

SYMPOSIUM COMMENTARY

Inside the System, Outside the Box: Palau's Pursuit of Climate Justice and Security at the United Nations[†]

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First published online 21 February 2014

Abstract

This commentary, which presents an expanded version of the keynote address at the 2012 Conference on 'Global Climate Change Without the United States', outlines Palau's role in attempting to motivate international action on climate change. It explains two initiatives: the passage of a United Nations (UN) General Assembly resolution highlighting the security implications of climate change, and the attempt to obtain an advisory opinion from the International Court of Justice on the responsibility of states for climate change. The two avenues are located 'inside the system' in that they target well-established organs of the UN system. However, they are 'outside the box' because they seek to bypass and ultimately jump-start the international negotiation process that has unfolded under the auspices of the UNFCCC.

Keywords: Climate Change, United Nations, International Court of Justice, Palau

1. INTRODUCTION

In the summer of 2012, a crew from the Public Broadcasting Station's (PBS) Friday evening programme 'Need to Know' travelled to Palau to document the damage wrought by climate change. What they found – and what they broadcast – were images of submerged houses, an eroded shore, destroyed crops, and islands that have been slowly disappearing for the last 20 years.¹ The images were heart-wrenching, but the

[†] This contribution is part of a collection of articles from the conference 'Global Climate Change Without the United States: Thinking the Unthinkable', held at Yale University Law School, New Haven, CT (United States), 9–10 Nov. 2012.

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The authors thank Zsofia Korosy for her assistance in preparing the text for publication.

¹ Need to Know on PBS, 'Paradise Lost in Palau?', *PBS Network*, air date 10 Aug. 2012, available at: <http://www.pbs.org/wnet/need-to-know/video/need-to-know-august-10-2012/14398>.

programme had little to no resonance. The American public had evidently seen sinking islands before. Like other recent stories about climate change, it seemed lost in the ether.

In October 2012, the American public was once again shown vivid images of a sinking island. This time, though, it was not tropical – it was Manhattan. Hurricane Sandy battered the East Coast of the United States (US). It caused extensive power outages, flooded streets, forced people from their homes, and resulted in more than 100 deaths. It caused more than US\$60 billion in damage in the states of New York and New Jersey alone.² In Sandy's wake, people asked themselves two questions: was it the result of climate change, and did it represent 'the new normal'?

To paraphrase *Bloomberg Businessweek*, the answer to the first question is indeed 'it's climate change, stupid'.³ While no single storm can definitively be attributed to climate change, the force and frequency of aggregate storm surges are on the rise, according to the Intergovernmental Panel on Climate Change (IPCC).⁴ As to the second question, Sandy's effects have long been 'the new normal' for island states. Island leaders have been sounding the alarm on climate change for years as rising seas, disastrous weather, and ocean acidification ravage their countries. Unlike New Jersey, their communities are unlikely to be restored. In the face of a future where crisis is a permanent state, the leaders of these small islands have pursued legal paths that can help to facilitate international climate coordination.⁵

The United Nations (UN) is an important forum in which to develop effective climate coordination. UN Secretary General Ban Ki-Moon warned world leaders at a general debate of the 2012 UN General Assembly (UNGA) that too many people in power are 'willfully blind' when it comes to climate change.⁶ The United Nations Environment Programme (UNEP) confirms that there is a gap between countries' cumulative pledges to reduce emissions and what is needed to prevent further damage.⁷ The IPCC advises island leaders that, in certain circumstances, the best policy may be

² Press Release, State of New Jersey: Governor C. Christie, 'Christie Administration Releases Total Hurricane Sandy Damage Assessment of \$36.9 Billion', 28 Nov. 2012, available at: <http://www.state.nj.us/governor/news/news/552012/approved/20121128e.html>; Press Release, State of New York: Governor Andrew Cuomo, 'Governor Cuomo Holds Meeting with New York's Congressional Delegation, Mayor Bloomberg and Regional County Executives to Review Damage Assessments for State in the Wake of Hurricane Sandy', 26 Nov 2012, available at <http://www.governor.ny.gov/press/11262012-damageassessment>.

³ P.M. Barrett, 'It's Global Warming, Stupid', *Bloomberg Businessweek*, 1 Nov. 2012, available at: <http://www.businessweek.com/articles/2012-11-01/its-global-warming-stupid#p1>.

⁴ IPCC, 'Fifth Assessment Report (AR5)', available at: <http://www.ipcc.ch/report/ar5/#.UllcGeCz4tA>.

⁵ See, e.g., Press Statement, 'Pacific Islands Forum Leaders Endorse the Niue Declaration on Climate Change', 26 Aug. 2008, available at: <http://www.forumsec.org/pages.cfm/newsroom/press-statements/2008/forum-leaders-endorse-niue-declaration-on-climate-change.html>; Alliance of Small Island States Leaders' Declaration, 27 Sept. 2012, available at: <http://aosis.org/wp-content/uploads/2012/10/2012-AOSIS-Leaders-Declaration.pdf>.

