "a common concern of humankind" and therefore a global problem requiring global cooperation.[537] According to the Intergovernmental Panel on Climate Change

---

[533] Andrew Strauss, *Climate Change Litigation: Opening the Door to the International Court of Justice*, *in* ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES 350 (William C.G. Burns & Hari M. Osofsky, eds., 2009).
[534] *UNFCCC*, *supra* note 6, pmbl. ¶ 1.
[535] Korman & Barcia, *supra* note 506, at 42.
[536] For more information, see the website of the Alliance of Small Island States, a 42-member coalition representing all oceans and regions of the world, at http://aosis.org/.
[537] Peter Prows, *A Mouse Can Roar: Small Island States, the United Nations, and the End of Free-for-All Fishing on the High Seas*, 19 COLO. J. INT'L ENVTL. L. &POL'Y 1, 9 (2008).

(IPCC),[538] evidence of "warming of the climate system is unequivocal"[539] and directly related to human activities.[540]

Seeking an Advisory Opinion from the ICJ will strengthen climate change negotiations and accelerate a process that is moving far too slowly to effectively address climate change. As Subsection 2 notes, there is a "significant gap" between UNFCCC Parties' GHG mitigation pledges and the ability to limit global average temperature increases to 1.5°C or even 2°C. Yet, although the consequences of inaction on mitigating GHG emissions are likely to be catastrophic and the fact that climate change undermines international security, human rights, and development, individual nations remain hesitant to take bold steps to address this problem. Unfortunately, for the average citizen, these enormous problems too often appear abstract and unreal. To help illustrate the costs of climate change for the average U.S. citizen, this section presents some of the likely economic costs of climate change-related events in the United States.

In the United States, climate change is likely to result in more frequent damaging weather events such as hurricanes, storm surges, and heat waves.[541] For example, James E. Hansen, director of the NASA Goddard Institute for Space Studies, recently demonstrated that the extreme 2011 droughts in Texas and Oklahoma are at least partially attributable to climate change and that "[s]uch events . . . will become even more frequent and more severe."[542] Moreover, such damaging weather events will not be confined to particular areas but rather will affect every region of the United States. According to the Center for Integrative Environmental Research, climate change will increase the risk of forest fires in the West and Northwest due to changing precipitation patterns and snow pack; the Midwest will experience more frequent severe flooding and drought, resulting in "billions of dollars in damages to crops and property;" the Northeast and Mid-Atlantic regions will become increasingly vulnerable to sea level rise and storms; and the South and Southwest will experience decreased precipitation, which will negatively impact "agriculture, industry and households."[543]

More frequent damaging weather events will result in significant economic costs for the United States. By any measure, the costs of inaction on climate change far outweigh the costs

---

[538] The United Nations Environment Program (UNEP) and the World Meteorological Organization (WMO) established the IPCC in 1988 to review and assess the most current scientific knowledge on climate change. It is an intergovernmental body open to all UN and WMO member countries. The IPCC produces reports that are "policy-relevant" whilst remaining "policy-neutral." *See* http://www.ipcc.ch/organization/organization.shtml#.T7wrS7_23Wd.

[539] IPCC, Climate Change 2007: Synthesis Report, *supra* note 2.

[540] *Id*. at 5 ("Global [greenhouse gas] emissions due to human activities have grown since pre-industrial times, with an increase of 70% between 1970 and 2004."); *see also* Trenberth et al., *Check with Climate Scientists for Views on Climate*, WALL ST. J., Feb. 1, 2012 ("Research shows that more than 97% of scientists actively publishing in the field agree that climate change is real and human caused."), http://online.wsj.com/article/SB10001424052970204740904577193270727472662.html.

[541] Lawrence Liebesman et al., *The Endangered Species Act and Climate Change*, 39 ELR 11173 (2009), *available at* http://www.hklaw.com/File.aspx?id=3529&inline=1; U.S. GLOBAL CHANGE RESEARCH PROGRAM, GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES (Thomas R. Karl et al. eds., 2009).

[542] James E. Hansen, Op-Ed., *Climate Change is Here – and Worse Than We Thought*, WASH. POST, Aug. 3, 2012, http://www.washingtonpost.com/opinions/climate-change-is-here--and-worse-than-we-thought/2012/08/03/6ae604c2-dd90-11e1-8e43-4a3c4375504a_story.html.

