

**INTERNATIONAL COURT OF JUSTICE**

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

**(Request for an Advisory Opinion)**

**WRITTEN STATEMENT OF THE REPUBLIC OF THE  
MARSHALL ISLANDS**

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## ACRONYMS

AO	Advisory Opinion
ARSIWA	ILC draft Articles of Responsibility of States for Internationally Wrongful Acts
CBDR	Common but Differentiated Responsibilities
ECtHR	European Court of Human Rights
GHG	Green House Gas
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IFRC	International Federation of the Red Cross
ILC	International Law Commission
IPCC	Intergovernmental Panel on Climate Change
ITLOS	International Tribunal for the Law of the Sea
	MARPOL International Convention on the Prevention of Pollution from Ships
	NDC Nationally Determined Contributions
PIF	Pacific Island Forum
SDG	Sustainable Development Goal
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNDRR	United Nations Office for Disaster Risk Reduction
UNFCCC	United Nations Framework Convention on Climate Change
	UNHCR United Nations High Commissioner for Refugees
	WIM Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts
WMO	World Meteorological Organization

## INTRODUCTION

1. In March 2023, the UN General Assembly requested the International Court of Justice (ICJ) to render an advisory opinion (AO) on the legal obligations of states to protect the environment from greenhouse gas emissions (GHG emissions) as well as the legal consequences of failing to adhere to those obligations.
2. On 29 March 2023, the United Nations General Assembly adopted Resolution 77/276 Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change. By Order of 20 April 2023, the International Court of Justice determined the following iteration derived from Resolution 77/276 for its advisory opinion:

*Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment,*

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

*(b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:*

*(i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?*

*(ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?*

3. By Order of 4 August 2023, the Honourable Court *inter alia* extended the time-limit for written submissions on the above questions to 22 January 2024. By Order of 15

December 2024, the Honourable Court *inter alia* further extended this time limit to 22 March 2024.

4. The Republic of the Marshall Islands submits that the significance of the threat of climate change and addressing it is a priority in the country and in the wider Pacific region.
5. In 2021, the Pacific Island Forum (PIF)<sup>1</sup> leaders adopted a declaration to fix their maritime borders in the face of climate change-related sea-level rise.<sup>2</sup> In adopting this declaration, the PIF leaders acknowledged that the “relationship between climate change-related sea-level rise and maritime zones was not contemplated by the drafters of the United Nations Convention on the Law of the Sea (UNCLOS) at the time of its negotiation, and that the Convention was premised on the basis that, in the determination of maritime zones, coastlines and maritime features were generally considered to be stable.”<sup>3</sup>
6. In 2023, the Pacific Island Forum leaders proceeded to adopt a declaration to recognize the region’s commitment to the continuity of statehood and the protection of persons affected by climate change-related sea-level rise. The importance of this declaration is its recognition at the highest political level of Pacific Island Forum leaders of the threat that climate change poses to its people, as well as the duty to cooperate and the need to take steps to address and to respond to these threats with solidarity through a Pacific regional position.
7. In this statement, the RMI shares some observations on jurisdiction and relevant points of general international law, international environmental law and climate change law. The submission of the RMI is structured as follows:
  - a) Part A includes observations on general principles of international environmental law, as well as observations on relevant Multilateral Environmental Agreements (MEA), including the UNFCCC, the Paris Agreement, and International Convention on the Prevention of Pollution from Ships (MARPOL). It also advances observations on relevant human rights treaties.
  - b) Part B addresses the question of State responsibility for causing significant harm to the climate system, especially in the context of SIDS, including the effect of climate change on human rights, namely the rights of displaced citizens and the rights of present and future generations (principle of intergenerational equity).

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<sup>1</sup> The Pacific Island Forum includes Australia, Cook Islands, Federated States of Micronesia, Fiji, French Polynesia, Kiribati, Nauru, New Caledonia, New Zealand, Niue, Palau, Papua New Guinea, Republic of Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu.

<sup>2</sup> Declaration on Preserving Maritime Zones in the Face of Climate Change-Related Sea-Level Rise, <https://www.forumsec.org/wp-content/uploads/2021/08/Declaration-on-Preserving-Maritime.pdf>

<sup>3</sup> Ibid, Preamble, para. 6.

## JURISDICTION

8. In its *Kosovo AO*, the Court explained that its advisory jurisdiction:

is not a form of judicial recourse for States but the means by which the General Assembly and the Security Council, as well as other organs of the United Nations and bodies specifically empowered to do so by the General Assembly in accordance with Art. 96, paragraph 2, of the Charter, may obtain the Court's opinion in order to assist them in their activities.<sup>4</sup>

9. The advisory jurisdiction of the Court only exists if the conditions set out in Art. 96 of the United Nations (UN Charter) and Art. 65 of the Statute of the International Court of Justice (ICJ Statute) are fulfilled. In light of art. 96 of the UN Charter and 65 of the ICJ Statute, three conditions, in order for the ICJ to possess jurisdictional competence to give an AO, must be met: 1) the body requesting the opinion must be authorised to do so, the GA and SC being authorised under art. 96(1) UN Charter; 2) if the requesting body is another UN organ than the UNGA or SC or a specialised body, the issue at hand must fall within the competence of the requesting body; and 3) the question must be a legal one.

10. With respect to the third requirement, the Court has continuously explained that legal questions are those that 'are framed in terms of law and raise problems of international law (...) are by their very nature susceptible of a reply based on law' and 'therefore (...) appear (...) to be questions of a legal character'.<sup>5</sup> In *Certain Expenses*, the ICJ noted that '[i]f a question is not a legal one, the Court has no discretion in the matter; it must decline to give the opinion requested'.<sup>6</sup> However, even if the question is a legal one, the Court's advisory jurisdiction is discretionary.<sup>7</sup> The 'compelling reasons' on which the ICJ could rely to decline an AO request must be 'based on considerations of judicial propriety', such as the risk of interference with political processes or the overly abstract nature of the question.

11. The RMI submits that the requirements for advisory jurisdiction are met. The questions upon which the AO of the Court is asked were laid before the Court by means of a written request containing an exact statement of the questions upon which an opinion is required. The request was made by the UN General Assembly (GA), which is authorised to submit such a request under art. 96(1) UN Charter. The request also comes within the scope of the activities of the GA.<sup>8</sup> The GA has in fact engaged with questions involving

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<sup>4</sup> ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, (Advisory Opinion) [2010] ICJ Rep 403, para. 33.

<sup>5</sup> ICJ, *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, para. 15; ICJ, *Certain expenses of the United Nations (Art. 17, paragraph 2, of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151, 155.

<sup>6</sup> *Certain expenses of the United Nations* (n 6).

<sup>7</sup> ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (First Phase) [1950] ICJ Rep 72.

<sup>8</sup> Articles 10, 11 and 13 UN Charter.

environmental matters for some time.<sup>9</sup> Accordingly, the RMI respectfully submits that as the request pertains to issues of the legal obligations of States to prevent and redress the adverse effects of climate change and the consequences for causing significant damage to the climate system, the core questions of the request falls within the activities of the GA.

12. Lastly, the question is of a legal nature. It refers to the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations. It also addresses the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to States, including, in particular, small island developing States, as well as peoples and individuals of the present and future generations affected by the adverse effects of climate change.
13. The request for the AO therefore raises critical legal questions on the obligations of States to ensure protection of the climate system from GHG emissions and to preserve the rights of future generations There are no compelling reasons to reject the request, the questions for instance not being of a political or overly abstract nature. Even if the questions have certain political dimensions, this Court has previously emphasised that the political dimensions of a request for an AO ‘does not suffice to deprive it of its character as a legal question and to deprive the Court of a competence expressly conferred on it by its Statute’.<sup>10</sup>
14. In light of the above, the RMI submits that jurisdictional requirements are met.

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<sup>9</sup> At the 74th Session of October 2019, the GA ‘endorse[d] the political declaration adopted by the high-level forum on sustainable development convened under the auspices of the GA’, which affirmed that climate change is one of the greatest challenges of our time, see <<http://sdg.iisd.org/news/unga-president-announces-plans-for-sdg-summit/>>.

<sup>10</sup> *Threat or Use of Nuclear Weapons* para. 13 (citations omitted); *Legal Consequences of the Construction of a Wall*.



**PART A: OBLIGATIONS OF STATES UNDER INTERNATIONAL LAW  
TO ENSURE THE PROTECTION OF THE CLIMATE SYSTEM AND  
OTHER PARTS OF THE ENVIRONMENT FROM ANTHROPOGENIC  
EMISSIONS OF GREENHOUSE GASES FOR STATES AND FOR  
PRESENT AND FUTURE GENERATIONS**

**Principles of International Environmental Law**

**Common but Differentiated Responsibilities**

15. To further support the shared climate change obligation under international law, the Republic of the Marshall Islands notes that Principle 7 of the Rio Declaration on Environment and Development incorporates the principle of ‘Common but Differentiated Responsibilities’ (CBDR).
  