⁶ UN Secretary-General, 'Address to the General Assembly', 25 Sept. 2012, available at: http://gadebate.un.org/sites/default/files/gastatements/67/SG_en_0.pdf.

⁷ UNEP, *Bridging the Emissions Gap: A UNEP Synthesis Report* (UNEP, 2011), p. 9, available at: http://www.unep.org/pdf/unep_bridging_gap.pdf.

to resettle their populations.⁸ The mounting challenge is: what can be done about climate change in the absence of support from the world's economic, political, and greenhouse gas (GHG) emitting powerhouse nations?

This commentary argues that, despite the need to act globally, it remains possible for effective climate action to emerge. Asking the UN Security Council (UNSC) to acknowledge the international peace and security implications of climate change and the International Court of Justice (ICJ) to provide baseline norms of climate responsibility can go a long way towards facilitating effective climate cooperation. Although these two avenues are 'inside the system' in that they target well-established organs of the UN system, they are 'outside the box' in that they seek to bypass and ultimately jump-start the international negotiation process that has unfolded under the auspices of the UN Framework Convention on Climate Change (UNFCCC).⁹

2. PALAU'S CLIMATE CHANGE INITIATIVES

While Palau is among the world's smallest states, it has led two of the largest climate change initiatives at the UN in recent years. The first was to pass a UNGA resolution highlighting the security implications of climate change.¹⁰ The second was to propose a UNGA resolution requesting the ICJ to produce an advisory opinion on climate change.¹¹ These two initiatives have a number of similar attributes. Firstly, they work within the traditional confines of the UN system, emphasizing that each UN organ has a unique role to play. Secondly, they are directed at facilitating climate coordination beyond the UNFCCC. Thirdly, they force people to rethink how they conceive of climate change: framing climate change as a security issue and as an issue of international law and justice can have powerful ramifications for effective climate cooperation.

2.1. *Why Within the UN System?*

International climate change cooperation can build upon mutual understanding, contribution, and responsibility.¹² UNGA, UNSC, and UNFCCC forums have enabled states to publicly recognize the growing threats of climate change. Current climate initiatives do not add up to an adequate climate response. By building on the well-established principle of state responsibility to respect the rights of other states not

⁸ IPCC, *Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation: Special Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2012), at p. 18.

⁹ New York, NY (US), 9 May 1992, in force 21 Mar. 1994, available at: <http://unfccc.int>.

¹⁰ UNGA Resolution A/RES/63/281 on Climate Change and its Possible Security Implications, 3 June 2009, available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/63/281&Lang=E.

¹¹ See Honorable Johnson Toribiong, President of the Republic of Palau, 'Statement to the 66th Regular Session of the United Nations General Assembly', 22 Sept. 2011, available at: <http://gadebate.un.org/66/palau>.

¹² A. Korman & G. Barcia, 'Rethinking Climate Change: Towards an International Court of Justice Advisory Opinion' (2012) 37 *The Yale Journal of International Law Online*, pp. 35–42, at 35, available at: <http://www.yjil.org/docs/pub/o-37-korman-barcia-rethinking-climate-change.pdf>.

to be harmed through transboundary pollution, the international community can coordinate through the UN to assess and respond effectively to transboundary climate ramifications.

As in the case of other small states, Palau's geopolitical leverage lies chiefly within the UN system. Without an army, navy, or sizeable economy, small island nation states appear vulnerable to being dominated by other countries in international affairs. Yet the system of international rule of law facilitated by the UN greatly enhances Palau's capacity to sustain independence and an equal voice.

In the past, other small states – particularly island states – have used their leverage within the UN system to great effect. For instance, Malta was instrumental in the creation of both the UN Convention on the Law of the Sea (UNCLOS)¹³ and the UNFCCC.¹⁴ Similarly, within five years of becoming a member of the UN, Palau led international coalitions to eliminate deep sea bottom trawling¹⁵ and to establish shark sanctuaries.¹⁶ Palau has been awarded the Future Policy Award of the World Future Council, in part in recognition of this shark sanctuary that now spans 6.7 million square kilometres of ocean.¹⁷ Small island leadership has been instrumental in the generation of path-breaking environmental solutions.

¹³ Montego Bay (Jamaica), 10 Dec. 1982, in force 16 Nov. 1994, 1833 UNTS 3, available at: http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm. See UN GAOR, 22nd Session, First Committee, 1515th Meeting, UN Doc. A/C.1/PV.1515, and 1516th Meeting, UN Doc A/C.1/PV.1516, 1 Nov. 1967, Address of Mr Pardo (Malta), available at: http://www.un.org/Depts/los/convention_agreements/texts/pardo_ga1967.pdf; T.T.B. Koh, 'A Constitution for the Oceans', remarks by Tommy T.B. Koh, of Singapore, President of the Third United Nations Conference on the Law of the Sea, adapted from statements by the President on 6 and 11 Dec at the final session of the Conference at Montego Bay, available at: http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm.

