



## Rethinking Climate Change: Towards an International Court of Justice Advisory Opinion

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### I. INTRODUCTION

Climate change<sup>1</sup> is popularly reported as a story about shifting geopolitics, new and emerging economies, and scientific intrigue. Although those characterizations are accurate, climate change is most importantly about people. The consequences of climate change—melting glaciers, ocean acidification, more frequent and intense storms, and droughts<sup>2</sup>—threaten people's daily lives, cause health crises, threaten food security, destroy industries and infrastructure, render borders unstable, and cripple economies.<sup>3</sup> In Kiribati, a small island country in the

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1. This Essay uses the Intergovernmental Panel on Climate Change's definition of "climate change," referring to "any change in climate over time, whether due to natural variability or as a result of human activity." INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS: CONTRIBUTION OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 2 n.1.
2. *Id.* at 7-8, 15.
3. See U.N. Secretary-General, *Climate Change and Its Possible Security Implications: Rep. of the Secretary-General*, ¶¶ 22-44, U.N. Doc. A/64/350 (Sept. 11, 2009); PAUL R. EPSTEIN & DAN FERBER, CHANGING PLANET, CHANGING HEALTH: HOW THE CLIMATE CRISIS THREATENS OUR HEALTH AND WHAT WE CAN DO ABOUT IT (2011); Anthony J. McMichael, *Climate Change and Human Health*, in HEALTH G20, at 121 (2010); Jonathan A. Patz et al., *Impact of Regional Climate Change on Human Health*, 438 NATURE 310 (2005) (reporting that during the past thirty years warming trends due to climate change have claimed over 150,000 lives annually); Julia Lisztwan, Note, *Stability of Maritime Boundary Agreements*, 37 YALE J. INT'L L. 153, 159-65 (2012) (arguing that as climate change has increased the rate of coastal shift, baselines might be considered ambulatory, but maritime boundaries will nonetheless remain stable); Laura LeBlanc, *From Allergies to Deadly Disease, Feeling the Effects of Climate Change*, PBS (May 20, 2011), <http://www.pbs.org/wnet/need-to-know/environment/video-from-allergies-to-deadly-disease-feeling-the-effects-of-climate-change/9457> (reporting that some researchers link climate change to the emergence of a rare fungal

South Pacific, rising seas have forced the government to prepare to resettle its entire population—and upend its ancient history, culture, and way of life.<sup>4</sup>

In September 2011, the Republic of Palau's President, Johnson Toribiong, announced that the nation of Palau would embark on a new legal initiative to bring emissions causing climate change under control. Speaking at the Sixty-Sixth Session of the United Nations General Assembly, President Toribiong noted that climate change implicates the international rule of law and warrants consideration by the International Court of Justice (ICJ).<sup>5</sup> He called for an ICJ advisory opinion on the obligations and responsibilities of states under international law to avoid transboundary harm caused by greenhouse gas emissions.<sup>6</sup>

This Essay argues that an ICJ advisory opinion on climate change, in addition to having historic value, would have the power to reshape positively the international approach to greenhouse gas emissions. Although it could not bind states to take specific action, an ICJ advisory opinion would define, for the first time, states' obligations and responsibilities with respect to emissions under international law. The ICJ's authoritative advice could help develop new international norms of behavior regulating transboundary harm caused by emissions, and could provide needed clarity on the principles according to which states can negotiate effective solutions. This Essay begins by showing the gap between the international community's understanding of the dangers of climate change and the dearth of action taken to mitigate those dangers. It continues by elaborating on the ICJ's advisory function, highlighting the utility of past advisory opinions, and reviewing the foundational legal principles that might apply in the climate change context. This Essay concludes by affirming the practical value that an ICJ advisory opinion would have in addressing climate change.

## II. A GAP BETWEEN KNOWLEDGE AND ACTION

The international community has proclaimed clearly that human activity is primarily responsible for climate change and that climate change poses a serious problem that requires an urgent solution. The General Assembly, for example, has repeatedly and unanimously reaffirmed the seriousness of climate change as a

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disease in the Pacific Northwest that had previously been observed exclusively in tropical climates).