16. CBDR is based on the concept of fairness and equity. It establishes that all states are responsible for addressing global environmental destruction, while recognizing the differentiated responsibilities based on their abilities and contributions to the deterioration of the global environment. In this regard, the differentiated responsibility means that different environmental standards are established on the basis of a range of factors, such as special needs and circumstances, the future economic development of developing countries, and the historic contributions to causing environmental harm.
  
17. The CBDR principle is found in various treaties and conventions and can have varying formulations:
  - a. The 1972 Stockholm Declaration stated the need to consider the ‘applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries’ (Principle 23).
  
  - b. The Rio Declaration introduced different standards and different treatment of developing countries in Principles 6 and 11: ‘... environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply.’
  
  - c. the 1992 United Nations Framework Convention on Climate Change (UNFCCC) states ‘the special situation of developing countries, particularly the least developed and those environmentally vulnerable, shall be given special priority’ (Preamble)
  
  - d. The Paris Agreement addresses the CBDR principle in principle in Article 2.2, stating that the Agreement “will be implemented to reflect equity and the principle

of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.” and in Article 9 that ‘[d]eveloped country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention.’ The Paris Agreement also establishes common obligations with “built-in flexibility which takes into account Parties’ different capacities,” as with the enhanced transparency framework in Article 13. Every Party to the Agreement is required to “prepare, communicate and maintain successive nationally determined contributions that it intends to achieve,” with each “successive nationally determined contribution” representing “a progression beyond the Party’s then current nationally determined contribution,” and reflecting its “highest possible ambition.” (Article 4.2, 4.3.) All parties are also legally bound to “pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.” (Article 4.2.)

18. Such conventions also take into consideration the fact that economic and social development and eradication of poverty are the first and overriding priorities of the developing country parties (e.g. Article 4(7), UNFCCC). These principles are recalled in Article 2.1 and 4.1 of the Paris Agreement. The techniques applicable to implement this principle include ‘grace’ periods which: (i) delay the implementation of convention provisions or decisions, or its organs delay compliance with control measures (the 1987 Protocol on Substances that Deplete the Ozone Layer (Article 5(1))), (ii) introduce specific commitments only for developed country parties; (iii) allow differentiation in reporting obligations (the 1992 United Nations Framework Convention on Climate Change (Articles 4 and 12)).
19. The UNFCCC Preamble recognises that ‘the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs’. It also recognises further that low-lying and other small island countries, countries with low-lying coastal, arid and semiarid areas or areas liable to floods, drought and desertification, and developing countries with fragile mountainous ecosystems are particularly vulnerable to the adverse effects of climate change. The Republic of the Marshall Islands submits that CBDR in the UNFCCC recognizes that developed countries have a greater responsibility for combating climate change due to their historical and current emissions, as well as their higher levels of economic development. This is further recalled and refined in the Paris Agreement. Equally, it is clear that only the highest possible levels of ambition from all Parties to the Paris Agreement and the UNFCCC will achieve its objectives.
20. The Republic of the Marshall Islands submits that the CBDR is in fact a shield from the worst adverse impacts of climate change, for without the willingness and cooperation of developed countries to assume the higher responsibility to mitigate their emissions,

progress will be impeded and those most vulnerable to the adverse impacts of climate change will continue to suffer. For the Republic of the Marshall Islands, as a low-lying atoll, climate change is a profound threat and we continue to advocate for the adherence to the highest possible ambition, with developed countries continuing to take the lead, given the serious implications of climate change for the security and wellbeing of our people.

### **‘No harm’ Rule, the Principle of Prevention, and the Precautionary Principle**

21. The Republic of the Marshall Islands respectfully asks the Court to also consider the following principles of international environmental law, in the context of their importance in relation to climate change obligations.
22. **The ‘no harm’ principle** binds States to prevent, reduce and control the risk of environmental harm to other States. It was initially laid down in the Trail Smelter arbitration and has subsequently been included in the Principle 21 of the Stockholm Declaration, and Principle 2 of the Rio Declaration. Furthermore, in its *Advisory Opinion on the Threat or Use of Nuclear Weapons*, the ICJ confirmed that the obligation to ensure that activities within a State’s jurisdiction respect the environment of other States or of areas beyond national control is a rule of customary international law.
23. **The preventive principle** requires states to take action to prevent ‘damage to the environment and otherwise to reduce, limit or control activities, which may cause such damage’. The essence of the preventive principle is that it calls upon states to take action even before such damage has arisen. Thus, in the *Gabčíkovo–Nagymaros* case, the ICJ said that it was ‘mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage’ (para.140). The ICJ has linked the principle of prevention with due diligence in several of its cases, such as the *Pulp Mills* case and in the joined cases of *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*. For example, in *Pulp Mills* the ICJ pointed out that the ‘principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory’ (at para 101).
24. Principle 7 of the Stockholm Declaration provides that: ‘States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea’. The principle has also been incorporated in Principle 21 of the Stockholm Declaration and Article 2 of the 1982 United Nations Framework Convention on Climate Change. It was considered as part of general

international law by ICJ in the 1996 *Advisory Opinion on the Threat or Use of Nuclear Weapons* (para 27) and by International Tribunal for the Law of the Sea (ITLOS) in the *Advisory Opinion on Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* (para 147).

25. **The principle of precaution** may be seen as an extension of the preventive principle. It is applicable in circumstances of scientific uncertainty and states that where there is such uncertainty, states are to err on the side of caution, and thus take action to prevent environmental harm, even though such harm is not certain to happen. The principle is incorporated in the 1992 Rio Declaration, Principle 15 of which states as follows: ‘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’.
26. UNFCCC Article 3(3) provides that the Parties should take precautionary measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects. 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, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors.
27. As recognised by ITLOS in its *Advisory Opinion in the Area*, it is important to recognise that the precautionary approach is also an integral part of the general obligation of due diligence (para 131). In this opinion, the Chamber also observed that ‘the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law (para 135).

### **Polluter Pays Principle**

28. The polluter-pays principle aims to ensure that those responsible for causing pollution and environmental damage are responsible for the costs involved, both in terms of liability for compensation for damage as well as for the costs of prevention and control measures.
29. This principle also received general, though qualified, recognition in Principle 16 of the 1992 Rio Declaration, which states: ‘National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution,

with due regard to the public interest and without distorting international trade and investment’.

30. According to the International Law Commission (ILC), the polluter pays principle is a general principle of law that has emerged through its incorporation into treaties and other international instruments (Second report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur (2021) UN Doc A/CN.4/741, para 135).

### **Duty of Cooperation in the Context of Climate Change**

31. The duty to cooperate is an obligation of conduct. It is focused on States’ conduct in terms of cooperating with each other and generally does not require States to reach a particular substantive outcome as a result of their cooperation, although the outcomes of such cooperation may sometimes shed light on the extent to which a State has fulfilled its obligation to cooperate. The duty to cooperate is of a continuing nature and generally cannot be satisfied by a one-time act. The duty to cooperate has been recognised as ‘fundamental principle’ of international environmental law by the ICJ (*Pulp Mills on the River Uruguay; Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*). The principle of cooperation underlines general international environmental law. It forms the fundamental principle of many multilateral environmental agreements. The Convention on the Law of the Non-navigational Uses of International Watercourses lays down a general duty to cooperate in Article 8. The Convention on Biological Diversity provides for an obligation of cooperation in Article 5.
32. The duty to cooperate is ‘other-regarding’ – ‘it requires a State to consider the potential impacts of its actions from the perspective of the affected State or community, and to seek outcomes based on good faith and due respect’ (Craig, Alastair Neil, *The Duty to Cooperate in International Environmental Law: Constraining State Discretion Through Due Respect* (May 9, 2020)). In the words of Judge Wolfrum, the duty ‘denotes an important shift in the general orientation of the international legal order. It balances the principle of sovereignty of States and thus ensures that community interests are taken into account *vis-à-vis* individualistic State interests’ (*MOX Plant*, Sep. Op. Wolfrum). The duty of cooperation is recognised in several important environmental and climate change treaties and instruments. Principle 14 of the Rio Declaration provides that ‘States should effectively cooperate to discourage or prevent the relocation and transfer to other states of any activities and substances that cause severe environmental degradation or are found to be harmful to human health’. There is no general legal obligation to cooperate in international law or even in international environmental law. The legal obligations related to cooperation are specific treaty obligations, or in the context of planned activities, customary obligations. As such, the precise contours of the duty to cooperate will depend upon the wording and context of the specific obligation.

