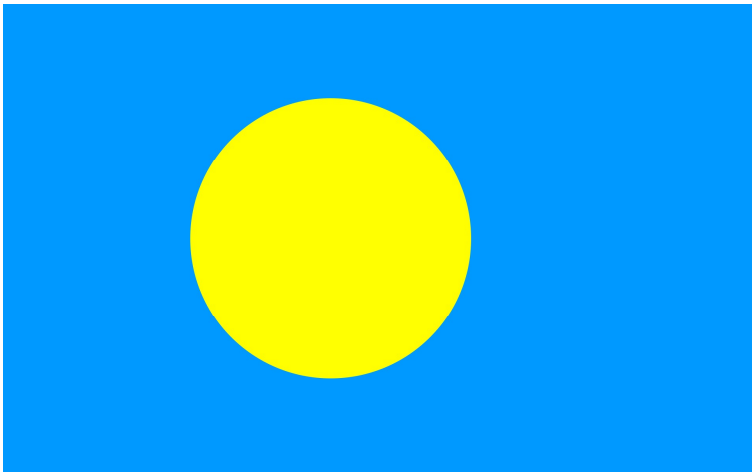
INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

CASE NO. 187

WRITTEN COMMENTS OF THE REPUBLIC OF PALAU
ON THE OTHER WRITTEN STATEMENTS

June 2024



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I. INTRODUCTION

1. Palau's opening brief urged this Court to answer the General Assembly's consensus request for an advisory opinion on States' obligations and legal consequences with respect to climate change by confirming that well-established principles of customary international law apply.

2. Specifically, Palau invoked the customary international law of Transboundary Harm, which obliges every State "to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State." (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment I.C.J. Reports 2015*, p. 706, para. 104, quoting *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 56, para. 101.) A State that is not using all the means at its disposal in order to avoid greenhouse-gas emissions from its territory or jurisdiction, which cause significant damage to the environment of another State, would be in breach of the law of Transboundary Harm.

3. Palau also invoked the customary international law of State Responsibility, which requires cessation of the wrongful conduct, and "full reparation" for the harm caused. In environmental cases, "full reparation" includes "compensation … for damage caused to the environment, in and of itself, in addition to expenses incurred by an injured State as a consequence of such damage." (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation Judgment, I.C.J. Reports 2018*, p. 28, para. 41.) Reparation should also cover any "moral" injury suffered (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012*, p. 324), and damage to "the living space, the quality of life and the very health of human beings, including generations unborn" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 241, para. 29). A State that tolerates harmful greenhouse-gas emissions from its territory or jurisdiction is required to use all the means at its disposal to prevent significant harm, and to pay full reparation for such harm caused.

4. None of the other 90 opening briefs filed dispute the existence of the customary international law of Transboundary Harm or State Responsibility.

5. However, the brief filed by the Organization of Petroleum Exporting Countries (OPEC) advances an argument that merits comment here. OPEC argues that, in the context of climate change, the United Nations Framework Convention on Climate Change (UNFCCC), Kyoto Protocol, and Paris Agreement completely supplant the customary international law of Transboundary Harm and State Responsibility. This argument by OPEC lacks merit.

6. OPEC's argument is refuted by the text of the UNFCCC, by general principles of treaty interpretation, and by the recent unanimous advisory opinion on climate change by the International Tribunal for the Law of the Sea. Transboundary Harm and State Responsibility continue to apply to climate change.

7. Although the Court has been presented by a large volume of material through the 91 opening submissions, its task remains straightforward: the Court should answer the General Assembly's request for an advisory opinion by confirming that the customary international law of Transboundary Harm and State Responsibility apply to climate change.

II. THE UNFCCC, KYOTO PROTOCOL, AND PARIS AGREEMENT DO NOT SUPPLANT THE CUSTOMARY INTERNATIONAL LAW OF TRANSBOUNDARY HARM OR STATE RESPONSIBILITY

8. Palau's opening brief explained how the customary international law of Transboundary Harm and State Responsibility are foundational to the international legal order. States are not really sovereign if they must suffer injury without consequence from other States.[1]

9. International law thus requires every State "to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State." (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment I.C.J. Reports 2015*, p. 706, para. 104, quoting *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 56, para. 101.) States that fail to comply with this obligation must make "full reparation" for the damage caused to other States. (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v.

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[1] A State "has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air." (*State of Georgia v. Tennessee Copper Company*, 206 U.S. 230, 237 (1907), cited by *Trail Smelter (United States/Canada) RIAA 1941 (III)*, p. 1965.)

"Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it [sovereignty] serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian." (*Island of Palmas case (Netherlands/U.S.A.) RIAA 1928 (II)*, p. 839.)

"[E]very State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" is "based" on "general and well-recognized principles … of humanity". (*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22.)

"The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment." (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 242, para. 29.)

Nicaragua), Compensation Judgment, I.C.J. Reports 2018, p. 28, para. 41.)

10. OPEC's brief shifts the focus from these well-established obligations of customary international law to "the complexities of the energy systems on which modern societies work" (para. 3). Of course, OPEC is not a neutral observer of the world's energy systems; OPEC's oil embargoes, quotas, and production agreements make it very much a self-interested participant in those systems. But where self-interest causes significant but avoidable harm to other States, the customary international law of Transboundary Harm and State Responsibility is implicated.

