INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

(Request for an Advisory Opinion)

RESPONSE TO QUESTIONS PUT BY JUDGES

Introduction

On 13 December 2024, the Court registry transmitted to participants the Questions put by Judges. The Republic of the Marshall Islands responds to:

Question put by Judge Cleveland

"During these proceedings, a number of participants have referred to the production of fossil fuels in the context of climate change, including with respect to subsidies. In your view, what are the specific obligations under international law of States within whose jurisdiction fossil fuels are produced to ensure protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases, if any?"

The Republic of the Marshall Islands submits that States within whose jurisdiction fossil fuels are produced must phase out fossil fuel production.[1] Accordingly, these States must cease participating in, authorizing or financing fossil fuel production, subsidizing the consumption of fossil fuels, and the expansion of fossil fuel production. These States must also enact, implement and enforce regulations designed to regulate fossil fuel production and reduce greenhouse gas emissions from both public and private sources under their jurisdiction or control. These States must further ensure that finance flows are consistent with a pathway towards low-greenhouse gas emissions and climate-resilient development. Their failure to act accordingly would amount to wrongful conduct under the law of State responsibility, in violation of their binding international law obligations to protect the climate system and represents a continuing breach of the 'no-harm' principle under customary international law. The obligation to cease the wrongful conduct, if continuing, is a fundamental principle underpinning the regime of State responsibility.[2]

Of particular relevance, according to the Polluter-Pays-Principle pursuant to Principle 16 of the Rio Declaration, the polluter must bear costs of pollution: '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'. In order to achieve the objective of this principle, public authorities must not subsize actors (public and private) causing pollution. This is also in line with the 1972 and 1974 OECD Recommendations that the polluter should bear the 'costs of pollution prevention and control measures', the latter being 'measures decided by public authorities to ensure that the environment is in an acceptable state' and that 'as a general rule they should not assist the polluters in bearing the costs of pollution control whether by means of subsidies, tax advantages or other measures...'[3]

In the modelling presented by the Marshall Islands Climate Envoy, Kathy Jetñil-Kijiner, the Court was shown the catastrophic inundation events that the Marshalls is predicted to suffer after we reach the 1.5°C threshold.[3] According to the Intergovernmental Panel on Climate Change (IPCC), to have even a 50 per cent chance of staying within the 1.5°C threshold, States must reduce GHG emissions, as measured against 2019 levels, by at least 43 per cent by 2030, 60 per cent by 2035, 69 per cent by 2040 and 84 per cent by 2050. According to UNEP, unless States rapidly and deeply reduce their emissions, "it will become impossible to get on a pathway that limits global warming to 1.5°C with no or limited overshoot".[4] Cessation is the *only* way to protect the Marshall Islands from the projected catastrophic

[1] Paris Agreement, Articles 2(1)(a) & (c), and 4(1) & (3).

[2] *Trail Smelter Arbitration*, RIAA, vol. III, pp. 1905–82, at p. 1934; *Whaling in the Antarctic (Australia v. Japan; New Zealand intervening)*, Judgment, I.C.J. Reports 2014, p. 226, paras 244-245. In *Trail Smelter*, the tribunal ordered Canada to undertake specific measures to 'prevent future significant fumigations' in breach of its duty of due diligence over injurious acts of private industry. In the *Whaling* case, ICJ granted Australia's request for the Court to declare that Japan 'cease with immediate effect the implementation of JARPA II', specifically by 'order[ing] that Japan shall revoke any extant authorization, permit or license to kill, take or treat whales in relation to JARPA II, and refrain from granting any further permits [...] in pursuance of that programme'.

[3] Oral Submissions of the Republic of the Marshall Islands (Kathy Jetñil-Kijiner).