¹⁴ See UNGA, Provisional Verbatim Record, 43rd Session, 35th Meeting. UN Doc A/43/PV.35, 24 Oct. 1988, Address of Mr Tabone (Malta), at pp. 6–20, available at: <http://www.un.org/Docs/journal/asp/ws.asp?m=A/43/PV.35>; UNGA Resolution A/RES/43/53 on Protection of Global Climate for Present and Future Generations of Mankind, 6 Dec. 1988, available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/43/53&Lang=E&Area=RESOLUTION.

¹⁵ UNGA Resolutions 61/105 and 66/68 protect vulnerable deep-sea marine ecosystems from bottom trawling and protect biodiversity on a global scale as a result of Palau's efforts: UNGA Resolution 61/105 on Sustainable Fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and Related Instruments, 8 Dec. 2006, available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/61/105&Lang=E; UNGA Resolution 66/68 on Sustainable Fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and Related Instruments, 6 Dec. 2011, available at: http://www.un.org/ga/search/view_doc.asp?symbol=%20A/RES/66/68. See also P. Prows, 'A Mouse Can Roar: Small Island States, the United Nations and the End of Free-For-All Fishing on the High Seas' (2007) 19 *Colorado Journal of International Environmental Law and Policy*, pp. 1–48.

¹⁶ Palau was the first country to declare a shark sanctuary, and it did so at the UNGA in 2009: see UN GAOR, 64th Session, 7th Meeting, UN Doc A/64/PV.7, 25 Sept. 2009, Address of Mr Johnson Toribiong, at p. 8, available at: http://www.un.org/ga/search/view_doc.asp?symbol=A%2F64%2FPV.7&Submit=Search&Lang=E.

¹⁷ Press Release, World Future Council, 'FPA 2012 Goes to Palau', 26 Sept. 2012, available at: <http://www.worldfuturecouncil.org/5633.html>; see also 'Cook Islands' Shark Sanctuary Creates World's Largest', *BBC News*, 13 Dec. 2012, available at: <http://www.bbc.co.uk/news/science-environment-20709853>.

2.2. *Why Facilitate Climate Cooperation Beyond the UNFCCC?*

The UNFCCC has yet to stabilize GHG emissions, though the time to do so and avoid catastrophic climate change consequences is rapidly running out.¹⁸ The UNFCCC's Kyoto Protocol¹⁹ alone has not curbed emissions. Despite agreement to a second Kyoto Protocol commitment period at the December 2012 UNFCCC Conference of the Parties (COP-18) in Doha (Qatar), the pledges made by countries are manifestly insufficient to keep global temperatures from increasing more than 2 degrees Celsius (°C).²⁰ While the agreement reached in 2011 to replace the Kyoto Protocol with an agreement that binds all states was widely celebrated,²¹ the agreed time frame pushes much of the implementation challenge out to 2020.

Year after year, tens of thousands of people descend on remote locations that are largely beyond media centres. They seek to solve interrelated, complex climate coordination challenges as major emitters from both sides of the development divide continue to stand in the way of substantial emissions reductions. Former British Prime Minister, Margaret Thatcher, once characterized consensus decision making as:

the process of abandoning all beliefs, principles, values, and policies in search of something in which no one believes, but to which no one objects – the process of avoiding the very issues that have to be solved, merely because you cannot get agreement on the way ahead.²²

The effectiveness of the UNFCCC requires a willingness to overcome the use of unanimity procedures that condone or even encourage inaction. Since time is of the essence and treaty making among almost 200 nation states is an unwieldy process, it is important to continue to facilitate climate coordination beyond the UNFCCC.

3. CLIMATE CHANGE AND SECURITY

The initiative on climate and security grew out of a simple realization that when the survival of nation states is at stake, international peace and security must be recognized as a legal issue that the international community has a collective obligation to address. While elementary, the efforts of small island nation states in 2007 to formally link climate change to international peace and security caused uproar at the UN. Despite the United Kingdom's (UK) leadership efforts within the UNSC, progress on addressing climate change within a security framework has remained embryonic as

¹⁸ UNFCCC, n. 9 above, Art. 2

¹⁹ Kyoto (Japan), 11 Dec. 1997, in force 16 Feb. 2005, available at: http://unfccc.int/kyoto_protocol/items/2830.php.

²⁰ See closing Press Briefing, UNFCCC: C. Figueres, 8 Dec. 2012, available at: http://unfccc.int/meetings/doha_nov_2012/meeting/6815.php.

²¹ See, e.g., 'Durban Climate Deal: The Verdict', *The Guardian*, 12 Dec. 2011, available at: <http://www.guardian.co.uk/environment/2011/dec/12/durban-climate-deal-verdict>.