33. The UNFCCC Preamble acknowledges that ‘the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions’. Article 3(5) UNFCCC further provides that the Parties should ‘cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change’. Article 4(1)(c) imposes a duty on States to ‘promote and cooperate in the development, application and diffusion, including transfer, of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases not controlled by the Montreal Protocol in all relevant sectors, including the energy, transport, industry, agriculture, forestry and waste management sectors’. Lastly, Article 4(1)(e) stipulates that States shall ‘cooperate in preparing for adaptation to the impacts of climate change; develop and elaborate appropriate and integrated plans for coastal zone management, water resources and agriculture, and for the protection and rehabilitation of areas, particularly in Africa, affected by drought and desertification, as well as floods’.
34. Paris Agreement Article 7(6) provides that ‘Parties recognize the importance of support for and international cooperation on adaptation efforts and the importance of taking into account the needs of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change’. According to Article 7(7), Parties should strengthen their cooperation on enhancing action on adaptation, taking into account the Cancun Adaptation Framework, including with regard to: sharing information, good practices, experiences and lessons learned, including, as appropriate, as these relate to science, planning, policies and implementation in relation to adaptation actions; strengthening institutional arrangements to support the synthesis of relevant information and knowledge, and the provision of technical support and guidance to Parties; strengthening scientific knowledge on climate, including research, systematic observation of the climate system and early warning systems, in a manner that informs climate services and supports decision-making; assisting developing country Parties in identifying effective adaptation practices, adaptation needs, priorities, and support provided and received for adaptation actions and efforts.
35. Furthermore, Article 8(3) of the Paris Agreement imposes a duty on Parties to enhance understanding, action and support, including through the Warsaw International Mechanism, as appropriate, on a cooperative and facilitative basis with respect to loss and damage associated with the adverse effects of climate change. Support, including financial support, shall be provided to developing country Parties, including for strengthening cooperative action on technology development and transfer at different stages of the technology cycle, with a view to achieving a balance between support for mitigation and adaptation (Article 10(6)). Decision 1/CP.21 recognises that climate

- change represents an urgent and potentially irreversible threat to human societies and the planet and thus requires the widest possible cooperation by all countries, and their participation in an effective and appropriate international response, with a view to accelerating the reduction of global greenhouse gas emissions (Preamble).
36. In the context of marine environmental protection Article 197 UNCLOS sets out the obligation for States to cooperate ‘in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment’. The International Tribunal for the Law of the Sea has described the duty to cooperate under Article 197 as a ‘Grundnorm’ or a ‘fundamental principle in the prevention of pollution of the marine environment under Part XII’ of UNCLOS (*MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, ITLOS Reports 2001, para. 82.). This holds true in the broader climate change system.
37. Cooperation is a significant aspect of the principle of prevention, which include the following elements: (i) a general duty to refrain from causing significant harm to the environment and to proactively take measures to prevent such damage and to ensure that such measures are effectively implemented; (ii) procedural duties of the prevention include the duty of cooperation through consultations and notifications; (iii) Environmental Impact Assessment (a procedural requirement recognised by the ICJ in *Pulp Mills and Costa Rica/Nicaragua cases*).
38. Furthermore, the duty to cooperate is continuing in nature. States must continually re-examine and strengthen the relevant rules and standards in this regard, including through continuing to participate meaningfully in ongoing processes under the UNFCCC and the Paris Agreement, such as the annual Conferences of the Parties and the Ocean and Climate Change Dialogue, which are focused on issues concerning oceans and the marine environment. Significantly, States are under a cooperative duty under Article 8(3) of the Paris Agreement to enhance action and support through the Warsaw International Mechanism with respect to loss and damage associated with the adverse effects of climate change. States must also cooperate in preparing for adaptation to the impacts of climate change, both under the UNFCCC and the Paris Agreement.

## **Climate Change, Multilateral Environmental Agreements, and Universal Human Rights Treaties**

39. The Republic of the Marshall Islands submits the following treaty obligations for the Court’s consideration.

### **The United Nations Framework Convention on Climate Change**

40. The UNFCCC established several detailed commitments, including stabilising greenhouse gas concentrations in the atmosphere, limiting emissions of greenhouse gases by developed countries, establishing a financial mechanism, and providing financial resources to developing countries for meeting certain incremental costs and adaptation measures.

### **The Paris Agreement**

41. The Paris Agreement takes this a step further, establishing methods to reduce climate change. The measures in the agreement included keeping the global temperature increase ‘well below’ 2°C and pursuing efforts to limit it to 1.5°C. The agreement also established the goal for global greenhouse gas emissions to peak ‘as soon as possible’ and to achieve overall carbon neutrality ‘in the second half of the century’.
42. In this vein, the Paris Agreement requires member States to review and increase their emission reduction commitments every five years to meet the long-term goal of greenhouse gas neutrality by the second half of the century and, accordingly, submit nationally determined contributions (NDCs). The Paris Agreement, in principle, through its ‘ratchet mechanism’ intends to encourage parties to adopt progressively more ambitious NDCs in the future.

### **International Convention for the Prevention of Pollution from Ships (MARPOL)**

43. MARPOL is the main international convention for marine pollution prevention from ships, both accidental and from routine operations. It is an umbrella treaty comprising six annexes addressing different pollution aspects. Annex VI addresses air pollution and imposes obligations to reduce emissions of ozone depleting substances.
44. The 2023 IMO Strategy on Reduction of GHG Emissions from Ships for Member States, formulates ‘the future vision for international shipping, the levels of ambition to reduce GHG emissions and guiding principles; and includes candidate mid- and long-term further measures with possible timelines and their impacts on States. The Strategy also obliges that the basket of mid-term measures should be developed should accomplish three things: an effective promotion of the energy transition of shipping, providing the world fleet with a much needed incentive, and contributing to a level playing field and a just and equitable transition. The strategy also identifies barriers and supportive measures including capacity building, technical cooperation and research and development.’ Of particular note is the IMO’s recognition that due account should be given in that the development of mid-term measures “ensures a just and equitable transition that leaves no country behind.” Furthermore a reduction in carbon intensity of international shipping of at least 20% should be made by 2030 and at least 70% by 2040, with the end goal of net-zero by 2050, consistent with the temperature goal of the Paris Agreement. The 2023 IMO GHG Strategy is characterised by a new level of



ambition relating to the uptake of zero or near-zero GHG emission technologies, fuels and/or energy sources which are to represent at least 5%, striving for 10%, of the energy used by international shipping by 2030. The strategy in the Vision calls for the promotion of a just and equitable transition <sup>11</sup>

### **United Nations Convention on the Law of the Sea (UNCLOS)**

45. UNCLOS is a convention ratified by 167 States. Part XII of UNCLOS sets out the obligations for States to protect and preserve the marine environment. While UNCLOS may have been created at a time when climate change was not part of the public consciousness, its provisions on prevention, reducing, and controlling pollution ‘from any source’ would be relevant here. Under Article 194(1)(2), States have responsibility to take ‘all the measures that are necessary to prevent, reduce and control pollution of the marine environment from any source’, and to ensure that ‘activities within their jurisdiction and control do not cause pollution damage to other states or their environment’.

46. UNCLOS Art 1(4) defines pollution of the marine environment, as ‘the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities’. Since climate change is caused by an excess of GHG emissions being released into the atmosphere, owing to man-made industrial activities, the emissions causing climate change can be considered as ‘pollution’.

### **International Covenant on Civil and Political Rights**

47. Article 6 of the ICCPR protects the right to life. The Human Rights Committee in General Comment No 36 clarified that States parties’ obligations under international environmental law should inform the content of Article 6 of the ICCPR, protecting the right to life. In this regard, the Human Rights Committee stated as follows:

*“Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. The obligations of States parties under international environmental law should thus inform the content of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law.*

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<sup>11</sup>Resolution MEPC.377(80)

<https://wwwcdn.imo.org/localresources/en/OurWork/Environment/Documents/annex/MEPC%2080/Annex%2015.pdf>

*Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors. States parties should therefore ensure sustainable use of natural resources, develop and implement substantive environmental standards, conduct environmental impact assessments and consult with relevant States about activities likely to have a significant impact on the environment, provide notification to other States concerned about natural disasters and emergencies and cooperate with them, provide appropriate access to information on environmental hazards and pay due regard to the precautionary approach.”*

48. Furthermore, in *Portillo Cáceres v Paraguay* (25 July 2019 CCPR/C/126/D/2751/2016), the Human Rights Committee held that the right to life also concerns the entitlement of individuals to enjoy a life with dignity and to be free from acts or omissions that would cause their unnatural or premature death, including from environmental pollution.

### **Universal Declaration on Human Rights**

49. Article 1 of the UDHR provides that *‘[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood’*. Article 1 of the UDHR recognises in very clear and unambiguous terms the responsibility that each human being owes each other, a responsibility that transcends borders and that is universal. Accordingly, if the actions of individuals in State X are causing unacceptable levels of emissions that are affecting the human rights of people in State A, B, C, and D, and causing these States to face the very real risk of a profound harm posed by climate change due to their vulnerabilities, the duty owed by individuals to each other under Article 1 of the UDHR is violated. Furthermore, this violation is attributable to State X if it failed to take action to prevent or repress the conduct of the individual in its territory that led to the violation, an obligation deriving from its duty to protect and promote universally recognized human rights.<sup>12</sup>

50. In the case of the Republic of the Marshall Islands, as a low-lying coral atoll, it is highly vulnerable to rising sea-levels induced by climate change. The universally recognized human rights of its people under the UDHR, ICESCR, and ICCPR faces serious threat, including their enjoyment of the right to life, the right to housing, the right to private life, the right to family and home, an adequate standard of living, and the right to be free from acts or omissions causing premature death, including from air pollution.