[4] See COSIS Oral Statement (Payam Akhavan), para 18.

harm, and inundation – or at the very least to give the Marshall Islands time to be able to adapt and ensure our islands remain liveable.[5]

In light of the overwhelming evidence before the Court on the climate harms already being experienced as a result of climate change – caused by the fossil fuel production,[6] the Republic of the Marshall Islands submits that the cessation of fossil fuel production must be accompanied by appropriate guarantees of non-recurrence and the provision of full reparations, including restitution, compensation and satisfaction in accordance with a wide range of obligations from across the corpus of international law.[7]

[5] Oral Submissions of the Republic of the Marshall Islands (Kathy Jetñil-Kijiner).

[6] Vanuatu Written Statement, paras 83-91,102-128; Melanesian Spearhead Group Written Statement, paras 60-219; Republic of the Marshall Islands Oral Statement (Ms Kathy Jetñil-Kijner), Audio-visual presentation of projected sea-level rise; Cook Islands Oral Statement (Ms Vaine Wichman), paras 1-9; Fiji Oral Statement (Mr Luke Daunivalu), paras 2-11; Samoa Oral Statement (Ms Su'a Hellene Wallwork), paras 17-26); Tuvalu Oral Statement (Ms Eselealofa Apinelu), paras 2-12 and video recordings of Lina Peleti, Grace Malie, and Itaia Lausavene; Kiribati Oral Statement (Mr Aretaake Ientaake), paras 2-10 including video recordings of individual testimony; Nauru Oral Statement (Mr Lionel Rouwen Aingimea), paras 4-7; Tonga Oral Statement (Ms Linda Simiki Folaumoetu'i), paras 11-14; the Pacific Community ("SPC") Oral Statement (Ms Coral Pasisi), paras 3-7 and (Mr Vishal Prasad) paras 9-12.

[7] Republic of the Marshall Islands Written Comments, paras. 49-52.

Question put by Judge Tladi

"In their written and oral pleadings, participants have generally engaged in an interpretation of the various paragraphs of Article 4 of the Paris Agreement. Many participants have, on the basis of this interpretation, come to the conclusion that, to the extent that Article 4 imposes any obligations in respect of Nationally Determined Contributions, these are procedural obligations. Participants coming to this conclusion have, in general, relied on the ordinary meaning of the words, context and sometimes some elements in Article 31 (3) of the Vienna Convention on the Law of Treaties. I would like to know from the participants whether, according to them, "the object and purpose" of the Paris Agreement, and the object and purpose of the climate change treaty framework in general, has any effect on this interpretation and if so, what effect does it have?"

The Republic of the Marshall Islands submits that the object and purpose of the Paris Agreement and climate change treaty framework in general aims to strengthen the international law protections over the climate system. The interpretation of the object and purpose of the treaty is contained in the chapeau of Article 31(1) of the Vienna Convention on the Law of Treaties: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. The Preamble of the treaty states its object and purpose as a starting point of the interpretation which is further confirmed through the reference to the full text.[8] There is a need for a direct link to the context of the treaty and its object and purpose.[9]

The Preamble of the UNFCCC setting the object and purpose of the Convention clearly has an effect on its interpretation as it sets out the interpretation of rights and obligations of States parties further developed in its text. It stresses the vulnerable position of SIDS, leading role of the Global North States and the principle of Common But Differentiated Responsibilities (CBDR). The Preamble of the Paris Agreement has as well included the CBDR principle which informs the interpretation of the a bottom-up approach to the differentiated responsibilities through the respective National Determined Contributions (NDCs) of all parties and that developed 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 (Article 9). The common concern principle as a part of the Preamble informs the interpretation of both the UNFCCC and the Paris Agreement as the nature of this concept is that the interests concerned extend beyond those of individual States and that safeguarding the interests involved requires collective action and cooperation and entails collective responsibility.[10]

The Preambular link of climate change to human rights, has a most significant effect on the interpretation of the obligations of States within the context of such human rights, including the right to life, as evidenced by the case law of the Human Rights Committee and international and national courts and tribunals.