²² M. Thatcher, 1981 Sir Robert Menzies Lecture, Monash University, Melbourne (Australia), 6 Oct. 1981, available at: <http://www.margaretthatcher.org/document/104712>.

a result of lack of political will among the five permanent members of the UNSC.²³ Recognizing climate change as a threat to international peace and security places the issue within the jurisdiction of the UNSC, the only UN body with the power to bind even unwilling states to take measures set out in its resolutions. The UNSC has real power to compel timely and effective action within the realm of international peace and security.²⁴ While Blue Helmets may be more effective at guarding a political line in the sand than holding back a rising tide, the day may soon come when peacekeeping forces are asked to do both. Efforts by the International Union for Conservation of Nature (IUCN) to build beaches through wetlands restoration indicate that effective mitigation and adaptation measures can be coordinated through international efforts.²⁵ Security framing can enhance the ability of the international community to do so.²⁶

Despite a myriad of reports from the country's defence and other departments that have highlighted the security risks associated with climate change,²⁷ US representatives initially denied the existence of a link between climate change and security risks that could have enabled the UNSC to coordinate international climate responses. Given diplomatic reticence to involve the UNSC, small island nation states moved on to UNGA consensus building. Within 18 months, small island nations led a successful endeavour to pass UNGA Resolution 63/281 with the support of every Member State – including the US.²⁸ This resolution calls on all organs of the UN to intensify their efforts to consider and address climate change, including its possible security implications. While the resolution avoids specific reference to the UNSC for political reasons, it had the intended effect when Germany used it as an explicit mandate to take

²³ Despite discussion to expand the permanent membership, the current five permanent members of the UNSC remain: China, France, Russia, the UK, and the US.

²⁴ See L.A. Malone, 'Green Helmets: A Conceptual Framework for Security Council Authority in Environmental Disaster' (1996) 17 *Michigan Journal of International Law*, pp. 515–36.

²⁵ See B. Brown & W. Yuniarti, 'Policy Brief: Suggested Practices for Post-Disaster Mangrove Rehabilitation', IUCN, 2008, at p. 1, available at: http://cmsdata.iucn.org/downloads/policy_brief_post_disaster_mangrove_rehabilitation__indonesia_3.pdf

²⁶ E. Bursleson, 'A Climate of Extremes: Transboundary Conflict Resolution' (2008) 32 *Vermont Law Review*, pp. 477–523; E. Bursleson, 'Multilateral Climate Change Mitigation' (2007) 41 *University of San Francisco Law Review*, pp. 373–407.

²⁷ See, e.g., US Department of Defense, 'Quadrennial Defense Review Report', Feb. 2010, at pp. 84–6, available at: http://www.defense.gov/qdr/images/QDR_as_of_12Feb10_1000.pdf. See also US Office of the Director of National Intelligence, 'Global Water Security: Intelligence Community Assessment', 2 Feb. 2012, available at: http://www.dni.gov/files/documents/Special%20Report_ICA%20Global%20Water%20Security.pdf.

²⁸ UNGA Resolution A/RES/63/281 on Climate Change and its Possible Security Implications, 3 June 2009, available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/63/281&Lang=E. See also UNGA, GA 10830, Department of Public Information, 'General Assembly, Expressing Deep Concern, Invites Major United Nations Organs to Intensify Efforts in Addressing Security Implications of Climate Change', 63rd General Assembly Plenary 85th Meeting, 3 June 2009, available at: <http://www.un.org/News/Press/docs/2009/ga10830.doc.htm>. Support for compensation for environmental damage is arguably provided by another UNSC resolution – specifically Resolution 687 – which, in 1991, affirmed that Iraq was 'liable under international law for any direct loss, damage, including environmental damage and the depletion' in its war against Kuwait. According to Christina Voigt, resolutions such as these support the general acceptance of the principle of ecological damage in international law: see C. Voigt, 'Security in a "Warming World": Competences of the UN Security Council for Preventing Dangerous Climate Change', in C.M. Bailliet (ed), *Security: A Multidisciplinary Normative Approach* (Brill Academic Publishers, 2009), pp. 291–312.

up the issue as the UNSC President in 2011. Thanks to its efforts, as well as those of others on the Council, a historic Presidential Statement now exists, highlighting the potential risks of climate change to international peace and security.²⁹

Germany's UNSC Presidential Statement and the preceding UNGA resolution have not stemmed the rising tides, but they constitute a step towards changing the way the world understands and discusses climate change. It is increasingly difficult to question the existence of substantial and interrelated effects of climate change, such as the impairment of territorial integrity, enhanced and in some cases forced migration, and the disruption of energy, food, and water resources. It is no longer plausible to deny that rising seas and droughts are displacing people across the globe. The link between climate and security has become a mainstream concern at the UN, and the US has been receptive to the issue by crafting effective climate responses. US Ambassador Rice has told the UNSC that the denial of the security implications of climate change was 'pathetic' and that failure by the UNSC to meet the challenge would be a 'dereliction of duty'.³⁰ As a result of the change in US policy, from friction to increasing engagement, climate coordination may be substantially more effective going forward.³¹