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<sup>12</sup> Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, <https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-right-and-responsibility-individuals-groups-and>

## International Humanitarian Law Obligations

51. Obligations of States can be derived from international humanitarian law in situations where displacement and migration are induced by climate change. International humanitarian law may also be relevant during disasters driven by climate change, where humanitarian situations arise. The scope of the obligations to be derived from international humanitarian law is applicable specifically in humanitarian situations arising as a result of climate change and the expectations of States will derive from the recourse and redress that they must provide in such situations. Of particular relevance is the increased focus now placed by the International Committee of the Red Cross (ICRC) on the correlation between climate change and conflict, particularly in contexts where competition for resources escalates when the availability of vital resources (e.g. water) becomes scarce and control over access to these resources become grounds for armed conflict.<sup>13</sup> In this regard, the ICRC and International Federation of the Red Cross have adopted The Climate and Environment Charter for Humanitarian Organizations<sup>14</sup>, with both organizations adopting specific targets,<sup>15</sup> and the ICRC adopting a further plan action to implement the charter.<sup>16</sup> In 2019, the ICRC further adopted a resolution on disaster laws and policies that leave no one behind which had a substantial focus on the need for laws and policies that address climate change in a manner that addresses the needs of persons and communities in the most vulnerable of situations.<sup>17</sup>
52. Furthermore, it is noteworthy that the Sendai Framework on Disaster Risk Reduction has a substantial focus on the imperative of States ‘[a]ddressing climate change as a driver of disaster risk’.<sup>18</sup> The implication of this focus in the Sendai Framework suggests that States must do more to address climate change as it drives disaster risk. This responsibility goes beyond the State obligation to adapt to climate change and instead emphasises their duty to mitigate emissions addressing the underlying cause of climate change. In this regard, the States’ obligation to reduce emissions is also linked to the obligation to reduce disaster risk, avoiding the humanitarian situations that can arise as a result.

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<sup>13</sup> ICRC, What we do: climate change and conflict, <https://www.icrc.org/en/what-we-do/climate-change-conflict>

<sup>14</sup> Climate Charter and Environment Charter for Humanitarian Organizations, <https://www.climate-charter.org/wp-content/uploads/2022/05/ClimateEnvironmentCharter-EN.pdf>

<sup>15</sup> IFRC Targets, <https://www.climate-charter.org/signatures/international-federation-of-red-cross-and-red-crescent/>

ICRC Targets, <https://www.climate-charter.org/signatures/international-committee-of-the-red-cross-icrc/>

<sup>16</sup> Implementing the Climate and Environment Charter for Humanitarian Organizations: The ICRC’s plan of action 2021 – 2024+, [https://www.climate-charter.org/wp-content/uploads/2022/01/4604\\_002\\_CE\\_Charter\\_Implementation\\_Plan\\_Web.pdf](https://www.climate-charter.org/wp-content/uploads/2022/01/4604_002_CE_Charter_Implementation_Plan_Web.pdf)

<sup>17</sup> ICRC, Disaster laws and policies that leave no one behind, resolution of December 2019, [https://rcrcconference.org/app/uploads/2019/12/33IC\\_R7-Disaster-Law-resolution-adopted-EN-1.pdf](https://rcrcconference.org/app/uploads/2019/12/33IC_R7-Disaster-Law-resolution-adopted-EN-1.pdf)

<sup>18</sup> Sendai Framework for Disaster Risk Reduction 2015 – 2030, Preamble, para. 13, [https://www.preventionweb.net/files/43291\\_sendaiframeworkfordrren.pdf](https://www.preventionweb.net/files/43291_sendaiframeworkfordrren.pdf)

53. In the broader context of international governance, the importance attributed to the Sendai Framework is significant as it sets the mandate for the United Nations Office for Disaster Risk Reduction (UNDRR).<sup>19</sup> According to UNDRR: ‘the Sendai Framework works hand in hand with the other 2030 Agenda agreements, including The Paris Agreement on Climate Change, The Addis Ababa Action Agenda on Financing for Development, the New Urban Agenda, and the Sustainable Development Goals’.<sup>20</sup>
54. In 2021, the General Assembly adopted resolution 76/114, on crimes against humanity, triggering a process of at least two years of debate and discussion by the Sixth Committee on the draft articles on prevention and punishment of crimes against humanity adopted by the International Law Commission at its seventy-first session in 2019 (see A/74/10). At the current time, the draft articles do not include any reference to impacts on humanity owing to climate change. Nevertheless, there have been various calls to include climate change harm within the definition of ecocide. Around the globe, many people are being denied the right to life as a consequence of climate change. This is due to direct impacts, such as floods, droughts, storm surges, heat stress, hurricanes, typhoons and cyclones, and indirect effects, such as being displaced from their homes owing to such events and having to confront the perils of migration, which may result in death.

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<sup>19</sup> UNDRR, The Sendai Framework, [Implementing the Sendai Framework | UNDRR](#).

<sup>20</sup> Ibid.

**PART B: WHAT ARE THE LEGAL CONSEQUENCES UNDER THESE OBLIGATIONS FOR STATES WHERE THEY, BY THEIR ACTS AND OMISSIONS, HAVE CAUSED SIGNIFICANT HARM TO THE CLIMATE SYSTEM AND OTHER PARTS OF THE ENVIRONMENT, WITH RESPECT TO: (I) STATES, INCLUDING, IN PARTICULAR, SMALL ISLAND DEVELOPING STATES, WHICH DUE TO THEIR GEOGRAPHICAL CIRCUMSTANCES AND LEVEL OF DEVELOPMENT, ARE INJURED OR SPECIALLY AFFECTED BY OR ARE PARTICULARLY VULNERABLE TO THE ADVERSE EFFECTS OF CLIMATE CHANGE? (II) PEOPLES AND INDIVIDUALS OF THE PRESENT AND FUTURE GENERATIONS AFFECTED BY THE ADVERSE EFFECTS OF CLIMATE CHANGE?**

**State Responsibility for Significant Harm to the Climate System**

55. The Republic of the Marshall Islands submits that where any harm has resulted out of a State's action or omission, the State that caused the harm attracts its responsibility, and also entails the obligation to cease the act and/or omission causing the damage and to repair the damage cause or pay compensation.
56. Reparations should be assessed from the point of view of general international law and reparations specifically relating to climate impacts and related loss and damage. Under the International Law Commission's draft Articles of Responsibility of States for Internationally Wrongful Acts (ARSIWA), there is a duty of a State to make reparations for the commission of a wrongful act which is a consequence of a breach of an international obligation. The obligation can be based on treaty law, customary international law and general principles of law. The breach, in relation to environmental law obligations, including climate change obligations, the breach of a norm of customary international law and a breach of a general principle of international law, will arise if a State acted negligently (i.e. failed to act with due diligence) and significant environmental harm occurred. In relation to breaches of treaty obligations, a State will incur responsibility if acting in breach of the obligation contained in the treaty.
57. Under Article 30 of ARSIWA, the State responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing; (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require. 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State (Article 31).
58. The Republic of the Marshall Islands submits that the Court could also take the opportunity to explain how compensation for environmental damage is to be

calculated. For instance, in *Certain Activities Carried Out by Nicaragua in the Border Area*, the Court concluded that the total amount of compensation to be awarded by Nicaragua to Costa Rica was US\$378,890.59, and in 2018, Nicaragua paid to Costa Rica the total compensation dictated by the Court. The Republic of the Marshall Islands understands that the Court noted that international law does not prescribe any specific method of valuation for the purposes of compensation for environmental damage, thereby leaving some room for creativity, and/or for future formulation of such a method.

## Causation and Due Diligence

59. The Republic of the Marshall Islands submits that the question of causation should be considered when deliberating on State climate change obligations, as the imposition of an obligation implies accountability for the adverse consequences of a failure to fulfil that obligation.
60. Causation is understood as the process of connecting an act (or omission) with an outcome as cause and effect. Generally, there must be a causal link between the activities in question and the environmental damage that occurs. Causation can be viewed from a historical and contemporary point of view. In order to establish a violation of environmental norms, including climate change obligations, a causal link will need to be established between the activities occurring within a respondent State's jurisdiction and the (potential) harm caused by climate change. Such a link should draw on scientific probabilistic standards of proof. Moreover, it would be necessary to show that activities within any particular respondent State's jurisdiction or control have *causally contributed* to the collective harm of global warming; a task which, in light of the contributions of others to the same harm could be met with the assistance of attribution science.
61. Article 47 of the International Law Commission's (ILC) 2001 Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), which codified customary international law on State responsibility, establishes that '[w]here several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act'. The commentary explicitly refers to the issue of pollution, and provides that in situations where several States are responsible for the damage, 'the responsibility of each participating state is determined individually, on the basis of its own conduct and by reference to its own international obligations'.
62. The question of causation has proved to be difficult to establish in cases in environmental damage, as observed by the ICJ in 2018 *Nicaragua/Costa Rica cases*. The Court stated that '[i]n cases of alleged environmental damage, particular issues may arise with respect to the existence of damage and causation. The damage may be due to several concurrent causes, or the state of science regarding the causal link between the wrongful act and the damage may be uncertain. These are difficulties that must be addressed as and when they arise in light of the facts of the case at hand and the evidence presented to the

Court. Ultimately, it is for the Court to decide whether there is a sufficient causal nexus between the wrongful act and the injury suffered' (at para. 34).