11. OPEC disagrees. OPEC holds up the UNFCCC, Kyoto Protocol, and Paris Agreement as supplanting those customary international law obligations and occupying the field of climate-change law: "[w]hile the existence of treaties does not generally preclude the application of other sources of international law, highly controversial and divisive subject matters such as ones related to anthropogenic [greenhouse gas] emissions, where the international community could achieve agreement only after long and protracted negotiations, indicates that State Parties intended to regulate the subject comprehensively and conclusively in this *lex specialis* regime while ruling out the application of other sources" (para. 9).

12. OPEC's argument lacks merit. While OPEC is correct that "the existence of treaties does not generally preclude the application of other sources of international law,"[2] OPEC's proposed exception to this rule for "controversial and divisive subject matters" has no basis.

13. Whether the UNFCCC, Kyoto Protocol, and Paris Agreement are "intended to regulate the subject comprehensively and conclusively", so as to "rul[e] out the application of other sources", is a question of treaty interpretation. Treaty interpretation is governed by Articles 31 through 33 of the Vienna Convention on the Law of Treaties, with Article 31.1 providing the basic rule: "A treaty shall be interpreted in good faith in accordance with the

[2] "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", *Yearbook of the International Law Commission* (2006), Vol. II, Part 2, p. 178 ("The application of the special law does not normally extinguish the relevant general law.").

ordinary meaning to be given to the **terms** of the treaty in their **context** and in the light of its **object and purpose**" (emphasis added). Under Article 31.3, subsequent agreements and subsequent practice shall also be taken into account.

14. The terms of the UNFCCC include a recital recognizing the continuing viability of the customary international law of Transboundary Harm, tracing its existence to the UN Charter and "principles of international law":

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

(Emphasis added.)

15. This recital is phrased in the present tense ("States have" the responsibility), leaving no doubt that the parties to the UNFCCC understood that this responsibility under customary international law would co-exist with the obligations under that agreement.

16. After this textual recognition in the UNFCCC of the co-existence of the Transboundary Harm obligation, it is not surprising that there is no text in the rest of the convention that supports OPEC's contention that the UNFCCC supplants that obligation.

17. The Kyoto Protocol and Paris Agreement supplement the UNFCCC. But the Kyoto Protocol and the Paris Agreement also do not include any terms that support the argument that those agreements supplant the Transboundary Harm obligation.

18. Nor as a practical matter is there any conflict between the customary international law of Transboundary Harm and State Responsibility, on the one hand, and the UNFCCC, Kyoto Protocol, and Paris Agreement, on the other. States can comply *both* with those agreements *and* that customary international law.

19. In general terms, the UNFCCC, Kyoto Protocol, and Paris Agreement establish an objective of limiting global temperature increases to 1.5ºC and financing mechanisms to help achieve that objective. But even if that temperature objective were achieved, and those financial mechanisms were fully implemented, that would be no guarantee against significant damage caused by climate change. Climate change is already causing significant damage, as Palau's brief and the briefs of many other countries, including other small island developing States, establish. The UNFCCC, Kyoto Protocol, and Paris Agreement may help mitigate climate-change damage, but they cannot prevent the damage that is already happening, or any future damage that may yet occur. If significant damage is still caused, and States could have done more to prevent it, there is liability under customary international law. Nothing prevents States from complying both with their specific obligations under those treaties, and with their general obligations under customary international law to use all the means at their disposal *now* to prevent significant harm to other States and to make full reparation for the harm that nevertheless is caused.

20. The General Assembly's advisory opinion request, adopted by consensus (including by all the parties to the UNFCCC, Kyoto Protocol, and Paris Agreement), confirms that those treaties do not supplant customary international law. The General Assembly's request held up the principle of Transboundary Harm *together* with the UNFCCC, Kyoto Protocol, and Paris Agreement as bases for climate-change-related obligations for this Court to consider:

> *Decides*, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to render an advisory opinion on the following question:
>
> "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 [etc.] …

(A/RES/77/276, emphasis added.)

21. The unanimous advisory opinion recently issued by the International Tribunal for the Law of the Sea strongly supports the above analysis. (*Request For An Advisory Opinion Submitted By The Commission Of Small Island States On Climate Change And International Law*, Advisory Opinion (21 May 2024), Case No. 31.) The Tribunal considered, and rejected, arguments that the UNFCCC, Kyoto Protocol, and Paris Agreement supplant obligations in the UN Convention on the Law of the Sea (UNCLOS) that closely track the customary international law of Transboundary Harm:

> The Tribunal does not consider that the obligation under article 194, paragraph 1, of [UNCLOS] would be satisfied simply by complying with the obligations and commitments under the Paris Agreement. [UNCLOS] and the Paris Agreement are separate agreements, with separate sets of obligations. While the Paris Agreement complements [UNCLOS] in relation to the obligation to regulate marine pollution from anthropogenic GHG emissions, the former does not supersede the latter. Article 194, paragraph 1, imposes upon States a legal obligation to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions, including measures to reduce such emissions. If a State fails to comply with this obligation, international responsibility would be engaged for that State.

22. OPEC's argument that the UNFCCC, Kyoto Protocol, and Paris Agreement supplant the customary international law of Transboundary Harm and State Responsibility is not supported by the terms of those agreements, other rules of treaty interpretation, or relevant jurisprudence. This Court should confirm that Transboundary Harm and State Responsibility apply to climate change.

III. CONCLUSION

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

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

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

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

Respectfully submitted.

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