

INTERNATIONAL COURT OF JUSTICE

**OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE
(REQUEST BY THE UNITED NATIONS GENERAL ASSEMBLY
FOR AN ADVISORY OPINION)**

**WRITTEN STATEMENT
OF THE REPUBLIC OF EL SALVADOR**

22 March 2024

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I. INTRODUCTION

1. As a United Nations Member State and a party to the Statute of the Court, the Republic of El Salvador ('El Salvador') wishes to avail itself of the opportunity afforded by the Court's Order of 15 December 2023 to make a Written Statement on the request by the General Assembly for an advisory opinion on the obligations of States in respect of climate change (UN General Assembly resolution 77/276). El Salvador has long advocated for an inclusive global approach to curb the magnitude and acceleration of climate change in various international law fora, including the United Nations, the Ibero-American Summit of Heads of State and Government, and the Community of Latin American and Caribbean States. It is in this spirit that it proposes to make a contribution to the current proceedings.
2. The Written Statement will first address matters relating to the jurisdiction of the Court to render the advisory opinion and the admissibility of the request. Secondly, it will provide the Court with information regarding the impact of climate change in El Salvador. Finally, it will present El Salvador's observations and submissions on certain aspects of the questions asked by the United Nations General Assembly.
3. In short, the Republic of El Salvador respectfully urges the Court to offer a full and detailed answer to the General Assembly's questions. It invites the Court, in particular, to address the principles of international environmental law that apply to climate change, and the question of the legal consequences flowing from loss of territory due to climate change-induced rise of sea levels.
4. While this Written Statement will refer, as appropriate, to the legal framework outlined in UN General Assembly resolution 77/276, it must in no way be construed as acceptance by El Salvador of the United Nations Convention on Law of the Sea, to which El Salvador is not a party.

II. JURISDICTION AND ADMISSIBILITY OF THE REQUEST

5. Article 65 of the ICJ Statute establishes the Court's competence to issue advisory opinions "at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request". Article 96(1) of the Charter authorizes the General Assembly to ask the Court for an advisory opinion "on any legal question".
6. The present request for an advisory opinion meets all the requirements for the Court to exercise its competence. The questions asked by the General Assembly concern the legal obligations of States in respect of climate change and the legal consequences that flow from those obligations in cases where breaches caused significant harm. The Court will only be required to look at the scientific evidence and how State conduct has affected the climate system to the extent necessary to identify the legal consequences of damage caused to States and other stakeholders.

7. Article 65 of the ICJ Statute – according to which “the Court may give an advisory opinion” – has been consistently construed as implying that the Court has discretion to refuse to give advisory opinions; however, doing so would compromise its integrity as a judicial body.¹ Thus far, the Court has never exercised this discretion. Even when faced with the fierce objection of States participating in the proceedings, it has shown the resolve to comply with requests by authorized bodies, considering this to be part of its function as the principal judicial organ of the United Nations. The Court has clarified in its jurisprudence that only “compelling reasons” would justify its refusing to contribute to the activities of the organization.
8. In the present case, no compelling reason exists whereby the Court should decline to give the opinion requested by the General Assembly. On the contrary, the questions posed to the Court address an urgent global challenge that has been under discussion for many years within the United Nations, where several resolutions have been adopted on the protection of the global climate for present and future generations. The challenge is undoubtedly of the greatest importance, due to the serious and detrimental effects of climate change, as evidenced in phenomena such as rising sea levels, and which have caused and will continue to cause extensive damage, in particular to the most vulnerable.
9. The Court’s advisory jurisdiction is not a form of judicial recourse for States. It does not result in binding judgments that can, as such, engage the responsibility of individual States. Rather, it is an opportunity for authorized bodies to rely on the legal expertise of the Court as they carry out their functions. The unanimous adoption of UNGA resolution 77/276, after co-sponsorship by 132 delegations, including El Salvador, highlights the absence of any objection to the Court issuing its opinion. It is evidence of the international community’s remarkable legal interest in the issues raised. Essentially, there is a firm consensus that the opinion will help the international community address the problem of climate change by providing legal guidance on aspects to be worked on by the organs and agencies of the United Nations in conjunction with its Member States.
10. El Salvador sustains that pending proceedings before other international tribunals on issues related to the environment and climate change do not prevent the Court from dealing with the questions as asked by the General Assembly. The requests for advisory opinions from the International Tribunal for the Law of the Sea and the Inter-American Court of Human Rights attend to specific issues concerning the protection and preservation of the marine environment and the protection of human rights, respectively. Each of those tribunals will provide legal advice within their respective normative frameworks and competence, and by reference to the treaties that they were created to apply. Unlike them, the International Court of Justice will offer a comprehensive analysis of the questions from the perspective of international law as a