63. From the historical point of view, there is a potential to establish causation by similar reasoning to that of the Dutch Supreme Court in the *Urgenda case* (2019) that whilst climate change as a consequence of collective human activities cannot be solved by one State alone, this does not reduce that country's individual responsibility.

64. The Paris Agreement, among its more specific obligations, requires:

*"Holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change."*<sup>21</sup>

65. Accordingly, in a situation where this obligation is not met, responsibility for the violation is incurred. In this regard, related to the question of causation and legal consequence, the onus is on those asserting a violation to establish, with evidence, those responsible and the extent of their responsibility.

66. It is in this respect that organizations like the World Meteorological Organization (WMO) and the Intergovernmental Panel on Climate Change (IPCC) play a significant role. Through the WMO and IPCC, we are able to follow the scientific evidence of a failure to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels and to hold that increase well below 2 °C. The more recent IPCC reports have painted a catastrophic situation, which has led to the growing recognition of the "climate crisis".

67. In its 2022 report, the IPCC determined with high confidence that "[e]ven with current, moderate climate change, vulnerable people will experience a further erosion of livelihood security that can interact with humanitarian crises, such as displacement and involuntary migration (high confidence)".<sup>22</sup> The IPCC in specific regard to vulnerability of Small Island States, determined with high confidence as follows:

*"Climate change is contributing to humanitarian crises where climate hazards interact with high vulnerability (high confidence). Climate and weather extremes are increasingly driving displacement in all regions (high confidence), with Small Island States disproportionately affected (high confidence)."*

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<sup>21</sup> Article 1(a) of the Paris Agreement.

<sup>22</sup> IPCC, Climate Change 2022: Impacts, Adaptation and Vulnerability, page 65, [https://report.ipcc.ch/ar6/wg2/IPCC\\_AR6\\_WGII\\_FullReport.pdf](https://report.ipcc.ch/ar6/wg2/IPCC_AR6_WGII_FullReport.pdf)

68. In this regard, the Republic of the Marshall Islands respectfully requests that the Honourable Court consider the question of causation when States fail, through their acts or omissions, to fulfil their obligations under international to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases.
69. The Republic of the Marshall Islands further submits that the question of causation encompasses a ‘failure to act’, in particular where NDCs are concerned and includes, NDCs that are without reasonable ambition to tackle the effect of climate change. The question of causation based on a ‘failure to act, directly relates to existing emissions pledges which, objectively considered, are insufficient to meet States’ fair emissions contribution required under the Paris Agreement. This applies not only when NDCs are not sufficiently ambitious, but also when the policies and implementation are not in place so that the targets set out in those NDCs are met.
70. Under international environmental law, the Republic of the Marshall Islands submits that climate change obligations, like other international environmental law obligations, are based on the principle of due diligence. Due diligence is an obligation of conduct, which imposes the duty on States to take positive action in the endeavour to realise a desired objective. Due diligence obligations can be separated into two overlapping types: procedural obligations and obligations relating to a State’s institutional capacity. Obligations of the procedural type typically involve reporting and notifying certain incidents and/or risks to other States, monitoring certain situations, consulting other States and to carry out risk assessments. The second type of due diligence obligation – relating to States’ institutional capacity – may oblige States to take legislative or administrative safeguard measures, for example to enact appropriate laws.
71. In this regard, the ICJ in its decision in the *Bosnia Genocide case (Bosnia and Herzegovina v Serbia and Montenegro, 2007)* concluded that States cannot avoid responsibility by claiming that even if they did act diligently, they would not have been able to prevent the damage. In that case, as the ICJ concluded that through the combined action and effort of States, they could have achieved the desired result.
72. In the context of climate change, the Republic of the Marshall Islands submits that States cannot avoid responsibility by exclusively relying on the principle of due diligence to claim that even if acting diligently, this could not have prevented environmental damage through climate change effects. To the contrary, membership to the United Nations requires adherence to the aspirations set out in its Charter, Article 1(3) of which provides:

*“The Purposes of the United Nations are:*

*To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect*



*for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion...”*

73. Accordingly, the Republic of the Marshall Islands submits that due diligence imposes an obligation on States to cooperate and advance their best efforts to address climate change and any other interpretation would run contrary to the UN Charter and the very purpose for which the UN was established.

## **Reparations for Loss and Damage under the Climate Change Regime**

74. The Republic of the Marshall Islands submits that it is already experiencing loss and damage as a consequence of climate change, including through loss of coastal territory, and the resources, livelihoods and cultural practices associated with it. ‘Loss and damage’ is a general term used in UN climate negotiations to refer to the consequences of climate change that go beyond what people can adapt to; for example, the loss of coastal heritage sites due to rising sea levels or the loss of homes and lives during extreme floods. This also includes situations where adaptation options exist, but a community does not have the resources to access or utilize them. There are two major UN climate conventions that call for financial assistance from parties with more financial resources to those that are less endowed and more vulnerable to climate change: the UNFCCC and the Paris Agreement.
75. Under the Paris Agreement on climate change, countries recognized ‘averting, minimizing and addressing’ loss and damage. Loss and damage can be ‘averted’ and ‘minimized’ by diminishing greenhouse gas emissions (mitigation) and by taking pre-emptive action to protect communities from the consequences of climate change (adaptation).
76. The IPCC states that ‘[n]ear-term actions that limit global warming to close to 1.5°C would substantially reduce projected losses and damages related to climate change in human systems and ecosystems, compared to higher warming levels, but cannot eliminate them all (very high confidence). (B3 IPCC AR 6 WG II SPM)’. In being ‘unavoidable’, loss and damage cover the negative impacts of climate change that cannot be avoided through ‘mitigation’ (reducing the emissions that contribute to climate change) or ‘adaptation’ (making adjustments, such as flood defences or sowing drought-resistant crops).
77. The conduct of States relevant to loss and damage includes acts and omissions resulting in significant harm to the climate system, also including the effect on the individuals and the enjoyment of human rights in general. As emphasised in the Synthesis Report of the IPCC Sixth Assessment, ‘[w]idespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred. Human-caused climate change is already affecting many weather and climate extremes in every region across the globe. This has

led to widespread adverse impacts and related losses and damages to nature and people'.<sup>23</sup>

78. Climate change will affect a wide range of social, economic and environmental systems. Furthermore, loss and damage can be divided into economic losses and non-economic losses. The economic losses can be understood as the loss of resources, goods and services that are commonly traded in markets, and that these can be valued using market-prices. Non-economic losses can be understood as the remainder of items that are not economic items; that is to say that non-economic items are those that are not commonly traded in markets. The absence of a market price is one of the main reasons why assessing non-economic losses is challenging. However, its effect on our population's welfare is no less important. In a small Pacific atoll nation like the Marshall Islands, where cultural practices and land is akin to one's identity, non-economic losses may well be more significant than economic losses.
79. The Republic of the Marshall Islands submits that recognising and managing the risk of non-economic loss should therefore be a crucial aspect of climate change policy. Non-economic losses may be related to both slow onset impacts (e.g. the loss of territory to sea level rise) and extreme events (e.g. loss of life in a cyclone) associated with climate change. The loss may be directly linked to adverse climate change impacts (e.g. loss of ecosystems) or occur indirectly (e.g. malnutrition as a consequence of impacts in the agriculture sector). Non-economic losses are therefore one of the elements that constitute the total cost of climate change. There is a link between the magnitude of adaptation cost, mitigation cost and loss and damage. Increasing the mitigation effort (higher mitigation costs) would reduce loss and damage and make adaptation cheaper. Increasing the amount of adaptation (higher adaptation cost) will also reduce loss and damage.
80. While a number of countries have pledged financial support for loss and damage, they remain very few and the amount pledged remain exceedingly below what is needed. Parties agreed, at COP27, to establish funding arrangements for assisting developing countries that are particularly vulnerable to the adverse effects of climate change, in responding to loss and damage, and to establish a fund for responding to loss and damage. At COP28, the loss and damage fund was initiated, with the World Bank hosting it. Countries pledged almost \$700 million to start filling the fund. The Santiago Network on Loss and Damage was also operationalized, with the UN Office of Disaster Risk Reduction and UN Office for Project Services as its hosts and the U.S. pledging an additional \$2.5 million.
81. In the lead-up to COP29 in 2024, countries will be looking for confirmation that the World Bank can meet the conditions required to host the loss and damage fund, such as the allowing countries direct access to resources from the fund; and ensuring universal

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<sup>23</sup> IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers, statement A.2, available at: <https://www.ipcc.ch/report/sixth-assessment-report-cycle>.

access to all parties of the Paris Agreement, even if they are not members of the World Bank. Developed nations must contribute more finance to fill the loss and damage fund. While the \$700 million pledged at COP28 is a start, vulnerable countries may face as much as \$580 billion in climate-related damages by 2030.<sup>24</sup>