The Paris Agreement's objective is to hold the increase in the global average temperature to well below 2°C above pre-industrial levels and for parties to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognising that this would significantly reduce the risks and impacts of

[8] Oil Platforms, Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, 1. C. J. Reports 1996, p. 803; on the analytical approach by the ICJ to the relationship between the 'object and purpose ' and the text of treaty , see: *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*,Judgment, I.C.J. Reports 2014, p. 226, in particular para. 58.

[9] Gardiner, The Vienna Convention Rules on Treaty Interpretation, in Hollis (ed) 2020 The Oxford Guide to Treaties

[10] Soltau, Common Concern of Humankind, in: Gray et al (eds), The Oxford Handbook of International Climate Change Law 2016

climate change (Article 2). The ultimate objective of the UNFCCC is to achieve stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system (Article 2).

With regard to the obligations States take on as signatories to the Paris Agreement in relation to NDCs, three points are critical to understand, all of which emerge clearly from interpreting the Agreement in accordance with Article 31 of the Vienna Convention on the Law of Treaties:

- Parties have an obligation to both communicate and implement their NDCs: that is, a state is under a binding obligation to take domestic action of a type that it assesses will be adequate to achieve in full all of the objectives it has set out in its NDC;
- Parties have an obligation to be guided by Article 4(3) in the preparation of their NDCs;
- Parties have an obligation to continue enhancing the ambition of their NDCs, and the ambition of their domestic action in implementing their NDCs, until such time as the purpose of the Agreement, set out in its Article 2, is met.

All of these obligations emerge from an orthodox interpretation of the plain language of the Paris Agreement, in light of its object and purpose. They are also supported by existing State obligations under other relevant and applicable international law. In clarifying that these obligations are mandatory under the Paris Agreement. The Republic of the Marshall Islands reiterates its position that adequately fulfilling these obligations in no respect discharges the entirety of a State's obligations under international law in respect of climate change.

Parties have a binding obligation to both communicate and implement their NDCs

The second sentence of Article 4(2) of the Paris Agreement imposes a clear and binding obligation on all States to pursue "domestic mitigation measures, with the aim of achieving the objectives" of their NDCs. Aiming to achieve an objective is a commonly understood phrase and requires no special interpretation: one either achieves an objective, or one does not. To fulfil an obligation to pursue measures with the aim of achieving an objective necessarily implies that the measures pursued must be adequate to the achievement of the objective.

With respect to the meaning of "mitigation measures," this term should be interpreted in light of the context of Article 4(1)(b) of the UNFCCC, which relevantly states that all parties shall "formulate, implement, publish and regularly update… programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol".

It has been noted by some that Article 4(2) does not impose an explicit obligation to "achieve" the objective of the NDC. While this is correct, it is not synonymous with a lack of obligation for a party to "implement" its NDC, which is the appropriate word to characterize the obligation established by the second sentence of Article 4(2). The failure to impose an obligation to "achieve" an NDC is explicable by the fact that some States, particularly SIDS and LDCs, face significant economic forces that are beyond their control, such that even implementing domestic measures they assess will be adequate to achieve the objectives of their NDCs cannot guarantee their achievement. The Paris Agreement's recognition of this reality does not diminish the binding obligation it imposes on all parties to implement domestic mitigation policies that each party assesses will be adequate to achieve the mitigation objectives of their NDC.

While the word "implement" does not appear in Article 4(2), the "implementation" of NDCs is referred to in Article 6 and Article 13 in a manner that clarifies that this is what is intended by the second sentence

of Article 4(2). Article 13(7)(b) is dispositive of the point: it imposes a binding obligation that each party submit "information necessary to track progress made in implementing and achieving its nationally determined contribution under Article 4."