¹ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, I.C.J. Reports 2019, para. 64.

whole. Furthermore, the questions formulated by the General Assembly have been drafted with the intent to allow the Court to contribute to the harmonization of international law in the field of climate change, an opportunity that the Court should by all means seize. Essentially, the more general opinion to be issued by the Court and the more specific opinions to be dictated by the other tribunals are equally necessary and will be complementary to each other.

III. CLIMATE CHANGE AND ITS IMPACT ON THE REPUBLIC OF EL SALVADOR

A. The scientific consensus regarding climate change, its cause, and its impacts

11. The scientific consensus on climate change and its impacts is indisputable. According to UN General Assembly Resolution 77/276 and the reports of the Intergovernmental Panel on Climate Change (IPCC), anthropogenic emissions of greenhouse gases are the main cause of the global warming observed since the mid-20th century. These emissions have triggered significant changes in the climate, adversely affecting both nature and human societies.
12. The IPCC reports underscore the urgent need to limit the global temperature increase to 1.5°C above pre-industrial levels to prevent catastrophic consequences. Exceeding this limit would drastically increase the risks associated with the intensification of extreme weather events, such as droughts, forest fires, floods, and heat waves, with potentially irreversible impacts on ecological and social systems.
13. The increasing frequency and intensity of extreme events represent some of the direct consequences of global warming. Variation in water availability and rising sea levels pose substantial challenges, particularly for coastal and island States whose very existence is threatened by the loss of territory and the salinization of freshwater sources.
14. Rising ocean temperatures and the resulting acidification threaten marine life and coral reef ecosystems, which are critical to biodiversity and to the economy of many island and coastal regions. Moreover, climate change is accelerating the extinction of species and exacerbating food insecurity, whilst disproportionately affecting the most vulnerable populations.
15. Adverse effects on human health are reflected through increased heat-related illnesses and the exertion of pressure on health care systems. Climate change also exacerbates poverty by destroying homes and communities, especially in vulnerable regions and coastal and island States, resulting in the displacement of millions of people. This reality accentuates the urgency of implementing meaningful measures to reduce greenhouse gas emissions, build adaptation and resilience measures in affected communities, and ensure a sustainable and equitable future for all.
16. Transitioning to low-carbon economies, strengthening the adaptive capacities of vulnerable communities, and implementing sustainable development strategies are

essential to reduce the impacts of climate change. International cooperation, political commitment, and the mobilization of financial and technological resources play a crucial role in achieving these objectives and ensuring that global efforts are aligned with the goals of the Paris Agreement and the Sustainable Development Goals. Further clarity on the international law that applies to those efforts is not only welcome but also much needed.

B. The impact of climate change on the Republic of El Salvador

17. According to the 2021 Global Climate Risk Index, which analyzes the extent to which countries and regions have been affected by the impacts of climate-related loss events for the period 2000–2019, El Salvador was ranked 28th globally. Likewise, for the period 2011–2020, the country has been included among the 20 countries with “very high risk”, according to the World Risk Index, which estimates the risk of disasters for 173 countries on the basis of several conditions and factors, also identifying the areas under risk of natural hazards.²
18. A first type of impact comes from extreme hydrometeorological events. El Salvador, according to rainfall records, was impacted by 36 events from 1969 to 2022, 19 of them having taken place in the last decade. Furthermore, since 2009, historical records for accumulated rain have been surpassed, in some cases even in dry season months.³ Those storms have severely impacted infrastructure, the education and health systems, agricultural production, connectivity, and safe drinking water systems, among other forms of damage.
19. A second type of impact concerns coastal-marine areas and ecosystems. To understand that impact, detailed studies have been carried out using cutting-edge techniques, a relevant example being a publication that utilizes methods based on underwater observations, photographs, and water parameter records from 2006 to 2022.⁴ In addition, the Directorate of the Observatory of Threats and Natural Resources of the Ministry of Environment of El Salvador (Dirección del Observatorio de Amenazas y Recursos Naturales del Ministerio del Ambiente) has conducted a study that analyzes sea level rise on the country’s coast.⁵ In El Salvador, one of the environmental impacts identified, on can find coral bleaching, evidencing the effects of climate change on marine biodiversity.
20. A third type of impact relates to the agricultural sector, which is essential for the country’s economy and food security. Since El Salvador is located in the so-called “Central American Dry Corridor”, farmers face severe agricultural challenges that have been exacerbated by climate variability and soil degradation, particularly in the eastern