[543] CIER, *Executive Summary: The US Economic Impacts of Climate Change and the Costs of Inaction* (Oct. 2007), www.cier.umd.edu/climateadaptation/.

associated with curbing greenhouse gas emissions. This vital point was missed when climate legislation failed to pass in Congress in 2011, due in part to the misconceived notion that the "legislation would amount to a massive tax hike" that outweighed the benefits of taking action.[544] Yet, just one damaging weather event may result in billions of dollars in damages. The economic damages of the 2011 drought in the state of Texas alone, for example, are estimated in excess of $5 billion.[545] Indeed in 2011, the United States experienced a "record-breaking 14 natural disasters that each caused $1 billion or more of damage."[546] Added together, these events result in colossal economic costs: in 2011, it is estimated that severe weather events cost the United States almost $60 billion in damages, and this figure is likely to be equaled or exceeded in 2012.[547] According to the National Center for Atmospheric Research, these costs are unparalleled: "weather-related disruptions cost the country $17 billion a year on average from 1960-2005."[548] Given that damaging weather events are predicted to become more frequent and more severe, the United States ignores the economic costs of inaction on climate change at its peril.

In addition to the direct adverse impacts of severe weather events that include property and crop damage, there are significant secondary impacts. For example, 2012 was "the hottest year ever recorded in the United States"[549] and a drought "more extensive than any drought since the 1950s"[550] affected almost two-thirds of the United States,[551] including approximately "80 percent of agricultural land."[552] Due to the drought, the 2012 corn crop was the smallest in almost a decade,[553] which led to extremely high corn prices that cattle operators are unable to afford. Thus, the secondary effects of the drought include threatening farmers' livelihoods and potentially changing the structure of the U.S. economy.[554] Moreover, as extreme weather events

---

[544] John Carey, *Calculating the True Cost of Global Climate Change*, YALE ENVIRONMENT 360, Jan. 6, 2011, http://e360.yale.edu/feature/calculating_the_true_cost_of_global_climate_change/2357/.
[545] Aaron Smith, *Wildfires and Drought Cost Texas Billions*, CNN MONEY, Sept. 8, 2011, http://money.cnn.com/2011/09/08/news/economy/damages_texas_wildfires/index.htm.
[546] Lauren Morello & ClimateWire, *U.S. Heat Waves of 2011 Linked Directly to Man-made Climate Change*, SCIENTIFIC AMERICAN, Aug. 6, 2012, *available at* http://www.scientificamerican.com/article.cfm?id=us-heat-waves-2011-linked-directly-man-made-climate-change; *see also* NOAA, *2011: a Year of Climate Extremes in the United States*, Jan. 19, 2012, *available at* http://www.noaanews.noaa.gov/stories2012/20120119_global_stats.html.
[547] Reps. Edward Markey (D-MA) and Henry Waxman (D-CA), *Going to Extremes: Climate Change and the Increasing Risk of Weather Disasters*, 2 (Sept. 25, 2012), *available at* http://democrats.naturalresources.house.gov/sites/democrats.naturalresources.house.gov/files/documents/2012-09-25_ExtremeWeather_.pdf.
[548] National Wildlife Federation, *More Extreme Weather and the U.S. Energy Infrastructure*, 1 (2011) *available at* http://www.nwf.org/~/media/PDFs/Global-Warming/Extreme-Weather/Final_NWF_EnergyInfrastructureReport_4-8-11.ashx.
[549] Annie Lowrey & Ron Nixon, *Severe Drought Seen as Driving Cost of Food Up*, N.Y. TIMES, July 25, 2012, http://www.nytimes.com/2012/07/26/business/food-prices-to-rise-in-wake-of-severe-drought.html.
[550] USDA, *U.S. Drought 2012: Farm and Food Impacts*, http://www.ers.usda.gov/newsroom/us-drought-2012-farm-and-food-impacts.aspx (last updated Oct. 25, 2012).
[551] Dan Huber, *Increasingly Extreme Weather is Costing Us in More Ways Than One*, THE ENERGY COLLECTIVE, Oct. 1, 2012, http://theenergycollective.com/seidel/118216/increasing-extreme-weather-costly-many-ways.
[552] USDA, *U.S. Drought 2012: Farm and Food Impacts*, *supra* note 550.
[553] Carey Gillam, *Candy Cereal, Cookies: Farmers Keep Cows Going on Creative Feed Alternatives*, CHRISTIAN SCIENCE MONITOR, Sept. 23, 2012, http://www.csmonitor.com/USA/Latest-News-Wires/2012/0923/Candy-cereal-cookies-Farmers-keep-cows-going-on-creative-feed-alternatives.
[554] John Eligon, *Drought Leaves Cracks in Way of Life*, N.Y. TIMES, Oct. 3, 2012, http://www.nytimes.com/2012/10/04/us/widespread-drought-threatens-way-of-life-for-farmers.html.