82. While funding is provided internationally through the United Nations and bilateral disaster relief support, this funding is generally on an *ad hoc* basis and well below what is needed. Furthermore, there is also a large time gap between the event of the disaster and the receipt of the relief money. Other funding for disaster risk reduction agendas primarily focuses on risk assessment and places the onus on affected countries and communities to fund their own losses. The Republic of the Marshall Islands respectfully calls to the Court's attention the views expressed to the Special Rapporteur on the Protection of Human Rights in the Context of Climate Change and submissions received that suggest that these arrangements are inadequate to address loss and damage both in the short and longer term.<sup>25</sup>

83. Current funding arrangements at the international, regional and national levels are either difficult to gain access to, do not address all loss and damage or are poorly capitalised. Little funding is provided to help particularly vulnerable developing countries, especially small island developing States, to cover the costs of loss and damage associated with slow-onset events, such as the resettlement of populations from areas rendered uninhabitable owing to climate change and measures to address permanent loss of, among other things, ecosystems and heritage.<sup>26</sup>

84. Cooperation is also emphasised in the loss and damage regime. In 2023, the Special Rapporteur on the Protection of Human Rights in the Context of Climate Change suggested the following recommendations with respect to loss and damage, suggesting that new climate change legislation should:

- Create provisions for compensation, liability and reparations to ensure that major greenhouse gas polluters – countries and corporations alike – pay for the harm they are causing;
- Develop affordable insurance and risk-pooling mechanisms to assist the most vulnerable;
- Create mechanisms to assess, quantify and compensate for loss and damage for economic and non-economic losses, including human rights impacts;
- Support the establishment of an international mechanism for processing loss and damage claims in an expedited manner.

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<sup>24</sup> Preety Bhandari et al, 'What Is "Loss and Damage" from Climate Change? 8 Key Questions, Answered', <https://www.wri.org/insights/loss-damage-climate-change>, 2024.

<sup>25</sup> UN Special Rapporteur on the Protection of Human Rights in the Context of Climate Change, 2022, paragraph 69.

<sup>26</sup> Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change, 2022, para 70.

## Human Rights Obligations with Respect to the Environment

85. The core international civil and political rights instrument embodying first generation rights – the ICCPR – does not explicitly refer to a right to a clean environment or impose any climate change obligations on States. Recent years have however seen several important developments in this regard. For instance, in July 2022, the UN General Assembly passed a landmark resolution recognising the right to a clean, healthy, and sustainable environment as a human right and called upon States, international organisations, businesses, and other stakeholders to ‘scale up efforts’.
86. In its General Comment No 36, the Human Rights Committee (HRC) clarified that States parties’ obligations under international environmental law should inform the content of Article 6 ICCPR, protecting the right to life. Furthermore, On September 23, 2022, the U.N. Human Rights Committee found that Australia’s failure to adequately protect indigenous Torres Islanders against adverse impacts of climate change violated their rights to enjoy their culture and be free from arbitrary interferences with their private life, family and home.
87. There are several regional human rights treaties, which include such a right, i.e. the Article 24 of the African Charter on Human and Peoples’ Rights and Article 11 of the Additional Protocol to the American Convention on Human Rights in the Field of Economic, Social and Cultural Rights (San Salvador Protocol). The Inter-American Court of Human Rights (IACtHR) in its *Advisory Opinion Concerning the Obligations of States parties to the American Convention on Human Rights in Respect of Infrastructural Works Creating a Risk of Significant Environmental Damage to the Marine Environment of the Wider Caribbean Region* defined the right to a healthy environment as an ‘autonomous right’ under the ACHR. This right has connections and implications for the rights to life, personal integrity, privacy, health, water, housing, cultural participation, property, and the prohibition of forcible displacement. Furthermore, the IACtHR had previously recognised in a 2017 advisory opinion that persons potentially affected by transboundary environmental harm must have access to justice without discrimination based on their nationality, residence, or the location of the environmental damage.
88. As early as in *SERAC and CESR v Nigeria*, the African Commission on Human Rights found that the Nigerian government had violated the right to health and the right to a clean environment as recognised under Articles 16 (right to health) and 24 (right to satisfactory environment) of the ACHPR by failing to fulfil the minimum duties required to protect against and prevent widespread contamination of soil, water and air; the destruction of homes; the burning of crops and killing of farm animals (Decision Regarding Communication 155/96, *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v Nigeria*).

89. The European Court of Human Rights (ECtHR) through an interpretation of Article 2 on the right to life and Article 8 on private and family life, have recognised that States have positive obligations to prevent environmental risks that may endanger the right to life and affect the quality of private and family life. For instance, the ECtHR stated in the *Lopez Ostra case* (1994) that a State has a general duty of care in relation to environmental protection. This can be transposed onto climate change obligations, which means that notwithstanding the questions of causation and due diligence from the point of view of human rights, States have a duty of care towards individuals in relation to protection against climate change.
90. In recognition of their responsibilities under the United Nations Framework Convention on Climate Change and the Paris Agreement, countries around the world have enacted laws and adopted policies that prescribe national and international responses to climate change. The linkage between taking action to address climate change and respecting, promoting and considering human rights obligations is stipulated in the preamble of the Paris Agreement. According to the Special Rapporteur on the Promotion and protection of human rights in the context of climate change (2023), there is an expanding trend of linking responsibilities on climate change to human rights treaties. According to the Rapporteur, ‘States cannot ignore their human rights responsibilities when addressing climate change; this is of critical importance given the impacts that climate change is having on the rights and freedoms of people across the globe’ (paragraph 2).
91. There are a number of pending cases before international and regional human rights adjudicative bodies in the link between climate change effects and human rights, including *KlimaSeniorinnen Schweiz v Switzerland*, *Duarte Agostinho and Others v. Portugal and 32 Other*, and *Carême v. France before the ECtHR*, and the request of an advisory opinion on climate change obligations submitted by Chile and Colombia to the Inter-American Court of Human Rights.
92. The State obligation arising under international human rights law has been thoroughly discussed in the Human Rights Council through the interactive dialogues that have flowed from the resolution on human rights and climate change<sup>27</sup> and the ongoing thematic consideration of this issue through the special procedure mandate created for the Special Rapporteur on the promotion and protection of human rights in the context of climate change.<sup>28</sup> States also have corresponding procedural obligations which are aimed at implementation of substantive human rights obligations. They are included in Principle 10 of the 1992 Rio Declaration on the Environment and Development and further evolved in the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which is based on

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<sup>27</sup> For more on this resolution, access: <https://www.ohchr.org/en/climate-change/human-rights-council-resolutions-human-rights-and-climate-change>

<sup>28</sup> For more on this resolution and its special procedure mandate, access: <https://www.ohchr.org/en/specialprocedures/sr-climate-change>

three pillars: i) environmental information; ii) public participation in environmental matters; and iii) and access to environmental justice. In addition, in a regional context the 2018 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement) provides for the same standards.

93. Furthermore, under the Declaration on the Right to Development, Article 1 provides that

*“The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.*

*The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.”*

94. In the *Chagos Advisory Opinion*, the ICJ was conscious that the right to self-determination, as a fundamental human right, has a broad scope of application (para 144). Climate change adversely affects the right to self-determination as an element of the right to development through deprivation of the enjoyment of several fundamental human rights, such as right to life, the right to enjoy the highest attainable standard of physical and mental health, the right to an adequate standard of living, the right to sufficient food, the right to housing, the right to safe drinking water and sanitation, and the right to participate in cultural life.

95. Linking environment protection with human rights can be an effective way to promote environmental protection. By framing environmental issues as human rights issues, it can help to raise awareness of the impacts of environmental degradation on human well-being and to emphasise the need for urgent action to address these issues. Furthermore, linking environment protection with human rights can provide a powerful legal and moral framework for holding governments and other actors accountable for their environmental actions or inactions. This can help to promote stronger environmental regulations, improve access to environmental information, and ensure greater public participation in environmental decision-making processes.

## **Impact of Climate Change to the Marshall Islands and its Implications**

96. For the Republic of the Marshall Islands and many countries that share our vulnerability to climate change, we have recognized the situation as a ‘climate crisis’ for a very long time. Rising sea-levels are gradually submerging our islands and atolls. If greenhouse gas emissions are not mitigated and climate change continues unabated, this would lead to an even greater problems to the Republic of the Marshall Islands and other low-lying

islands with similar vulnerabilities to rising sea-levels induced by climate change. The Republic of the Marshall Islands submits that when deciding the consequences of states who do not comply with their obligations under international law to protect the climate system, the Court should consider the impacts that those non-compliant actions and omissions have caused to the Marshall Islands.