² National Climate Change Plan 2022 – 2026. Ministry of Environment and Natural Resources of El Salvador. Pages 37–40. Available in: <https://bibliotecaambiental.ambiente.gob.sv/documentos/plan-nacional-de-cambio-climatico-2022-2026/>

³ Ibid. National Climate Change Plan 2022 – 2026. Pages: 33.

⁴ <https://revistas.ucr.ac.cr/index.php/rbt/article/view/54739>

⁵ <https://www.snet.gob.sv/ver/oceanografia/estudios/nivel+del+mar+en+la+costa+de+el+salvador/>

zone. The agricultural sectors have recorded considerable losses in subsistence crops putting food security, health, and sustainable development at risk. The most vulnerable groups, such as children and pregnant or lactating women, are the sectors of the population most affected by this situation.

21. In this sense, droughts and floods have negatively impacted agricultural productivity, placing El Salvador in a vulnerable position. The 2014 drought, the worst in 44 years, devastated crops in 105 municipalities, caused more than 70 million US dollars in damage, and wiped out almost 4 million quintals of corn. In 2015, three shorter but still impactful droughts occurred, which caused the loss of 4.76 million quintals of corn and beans that affected more than 160,000 producers. 2018 brought yet another severe drought, lasting 40 consecutive days without rain, which led to estimated losses of 2.13 million quintals of corn that impacted approximately 77,000 producers. This series of phenomena has significantly impacted El Salvador's agriculture, causing substantial economic losses and difficulties for hundreds of thousands of farmers.
22. According to the Inter-American Development Bank, the impacts of climate change have cost the Salvadoran economy over US\$2.2 billion in loss of productivity over the past three decades.⁶
23. El Salvador recognizes the importance of addressing new challenges derived from climate change, such as human mobility which particularly affects different population groups. The adverse effects of climate change are increasing migration and displacement in all the regions of the world, and particularly in countries with high exposure, vulnerability, and low adaptive capacity. The relationship between climate change and migration is recognized in the Global Compact for Safe, Orderly and Regular Migration, to which El Salvador is a party, and which was also approved within the United Nations in 2018.⁷
24. Aware of its vulnerability to climate change, El Salvador has adopted an active role in addressing climate change and in the implementation of internal policies to mitigate its causes and adapt to its effects. It has reflected its commitment to global action, including, among others: Regulations such as the Environmental Protection Act (Ley del Medio Ambiente); the National Environmental Policy, aimed at the sustainable management of resources and the reduction of climate risks; the National Climate Change Plan 2022–2026⁸; the Nationally Determined Contribution and its implementation plans. Similarly national coordination mechanisms have been

⁶ Climate change in the Northern Triangle, available at:

https://www.wilsoncenter.org/sites/default/files/media/uploads/documents/Climate%20change%20impacts%20in%20HO%20GU%20and%20ES_Omar%20Samayoa%20%28005%29.pdf

⁷<https://www.ambiente.gob.sv/oim-en-coordinacion-con-el-marn-reconocen-la-movilidad-humana-en-el-contexto-del-cambio-climatico-y-la-importancia-de-tomar-medidas-concretas-para-abordarla-2/>

⁸ National Climate Change Plan 2022 – 2026 (Plan Nacional de Cambio Climático 2022-2026, in Spanish). Ministry of Environment and Natural Resources of El Salvador. Available at: <https://bibliotecaambiental.ambiente.gob.sv/documentos/plan-nacional-de-cambio-climatico-2022-2026/>

established, such as the Climate Financing Roundtable and the Long Term Low Carbon Development Strategy 2050.