become more frequent, farmers in the United States will increasingly rely on insurance to cover their losses. Yet, "insurers may stop coming to the rescue" as costs skyrocket. The 2012 drought, for example, will cost insurers almost $20 billion.[555] The drought's secondary effects will also negatively impact the U.S. public through food price increases, with milk, beef, chicken, and pork estimated to increase by 4-5% in 2013.[556] More generally, a recent study by the Natural Resources Defense Council highlights another area of significant secondary, or "hidden,"[557] costs resulting from inaction on climate change – health costs. The study estimates that climate change-related events over the past decade in the United States have resulted in "[h]ealth costs exceeding $14 billion dollars."[558] This figure is based on lives lost as well as actual health costs including hospitalizations and other required medical services.

Urgent action on climate change is required. The UNFCCC provides an essential forum for global negotiations on climate change, but the process is currently too slow to prevent the loss of nations and other devastating human costs, in addition to the economic costs outlined above. Three recent examples underscore the urgency of this problem. First, in July 2012, NASA reported unprecedented Greenland ice sheet melt when approximately 97 percent of the ice sheet showed surface thawing.[559] Second, in September 2012, the National Snow and Ice Data Center reported that the Arctic sea ice extent had reached a record low.[560] These events illustrate more than the dramatic effects of climate change; they also demonstrate that climate change, at least in the Arctic, is progressing at a much faster rate than scientists had previously predicted and that existing climate models are too conservative. It is feasible that existing predictions about the effects of climate change in other areas of the world are also too conservative and that the negative impacts of climate change may be far greater than predicted.

Third, and most recently, Hurricane Sandy devastated parts of the United States, particularly the Northeast, in late October 2012. It is the second costliest storm in the history of the United States after Hurricane Katrina,[561] and its negative impacts were widespread, including over 100 lives lost in the United States.[562] Other costs included the loss of power for eight million homes, the evacuation of hundreds of thousands of people from affected areas, and the

---

[555] Andrew Freedman, *Extreme Weather Threaten Insurers' Risk Models, New Report Shows*, HUFFINGTON POST, Sept. 24, 2012, http://www.huffingtonpost.com/2012/09/22/extreme-weather-insurers-risk-models_n_1904698.html.
[556] Lowrey & Nixon, *Severe Drought Seen as Driving Cost of Food Up*, *supra* note 549.
[557] CIER, *Executive Summary: The US Economic Impacts of Climate Change and the Costs of Inaction* (October 2007), *available at* www.cier.umd.edu/climateadaptation/.
[558] NRDC, *Groundbreaking Study Quantifies Health Costs of U.S. Climate Change-Related Disasters & Disease*, Nov. 8, 2011, http://www.nrdc.org/media/2011/111108c.asp.
[559] NASA, *Satellites See Unprecedented Greenland Ice Sheet Surface Melt*, July 24, 2012, http://www.nasa.gov/topics/earth/features/greenland-melt.html.
[560] NSIDC, *Arctic Sea Ice Extent Settles at Record Seasonal Minimum*, Sept. 19, 2012, http://nsidc.org/arcticseaicenews/2012/09/arctic-sea-ice-extent-settles-at-record-seasonal-minimum/.
[561] Martin Crutsinger, *Sandy Economic Damage Worse Than Expected at $62 Billion*, HUFFINGTON POST, Nov. 29, 2012, http://www.huffingtonpost.com/2012/11/29/sandy-economic-impact-damage_n_2214060.html.
[562] Joseph Serna, *Hurricane Sandy Death Toll Climbs Above 110, N.Y. Hardest Hit*, LA TIMES, Nov. 3, 2012, http://articles.latimes.com/2012/nov/03/nation/la-na-nn-hurricane-sandy-deaths-climb-20121103.

shutdown of critical services such as airports, subways, and hospitals.[563] To respond to this crisis, a bill was introduced to Congress in December 2012 requesting $60 billion in disaster relief.[564]