4. *As Sea Levels Rise, Kiribati Eyes 6,000 Acres in Fiji as New Home for 103,000 Islanders*, ASSOCIATED PRESS, Mar. 9, 2012, available at [http://worldnews.msnbc.msn.com/\\_news/2012/03/09/10618829-as-sea-levels-rise-kiribati-eyes-6000-acres-in-fiji-as-new-home-for-103000-islanders](http://worldnews.msnbc.msn.com/_news/2012/03/09/10618829-as-sea-levels-rise-kiribati-eyes-6000-acres-in-fiji-as-new-home-for-103000-islanders).
5. See Johnson Toribiong, President, Rep. of Palau, Statement to the 66th Regular Session of the United Nations General Assembly (Sept. 22, 2011), available at [http://gadebate.un.org/sites/default/files/gastatements/66/PW\\_en.pdf](http://gadebate.un.org/sites/default/files/gastatements/66/PW_en.pdf).
6. *Id.*; see also Lawrence Hurley, *Island Nation Girds for Legal Battle Against Industrial Emissions*, N.Y. TIMES (Sept. 28, 2011), [www.nytimes.com/gwire/2011/09/28/28greenwire-island-nation-girds-for-legal-battle-against-i-60949.html](http://www.nytimes.com/gwire/2011/09/28/28greenwire-island-nation-girds-for-legal-battle-against-i-60949.html) (describing President Toribiong's statement to the General Assembly and reactions from the environmental law community).

“common concern of mankind;”<sup>7</sup> the connection between global warming and flood, drought, desertification, and sea-level rise;<sup>8</sup> and the particular vulnerability of “the least developed countries, landlocked developing countries, small island developing states and countries in Africa.”<sup>9</sup>

The General Assembly has further expressed concern that the adverse impacts of climate change have potential security implications. In a 2009 consensus resolution, the General Assembly raised the specter of security-related climate impacts and accordingly invited all organs of the United Nations “to intensify their efforts in considering and addressing climate change, including its possible security implications.”<sup>10</sup> That call to action resulted in an historic debate at the Security Council wherein a majority of states acknowledged the very serious threats posed by climate change. Although the debate was fraught with internal Council politics, it resulted in a first-ever statement by Germany, as the then-President of the Security Council, expressing the Council’s concern about the implications of climate change for international peace and security.<sup>11</sup>

Years earlier, in 1992, states organized the United Nations Framework Convention on Climate Change (UNFCCC) to address the problem of greenhouse gas emissions. Although the intricacies of the framework are highly technical, the UNFCCC’s underlying rationale is simple: climate change is a serious problem, human activities are primarily responsible for it, and, by working together, states can effect a solution. That rationale is reflected in the Convention’s preamble<sup>12</sup> and has been reiterated in the decisions taken under the framework.

The 1997 Kyoto Protocol is the UNFCCC’s only binding agreement on emissions, and it expires at the end of 2012.<sup>13</sup> But even with the Kyoto Protocol, carbon dioxide emissions have increased nearly forty percent over the last twenty years.<sup>14</sup> Moreover, since neither of the world’s two largest emitters, the United States and China,<sup>15</sup> nor emerging economy emitters like India and Brazil,<sup>16</sup> are

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7. G.A. Res. 43/53, ¶ 1, U.N. Doc. A/RES/43/53 (Dec. 6, 1988); *see* G.A. Res. 65/159, ¶ 1, U.N. Doc. A/RES/65/159 (Mar. 4, 2011); G.A. Res. 64/73, ¶ 1, U.N. Doc. A/RES/64/73 (Jan. 29, 2010); G.A. Res. 63/32, ¶ 1, U.N. Doc. A/RES/63/32 (Jan. 28, 2009); G.A. Res. 62/86, ¶ 1, U.N. Doc. A/RES/62/86 (Jan. 31, 2008); G.A. Res. 61/201, ¶ 4, U.N. Doc. A/RES/61/201 (Feb. 16, 2007); G.A. Res. 44/228, ¶ 12, U.N. Doc. A/RES/44/228 (Dec. 22, 1989).
  8. G.A. Res. 65/159, *supra* note 7, ¶ 9; G.A. Res. 64/73, *supra* note 7, ¶ 9; G.A. Res. 63/32, *supra* note 7, ¶ 9; G.A. Res. 62/82, ¶ 6, U.N. Doc. A/RES/62/82 (Jan. 21, 2008); G.A. Res. 51/184, pmbl., U.N. Doc. A/RES/51/184 (Feb. 3, 1997); G.A. Res. 44/206, ¶ 1, U.N. Doc. A/RES/44/206 (Dec. 22, 1989).
  9. G.A. Res. 65/159, *supra* note 7, pmbl.; G.A. Res. 64/73, *supra* note 7, pmbl.
  10. G.A. Res. 63/281, ¶ 1, U.N. Doc. A/RES/63/281 (June 11, 2009).
  11. *See* S.C. Pres. Statement 2011/15, U.N. Doc. S/PRST/2011/15 (July 20, 2011).
  12. United Nations Framework Convention on Climate Change, pmbl., May 9, 1992, 1771 U.N.T.S. 107.
  13. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 162.
  14. U.N. SECRETARY-GENERAL’S HIGH-LEVEL PANEL ON GLOBAL SUSTAINABILITY, RESILIENT PEOPLE, RESILIENT PLANET: A FUTURE WORTH CHOOSING 19 (2012), *available at* [http://www.un.org/gsp/sites/default/files/attachments/GSP\\_Report\\_web\\_final.pdf](http://www.un.org/gsp/sites/default/files/attachments/GSP_Report_web_final.pdf).
  15. *See Greenhouse Gas Inventory Data—Detailed Data by Party*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, <http://unfccc.int/di/DetailedByParty.do>