IV. SUBMISSIONS ON THE GENERAL ASSEMBLY'S QUESTIONS

A. The scope of the Court's opinion and the applicable law

25. In exercising its jurisdiction, it is essential that the Court answers the questions as asked by the General Assembly, without reformulating or rephrasing them. The request for an opinion of the Court in the terms expressed in resolution A/RES/77/276 reflects the unanimous consensus of all UN Member States. In such circumstances, it cannot be argued that the formulation of the request does not correspond exactly to what the General Assembly needs the Court to clarify for 'the solution of [the] problem confronting it'⁹. This is not a case where the questions can be said to have not been 'adequately formulated', or where they can be described as 'ambiguous or vague'.¹⁰
26. It is undeniable that the opinions of the ICJ, as the main judicial organ of the United Nations, are of paramount importance and can have a considerable impact on the international legal order. Previous advisory opinions have clarified numerous legal debates and generated influential legal precedents. El Salvador thus respectfully requests the Court to answer the questions asked by the General Assembly faithfully and fully, based on all relevant sources of international law. This effort should involve an examination of the rules of general and conventional international law, while taking into account the perspective of participants in the proceedings and the extensive scientific evidence available.
27. The law applicable to the questions asked by the General Assembly includes the international treaties that make up the so-called "climate change regime". However, because climate change results from anthropogenic activities that are related to other environmental aspects, the Court's analysis should also consider any other relevant treaties, such as the Convention on Biological Diversity, the Convention to Combat Erosion and Desertification, the Vienna Convention for the Protection of the Ozone Layer and the Montreal Protocol on Substances that Deplete the Ozone Layer.
28. The other sources of international law listed in Article 38 of the ICJ Statute are, of course, also essential for a holistic legal analysis of the questions. The Court cannot fail to take into account customary law, including the key principles of international environmental law that have developed over time and which give coherence to the rules that govern the response to climate change.

⁹ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*, I.C.J. Reports 2019, para. 137.

¹⁰ *Ibid.*, para. 135.

B. Obligations of States under international law in relation to climate change

29. The main international treaties on climate change, to which El Salvador is a party, are the United Nations Framework Convention on Climate Change (UNFCCC); the Kyoto Protocol to the UNFCCC; the Paris Agreement; and the Doha Amendment to the Kyoto Protocol. The Kyoto Protocol and the Paris Agreement comprise obligations related to the reduction of gas emissions (including the established ceilings), the control measures to be implemented by States, and the obligation to reduce damage.
30. Article 2 of the Paris Agreement refers to the core objective of “[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels, and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change”. The Court will no doubt have the opportunity to clarify the scope and content of the conventional obligations geared towards the achievement of this objective. However, El Salvador proposes, in the present Written Statement, to focus on four core principles which it believes the Court should address in its opinion. The importance of those principles is that, apart from creating obligations that converge in realizing the goals of climate justice, they bring coherence to, and help in the interpretation of, more specific rules.
31. As the late Judge Cançado Trindade observed in his Separate Opinion in the *Pulp Mills* case, “it is perfectly warranted, and necessary, for the ICJ to dwell upon the principles it resorts to, and to elaborate on them, particularly when such principles play an important role in the settlement of the disputes at issue, and when these latter pertain to domains of international law which are undergoing a remarkable process of evolution in time”.¹¹ That observation rings even more true in the case of a request for an advisory opinion concerning the obligations of States in respect of climate change.

i. The no harm rule

32. The no harm rule’s applicability to environmental harm is confirmed in Principle 21 of the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment and Principle 2 of the 1992 Rio Declaration on Environment and Development. It is also firmly established in the Court’s case law.
33. In the *Nuclear Weapons* advisory opinion, the Court stated that “the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment”.¹² Later on, in the *Pulp Mills* and *Certain Activities/Construction of a Road* cases, the Court further clarified that

¹¹ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, Separate Opinion of Judge Cançado Trindade, para. 50.

¹² *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, para. 29.

“[a] State is ... 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”.¹³ The principle has also been included in the International Law Commission’s Draft articles on Prevention of Transboundary Harm from Hazardous Activities, Article 3 of which restates that “[t]he State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof”.