It is too soon to link Hurricane Sandy with certainty to human-caused global warming, but it is very likely that storms of this magnitude will become more frequent occurrences in the United States. This is because the ocean and atmosphere are becoming warmer, which increases the energy available to create large cyclones. Furthermore, there is a link between Arctic ice melt and the weather patterns that enhance the destructive nature of storms like Hurricane Sandy in the Northeast, specifically the intersection of a tropical cyclone with a burst of cold air from the Arctic (and, as noted above, Arctic ice is melting rapidly).[565] Finally, ongoing sea level rise is going to make such storms more destructive, particularly for coastal cities like the New York metropolitan area where storm surge will affect a larger proportion of the city. As Eric Pooley, vice president of the Environmental Defense Fund, stated, "[w]e can't say that steroids caused any one home run by Barry Bonds, but steroids sure helped him hit more and hit them farther. Now we have weather on steroids."[566]

Looking at Hurricane Sandy in a global context, Munich Re estimates that it was the world's costliest disaster in 2012 with $25 billion in insured losses.[567] Overall, the United States accounted for 90% of the global insurance payouts for natural disasters in 2012.[568] These facts further highlight the vulnerability of U.S. economic activity to extreme weather events, which are likely to become more frequent as a result of human-caused global warming.

Although the world's most vulnerable regions may bear the human costs of climate change disproportionately,[569] developed nations, including the United States, will face significant economic costs as well. In addition, the United States and other developed nations are also likely to bear a large portion of the costs of climate change in other parts of the world due to the increased demand for disaster and humanitarian relief that these countries will be called on to provide. It is illogical to wait until the costs of climate change are insurmountable when action may be taken now at a much lower cost. The global community must take immediate steps to mitigate the titanic human and economic costs that will result from climate change (and which may be far larger than current climate models predict). The United States can and should play a large role in this global process, as U.S. action will help to catalyze much-needed action by other countries. Unfortunately, the UNFCCC process, in its current form, is unlikely to result in the bold steps required to effectively reduce GHG emissions in the short-term. An Advisory Opinion from the ICJ would help to remedy this situation by establishing a new baseline of common understanding for climate change negotiations by clarifying international climate change law.

---

[563] Paul M. Barrett, *It's Global Warming, Stupid*, BUSINESSWEEK (Nov. 1, 2012), *available at* http://www.businessweek.com/articles/2012-11-01/its-global-warming-stupid.
[564] James Rowley, *Congress Passes First Stage of Hurricane Sandy Relief*, BLOOMBERG NEWS, Jan. 5, 2013, http://www.bloomberg.com/news/2013-01-04/house-approves-first-stage-of-hurricane-sandy-relief.html.
[565] Barrett, *It's Global Warming, Stupid*, *supra* note 563.
[566] *Id*.
[567] Geir Moulson, *Superstorm Sandy Cost Insurers $25B*, GLOBAL NEWS, Jan. 3, 2013, http://www.globalnews.ca/superstorm+sandy+cost+insurers+25b/6442781366/story.html.
[568] *Id*.
[569] *See, e.g.*, R.K. Pachauri, Nobel Lecture, *supra* note 507 (2007) ("By 2020, in some African countries, yields from rain-fed agriculture could be reduced by up to 50%").

4. THREAT TO INTERNATIONAL SECURITY AND THE U.S. NATIONAL INTEREST

In addition to the significant economic costs of inaction on climate change, U.S. citizens should understand that failing to take action on climate change also directly impacts U.S. national interests as a result of the international security implications of climate change. Thus, this section will elucidate the link between climate change and security. Furthermore, it will illustrate how the international standing and the wealth of the United States will be negatively affected if it fails to keep up with the pace of action by rising powers such as China and India.

Climate change is increasingly recognized as a serious threat to international security. The U.N. Security Council confirmed this in a 2011 meeting on the potential security implications of climate change.[570]A majority of the 65 actively participating delegates at this debate supported the Security Council addressing climate change and referred to the mandate of the UNFCCC and the Kyoto Protocol. The Security Council concurred and decided to take action on climate change due to its relevance to international security.[571] These recent developments highlight the link between global warming and international instability, and corroborate the reasoning behind the international movement to seek an Advisory Opinion from the ICJ.