bound by the Protocol, Kyoto as currently constituted will be unable to achieve needed reductions in global emissions going forward, even if it is renewed.

States at the UNFCCC's most recent meeting committed to a new process to work towards an agreement that binds all parties.<sup>17</sup> The agreement is silent, however, on how and to what emissions standards states might ultimately be bound. It therefore remains to be seen whether this new agreement will be more effective than Kyoto. Twenty years of negotiations in the consensus-based UNFCCC process have so far allowed the status quo to continue in the face of rising emissions and failed to address the needs of states most vulnerable to the effects of climate change.

The only logical conclusion from more than twenty years of stated concern and ineffectual action by states at the General Assembly, the Security Council, and the UNFCCC is that the case for controlling emissions is clear. Yet a gap nonetheless persists between what the world knows and how the world acts. With states poised to begin negotiating a new agreement that will bind all countries, it is an opportune time to seek guidance from the ICJ on the rights and obligations of all states vis-à-vis climate change. Such an opinion might fill the rhetorical gap and help to bring state action in line with international legal responsibilities.

### III. ICJ ADVISORY OPINIONS

The ICJ, in its advisory capacity, is the proper body to articulate states' rights and obligations with regard to climate change. As the "principal judicial organ of the United Nations,"<sup>18</sup> the ICJ serves two adjudicative functions: it issues judgments on international law disputes between sovereign states<sup>19</sup> and it issues advisory opinions at the request of the United Nations.<sup>20</sup> Under the U.N. Charter, the ICJ can render an advisory opinion on any legal question posed by the U.N. General Assembly.<sup>21</sup> It delivers that advisory opinion in open court, after notifying the Secretary-General and Members of the United Nations, all of whom have the right to submit briefs.<sup>22</sup> The ICJ has never denied rendering its opinion when so requested by the General Assembly.

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- (last visited Apr. 10, 2012).
16. *Id.*; see INT'L ENERGY AGENCY, CO<sub>2</sub> EMISSIONS FROM FUEL COMBUSTION: HIGHLIGHTS 20-24 (2011).
17. See Conference of the Parties to the United Nations Framework Convention on Climate Change, Durban, S. Afr., Nov. 28-Dec. 9, 2011, *Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action*, ¶ 2, U.N. Doc. FCCC/CP/2011/L.10 (Dec. 10, 2011).
18. U.N. Charter art. 92.
19. *Id.* art. 94.
20. See *id.* art. 96 ("[T]he General Assembly of the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.").
21. See *id.* art. 96; Statute of the International Court of Justice arts. 65-68, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 [hereinafter ICJ Statute].
22. ICJ Statute, *supra* note 21, art. 57

The primary difference between the ICJ's advisory function and its dispute settlement function is that advisory opinions are not binding. The ICJ cannot, for instance, compel a State to curb any specific amount of emissions through an advisory opinion. It can, however, provide an authoritative statement on principles of general international law.<sup>23</sup> In doing so, the ICJ, through its advisory function, helps to establish international norms of State behavior.

The ICJ has issued a total of twenty-six advisory opinions.<sup>24</sup> The most relevant opinion with respect to climate change is the ICJ's 1996 *Nuclear Weapons* case.<sup>25</sup> The requesting General Assembly resolution asked the ICJ to determine whether the threat or use of nuclear weapons in any circumstance is permitted under international law.<sup>26</sup> In a mixed decision, filled with dissenting opinions, the ICJ held that the threat or use of nuclear weapons was generally prohibited, except, perhaps, in self-defense.