97. Even at 1.5°C warming, SIDS risk flooding from sea level rise. We face a drastic increase in coastal flood risk due to rising sea levels caused by climate change. Coastal flooding results in land loss. This affects communities and ecosystems reliant on coastal areas for their livelihoods and survival as well as way of life. Protective function of coral reefs and mangroves is under threat, due to global warming.<sup>29</sup>
98. The particular vulnerability of the RMI is emphasised in our National Adaptation Plan. The RMI is particularly vulnerable to ‘natural hazards like typhoons and sea-level rise, facing various climate challenges, including rising temperatures, droughts, and sea-level rise in our tropical country, which has two distinct seasons: a wet season from May to November and a dry season from December to April. Our climate is influenced by trade winds, the South Pacific Convergence Zone and periodic El Niño events, and it has been following global warming trends. Average temperatures have been gradually increasing especially since the 1980s, accompanied by reduced rainfall exacerbated by El Niño, sometimes leading to an 80% reduction in rainfall. Under a very high emission scenario (RCP8.5): Average air temperature will increase by 5.6°F (3.1°C) in Kwajalein and 5.4°F (3.0°C) in Majuro by 2090; Annual rainfall will increase by 14% in Kwajalein and by 8% in Majuro by 2090; Current extreme rainfall events (5% probability occurrence in any one year) will have a 20% probability of occurrence in any one year in Kwajalein and a 16.7% probability of occurrence any one year in Majuro; Rainfall during these extreme events will increase by 1.3 in (32 mm) in Kwajalein and 1.2 in (30 mm) in Majuro by 2090 and; Sea level will rise by 2.13 ft (65 cm) by 2090’.<sup>30</sup>
99. As outlined in the report, the ‘cost of adaptation strategies to protect against sea-level rise in particular is substantial, with estimates ranging from USD 250 million for protection of individual specific areas to over USD 1 billion for comprehensive protection of both urban centers against a 20” (0.5m) sea level rise. Raising and protecting an area against 6.5ft (2m) sea level rise (needed by 2150 on current projections) sufficient for the RMI’s current population could exceed USD 5 billion. Semiurban and intermediate centers have varying costs based on the extent of the adaptation needed and the investment available, ranging from USD 250 million to USD 2 billion for protection to 20” (0.5m) and 6.5ft (2m) SLR respectively. The RMI

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<sup>29</sup> EU Science Hub, [https://joint-research-centre.ec.europa.eu/jrc-news-and-updates/even-15degc-warming-small-island-developing-states-risk-flooding-sea-level-rise-2023-12-05\\_en#:~:text=Joint%20Research%20Centre,Even%20at%201.5%C2%B0C%20warming%2C%20small%20island%20developing%20states,to%20a%20JRC%20led%20study](https://joint-research-centre.ec.europa.eu/jrc-news-and-updates/even-15degc-warming-small-island-developing-states-risk-flooding-sea-level-rise-2023-12-05_en#:~:text=Joint%20Research%20Centre,Even%20at%201.5%C2%B0C%20warming%2C%20small%20island%20developing%20states,to%20a%20JRC%20led%20study).

<sup>30</sup> RMI, National Adaptation Plan: Responding to the Impact of Climate Change, Prepared and submitted by the World Bank PREP II Project for the Climate Change Directorate, Ministry of the Environment October 10, 2023, p 94.

Government will evaluate the practicality and cost implications of these options, including with existing and potential funders'.<sup>31</sup>

100. On October 26, 2023, Parties to the Nauru Agreement (PNA), Leaders from the PNA<sup>32</sup> and Tokelau Heads of States held a meeting in Kiritimati, Kiribati, to deliberate and discuss key issues impacting their tuna resources within the PNA region. One of the key issues agreed by the PNA Leaders was the issue on climate change, which PNA Leaders agreed '...[t]o prepare for the action necessary to adapt to climate change and to seek climate justice for the damage done to PNA tuna fisheries by climate change, including through access to high seas fisheries'. This reflects the strong commitment by PNA Leaders to protect the value of the system that was built on their sovereign rights to protect and fully utilise marine living resources within their Exclusive Economic Zones, which the PNA has implemented through its Vessel Day Scheme (VDS).<sup>33</sup>

101. The Republic of the Marshall Islands submits that the Court, when deciding the consequences of States who do not comply with their obligations under international law, take into consideration the threat that climate change induced sea-level rise poses to low-lying atoll states like the Marshall Islands, namely the loss of habitable land and possible forced relocation of SIDS nationals. The Republic of the Marshall Islands also calls to the Courts attention the efforts taken nationally and regionally, to address and solve the issues that sea-level rise poses to the Marshall Islands and fellow small island developing states, such as the fixing of baselines.

102. Sea-level rise, despite it being a slow onset issue, is one of the most significant effects of climate change for the Marshall Islands. As a low-lying atoll, we are particularly concerned that our land areas would be decreased due to inundation and coastal erosion that may result in human issues concerning migration of our population due to uninhabitability. Global warming is causing sea level to rise in two ways. First, glaciers and ice sheets worldwide are melting and adding water to the ocean. Second, the volume of the ocean is expanding as the water warms. The ocean absorbs excess heat and energy released from rising greenhouse gas emissions trapped in the Earth's system. Currently, the ocean has absorbed about 90 percent of the heat generated by rising emissions. The change in temperature leads to effects, including ice-melting, sea-level rise, marine heatwaves, and ocean acidification. These changes result in an adverse global impact on marine biodiversity, and the lives and livelihoods of coastal communities, including around 680 million people living in low-lying coastal areas, almost 2 billion who live in half of the world's megacities that are coastal, nearly half of the world's population (3.3 billion) that depends on fish for protein, and almost 60 million people who work in fisheries and the aquaculture sector worldwide.

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<sup>31</sup> Ibid p 85.

<sup>32</sup> PNA membership consists of Federated States of Micronesia, Kiribati, Marshall Islands, Palau, Papua New Guinea, Solomon Islands, and Tuvalu.

<sup>33</sup> PNA Vessel Day Scheme, <https://www.pnatuna.com/content/pna-vessel-day-scheme>.



103. From the point of view of international law there are a number of instruments which deal with the issue of sea level rise. In addition to the UNCLOS, there are many other bilateral and multilateral treaties, dealing with a range of aspects of the law of the sea and different areas affected by sea-level rise. Treaties are supplemented by customary international law in the area of the law of sea, international environmental law, and human rights law. In particular, the most important international legal questions concern SIDS generally, since our livelihood is at risk in light of the possible disappearance of land territory as an effect of sea-level rise. The rising sea levels also has enormous potential to impact the movement of populations living in areas like the Marshall Islands. These questions were raised and recognised by the 2013 Majuro Declaration, which initiated the path to a ‘new wave of climate leadership’.

104. With respect to statehood, the members of the Pacific Islands Forum, including the Republic of the Marshall Islands, have been clear that the statehood and sovereignty of Members of the Pacific Islands Forum will continue, and the rights and duties inherent thereto will be maintained, notwithstanding the impact of climate change-related sea-level rise.<sup>34</sup>

105. With respect to maritime zones and maritime delimitation (baselines), the members of the Pacific Islands Forum, including the Republic of the Marshall Islands have been clear that baselines are fixed, and that maritime zones, as established and notified to the Secretary-General of the United Nations in accordance with the United Nations Convention on the Law of the Sea, and the rights and entitlements that flow from them, shall continue to apply, without reduction, notwithstanding any physical changes connected to climate change-related sea-level rise.<sup>35</sup>

106. The Marshall Islands has further observed a convergence between the climate crisis and its nuclear legacy, where rising sea-levels threaten to submerge a nuclear waste dump on Runit Atoll and to cause secondary displacement of those already displaced during the nuclear testing period between 1946 and 1958. During this period, 67 known nuclear weapons were tested on the Marshall Islands and the climate crisis further exacerbates the legacy of displacement and environmental damage left behind.

## **Protection of Displaced Persons**

107. With respect to forced relocation, sea level rise poses a serious threat to the enjoyment of fundamental human rights, such as the right to life and related rights to adequate food to water and the right to the highest attainable standard of physical and mental health, as well as rights, such as the right to adequate housing, right to access to drinking water and the right to adequate food due to increased land conditions and impacts on fisheries.

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<sup>34</sup> Pacific Islands Forum 2023 DECLARATION ON THE CONTINUITY OF STATEHOOD AND THE PROTECTION OF PERSONS IN THE FACE OF CLIMATE CHANGE-RELATED SEA-LEVEL RISE.

<sup>35</sup> Pacific Islands Forum 2021 Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise

Among the physical impacts, rising sea levels expose coastal populations to loss of land owing to an exacerbated risk of destructive erosion, inundation and wetland flooding of low-lying coastal areas.

