INTERNATIONAL COURT OF JUSTICE

Obligations of States in respect of Climate Change

(Request for an advisory opinion)

WRITTEN STATEMENT OF THE REPUBLIC OF COSTA RICA

March 2024

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A. Introduction

1. The present written statement is filed pursuant to the Court's Orders dated 20 April 2023, 4 October 2023, and 15 December 2023. On 29 March 2023, the General Assembly of the United Nations adopted by consensus Resolution 77/276 entitled "Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change". Costa Rica has played, together with other Member States, a leading role in the process aiming at the adoption of this resolution, as it was a member of the Core Group constituted to promote the request and to elaborate the draft resolution.
2. In doing so, Costa Rica took into consideration the high function of the International Court of Justice as the principal judicial organ of the United Nations, and consequently the key role the Court must play in identifying the relevant rules, the rights and obligations of States in respect of climate change, and their consequences in case of non-respect of them.
3. The world is facing a triple environmental crisis, including climate change, biodiversity loss, and pollution, with unprecedented impacts in the planet's ability to restore its ecosystems and sustain the life of all living species. Due to anthropogenic climate change, the enjoyment of human rights is also at stake.
4. Costa Rica, as an active participant in Court's proceedings, has entire confidence on the positive influence of the advisory opinion that the Court will deliver for the future action of States, the United Nations, other international organizations, and actors in order to better address the consequences of climate change.
5. The relevant questions put forward by the General Assembly are the following:

> 'Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment,

(a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations;

(b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:

(i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?

(ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?'

6. As the Court stated: "The jurisdiction of the Court under Article 96 of the Charter and Article 65 of the Statute, to give advisory opinions on legal questions, enables United Nations entities to seek guidance from the Court in order to conduct their activities in accordance with law".[1] This is exactly what the General Assembly is looking for in this matter, which is of decisive importance for the international community and the future of the planet as a whole.

7. The present written statement (hereinafter "**WSCR"**) constitutes Costa Rica's contribution to the Court in these advisory proceedings. It addresses some of the significant legal issues arising from the questions submitted to the Court, both with regard to its jurisdiction and propriety and to the merits. The WSCR is divided into four principal parts. **Part "B"** refers to the competence of the General Assembly to request this advisory opinion and the reasons for the Court to exercise its jurisdiction in this regard. **Part "C"** explains the importance for Costa Rica of the climate change and the protection of the environment. **Part "D"** addresses an important aspect of the request, dealing with the applicable law relevant to the case. Costa Rica will focus in particular on the right of a healthy environment as a human right. **Part "E"** concludes with the proposed content of the questions posed by Resolution 77/276 and the possible directions of their answers.

[1] Applicability of Article VI, Section 22, of the *Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion, I.C.J. Reports 1989, pp. 188-189, para. 131.

B. The Court has jurisdiction and its exercise is needed

8. In this section, it will be shown that the General Assembly has competence to request the present advisory opinion, since it clearly raises legal questions falling within the scope of its powers and functions. Likewise, the section addresses the absence of compelling reasons that would lead the Court not to exercise its advisory jurisdiction.

a) The General Assembly has competence to request an advisory opinion

9. The competence of the General Assembly to request an advisory opinion of the International Court of Justice is derived directly from Article 96 (1) of the UN Charter, which reads as follows:

> "The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question."

10. Both the reference to the General Assembly as one of the two named principal organs of the United Nations and the phrase "any legal question" exemplify the broad competence of the Assembly to request advisory opinions. As to what constitutes a legal question, it is relevant to refer to the observations of the Court in earlier advisory opinions in which the Court indicated that questions "framed in terms of law and rais[ing] problems of international law […] are by their very nature susceptible of a reply based on law […and] appear […] to be questions of a legal character."[2]
11. The questions in the present case submitted to the Court for advice are clearly legal ones, relating as they do to the "obligations of States under international law" and to the "legal consequences under these obligations" of the conduct of States relating to the climate change.
12. The request currently under review is the eighteenth request made by the General Assembly out of a total of 31 requests for advisory opinions. Up to today, the Court has never declined to render an advisory opinion requested by the General Assembly.
13. Significantly, this request for an advisory opinion has been adopted by consensus of the General Assembly, demonstrating the clear understanding of the whole international community of the importance of having the International Court of Justice providing

[2] See *Western Sahara*, Advisory Opinion, ICJ Reports 1975, p. 18, para. 15 and *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 233, para. 11.

guidance to the international legal matters resulting from the anthropogenic produced climate change.

b) There are compelling reasons for the Court to exercise its advisory jurisdiction