Parties have an obligation to continue enhancing the ambition until the purpose of the Paris Agreement is met

The term "nationally determined contribution" is first mentioned in Article 3 of the Paris Agreement, which relevantly states: "As nationally determined contributions to the global response to climate change, all parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of this Agreement as set out in Article 2." The Paris Agreement thus answers the implicit question regarding a nationally determined "contribution" – it is to be a contribution to the achievement of "the purpose of the Agreement as set out in Article 2."

While the Paris Agreement does not explicitly impose a quantitative standard of adequacy in relation to the ambition of any particular party's NDC, through its Article 14 it does impose a binding requirement on all parties to enhance the ambition and implementation of their NDCs until they are adequate to achieve the objective of the Agreement. If parties do not act on this requirement, then it is possible and necessary to state that parties are collectively failing to meet their obligations under the Paris Agreement.

Article 14(1) states that "The Conference of the parties serving as the meeting of the parties to this Agreement shall periodically take stock of the implementation of this Agreement to assess the collective progress towards achieving the purpose of this Agreement and its long-term goals (referred to as the "global stocktake")." The first Global Stocktake, undertaken in 2023 in accordance with Article 14(2), concluded unequivocally that collective progress towards achieving the purpose of the Agreement was inadequate.[11]

Article 14(3) states that "the outcome of the global stocktake shall inform parties in updating and enhancing, in a nationally determined manner, their actions and support in accordance with the relevant provisions of this Agreement, as well as in enhancing international cooperation for climate action." While it is possible for parties to update their NDCs at any time to increase their ambition, parties are also required to regularly submit new NDCs on a five yearly cycle. The next round of NDCs are due to be delivered by February 2025. The UNFCCC Secretariat will produce a Synthesis Report of all NDCs ahead of COP30 in November 2025. Since this will mark the first round of NDCs to be submitted following the first Global Stocktake, if parties collectively do not take adequate account of Article 14(3)

[11] See UNFCCC Decision 1/CMA.5, in which the CMA inter alia:

"21. Notes with concern the findings in the latest version of the synthesis report on nationally determined contributions that implementation of current nationally determined contributions would reduce emissions on average by 2 percent compared with the 2019 level by 2030 and that significantly greater emission reductions are required to align with global greenhouse gas emission trajectories in line with the Paris Agreement temperature goal and recognizes the urgent need to address this gap;

22. Notes the findings in the synthesis report on nationally determined contributions that greenhouse gas emission levels in 2030 are projected to be 5.3 per cent lower than in 2019 if all nationally determined contributions, including all conditional elements, are fully implemented and that enhanced financial resources, technology transfer and technical cooperation, and capacity-building support are needed to achieve this;

23. Notes with concern the findings of the Sixth Assessment Report of the Intergovernmental Panel on Climate Change that policies implemented by the end of 2020 are projected to result in higher global greenhouse gas emissions than those implied by the nationally determined contributions, indicating an implementation gap, and resolves to take action to urgently address this gap;

24. Notes with significant concern that, despite progress, global greenhouse gas emissions trajectories are not yet in line with the Paris Agreement temperature goal, and that there is a rapidly narrowing window for raising ambition and implementing existing commitments in order to achieve it;"

in updating their NDCs, such that the Synthesis Report indicates that parties collectively are on track to achieve the Paris Agreement's temperature goal, then it will be possible to state definitively that the obligations parties hold under the Paris Agreement are not being fulfilled.

Parties have an obligation to be guided by Article 4.3 in the preparation of their NDCs

Article 4(3) of the Paris Agreement reflects an expectation that each NDC will reflect the State party's Highest Possible Ambition (HPA). The HPA standard can, therefore, assist with clarifying the content and nature of due diligence obligations on climate change mitigation, highlighting, for instance, the relevance of parties' capacity in assessing their requisite level of mitigation action.[12] If, for instance, the nationally determined contribution of a State is considered insufficiently ambitious, that State would need to adjust it to reflect its HPA in order to comply with its due diligence obligations or otherwise, bear the consequences under the law of State responsibility.