Although that was not the unequivocal determination that some had hoped for,<sup>27</sup> the ICJ's observations and reasoning remain undeniably valuable. The ICJ, for example, endorsed "complete nuclear disarmament."<sup>28</sup> Moreover, on the issue of transboundary environmental harm, the Court laid down the basic but critical principle that all states must "ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control."<sup>29</sup>

23. See Roberto Ago, "Binding" *Advisory Opinions of the International Court of Justice*, 85 AM. J. INT'L L. 439, 439 (1991) (arguing that the provisions that give the ICJ that power "characterize the opinion requested of the Court as a 'decision' in relation to the dispute at issue[,] confer[ing] 'binding force' on the opinion for the parties to the dispute"); Pieter H.F. Bekker, *The UN General Assembly Requests a World Court Advisory Opinion on Israel's Separation Barrier*, ASIL INSIGHTS, Dec. 2003, available at <http://www.asil.org/insigh121.cfm>; Hisashi Owada, H.E. Judge, President, Int'l Court of Justice, *Introductory Remarks at the Seminar on the Contribution of the International Court of Justice to International Law* (Oct. 25, 2011), available at <http://www.icj-cij.org/presscom/files/9/16739.pdf> (addressing the legal advisers of the U.N. Member States).

24. The ICJ issued its first advisory opinion in 1948, see *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, 1948 I.C.J. 57 (May 28), and its most recent opinion in 2010, see *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 2010 I.C.J. 1 (July 22). For the list of ICJ judgments, including all twenty-six advisory opinions, see *Judgments, Advisory Opinions, and Orders by Chronological Order*, INT'L COURT JUSTICE, <http://www.icj-cij.org/docket/index.php?p1=3&p2=5&p3=-1&y=0> (last visited May 1, 2012).

25. *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8).

26. *Request for an Advisory Opinion from the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, G.A. Res. 49/75(K), U.N. Doc. A/RES/49/75 (Jan. 9, 1995).

27. For commentaries discussing the relative success of the advisory opinion, see, for example, Manfred Mohr, *Advisory Opinion of the International Court of Justice on the Legality of the Use of Nuclear Weapons Under International Law: A Few Thoughts on its Strengths and Weaknesses*, 37 INT'L REV. RED CROSS 92 (1997); Yves Sandoz, *Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, 37 INT'L REV. RED CROSS 6 (1997).

28. *Legality of Threat or Use of Nuclear Weapons*, 1996 I.C.J. ¶ 98.

29. *Id.* ¶ 29.

The *Nuclear Weapons* case also had valuable ancillary benefits. With the case pending, parties to the Treaty on Non-Proliferation of Nuclear Weapons (NPT) renewed the treaty indefinitely. They also agreed to institute a new regime of five-year periodic reviews to monitor the commitments made under the treaty.<sup>30</sup> The five Permanent Members of the Security Council further pledged not to use nuclear weapons against parties to the NPT that did not possess nuclear weapons, except in self-defense.

Requesting an advisory opinion on climate change would allow the ICJ to revisit the transboundary harm principle it articulated in the *Nuclear Weapons* case in the climate change context. Even while pending, it might also inspire states to work more diligently at the UNFCCC to set effective binding targets. Either of those two outcomes would be invaluable.

#### IV. CLIMATE CHANGE AND INTERNATIONAL LAW

An ICJ advisory opinion would present a unique opportunity to determine what the rule of law means regarding climate change. Since the landmark *Trail Smelter* arbitration, international law has adhered to the principle that states must ensure that their territories are not used to violate the rights of other states.<sup>31</sup> The ICJ elaborated on that principle in the environmental context in the *Nuclear Weapons* case and in the *Pulp Mills* case, ruling that “[a] State is thus obliged 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.”<sup>32</sup>

Numerous international declarations reflect that principle. Principle 21 of the Stockholm Declaration of 1972,<sup>33</sup> Principle 2 of the Rio Declaration of 1992,<sup>34</sup> Article 3 of the 1992 Biodiversity Convention,<sup>35</sup> and the preambles to the Convention on Long-Range Transboundary Air Pollution<sup>36</sup> and the UNFCCC,<sup>37</sup> for example, all assert that states’ sovereign rights to exploit their own resources

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30. See 1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, *Organization and Work of the Conference*, Annex at 8, 13, U.N. Doc. NPT/CONF.1995/32 (Part I) (1995) (declaring these principles as part of Decision 3 and Decision 1, respectively); see G.A. Res. 66/33, U.N. Doc. A/RES/66/33 (Jan. 12, 2012).

31. *Trail Smelter Case* (U.S. v. Can.), 3 R.I.A.A. 1905, 1965 (Int’l Joint Comm’n 1941).

32. *Pulp Mills on the River Uruguay* (Arg. v. Uru.), Judgment, 2010 I.C.J. 135, ¶ 101 (Apr. 20); see *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8).