14. According to Article 65 of the Statute of the ICJ, the Court "may give" (*"peut donner")* an advisory opinion, thus indicating its discretion not to entertain such a request. However, on various occasions the Court emphasized that, in principle, requests for advisory opinions should not be refused, unless "compelling reasons would justify refusal of such a request".[3] In the present case there are instead urgent "compelling reasons" to comply with the request of the General Assembly.
15. The arguments that have been advanced in another advisory proceedings inviting the Court to use its discretion and not to exercise its advisory jurisdiction are of no avail in the present one. Those arguments were based on a possible abstract nature of the questions raised, on the lack of sufficient knowledge of the facts or on the insufficient available scientific evidence to be able to respond to the questions in an appropriate manner.
16. With regard to the first contention the Court has already had the occasion to pronounce as follows:

> "Certain States have however expressed the fear that the abstract nature of the question might lead the Court to make hypothetical or speculative declarations outside the scope of its judicial function. The Court does not consider that, in giving an advisory opinion in the present case, it would necessarily have to write "scenarios", to study various types of nuclear weapons and to evaluate highly complex and controversial technological, strategic and scientific information. The Court will simply address the issues arising in al1 their aspects by applying the legal rules relevant to the situation".[4]

17. In the present case, it can be said that the questions submitted by the General Assembly are of a concrete nature, raising as they do the identification of the existent international legal obligations and consequences of the conduct of States.

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[3] See *Application for Review of judgment no. 333 of the UN Administrative Tribunal*, Advisory Opinion, ICJ Reports 1987, p. 31; *Western Sahara*, Advisory Opinion, ICJ Reports 1975, p. 21, para. 23; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 235, para. 14.
[4] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 237, para. 15

18. In relation to the second argument, i.e. a supposed lack of scientific evidence and/or knowledge of the relevant facts to reach its conclusions, the Court too had the opportunity to state that what is decisive is:

> "whether the Court has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character".[5]

19. In the current case, the Court has at its disposal a voluminous dossier submitted by the Secretariat of the United Nations containing both legal and scientific data. With regard to the latter, the Court can rely upon the objective analysis formulated by scientific organs and specialized institutions, such as the Intergovernmental Panel on Climate Change ("IPCC"), the United Nations Environment Programme ("UNEP") and the World Meteorological Organization ("WMO").

20. The same what the Court found in another advisory opinion is applicable here:

> "The Court finds that it has before it sufficient information and evidence to enable it to give the advisory opinion requested by the General Assembly. Moreover, the circumstance that others may evaluate and interpret these facts in a subjective or political manner can be no argument for a court of law to abdicate its judicial task. There is therefore in the present case no lack of information such as to constitute a compelling reason for the Court to decline to give the requested opinion".[6]

C. The importance for Costa Rica of the present advisory opinion

21. In its analysis of the applicable law and the answers to the questions raised by the present advisory opinion, it is important for the Court to know how States have tackled the problems caused by the anthropogenic climate change and more generally the protection of the environment. This could help the Court to determine the existence of general principles of law, customary rules or common interpretation of existing rules, no matter their source.

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[5] *Western Sahara*, I.C.J. Reports 1975, pp. 28-29, para. 46

[6] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 162, para. 58

22. Costa Rica, a country small in size but rich in diversity, is home to varied ecosystems, about 6% of the world's species and an extensive network of protected areas. The country has been a pioneer in the implementation of the Payments for Environmental Services (PSA) programme, which has contributed to slowing biodiversity loss and extending forest cover to almost 60% of Costa Rica's territory. Internationally, the country is recognised for having reversed deforestation, producing more than 94% of its electricity from renewable energy (2023), and committing to achieving the goal of zero net emissions by 2050.
23. Over fifty years ago, Costa Rica initiated a series of innovative and cutting-edge environmental policies, becoming a pioneer in sustainability and a world leader in environmental conservation, ranking as one of the most sustainable countries in the world.
24. In the 1990's, recognising the need to address multiple environmental challenges, a series of investment policies were introduced, including economic benefits to encourage conservation and environmental preservation. Amongst them:
    - The establishment of National Parks. The country has 28 national parks, with protected areas covering a quarter of the country's land area (25-28% coverage).
    - The promotion of ecotourism;
    - The Payment for Environmental Services Programme (PSA- established in 1997) is a tool to fight poverty and deforestation. This innovative tool gives money to landowners who preserve the environment through actions such as biodiversity conservation, protection of clean water sources or carbon storage. It is noted that more than one million hectares of forests are protected by the PSA programme. The programme is currently financed by taxes on fossil fuels.
25. In 2022, Costa Rica presented the National Strategic Plan 2050 (PEN 50) which sets out Costa Rica's long-term sustainable development strategy based on:
    - Decarbonisation of the economy;
    - Building resilience;
    - Investing in research and development related to sustainability;
    - Building an inclusive, modern, green and emission-free economy.
26. That same year, the updated version of the Nationally Determined Contribution (NDC) was presented, reinforcing the country's commitment to climate resilience through capacity building and information for decision-making, the inclusion of adaptation