One lesson that Palau's diplomatic leaders took from the climate security initiative was that different forms of climate cooperation need not be mutually exclusive. Encouraging leading nations of the world to discuss and debate climate change in the context of the UNSC did not impede or undermine negotiations at the UNFCCC. If anything, these discussions raised the profile of the negotiations by highlighting matters of concern to powerful departments, agencies and organizations not typically engaged in environmental negotiations. Irrespective of the form that climate cooperation takes, progress towards mitigation, adaptation, technology transfer, funding, and other key elements of the climate matrix need to be ramped up by several orders of magnitude. Palau's next attempt to increase global climate discussions focused on the ICJ and the attempt to show that the climate change problem is one of law and justice, not merely of politics and power.

4. THE INTERNATIONAL COURT OF JUSTICE

Palau's climate initiative at the ICJ naturally flowed from its ongoing climate security leadership. The UNGA resolution calling on all UN organs to consider climate change provided a strong mandate. The ICJ is a UN organ and is the organization's primary judicial body. Its competence to offer advisory opinions on international law is unquestioned,³²

²⁹ UNSC, Statement by the President, UN Doc S/PRST/2011/15, 20 July 2011, available at: <http://www.securitycouncilreport.org/atf/ct/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CC%20SPRST%202011%205.pdf>.

³⁰ UNSC, 66th Session, 6587th Meeting, UN Doc S/PV.6587, 20 July 2011, at p. 7, available at: http://www.un.org/ga/search/view_doc.asp?symbol=S/PV.6587.

³¹ White House Office of the Press Secretary, 'Remarks by the US President on Climate Change', 25 June 2013, available at: <http://www.whitehouse.gov/the-press-office/2013/06/25/remarks-president-climate-change>.

³² Art. 65(1) of the ICJ Statute states that 'the Court may give an advisory opinion on any legal question at the request of whichever body may be authorized by or in accordance with the Charter of the United Nations to make such a request': Statute of the International Court of Justice, New York, NY (US), 26 June 1945, in force 24 Oct. 1945, available at: legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf.

as is the prerogative of the UNGA to request such opinions.³³ Moreover, the need for alternative international forums to address climate change had become increasingly clear. By the time Palau announced, in 2011, that it would take the issue of climate change to the ICJ,³⁴ UNFCCC negotiations were deeply troubled and hope of achieving a meaningful treaty-based coordination approach was at an all time low.

Palau's goal was to establish the applicability to the emission of GHGs of existing norms of international law prohibiting transboundary harm.³⁵ Such an application would provide a baseline for negotiations at the UNFCCC and would inevitably impact on national courts and legislatures. It would constitute a norm from which no country could opt out. It was clear from the outset that taking climate change to the ICJ was ambitious and would provoke significant opposition, but it created the opportunity to make a meaningful impact. Firstly and most significantly, it would reintroduce the notions of justice and law into the debate.

Choosing the advisory route, instead of engaging in contentious litigation,³⁶ has a number of benefits. It is generally less antagonistic. It also entails fewer procedural hurdles. It does not involve choosing plaintiffs or defendants, or trying to obtain jurisdiction over any one state or group of states. These are no small tasks in practice. Since the judges would be asked only to elaborate on a general principle of international law, the vexing issue of causation that would be central to any concrete question of liability could be left in the background. Jurists could be asked to specify the responsibility of nations to avoid contributing substantially to climate-induced harms, *assuming* that such contributions could be demonstrated.

Climate adaptation and mitigation are both important and each needs to be tailored to circumstances of the particular country. One size does not always fit all. For instance, how does one define adaptation for small island states? Firstly, warmer, more acidic waters, calcified reefs, and salinized crops substantially reduce food security. Secondly, flooded and eroded lands result in relocation of populations whose heritage is tied to ancestral property. Thirdly, environmental degradation results in loss of tourism revenue, with devastating effects on constrained national

³³ Art. 96(1) of the UN Charter states: 'The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question': Charter of the United Nations, 26 June 1945, in force 24 Oct. 1945, 1 UNTS XVI. These provisions establish the prima facie competence of the UNGA to request an advisory opinion. Scope for questioning this competence is limited: expert commentary suggests that the breadth of UNGA competence provided for in the Charter makes it difficult to conceive of a legal question that would fall outside it. See also K. Oellers-Frahm, 'Article 96', in B. Simma, D.E. Khan, G. Nolte & A. Paulus (eds), *The Charter of the United Nations: A Commentary* (3rd edn, Oxford University Press, 2012).

³⁴ UNGA OR, 66th Session, 16th Plenary Meeting, UN Doc A/66/PV.16, 22 Sept. 2011, Address of Mr Toribiong, at pp. 27–8, available at: http://www.un.org/ga/search/view_doc.asp?symbol=A%2F66%2FPV.16&Submit=Search&Lang=E.