The United States also explicitly identifies climate change as a threat to international security. This was reflected in the speech made by Ambassador Susan Rice (U.S.) at the 2011 United Nations Security Council meeting. Rice declared that climate change has very real implications for international peace and security, calling it "one of the central threats of our age."[572] She also expressed her disappointment that the U.N. Security Council had not issued such a statement earlier, which she called "pathetic."[573]

In a 2009 report to the U.N. General Assembly on "climate change and its possible security implications,"[574] the U.N. Secretary-General identified channels through which climate change could affect international security. He stated that climate change threatens food security and human health; increases human exposure to extreme events; undermines the capacity of States to maintain stability, which elevates the risk of domestic conflict leading to international repercussions; leads to Statelessness because of disappearing territory; and may have implications for international cooperation due to stress on natural resources.[575] These findings paralleled those of the IPCC chairman, who specified threats to the international community resulting from climate change as including "rising tensions between rich and poor nations, health problems caused particularly by water shortages, and crop failures as well as concerns over

---

[570] U.N. Doc. S/PRST/2011/15, Security Council 6587th meeting, July 20, 2011.
[571] *Id*.
[572] U.N. News. www.un.org/News/Press/docs/2011/sc10332.doc.htm.
[573] *Id*.
[574] U.N. General Assembly, CLIMATE CHANGE AND ITS POSSIBLE SECURITY IMPLICATIONS: REPORT OF THE SECRETARY-GENERAL, Sept. 11 2009, A/64/350, *available at* www.unhcr.org/refworld/docid/4ad5e6380.html.
[575] *Id*.

nuclear proliferation," that could lead to "dramatic population migration, conflict, and war over water and other resources as well as a realignment of power among nations."[576]

The latest report of the U.S. Defense Science Board Task Force on climate change goes even further, stating that "[i]n some instances, climate change will serve as a threat multiplier, exacerbating tensions between tribes, ethnic groups, and nations. In other cases, climate change will seem more like Mother Nature's weapon of mass destruction."[577] The report also delineates how climate change adversely impacts U.S. national interests. For example, population and political instability resulting from climate change in a myriad of countries around the world threatens the accessibility of natural resources by the United States. International instability may also contribute to increased criminal and terrorist activity as well as to economic costs (see also Part II);[578] significant instability of any kind makes it harder for countries to engage in international business activities or to meet international obligations. Moreover, international insecurity can eventually lead to kinetic military conflict.[579] For example, political and population instability in Somalia, combined with a decline in fishing and other basic industries, has created an environment conducive to piracy and terrorism. This has direct repercussions for U.S. national interests, including the security of oil tankers that travel through the Gulf of Aden and the potential for terrorist attacks on U.S. interests.

In addition to international insecurity that directly threatens U.S. national interests, the United States acknowledges the importance of diplomacy and international cooperation for long-term peace and security. In 2010, President Obama declared, "[W]e must foster even deeper connections among Americans and peoples around the globe. Our long-term security will come . . . through our capacity to speak to their hopes. And that work will best be done through the power of . . . our troops and diplomats."[580] President Obama also stated, "Our security also depends upon diplomats who can act in every corner of the world."[581] Yet, the resistance of the United States to an ICJ Advisory Opinion on climate change may harm U.S. diplomatic relations with countries around the world. Support for the resolution initiative comes not only from the small island developing states, but also from a broad coalition that includes many European and African countries. The position of the United States as global leader would be reaffirmed and enhanced by staying at the forefront of international action on climate change, an issue of paramount global concern as well as opportunity.

A positive ICJ Advisory Opinion would attract significant media attention in the United States and could help to inspire a citizen-driven movement for domestic climate change policy. As Bob Inglis, a former Republican member of the U.S. House suggested,[582] "Congress doesn't act until there's some kind of crisis…So you've got to build the support in the country, and then

---

[576] Pachauri, Nobel Lecture, *supra* note 507.
[577] Defense Science Board, *Report on Trends and Implications of Climate Change for National and International Security*, 2011.
[578] *Id*.
[579] *Id*.
[580] Barack Obama, *U.S. National Security Strategy*, foreword, 2010.
[581] *Id*.
[582] Bob Inglis represented the 4th district of South Carolina in the U.S. House of Representatives from 1993 to 1999 and from 2005 to 2011.

the political process will reflect that support."[583] An ICJ Advisory Opinion would help to highlight climate change as a real crisis, spurring citizen support that could create the necessary momentum in Congress to address the issue substantively. Furthermore, Inglis also points out that congressional solutions can be bipartisan, or at least not solely driven by the left side of the political spectrum: "The solution to our energy and climate challenge can be found in the conservative concept of accountability and in a well-functioning free-enterprise system."[584] For example, the removal of fossil fuel subsidies would allow low-carbon technologies to become more competitive and increase their market share as well as divert much-needed resources to clean energy innovation. Additionally, innovation in the transportation sector could decrease dependence on petroleum, which would simultaneously improve national security. U.S. competitiveness in clean energy and other areas would be strengthened through such technological innovation.[585] Countries like China are already creatively addressing climate change and energy challenges,[586] and it is crucial that the United States take similar action or it risks diminishing international competitiveness, which undermines U.S. prosperity in the long-term. An ICJ Advisory Opinion would help to increase domestic support for action, including free market innovations that would simultaneously strengthen U.S. competitiveness and meet the climate change and energy challenge.