34. The no harm rule is of great systemic importance in international law. On the one hand, it fulfills the purpose of protecting the natural environment on which all States and their peoples depend. In doing so, it requires States to take a preventive approach and a proactive role in regulating potentially harmful conduct.¹⁴ On the other hand, it gives effect to the principle *sic utere tuo ut alienum non laedas*, which is essential for the peaceful coexistence of sovereign equals who must have regard – and refrain from causing harm – to each other’s natural resources, territories, and populations. A duty to provide reparation in cases where a State fails to take appropriate steps to prevent harm is accordingly provided.
35. For the no harm rule to be effective, it cannot be narrowly construed as applicable only to cases of transboundary harm involving neighboring States. The scope of application of the principle must be broader, so as to include any activities carried out in the territory of one or more State or under their jurisdiction or control that may cause damage to the environment of other States, wherever the latter may be located. It must also extend to the ‘global commons’¹⁵, that is, to areas where no State has jurisdiction but which can be accessed and reasonably used by all States. International law would hardly be a coherent system if States were only prohibited from causing environmental harm to their neighbors on an individual basis but allowed to collectively cause environmental harm to other States or to the global commons.
36. The no harm rule contributes to the realization of another important principle of domestic and international environmental law: the polluter pays principle. Pursuant to Principle 16 of the Rio Declaration, “[n]ational authorities should endeavour to promote the internalisation 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

¹³ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, para. 101; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015, para. 104.

¹⁴ This notion has been included in El Salvador’s domestic regulations, with the Supreme Court of Justice having found that the principle of preventive action “implies the use of mechanisms, instruments and policies with the objective of avoiding relevant damages to the environment or to people’s health. Moreover, its basic function is to foresee and prevent damage before it occurs, not necessarily by prohibiting an activity, but by conditioning, supervising and controlling its execution”: Judgment 400-2011. Constitutional Chamber of the Supreme Court of El Salvador. March 11, 2015. Available at: <https://www.jurisprudencia.gob.sv/DocumentosBoveda/1/2010-2019/2015/03/B08E3.PDF>

¹⁵ Global commons are the natural or cultural resources that humanity shares and that benefit all people. Among them are the four common goods that by convention are not subject to national jurisdiction, the high seas, the atmosphere, Antarctica, and outer space. Report of the UN Secretary General: “Our Common Agenda”. Page 48 (2021). Available in: <https://www.un.org/es/content/common-agenda-report/>

international trade and investment”. By requiring States to prevent significant damage to the environment and establishing a duty to make reparation in case where that obligation is breached, the no harm rule contributes to allocate the costs of pollution on the polluter.

37. Applying the no harm rule to the climate system entails that States are under the obligation to manage their carbon emissions in so far as they may result in damage to other States, irrespective of their specific treaty commitments. El Salvador respectfully urges the Court to offer further guidance on the scope and content of the no harm rule in the present context.

ii. The principle of common but differentiated responsibilities

38. The principle of common but differentiated responsibilities serves as the cornerstone of the climate regime, with Article 3(1) of the UNFCCC providing, that “[t]he Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities”, and that, “[a]ccordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof”.¹⁶
39. The principle provides for differential treatment among States for reasons of climate justice and equity. It recognizes that States have different levels of historical responsibility for climate change, and of capacity to address it. It stands to reason that developed States take greater responsibility for the protection of the climate system, not only because it was mainly their emissions that have led to the crisis that the world now faces, but also because of their technological and financial capabilities. This is in line with the polluter pays principle discussed above.
40. In the service of the principle of common and differentiated responsibilities stand the obligations of cooperation and assistance provided in the treaties forming the climate change regime. Article 9 of the Paris Agreement, for example, states that “[d]eveloped country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention”. Likewise, Article 4(1)(h) of the UNFCCC establishes the commitment to “promote and cooperate in the full, open and prompt exchange of relevant scientific, technological, technical, socio-economic and legal information related to the climate system and climate change, and to the economic and social consequences of various response strategies”; and Article 4(3) prescribes that “developed country Parties and other developed Parties included in Annex II of the UNFCCC shall provide new and additional financial resources to meet the agreed full costs incurred by developing country Parties in complying with their obligations.” Those commitments denote the urgency of scaling up action and support, including

¹⁶ See also Kyoto Protocol, Art. 10 and Paris Agreement, Art. 2(2).

financing, capacity building, and technology transfer to enhance adaptive capability and implement collaborative approaches to respond to the adverse effects of climate change effectively.