³⁵ For a thorough overview of the ICJ climate change initiative, including a review of existing international and transnational legal norms and cases supporting the notion that nations do not have an unfettered right to contribute to the causation of climate-induced transboundary harms, see D.A. Kysar et al, 'Climate Change and the International Court of Justice', Yale Center for Environmental Law & Policy Report, 14 Aug. 2013, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2309943.

³⁶ For an assessment of a hypothetical contentious case involving climate change, see R.E. Jacobs, 'Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice' (2005) 14(1) *Pacific Rim Law & Policy Journal*, pp. 103–28, at 114.

economies. Fourthly, even if effective sea walls could be engineered, costs continue to be prohibitive without an international equivalent of the Federal Emergency Management Agency (FEMA) – the US agency charged with preparing for and responding to domestic disasters and hazards – or other means of risk allocation. Clearly, such a list is not exhaustive but it does highlight some of the challenges.

Effective adaptation for small island states hinges upon mitigation by major emitting states. It involves dramatic transformation of energy, transportation, housing, agriculture, and other key sectors within the top emitting countries. The ICJ initiative aimed to facilitate this carbon curbing coordination. It sought to place the onus back on source countries to reduce their emissions and avert resulting damage on receiving countries by applying traditional international legal concepts like transboundary harm. While an advisory opinion from the ICJ would not have issued specific terms for emissions reduction for a particular country, it could have facilitated a meaningful aggregate check on emissions.

The ICJ was asked to consider the question of what are the obligations of states to ensure that activities under their jurisdiction or control that emit GHGs do not cause, or substantially contribute to, damage to another state or states. The case to be made was straightforward. Anthropogenic GHGs act as a pollutant that causes damage across borders. The source of the damage may be diffuse and the causal pathway long and complex, but they are by now well understood and remediable. The effects are also known and are likely to cause significant damage up to and including the destruction of some existing states.³⁷

The evidence has already been admitted. The UNFCCC's premise is that climate change is a serious problem, human activities are primarily responsible and, by working together, states can provide a solution. That rationale is reflected in the Convention's Preamble and has been reiterated in the COP decisions taken under the UNFCCC framework.³⁸ The IPCC, the UN Secretary General, the UN Development Programme (UNDP), UNEP and others have similarly established the requisite evidence beyond debate.³⁹ Each successive study demonstrates that the situation is clearly deteriorating as the damage mounts.⁴⁰

The ICJ is the ideal forum to put forward the most compelling facts and the best available science. It is the broadest international court and remains prominent in

³⁷ See A. Korman & G. Barcia, 'Rethinking Climate Change: Towards an International Court of Justice Advisory Opinion' (2012) 37 *The Yale Journal of International Law Online*, pp. 35–42, at 40–2.

³⁸ UNFCCC COP decisions are available at: <http://unfccc.int/documentation/decisions/items/3597.php?dec=j&such=j&cp=/CP#beg>.

³⁹ See IPCC, 'Fourth Assessment Report: Climate Change 2007', available at: http://www.ipcc.ch/publications_and_data/publications_and_data_reports.shtml#1; UNGA, 'Climate Change and its Possible Security Implications: Report of the Secretary-General', UN Doc A/64/350, 11 Sept. 2009, available at: http://www.un.org/ga/search/view_doc.asp?symbol=A%2F64%2F350&Submit=Search&Lang=E; UNDP, 'Mapping Climate Change: Vulnerability and Impact Scenarios', Nov. 2010, available at: <http://tiny.cc/UNDP2010>; UNDP Environment & Energy Group, 'Climate Change at UNDP: Scaling Up to Meet the Challenge', Sept. 2008, available at: <http://tiny.cc/UNDP2008>; UNEP, 'GEO5 – Global Environmental Outlook: Environment for the Future We Want', 2012, available at: <http://www.unep.org/geo>.

⁴⁰ For latest information see IPCC, 'Fifth Assessment Report (AR5)', n. 4 above.

international decision making. It is also a UN organ that unlike the UNSC is not subject to veto by the US or other major emitter.

Over 30 countries worldwide have lent their support to taking climate change initiatives to the ICJ. The movement started as a core group of island Ambassadors known as the Ambassadors for Responsibility on Climate Change (ARC Group).⁴¹ Over time, countries from across Asia, Africa, South America, and Europe have joined the group. Some were large, climate vulnerable countries; others were simply committed to tackling climate change and were supportive of strengthening the international rule of law. Yet even this tremendous support is not quite enough to ensure success.

As the ICJ initiative became a serious force, the US threw its full diplomatic weight against it. The same government that had called inaction on climate and security ‘pathetic’ urged Palau and other states to drop the case.⁴² China has similarly opposed a climate case before the ICJ. Powerful diplomatic resistance to even allowing a debate on the issue to reach UN deliberations has slowed progress towards an ICJ judgment.