criteria in financing and planning instruments, the adaptation of public services, productive systems and infrastructure, and the implementation of nature-based solutions.

27. In April 2022, the first National Adaptation Plan (NAP) was launched, setting out a roadmap to strengthen the country's resilience to climate change impacts over the next 5 years. It is important to highlight, that Costa Rica is among a limited number of States (forty – 40) that have a NAP, according to the UNFCCC. It also developed a comprehensive National Decarbonisation Plan (NDP or "*Plan Nacional de Descarbonización*") to achieve carbon neutrality by 2050, one of the few Latin American countries to do so. It sets a 2030 target in line with this goal.
28. On the other hand, in relation to the ocean, Costa Rica is part of the Eastern Tropical Pacific Marine Corridor (CMAR) that links the marine protected areas of Malpelo Flora and Fauna Sanctuary (Colombia), Gorgona National Natural Park (Colombia), Coiba National Park (Panama), Galapagos National Park and Marine Reserve (Ecuador), Cocos Island National Park (Costa Rica) and recently the Revillagigedo National Park in Mexico. This new form of marine resource protection seeks to expand and connect its marine protected areas to conserve one of the most biodiverse marine environments in the world.
29. At the international level, Costa Rica aligns its national policies with international commitments, such as the Paris Agreement and the 2030 Agenda for Sustainable Development. It is also party to a number of international agreements, including: the Convention on Biological Biodiversity, the United Nations Framework Convention on Climate Change (UNFCCC) -, the Kyoto Protocol, the United Nations Convention to Combat Desertification (UNCCD), the Convention on International Trade in Endangered Species of Wild Fauna and Flora Species (CITES), the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD Convention) l, the Basel Convention on the Border Control of Hazardous Wastes and their Disposal, the UN Convention on the Law of the Sea, the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention), the Comprehensive Nuclear-Test-Ban Treaty (CTBT), the Vienna Convention for the Protection of the Ozone Layer, the International Tropical Timber Agreement 2006, the Ramsar Convention or Convention on Wetlands of International Importance especially as Waterfowl Habitat, and the International Convention for the Regulation of Whaling, among other relevant international

instruments. Recently, Costa Rica became the second country to sign the "United Nations Convention on the Law of the Sea Framework Agreement on the Conservation and Sustainable Use of Marine Biological Diversity in Areas Beyond National Jurisdiction", known as BBNJ.

30. Thanks to its efforts in favour of environmental preservation and its commitment to ambitious policies to combat climate change, the country has received several awards, including: the Montreal Protocol International Prize for the protection of the ozone layer (2012); the UN Champions of the Earth Award (2019); the Global Sustainability Forum Award, awarded by the UN and the World Business Council for Sustainable Development, organised by the LUISS University of Rome (2019); the Global Ocean Refuge Award given to Cocos Island National Park by the US Marine Conservation Institute (2019); and the UN Global Climate Action Awards, Costa Rica being one of the winning countries in the Global Climate Action Awards edition (December 2020) for the Payments for Environmental Services (PSA) Programme. More recently, in 2021, Costa Rica received the Earthshot Prize in the Protect and Restore Nature category, awarded by the Royal Foundation to encourage change and help repair the planet over the next ten years, a crucial decade for the Earth.

D. The Applicable Law to the Questions Raised by the General Assembly

31. The present section addresses the applicable law to the questions raised by the General Assembly. At the outset, it will be stressed that not only specific international environmental law is applicable, but also other rules and principles of international law relevant to the issues at stake (sub-section *a*). Costa Rica will focus in particular on the human right to a healthy environment as an existing rule in contemporary international law (sub-section *b*).

a) International Law as a whole must be applied

32. The United Nations Framework Convention on Climate Change (UNFCCC)[7], the Kyoto Protocol[8] and the Paris Agreement[9] are certainly three major conventional instruments of crucial relevance to the present proceedings. They contain rules that