41. In the *Tunisia v. Libya* case, the Court acknowledged that “[e]quity as a legal concept is a direct emanation of the idea of justice”, that the “legal concept of equity is a general principle directly applicable as law”, and that “when applying positive international law, a court may choose among several possible interpretations of the law the one which appears, in the light of the circumstances of the case, to be closest to the requirements of justice”.¹⁷ The principle of common but differentiated responsibilities presents the lens through which the Court can give effect to those invaluable considerations in the present case. Without its full application in the interpretation of all treaties and rules of general international law relating to climate change, no nuanced identification of the obligations of States is possible.

iii. The Human Right to a Healthy Environment

42. The right to a healthy, clean and sustainable environment has emerged as a norm of international law. It was recognized by the Human Rights Council in resolution 48/13 (2021) and by the General Assembly itself in resolution 76/300 (2022), adopted by an overwhelmingly large majority of States (including the Republic of El Salvador) with only a handful of abstentions. Those resolutions represent a landmark achievement, crystallizing the entitlement to a healthy environment as a human right while also acknowledging its relationship to other human rights. Recognizing the undeniable importance of a healthy environment for human well-being, El Salvador would like to hear from the Court whether the right to such an environment is demonstrably evolving towards the status of a peremptory norm of general international law (*jus cogens*).
43. The right to a healthy environment allows individuals to hold their governments, big polluters, and all those responsible for environmental harm to account. It is significant that the preambles of UN Human Rights Council resolution 48/13 (2021) and UN General Assembly resolution 76/300 (2022) both refer to climate change. The Republic of El Salvador respectfully urges the Court to confirm that the right to a healthy environment is a source of obligations for States in the field of climate change, and to offer further clarifications on the content and scope of those obligations.

iv. Intergenerational Equity

44. The principle of intergenerational equity is expressly incorporated by the climate change regime via Article 3(1) of the UNFCCC, which provides that “[t]he Parties should protect the climate system for the benefit of present and future generations of humankind”. It has also been affirmed in separate opinions of judges of the Court. In

¹⁷ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, para. 71.

his Dissenting Opinion in the *Nuclear Weapons* advisory opinion, Judge Weeramantry observed that “the rights of future generations have passed the stage when they were merely an embryonic right struggling for recognition”, for “[t]hey have woven themselves into international law through major treaties, through juristic opinion and through general principles of law recognized by civilized nations”.¹⁸ Likewise, in his Separate Opinion in *Pulp Mills*, Judge Cançado Trindade remarked that “it can hardly be doubted that the acknowledgement of inter-generational equity forms part of conventional wisdom in International Environmental Law”.¹⁹

45. The present case offers an opportunity for the Court to pronounce on, and take into account, the “long-term temporal dimension” that inheres in international environmental law’s “predominantly preventive (and precautionary) character”.²⁰ As a general principle of the climate change regime, intergenerational equity requires the Court to interpret the obligations of States in the way that best meets the interests and needs of future generations. This provides yet another opportunity for the Court to apply the legal concept of equity referred to above.

v. Climate Migration

46. Another topic worthy of consideration is the relocation of human settlements caused by climate change. The constant threat of sea-level rise puts many people living in coastal communities at risk. This continuous increase in the sea will force to leave their homes and move to another area, resulting in the corresponding demographic, economic, and social problem of forced migration due to climate change.
47. In 2019, the Organization for Migration (IOM), included in its glossary the term “climate migration”. It is defined as “the transfer of a person or groups of persons who, owing mainly to sudden or progressive changes in the environment due to the effects of climate change, are obliged or decide to leave their habitual place of residence, whether temporarily or permanently, within a State or crossing an international border”. Climate migration is part of forced population movements.
48. The question of climate migration has been the subject of doctrinal debates. For some authors²¹, people displaced by climate change are not to be viewed as climate *migrants*

¹⁸ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, Dissenting Opinion of Judge Weeramantry, at 455.

¹⁹ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, Separate Opinion of Judge Cançado Trindade, para. 122.

²⁰ *Ibid.*, paras. 114–115.

²¹ Essam El-Hinnawi, *Environmental refugees*. United Nations Environment Programme, 1985.

<https://digitallibrary.un.org/record/121267> / Control, Adapt or Flee How to Face Environmental Migration? Fabrice Renaud, Janos J. Bogardi Olivia Dun, Koko Warner (2007). United Nations University. Institute for Environmental and Human Security InterSecTions ‘Interdisciplinary Security ConnecTions’ Publication Series of UNU-EHS. <https://collections.unu.edu/eserv/unu:1859/pdf3973.pdf> / Stijn Neuteleers. *Environmental Refugees: A misleading notion for a genuine Problem*. Katholieke Universiteit leuven. Belgium. https://www.researchgate.net/profile/Stijn-Neuteleers/publication/282156981_Environmental_Refugees_A_Misleading_Notion_for_a_Genuine_Problem/links/560593ab08ae8e08c08c6df9/Environmental-Refugees-A-Misleading-Notion-for-a-Genuine-Problem.pdf / Bonnie Docherty and Tyler Giannini. *Confronting a Rising Tide: A proposal for a Convention on Climate Change Refugees* (2009). <https://climate.law.columbia.edu/sites/default/files/content/5c3e836f23a774ba2e115c36a8f72fd3e218.pdf>