Interpreting the Paris Agreement with reference to its **object and purpose and the principle of effectiveness** would mean that the HPA standard can be approached as an effective and serious legal standard which can be translated into concrete action in the form of **reduction targets and clear requirements for the designation of national law and policies.** This is how domestic courts approached the HPA standard in the cases of Urgenda,[13] Neubauer[14] and Klimaatzaak[15], where the domestic courts spelled out clear and quantified GHG emission reduction targets for the Netherlands, Germany and Belgium respectively by interpreting the HPA standard under the principle of effectiveness, with preference for an interpretation which gives HPA term concrete meaning.

This allows the HPA to be construed as an objective yardstick for assessing the ambition and quality of a State's NDC. In other words, interpreting Article 4(2) of the Paris Agreement and the UNFCCC in light of their object and purpose can give normative meaning to the substantive duty of due diligence under the Paris Agreement to hold 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. Submitting and implementing an NDC is also a means to implement the due diligence obligation under the customary principle of prevention, provided that the NDC is sufficiently ambitious and equitable.

It may be also added that, in accordance with the principle of systemic integration under Article 31(3)(c) of the Vienna Convention on the Law of Treaties, the HPA expectation can inform the interpretation and application of due diligence obligations on climate change mitigation arising under various norms of national and international law. Accordingly, the NDC can be considered more broadly, beyond the Paris Agreement, to inform existing obligations under customary international law, including in the application of the State's duty to prevent significant harm to the environment, catastrophic harm to the climate system, and transboundary harm to other States, including to their economic development, territory and the human rights of their people.

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[12] Benoit Mayer, 'The 'Highest Possible Ambition' on Climate Change Mitigation as a Legal Standard' (2024) International and Comparative Law Quarterly 73(2).

[13] Urgenda Foundation v. State of the Netherlands, (2019) Supreme Court of the Netherlands, https://www.rechtspraak.nl/Bekende-rechtszaken/klimaatzaak-urgenda

[14] Neubauer, et al. v. Germany, (2021) German Constitutional Court, 1 BvR 2656/18

[15] VZW Klimaatzaak v. Kingdom of Belgium & Others, (2023) Brussels Court of Appeal, https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20231130_2660_judgment-1.pdf

Question put by Judge Aurescu

"Some participants have argued, during the written and/or oral stages of the proceedings, that there exists the right to a clean, healthy and sustainable environment in international law. Could you please develop what is, in your view, the legal content of this right and its relation with the other human rights which you consider relevant for this advisory opinion?"

The Republic of the Marshall Islands submits that the right to a clean, healthy and sustainable environment imposes an obligation on States to promote environmental sustainability, protect against a toxic and hazardous environment, and prevent harm to the environment which could impede the enjoyment and realisation of human rights. The right to a clean healthy environment is given meaning by the other substantive rights which are harmed by environmental degradation and the procedural rights necessary to tackle it and support better environmental policy-making.[16] The right to a clean, healthy and sustainable environment is supported by decades of widespread State practice, as well as regional and international agreements which recognize this right. States have positive obligations to protect and preserve the environment and to empower individuals to exercise their rights in support of environmental protection and to ensure governments are fulfilling their obligations.

A violation of this right has both domestic and extra-territorial consequences, given that the conduct of a State on territories within its jurisdiction or control can incur transboundary environmental harm and violate the human rights of individuals in other States. In this regard, international environmental law obligations are essential to the protection of fundamental universal human rights, which accordingly informs the recognition of the universal right to a clean, healthy and sustainable environment. The right to a clean, healthy and sustainable environment should also be considered consistently with the principle of intergenerational equity, as the collective actions or inactions taken today will greatly impact the quality of life of generations to come and their human rights. The principle of intergenerational equity informs the State's human rights obligations towards present and future generations and the right to a clean, healthy and sustainable environment. In accordance with this principle, 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.[17]