Despite the vested interests of opposing countries such as the US and China, climate coordination is under way.⁴³ An ICJ decision that recognizes climate-related harm by applying traditional notions of state environmental responsibility to the climate change context could focus and catalyze international climate coordination going forward. In its capacity as the principal judicial organ of the UN, the ICJ can increase awareness and the political will to respond effectively to climate change. Further, ICJ guidance on climate-related rights and obligations could contribute to clarifying effective climate responses. This could build on ongoing IPCC, UNFCCC, UNGA, UNSC, and other guidance on climate state responsibility.

While a case before the ICJ would take time – time that is running out – an outcome that recognizes climate transboundary harm as a violation of international legal norms would be instrumental. In particular, a strong message from the ICJ that countries owe a transboundary duty not to harm one another’s climate would potentially galvanize the international community to increase the effectiveness of climate coordination. ICJ cases do not create binding precedent but many cases have

⁴¹ Press Release, Permanent Mission of the Republic of Palau to the United Nations, ‘United Nations Ambassadors Align for Responsibility on Climate Change’, 12 Dec. 2011.

⁴² L. Friedman, ‘Island States Mull Risks and Benefits of Suing Big Emitters’, *EE News*, 16 Nov. 2012, at p. 1, available at: <http://www.eenews.net/climatewire/stories/1059972615> (‘Tiny islands are getting some big-league help in their quest to haul major emitters into international court over global warming. But they’re fearful the United States and China might punish them by cutting off foreign aid. Germany, Ireland and Switzerland have vowed support for the Republic of Palau, which is leading a coalition of vulnerable nations in a landmark campaign to make climate change a matter of international law. The backing of wealthy European nations brings support for a resolution before the [UNGA] to 33 countries and is considered a major boost to the case’).

⁴³ See, e.g., short-term climate forced reduction cooperation, n. 39 above; E. Bursleson & W. Bursleson, ‘Innovation Cooperation: Energy Biosciences and Law’ (2011) 2 *University of Illinois Law Review*, pp. 651–94; E. Bursleson, ‘Making Sand Castles as the Tide Comes In: Legal Aspects of Climate Justice’ (2011) 2 *George Washington Journal of Energy and Environmental Law*, pp. 42–50; E. Bursleson, ‘Climate Change Consensus: Emerging International Law’ (2010) 34(2) *William and Mary Environmental Law and Policy Review*, pp. 543–88; J. Peel, L. Godden & R. Keenan, ‘Climate Change Law in an Era of Multi-Level Governance’ (2012) 1(2) *Transnational Environmental Law*, pp. 245–80.

been highly persuasive in less direct ways. States have recognized ICJ decisions as determinative of a wide range of issues ranging from natural resource coordination,⁴⁴ international institution law,⁴⁵ use of force,⁴⁶ and recognition of sovereignty.⁴⁷

Building on a series of decisions concerning natural resources that have clarified state responsibilities, a decision by the ICJ on climate could help to bring state implementation in line with scientific findings conveyed by the IPCC and international legal responsibilities recognized by the UNFCCC.⁴⁸ The ICJ, in its advisory capacity, can articulate the rights and obligations of states with regard to climate change. While adjudication can be slow, treaty making (and ratification) and other forms of decision making can also involve lengthy and complex processes, as the 20-year history of the UNFCCC negotiation process illustrates. Rather than a short cut or an end run, an ICJ decision on climate change could work in conjunction with other instruments, institutions, and civil society at large to be influential in mitigating GHGs and adapting effectively to extreme climate change. Such a decision could also help frontline communities who are already seeing catastrophic climate change and who cannot wait for slow and collective deliberation before responding to existing climate disruptions. The stature of an ICJ decision could also kindle greater state-to-state cooperation, as well as facilitating the implementation of mitigation and adaptation measures by non-state actors.

ICJ case law on natural resources offers an intriguing comparator of what the Court could contribute in the field of climate change.⁴⁹ Natural resource cases that have come before the ICJ have been mixed with sovereignty claims, similar to the current climate challenge, which includes both a natural resource collective action problem and a sovereignty deliberation. The ICJ has thus far been adept at providing incremental contributions to the ongoing task of balancing the right not to be harmed with the right to use natural resources and to develop. The nuclear and fisheries contexts have each provided distinct scientific and geopolitical challenges involving food security, self-defence, and decisions with far reaching implications for human and

⁴⁴ E.g. *Fisheries Case (United Kingdom v. Norway)*, Judgment 18 Dec. 1951, General List No. 5 (1949–51); *Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland)*, Jurisdiction of the Court, Judgment, General List No. 56 (2 Feb. 1973); *Fisheries Jurisdiction Case (United Kingdom v. Iceland)*, Merits, Judgment, General List No. 56 (25 July 1974); *Fisheries Jurisdiction (Spain v. Canada)*, Judgment 4 Dec. 1988, General List No. 96 (1995–98); *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)* (1967–69) (20 Feb. 1969); *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 Sept. 1997, General List No. 92 (1993–97); *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment 20 Apr. 2010.