In conclusion, the decision of the United States not to support the resolution initiative negatively impacts its national agenda, international political standing, and the long-term competitiveness of its economy. Indeed, the U.S. National Security Strategy concludes that"[t]he U.S. will therefore confront climate change . . . in cooperation with all nations–for there is no effective solution to climate change that does not depend upon all nations taking responsibility for their own actions and for the planet we will leave behind."[587] The resolution initiative seeking an Advisory Opinion from the ICJ on climate change aims to facilitate such an international cooperative response and would help to establish a more legitimate framework for the UNFCCC to achieve a global solution for this unprecedentedly "wicked problem."[588]

5. CONCLUSION

At the 2011 UNFCCC Conference of the Parties (COP) 17 in South Africa, the Durban Platform noted with "grave concern" the "significant gap" between UNFCCC Parties' greenhouse gas mitigation pledges and constraining an increase in global average temperature to 2°C or 1.5°C above pre-industrial levels.[589]

---

[583] Bloomberg, *Conservative Means Standing With Science on Climate: Bob Inglis*, BLOOMBERG NEWS, Oct. 2, 2011, http://www.bloomberg.com/news/2011-10-03/conservative-means-standing-with-science-on-climate-bob-inglis.html.
[584] *Id*.
[585] *Id*.
[586] Center for Climate and Energy Solutions, *China and Climate Change*, http://www.c2es.org/international/key-country-policies/china.
[587] U.S. National Security Strategy, 2010.
[588] Levin, K., Cashore, B., Bernstein, S. and A. Graeme, *Overcoming the tragedy of super wicked problems: constraining our future selves to ameliorate global climate change*, POL'Y SCI. 45(2), 123-52 (2012).
[589] Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, Draft decision CP.17 (2011).

An Advisory Opinion from the International Court of Justice would promote international efforts to come to an agreement within the UNFCCC negotiation process. Even though the nature of an Advisory Opinion is non-binding, it would entail moral authority and would establish a new legal baseline for the UNFCCC to build upon by articulating a "clear legal standard applicable to all states."[590] This would place all States on an equal footing in terms of their obligations to reduce greenhouse gas emissions under international law. Even if the Advisory Opinion did not support a finding of legal responsibility, this would be unlikely to cause Parties to walk away from commitments. The UNFCCC is a long-standing process that began in 1992 and there are currently 195 parties to the Convention.[591] Climate change threatens international peace and security[592] and concerted collective action is necessary to manage its consequences. Clarifying international law on this issue, regardless of the outcome, will help to provide a clearer framework for international negotiations.

Furthermore, seeking an Advisory Opinion from the ICJ is consistent with the 2012 "Declaration on the Rule of Law at the National and International Levels" adopted by world leaders during the first high-level meeting on the rule of law at the General Assembly.[593] This declaration reaffirmed the commitment of the international community to the international rule of law as a way to respond to challenges of collective concern. Climate change is not only a quintessential challenge of collective concern, it is also, arguably, *the* most serious challenge facing the international community.

Furthering the rule of law, avoiding direct economic damages, promoting international peace and security, and enhancing the global leadership role of the United States strongly suggest that the United States should support the broad coalition of diverse countries that has come together in favor of the resolution initiative. Alternatively, and by ignoring the opinion of its highest officials and institutions that have spoken out on climate change, the United States may experience diplomatic isolation on one of the most important international issues of our time.

The UNFCCC process is commendable, but slow moving; after two decades, there has been little progress. Rising global temperature is an urgent problem that lengthy negotiations will not effectively remedy. The ICJ offers a viable means to accelerate this process by supporting effective country commitments to reducing greenhouse gas emissions.

---

[590] Strauss, *Climate Change Litigation*, *supra* note 533, at 350.
[591] *UNFCCC*, *supra* note 16, Ratification of the Convention, *available at* http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php (last visited Oct. 25, 2012).
[592] UN News Center, *Warning of Climate change's Threat to Global Security, Ban Urges Concerted Action* (July 20, 2011), http://www.un.org/apps/news/story.asp?NewsID=39093#.UIn0QYU-JfQ.
[593] World Leaders Adopt Declaration Reaffirming Rule of Law as Foundation for Building Equitable State Relations, Just Societies, *supra* note 522.