With respect to climate change, the Paris Agreement expressly acknowledges the linkage between climate action and human rights in its Preamble. In 2023, the UN Special Rapporteur on the promotion and protection of human rights in the context of climate change observed an expanding trend of linking States' responsibilities on climate change to human rights treaties. According to the Special 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'.[18] The International Tribunal on the Law of the Sea (ITLOS) has also acknowledged the importance of human rights in the context of climate change. ITLOS noted, in its reflection of the principle of systemic integration as codified in Article 31(3)(c) of the Vienna Convention on the Law of Treaties, that '[c]limate change represents an existential threat and raises human rights concerns'.[19] The UN Committee on the Rights of the Child, in a case which considered the impacts of climate change on

[16] Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, Preliminary report, A/HRC/22/43, 24 December 2012, paras 16-17.

[17] Maastricht Principles on the Human Rights of Future Generations

[18] Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change, 21 June 2024, UN Doc A/HRC/56/46, para. 2.

[19] ITLOS AO, para 66.

Marshallese children, has also adopted the approach that States are responsible for the human rights violations caused by their failure to regulate emissions over which they have effective control.[20]

In regard to the interrelation between the right to a clean, healthy and sustainable environment and other human rights, there is a growing volume of persuasive authority for the Court's consideration. For instance, in General Comment No 36, the UN Human Rights Committee clarified that States parties' obligations under international environmental law should inform the content of Article 6 of the ICCPR, protecting the right to life. Furthermore, on 23 September 2022, the 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.

There are also 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 American Convention on Human Rights. 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.

The recent judgment of the European Court of Human Rights' (ECtHR) (Grand Chamber) in the *KlimaSeniorinnen v Switzerland*[21] has addressed the core question of whether there is a positive obligation imposed on the State(s) to prevent climate harm i.e. whether States can be found responsible under the ECHR for anthropogenic climate change. The ECtHR answered this question in the affirmative and clarified that obligations of States under Article 8 (protecting the right to home, privacy and family life) of the European Convention on Human Rights (ECHR) include, in particular, to:

i. adopt general measures specifying a target timeline for achieving carbon neutrality and the overall remaining carbon budget for the same time frame, or another equivalent method of quantification of future greenhouse gas (GHG) emissions, in line with the overarching goal for national and/or global climate-change mitigation commitments;

ii. set out intermediate GHG emissions reduction targets and pathways (by sector or other relevant methodologies) that are deemed capable, in principle, of meeting the overall national GHG reduction goals within the relevant time frames undertaken in national policies;

iii. provide evidence showing whether they have duly complied, or are in the process of complying, with the relevant GHG reduction;

iv. keep the relevant GHG reduction targets updated with due diligence, and based on the best available evidence; and

[20] Committee on the Rights of the Child, Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child, concerning Communication Nos. 104-107/2019: Chiara Sacchi et al. v. Argentina, Brazil, France, and Germany (CRC/C/88/D/104/2019, CRC/C/88/D/105/2019, CRC/C/88/D/106/2019, CRC/C/88/D/107/2019), 11 November 2021, para 10.7.

[21] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, no. 53600/20, judgment (Grand Chamber) of 9 April 2024.

v. act in good time and in an appropriate and consistent manner when devising and implementing the relevant legislation and measures.[22]

The *KlimaSeniorinnen* judgment also broke new ground as, for the first time, it saw climate-related harm endangering the enjoyment of individuals' rights as violations of the ECHR. The judgment clarified that, insofar as the ECHR rights are profoundly affected, the ECtHR can decide on matters touching upon collective interests of global concern.

[22] Ibid, (paras. 420-436, 449-451)

Question put by Judge Charlesworth

"In your understanding, what is the significance of the declarations made by some States on becoming parties to the UNFCCC and the Paris Agreement to the effect that no provision in these agreements may be interpreted as derogating from principles of general international law or any claims or rights concerning compensation or liability due to the adverse effects of climate change?"