⁴⁵ E.g., *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion of 28 May 1948, General List No. 3 (1947–48).

⁴⁶ E.g., *Legality of Use of Force (Yugoslavia v. United States of America)*, Request for the Indication of Provisional Measures, Order, General List No. 114 (2 June 1999).

⁴⁷ E.g., *International Status of South West Africa*, Advisory Opinion of 11 July 1950, General List No. 10 (1949–50); *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Judgment, General List No. 67 (12 Oct. 1984).

⁴⁸ UNFCCC COP Decision 1/CP.17 on Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, UN Doc. FCCC/CP/2011/L.10, 10 Dec. 2011, at p. 2, available at: <http://www.unfccc.int/resource/docs/2011/cop17/eng/09a01.pdf>.

⁴⁹ See generally the ICJ case law, available at: <http://www.icj-cij.org/docket>.

environmental integrity.⁵⁰ Climate science is multifaceted on a scale beyond previous natural resource deliberations. That said, adjudication can add to treaty negotiations by lending the heavy weight of international legal interpretation to short-term political cycles and quid pro quo negotiating capacities that vary from state to state.

To conclude, the ICJ can help to focus international climate change law in a manner that clearly articulates a legal recognition of state responsibility with regard to climate change. The celebrated *Trail Smelter Arbitration*⁵¹ broadly delineated the responsibility of one state not to cause harm to another state. The right not to be harmed has evolved in distinct directions based on the nuances of a range of contexts, but it remains foundational in international law. Irrespective of the scope of a decision, courts such as the ICJ can contribute to addressing climate change by stating and restating climate-related responsibilities and rights. Doing so allows rights holders and duty bearers to engage with one another in contexts of climate collective action with a greater capacity to carry out genuine implementation rather than merely rhetoric. Having participated in climate negotiations for many years, these authors can attest to the eloquence of state and non-state accounts of climate change challenges and solutions. These statements have resonated irrespective of the size of the state expressing the given climate realities. Gathering the wealth of eloquence into a straightforward ICJ legal decision could bring a strong climate mandate into the body of international case law and further strengthen the foundation of climate law.

5. CONCLUSION: CLIMATE STOCKTAKING

US engagement in climate coordination is core to mitigation and adaptation. For better or worse, the US remains profoundly powerful as an energy, economic, and military force. If the US should decide to take the lead, other states, tribes, private sector, and civil society climate networks would thrive as a result of the ice-breaking, pathfinder role that the US is in a position to provide. Silence on climate throughout the US presidential campaign and beyond⁵² shows how constrained domestic climate coordination has become by powerful stakeholders, particularly in the energy sector. Without a broad dialogue, the domestic price for not responding to climate change has remained hidden. While real progress can be made in treaty-body contexts, the UNFCCC negotiations continue to suffer from straightjacket constraints placed on the international community by top emitting countries struggling with the realities of achieving collective action. Until a forum of international coordination breaks through

⁵⁰ *Nuclear Tests Case (Australia v. France)*, Judgment, General List No. 58 (20 Dec. 1974); *Nuclear Tests Case (New Zealand v. France)*, Judgment, General List No. 59 (20 Dec. 1974); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, General List No. 95 (8 July 1996); *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, General List No. 93 (8 July 1996).

⁵¹ *Trail Smelter Arbitration (United States v. Canada)*, Decision 16 Apr. 1938 and 11 Mar. 1941, available at: http://legal.un.org/riaa/cases/vol_III/1905-1982.pdf.

⁵² See J.M. Broder, 'Both Romney and Obama Avoid Talk of Climate Change', *The New York Times*, 25 Oct. 2012, available at: <http://www.nytimes.com/2012/10/26/us/politics/climate-change-nearly-absent-in-the-campaign.html?pagewanted=all&r=0>.

the political inertia, it will be difficult to coordinate broad, effective and timely climate responses throughout the world.

Diplomatic persistence has contributed to US climate evolution to date and can further enhance the required cooperation to mitigate and adapt. The US has already been able to shift its position on climate and security. Breakout solutions can involve framing the issue in terms of lives and homes. Implementation can expand by building a strong climate coalition that gathers state and non-state voices to implement security, public health, human rights, environmental, energy, water, and other threads of the climate resilience tapestry. Although an ICJ advisory opinion would not bind states to implement given climate actions, such a decision could help to define climate state responsibilities not to harm one another with GHG emissions.

Climate change is not just about emissions targets or endless geopolitical wrangling. It is about justice and law. It is about people's rights to live without disaster thrust upon them, and to be helped when it is. Superstorm Sandy helped to refocus attention on how to coordinate effective climate responses. Sustaining this focus and stepping up to the substantial challenge of coordinating mitigation and adaptation implementation need not ebb and flow with political campaign contributions. Recognizing international legal cornerstones can help to sustain a firm, yet resilient, foundation for effective climate responses globally.