108. Because sea-level rise is not uniform across time and space, the nature and intensity of its physical impact will vary from region to region and locality to locality, depending, *inter alia*, on terrain, climatic conditions, wealth, economic conditions, infrastructure and political institutions. Yet, together, sea-level rise and the frequency and intensity of extreme events have potentially significant socioeconomic, environmental and cultural consequences for human lives and living conditions in coastal and low-lying areas, which are key physical features of the Marshall Islands. They threaten all aspects of human life, including mortality, livelihoods and industry, food and water security, health and well-being, homes, land and other property, infrastructure and critical services, and cultural heritage. Accordingly, although sea-level rise does not in itself constitute a violation of human rights, it has the potential to adversely affect the enjoyment of human rights, especially those of already vulnerable persons and groups, including women, children, older persons, and indigenous groups and other traditional communities.
109. In resilient communities, the physical impact of sea-level rise and associated extreme events falling short of total submergence may be overcome through mitigation and adaptation strategies. However, in more severe cases, where the habitability of coastal and low-lying areas is jeopardised and adaptation and mitigation measures prove inadequate, such disruption may have a serious impact on the lives of SIDS inhabitants, potentially leaving us with no choice but to relocate or migrate. To date, there is no treaty that specifically includes provisions for cross-border movements induced by climate change and for the protection of persons who are affected and/or move owing to the adverse effects of climate change, such as sea-level rise.
110. International law does not at present grant to persons affected by the adverse consequences of climate change, including sea level rise, any distinct legal status. However, human rights can offer some scope of protection. For instance, in *Teitiota v New Zealand*, a citizen of Kiribati filed a communication with the UN Human Rights Committee claiming that New Zealand had violated his right to life under Article 6 of the ICCPR by denying him asylum despite his assertions that climate change made Kiribati uninhabitable. The Committee concluded that the communication was admissible, but that New Zealand's decision was not clearly arbitrary, a manifest error, or a denial of justice. That said, the Human Rights Committee accepted that environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.
111. The Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise was adopted by the International Law Association in 2018. The purpose of the Sydney Declaration of Principles is to provide guidance to States in

averting, mitigating, and addressing displacement of persons occurring in the context of sea level rise, based on and derived from relevant international legal provisions, principles, and frameworks. The Sydney Declaration of Principles applies to all forms of human mobility arising in the context of sea level rise.

112. Additionally, the ILC is currently considering the issue of sea level rise, also in relation to protection of persons. According to the ILC, the protection of persons affected by sea-level rise should be understood as all activities aimed at ensuring full respect for the rights of persons affected, in accordance with the relevant and applicable bodies of international law. As stated by the Special Rapporteur, Eduardo Valencia-Ospina, in the Commission's preliminary report on the topic, 'The title [of the topic] ... imports a distinct perspective, that is, of the individual who is a victim of a disaster, and therefore suggests a definite rights-based approach to treatment of the topic. The essence of a rights-based approach to protection and assistance is the identification of a specific standard of treatment to which the individual, the victim of a disaster, *in casu*, is entitled.
113. The Human Rights Council, in several of its resolutions, has acknowledged that the adverse effects of climate change have a range of direct and indirect implications for the effective enjoyment of human rights. These adverse effects have also been highlighted by the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment and other special procedures of the Council. The Council's recent creation of the Special Rapporteur on the promotion and protection of human rights in the context of climate change and the Council's recognition of the human right to a clean, healthy and sustainable environment further highlights the link between the adverse effects of climate change and the enjoyment of human rights. The Paris Agreement was the first international agreement on the subject of climate change to refer to human rights: in the preamble, it is acknowledged 'that climate change is a common concern of humankind', and that States should, 'when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity'.
114. To date, no receiving State has granted refugee status, in the sense of the Convention relating to the Status of Refugees, based exclusively on factors relating to climate-induced changes such as sea-level rise. The existing international regulatory framework governing refugees does not recognise climate change, or any of its adverse effects, such as sea-level rise, as a situation that merits the recognition of protected status, unless the specific conditions of the existing legal definition of a refugee discussed below are otherwise met.
115. The legal definition of 'refugee' status, and the rights and entitlements that it entails, are set out in the 1951 Convention, read in conjunction with the Protocol relating to the

Status of Refugees. This definition governs mainly political refugees (that is, those who are fleeing persecution) and therefore does not cover the possibility of extending protection to persons affected by climate change, including sea-level rise. The 1951 Convention defines a refugee as any person who, ‘owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it’. The Office of the UN High Commissioner for Refugees (UNHCR), in its Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, has confirmed that victims of natural disasters are excluded from the scope of the Convention, unless the above-mentioned criteria from the 1951 Convention are met. The same reasoning should be applicable in relation to the adverse effects of climate change, such as sea-level rise.

116. With respect to international law concerning internally displaced persons, individuals who are displaced within their country are categorised or referred to as ‘internally displaced persons’ rather than refugees and are therefore excluded from the scope of the 1951 Convention. Instead, they fall under the responsibility of their country of origin, and there is no international convention regarding this category of persons. At the international level, the non-binding Guiding Principles on Internal Displacement contain the first international standards developed for internally displaced persons and collate all the existing international principles relevant to internally displaced persons into a single instrument. The Guiding Principles do not create a new legal status for internally displaced persons – who enjoy the same rights and freedoms as other persons in their country – but seek to address their specific needs. The Guiding Principles define internally displaced persons as ‘persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border’.

117. In the Pacific context, which includes the Marshall Islands, this recognition of the impact of sea-level rise on relocation, migration and even possible forced displacement is captured in the Pacific Regional Framework on Climate Mobility, a world-first framework on displaced persons and climate mobility.<sup>36</sup> The Marshall Islands submits that more work must be done internationally on developing and implementing

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<sup>36</sup> Pacific Island Forum, Pacific Regional Framework on Climate Mobility, <https://www.forumsec.org/wp-content/uploads/2023/11/Annex-C-Pacific-Regional-Framework-on-Climate-Mobility-1.pdf>

mechanisms that address displacement or mobility arising from climate change-related impacts.

## **‘Present and Future Generations’ and the Concept of Intergenerational Equity**

118. The Republic of the Marshall Islands requests the Court, when deciding the consequences of States whose acts and omissions have caused harm, to also take into account intergenerational equity, as the collective actions or inactions taken today will greatly impact the quality of life of generations to come. The RMI submits that as members of the present generation, we owe a duty to future generations to ensure they have the ability to fully enjoy their rights and live in a healthy environment.
119. The principle of intergenerational equity is based on the premise that every generation holds the Earth in common with members of the present generation and with other generations, past and future. This principle is based on the concept of fairness among generations in the use and conservation of the environment and its natural resources. The concept is rooted in diverse cultural and religious traditions. The principle of intergenerational equity is a foundation for the concept of sustainable development. The 1992 Rio Conference on Environment and Development defined sustainable development ‘as meeting the needs of the present without compromising the ability of future generations to meet their own needs’. The concept has been in multiple proceedings before international and national courts, including the ICJ.
120. There are several related concepts, such as the principle of the common heritage of humankind and common concern of humankind, which is a concept upon which the UNFCCC is based. Under the UNFCCC, Member States have committed to protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Article 3(1) of the UNFCCC states that the Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof. This commitment is also reflected in the acknowledgment of human rights in the Preamble of the Paris Agreement.
121. Furthermore, in 2023, the Maastricht Principles on the Human Rights of Future Generations were adopted by experts and civil society organisations. The Principles state that states must impose reasonable restrictions on activities that will threaten the enjoyment of human rights by future generations, including the unsustainable use of natural resources and the destruction of nature, to meet their obligations to future generations.

122. Since the concept of intergenerational equity has acquired judicial application, the ICJ is likely to use this concept as the basis of its advisory opinion to call upon States to include it in their considerations of climate change obligations and in submitting their NDCs. The Marshall Islands can advise the ICJ that invoking future generations can enhance the relevance of international law by fostering more inclusive approaches and long-term solutions. Through a future generations-based concept of climate justice, international law can evolve on the basis of justice and solidarity in a temporal context.

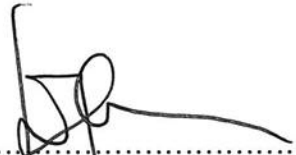
## **Conclusion**

123. The Republic of the Marshall Islands submits that the gravity of the climate crisis and the overwhelming evidence of the need for greater commitment to address climate change, places an immense responsibility on the Honourable Court when delivering its advisory opinion. In defining the legal obligations owed and the legal consequences that flow as a result, the advisory opinion of the Honourable Court will be an immensely important guide in determining the course forward in the efforts to combat climate change and could be a catalyst for positive change.

124. The Republic of the Marshall Islands submits that the ICJ should affirm the legal obligations outlined in our submission. These obligations range from customary international law principles to treaty obligations. There are treaty obligations that stem from multilateral environmental agreements such as UNFCCC, Paris Agreement, and MARPOL. Treaty obligations can also be derived from UNCLOS. Additional treaty obligations are also taken from human rights instruments, such as ICCPR, ICESCR, CRC, and other regional instruments such as the African Charter of Human Rights and San Salvador Protocol to the Inter-American Convention on Human Rights. In addition to obligations stemming from treaties, certain principles of custom also provide an additional binding force on all states, regardless of whether they are party to any of the above treaties. These include due diligence, no harm rule, prevention and precaution. These are further supplemented with general principles, such as CBDR-RC, polluter pays, and duty of cooperation.

125. If these obligations are breached by a State and harm has occurred, the Republic of the Marshall Islands submits that the State should pay reparations, as per the provisions of ARSIWA. These reparations can be for climate impacts and loss and damage. When deciding the consequences of States, the Marshall Islands further submits that the Court should take into account the impacts the climate change has on society and small island states like the Marshall Islands. The Court must further take into account intergenerational equity and the moral duty owed to generations to come to live in a clean, healthy and sustainable environment.

Submitted this day of 27 March 2024,



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H.E. Doreen DeBrum  
Ambassador / Permanent Representative

For the Republic of the Marshall Islands