Almost a third of the declarations made by States in respect of the UNFCCC emphasise that the UNFCCC does not derogate from existing general international law or the rights arising under the law of State responsibility.[23] In relation to the Paris Agreement, 9 of 21 declarations made clear that the Paris Agreement did not derogate from general international law nor did it constitute renunciation of States' rights under the law of State responsibility in respect of the adverse effects of climate change.[24] Marshall Islands was among the States to make this declaration. Furthermore, the Marshall Islands, along with other SIDS, also confirmed in its declaration that neither the creation of specialized funds nor the existence of compliance mechanisms can replace or diminish the requirement that responsible States must offer full reparation for the relevant conduct.[25] Of particular significance, these declarations under both treaties were unopposed and there were no declarations by States under either treaty taking the opposite view.

The Republic of the Marshall Islands, therefore, submits that these derogations inform the understanding that the UNFCCC and the Paris Agreement would contribute to, rather than limit, the international law protections over the climate system. The Paris Agreement aims to strengthen, not weaken, international law protections over the climate system and accordingly, it was not intended as 'lex specialis' circumventing existing protections and obligations under other relevant and applicable areas of international law, including customary international law, international environmental law, the law of the sea and international human right law. Accordingly, the law of State responsibility is applicable across the spectrum of existing international law obligations where climate change is concerned and must be applied in the determination of liability and the assessment of compensation for composite and individual breaches.

As observed by the Court in the 2018 *Nicaragua/Costa Rica* cases, in relation to global environmental damage, the question of causation in cases of environmental harm is less stringent. The Court observed 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).

[23] See the declarations of Fiji, Kiribati, Nauru, Papua New Guinea at:

https://unfccc.int/process-and-meetings/the-convention/status-of-ratification/declarations-by-parties

[24] See the declarations of Cook Islands, Marshall Islands, Micronesia, Nauru, Niue, Philippines, Solomon Islands, Tuvalu, Vanuatu at:

https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=xxvii-7-d&chapter=27&clang=_en

[25] See the declarations of Cook Islands, Marshall Islands, Micronesia, Nauru, Niue, Philippines, Solomon Islands, Tuvalu, Vanuatu at:

https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=xxvii-7-d&chapter=27&clang=_en

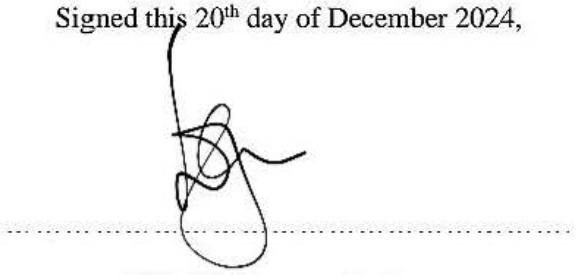
The Republic of the Marshall Islands submits that such a causal link should draw on scientific probabilistic standards of proof. Moreover, it would be necessary to show that activities within any particular respondent State's jurisdiction or control have causally contributed to the collective harm of 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. In this regard, the evidence before the Court is that States have known that emissions would cause significant harm to the climate system since at least the 1960s[26] – long before the adoption of the UNFCCC and the Paris Agreement. These treaties do not displace or exclude States' customary law obligations under the preventative principle. Indeed, the climate treaties do not displace any other international law and treaty obligations that are engaged by the conduct which causes climate change and its consequences.

[26] Vanuatu Written Statement, paras 177-192 and Expert Reports of Corinne Le Quéré CBE FRS, Professor Naomi Oreskes; Barbados Written Statement, paras 38-82 and Annexes 1-35 ("Scientific Reports 1850-1991").

Conclusion

The Republic of the Marshall Islands relies on its written statement, commenting statement and oral statement and the responses to the Questions put by Judges are informed by these prior statements and further add to the legal arguments therein.

Signed this 20th day of December 2024,



H.E. Ms. Doreen de Brum