but rather as climate *refugees*, triggering the application of the 1951 Convention relating to the Status of Refugees, including the Principle of Non-refoulement, and requiring action on the part of the High Commissioner for Refugees UNHCR. Other authors²² suggest that climate migrants be addressed as their own category, which invites greater refining and delineation of the legal regime that applies to it. What obligations States owe to climate migrants, whether as a category of their own or under refugee protection law, needs to be addressed by the Court's opinion.

C. Legal consequences under those obligations of the conduct of States which has caused climate change and its impacts

49. The Republic of El Salvador will not address in a detailed manner the legal consequences derived from the non-compliance with the obligations arising from the climate change regime and general international law. Instead, it will focus on three points.
50. First, the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) are an important starting point for the Court's analysis of legal consequences. El Salvador has expressed the view in debates in the Sixth Committee of the UN General Assembly that "the draft articles respond to the needs of the present time in a globalized world, where the relations between States and other subjects of international law have undergone significant changes", and that "[f]rom the creation of the draft articles to the present day, they have had the function of soft law and have served as guiding norms".²³ That the ARSIWA have been cited in the judgments of various international courts and tribunals shows that to a large extent, they have restated or crystallized customary international law.
51. Secondly, El Salvador respectfully urges the Court to provide guidance as to how the rules found in Chapter II of Part 2 of the ARSIWA apply to conduct leading to, and damage caused by, the breach of specific obligations in the field of climate change. Of special interest are the continued duty of performance of international obligations restated in Article 29, and the obligations of cessation and reparation covered in Articles 30 and 31. It is necessary for the Court to examine the result of the adverse effects of climate change, including the consequent more intense, frequent, and extreme weather events that lead to loss of human life and environmental harm, especially in coastal and island States. That should lead to findings of what kinds of restitution and compensation are owed to injured States and other stakeholders based

²² Jane McAdam. (2010) El desplazamiento provocado por el Cambio Climático y el Derecho Internacional. <https://www.acnur.org/libraries/pdf.js/web/viewer.html?file=https%3A%2F%2Fwww.acnur.org%2Fsites%2Fdefault%2Ffiles%2Flegacy-pdf%2F5d5476434.pdf?version1692332404> / José Riera (2013). Retos relacionados con el desplazamiento inducido por el cambio climático Conferencia Internacional denominada: "Millones de personas sin protección: Desplazamiento inducido por el cambio climático en países en desarrollo". <https://www.acnur.org/libraries/pdf.js/web/viewer.html?file=https%3A%2F%2Fwww.acnur.org%2Fsites%2Fdefault%2Ffiles%2Flegacy-pdf%2F5d4c9fc24.pdf> / Shirley Llain Arenilla y Cindy Hawkins Rada. Cambio Climático y Migración Forzada

(2020) https://www.scielo.org.mx/scielo.php?pid=S1665-89062020000100106&script=sci_arttext&tlng=es
²³ 2022 Report of El Salvador presented under resolution 74/180 approved by the United Nations General Assembly under the framework of the analysis of the "Responsibility of States for Internationally Wrongful Acts".

on damage caused to people, territory, and the environment. It should also lead to the identification by the Court of the legally required measures to prevent further damage, including the physical disappearance of the territories of vulnerable States. The question of whether guarantees of non-repetition or satisfaction should be offered is equally relevant.