33. United Nations Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, *Declaration of the United Nations Conference on the Human Environment*, princ. 21, U.N. Doc A/CONF.48/14/Rev.1 (June 16, 1972).

34. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, princ. 2, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992).

35. Convention on Biological Diversity art. 3, June 5, 1992, 1760 U.N.T.S. 79.

36. Convention on Long-Range Transboundary Air Pollution, pmbl., Nov. 13, 1979, 34 U.S.T. 3043, 1302 U.N.T.S. 217.

37. United Nations Framework Convention on Climate Change, *supra* note 12, pmbl.

come with the concomitant 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.

The United Nations Convention on the Law of the Sea (UNCLOS)<sup>38</sup> likewise has numerous provisions relating to states' responsibilities to protect against harm. Article 194(2), for instance, obliges states to take all measures necessary to ensure that activities under their jurisdiction or control are conducted so as not to cause damage by pollution to other states and their environments.<sup>39</sup> The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (the Chamber) recently rendered an advisory opinion considering states' responsibilities for seabed mining under UNCLOS, as well as under customary international law.

The Chamber was tasked by the Council of the International Seabed Authority judges to determine the responsibilities and obligations of states sponsoring persons and entities for mining activities in areas beyond national jurisdiction.<sup>40</sup> It rendered a clear and cogent decision that offers a potential model for an advisory opinion on climate change. Among its many declarations, the Chamber made the following important findings. First, it found that states' responsibility to ensure compliance with UNCLOS is an obligation of due diligence whereby states must "deploy adequate means, to exercise best possible efforts, to do the utmost" to avoid or minimize the risk of damage.<sup>41</sup> Second, the Chamber found the precautionary approach to be an integral part of states' obligations of due diligence and a part of customary international law. According to the precautionary approach, states must act to prevent damage where there are plausible indications of potential risk, even if the full extent of potential damage is uncertain.<sup>42</sup> Finally, the Chamber reaffirmed a prior ICJ ruling that customary international law compels states to undertake environmental impact assessments where there is a risk of significant adverse transboundary harm to areas beyond national jurisdiction.<sup>43</sup>

Those decisions address transboundary pollution from industrial smelting, nuclear radiation, pulp mills on a river, and deep-sea mining in areas beyond national jurisdiction. The circumstances of climate change are not altogether different. In both cases, the activities causing damage are well known and remediable. The effects are also known and likely to cause significant damage, up to and including the destruction of existing states. That the damage is caused first to the environment and then to states should not absolve a state of its responsibility not to cause or substantially contribute to transboundary harm.

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38. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

39. *Id.* art. 194(2).

40. Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, ITLOS, Case No. 17, Advisory Opinion of Feb. 1, 2011, *available at* [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_17/adv\\_op\\_010211.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf).

41. *Id.* ¶¶ 110-12.

42. *Id.* ¶¶ 131-35.

43. *Id.* ¶¶ 147-48.

In his seminal text on the rule of law, scholar Brian Tamanaha wrote that “[i]f there is to be an enduring international rule of law, it must be seen to reflect the interests of the entire international community. Otherwise there is little prospect of pervasively entrenching requisite belief that international law is worthy to rule.”<sup>44</sup> Likewise, an enduring ruling on international climate change law requires a sense of mutual understanding, contribution, and responsibility. An advisory opinion based on existing principles in international law would offer precisely that spirit of mutuality for the international rule of law on climate change.

## V. CONCLUSION

Climate change is one of the world’s greatest challenges. Although residents of small island countries like Palau are most immediately threatened, climate change ultimately affects populations throughout the world. At the international level, states have recognized the threats of climate change at the General Assembly, at the Security Council, and at the UNFCCC. All acknowledge that the situation is getting worse and that current efforts are inadequate to solve the problem.

Moreover, international law has long held that states are responsible for ensuring that activities under their jurisdiction and control respect the rights of other states. Under existing international law, states are obliged to undertake the best possible efforts to ensure against significant harm to other states, including by assessing the environmental impact of the transboundary effects of activities likely to cause damage. Does that mean that states are responsible to prevent harm caused by greenhouse gases?

The ICJ has the ability and the mandate to provide an answer. An ICJ advisory opinion could determine for the first time states’ responsibilities for climate change. Such authoritative advice could help create a new international norm against transboundary harm caused by greenhouse gas emissions and could clarify the principles against which state action could be measured. As states work towards an inclusive, binding agreement at the UNFCCC, the ICJ’s opinion could further provide a helpful baseline for negotiations that applies to all states. Those are very compelling reasons to seek the Court’s advice for all members of the international community—not just for those threatened with losing their land, their home, their culture, and their way of life.

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44. BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 136 (2004).