52. Thirdly, though the legal consequences of breaches of obligations related to climate change are at first glance a question of State responsibility, in the case of rise of sea levels they take on a genuinely existential character, inviting the consideration of the law of statehood. That is because the rise in sea levels due to global warming will lead to the sinking of territory in coastal and island States. This phenomenon, seen as an almost inevitable reality due to the unlikely possibility to reverse it in the short term, is starting to become tangible in particularly vulnerable States. It requires the making of extremely difficult decisions about the future.
53. Under international law, the elements of statehood are population, territory, government, and the capacity to enter into relations with other States (which has also been conceptualized as the attribute of independence). When those elements converge, a State commences its legal life. This entails the acquisition of international legal personality, together with the rights, obligations, and capacities of statehood under general international law. It also entails the acquisition of the status of sovereign equality, which both Article 2(1) of the UN Charter and the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States* (UN General Assembly resolution 2625/XXV) enshrine.
54. The question then arises of what ensues when one of the elements of statehood disappears. If a State loses its territory as a result of climate change, does it cease to exist as a subject of international law? Total loss of territory is the most extreme of scenarios, but challenging legal questions are also posed when States incur partial losses of territory on a more gradual basis. What happens to the sovereign and jurisdictional rights that attached to the territory lost?
55. El Salvador is of the view that those are issues that the Court should address in its opinion. In doing so, it invites the Court to apply the doctrine of the “freezing of the baselines”, which safeguards the sovereign and jurisdictional rights of the States that could be affected by loss of territory due to by climate change. As the 78th International Law Association Conference stated, on the basis of the Report of the Committee on International Law and Sea Level Rise:

‘[O]n the grounds of legal certainty and stability, provided that the baselines and the outer limits of maritime zones of a coastal or an archipelagic State have been properly determined in accordance with the 1982 Law of the Sea Convention,

these baselines and limits should not be recalculated should sea level change affect the geographical reality of the coastline'.²⁴

56. Considerations of legal certainty and stability no doubt justify freezing baselines. Yet, in some ways, the ILA's statement underplays the systemic imperatives at play. Apart from legal certainty and stability, the doctrine of the freezing of baselines is underpinned by considerations of distributive and corrective justice that bear upon the very integrity of the international legal system. That is because the loss of territory caused by climate change to vulnerable coastal and island States is not damage of the kind that can be addressed through a traditional application of the remedies prescribed by the law of State responsibility. It is, rather, damage that leads to the diminution of sovereign and jurisdictional rights in ways that directly affects the injured parties' statehood, legal personality, and status as sovereign equal. International law cannot plausibly treat that kind of damage as if it were 'a vicissitude of life', a factual change that must produce the ordinary legal effects – not when that factual change is a direct result of the wrongful conduct of third States. Instead, international law must treat the preservation of sovereign and jurisdictional rights over maritime spaces as a form of legal restitution.²⁵
57. In its *Nuclear Weapons* advisory opinion, the Court expressed the view that it could not 'lose sight of the fundamental right of every State to survival'.²⁶ The freezing of baselines as a remedy to climate change-induced sea rise should be viewed as an expression of that fundamental right.
58. The regrettable but likely legal scenario of loss of territory due to climate change is currently being addressed by the UN International Law Commission under the rubric of "Sea level rise in relation to International Law". In a first issues paper, two of the co-chairs of the relevant ILC Working Group submitted that "[a]n approach responding adequately to those concerns – ie, the concerns of Member States that are prompted by the effects of [sea levels rise] – is one based on the preservation of baselines and outer limits of the maritime zones measured therefrom".²⁷ That proposition has so far attracted considerable and widespread support among UN Member States.²⁸ El Salvador respectfully urges the Court to endorse it and make its own substantial contribution to the articulation of a solution to this formidable legal problem that climate change poses. That contribution should not only be just and equitable, but also capable of applying to States that are not party to the UN Convention on the Law of the Sea, like the case of El Salvador.

²⁴ Resolution 5/2018, available at <https://ila-hq.org/en_GB/documents/conference-resolution-sydney-2018-english-2>. This proposition should be understood as extending to the determination of maritime zones in accordance with customary international law, so as to make sense also of the position of States that are not party to UNCLOS, such as El Salvador.

²⁵ Irrespective of other potential legal bases for the freezing of baselines, such as a reasonable interpretation of specific conventional and/or customary rules coming from the law of the sea.

²⁶ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, para. 96.

²⁷ 'Sea-level rise in relation to international law', First issues paper by Bogdan Aurescu and Nilüfer Oral, A/CN.4/740, at 41.

²⁸ See the description and analysis of the debates in 'Sea-level rise in relation to international law', Additional paper to the first issues paper (2020), by Bogdan Aurescu and Nilüfer Oral, paras. 82-98.

V. CONCLUSIONS

59. On the basis of the foregoing considerations, the Republic of El Salvador respectfully submits that the Court should give a full and detailed answer to the questions asked by the UN General Assembly in its request for an advisory opinion contained in Resolution 77/276, including the substantive aspects discussed in this Written Statement.

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