[7]United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107
[8] Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, 2303 NTS 148
[9] Decision 1/CP.21, 12 December 2015, FCCC/CP/2015/L.9, Annex

specifically address, from the date of their entry into force and without being exhaustive, aspects of the conduct to be evaluated by the Court: mitigation, adaptation, loss and damage, finance, technology transfer and capacity-building. The recent COP 28 Decision can be equally mentioned.[10] Of particular relevance is Article 2(1)(a) of the Paris Agreement, which sets the temperature goal, and Article 4(1) which identifies the longer-term goal of reaching net zero. However, they cannot simply be considered the exclusive *lex specialis* to respond to the questions submitted to the Court. In other words, they are not the only relevant instruments and rules to address the issues at stake in a holistic manner. Furthermore, there is a need for clarification of certain important issues of general character contained in those treaties. The exact determination of their scope, both at the obligational and the substantial levels, will be an important task and contribution by the Court. This can be done through the examination of other principles and rules of international law relevant to the case.

33. The General Assembly, in the *chapeau* of the questions raised by it, has clearly requested the Court to take into consideration not only those instruments, but also a wider set of rules, principles and instruments:

> "Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment".

34. The General Assembly Resolution 77/276 of 29th March 2023 is even more precise in this regard in its fifth preambular paragraph, when it

> "Emphasiz[es] the importance of the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the United Nations Convention on the Law of the Sea, the Vienna Convention for the Protection of the Ozone Layer, the Montreal Protocol on Substances that Deplete the

[10] Outcome of the first global stocktake. 13 December 2023, Decision -/CMA.5, FCCC/PA/CMA/2023/L.17

> Ozone Layer, the Convention on Biological Diversity and the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, among other instruments, and of the relevant principles and relevant obligations of customary international law, including those reflected in the Declaration of the United Nations Conference on the Human Environment and the Rio Declaration on Environment and Development, to the conduct of States over time in relation to activities that contribute to climate change and its adverse effects".[11]

35. Of particular importance are some principles of general international law, such as the (i) duty of due diligence, (ii) the principle of prevention of, (iii) that of not to cause significant harm to the environment, (iv) the ecosystem approach, (v) that of intergenerational equity, (vi) the common but differentiated responsibility, (vii) the respect and promotion of fundamental human rights, (viii) the duty to protect and preserve the marine environment, (ix) the equality of rights and the rights of peoples to self-determination, and (x) the respect for the territorial integrity of States.

36. Indeed, the International Court of Justice, to the difference of other international jurisdictional bodies having been requested to examine similar issues,[12] is the only Court or tribunal having general jurisdiction *ratione materiae* able to assess the conduct of States over time taking into account the whole international legal order. In fact, given the scope of the questions put forward by the General Assembly, only by examining different areas of international law the Court will be able to respond to them. The following sub-sections address the principles that are enshrined both in conventional and customary law that are of particular relevance to examine those questions.

(i) The duty of due diligence

37. The duty of due diligence is important both as an independent obligation and as a tool to examine the compliance with other obligations. The Court has had the opportunity to recognize and apply this duty in a number of occasions, included in cases in which

[11] See Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 49 (A/77/49), sect. I

[12] ITLOS: Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal); Inter-American Court of Human Rights: Request of an Advisory Opinion submitted by Colombia and Chile, 9 January 2023

Costa Rica advanced its existence and application[13]This duty is applicable at all levels of international obligations of States. As an autonomous duty, its threshold must be identified in each particular case. In combination with a treaty or a customary obligation, the duty of due diligence emphasises an evolving standard to assess compliance or breach.

38. Considering its very content, compliance or breach with this duty must be examined during a given period of time, something important taking into account the temporal dimension of the conducts to be evaluated in these proceedings. In this regard, it is worthy to stress that this duty is not one that has just emerged recently. It is a general principle of law that merely exists because of the existence of a plurality of sovereign States that live together and must respect each other. The fact that this duty was referred to in early modern arbitration and in relation to different obligations of States offers evidence of this.[14]

39. While due diligence action is expected to be taken by State organs, it cannot be confined to the activities of the public organs. Equally important is the due diligence observed with regard to the acts of individuals and private corporations. This idea has been explained and applied by the Court and by other courts and tribunals.[15] The principle of due diligence encompasses also the precautionary principle or approach. As the ITLOS Chamber in the *Seabed Mining Advisory Opinion* stated, the precautionary approach is "an integral part of the general obligation of due diligence".[16]

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[13] *Corfu Channel (United Kingdom v. Albania*), Merits, Judgment, I.C.J. Reports 1949, p. 22; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996 (I), p. 242, para. 29; *Pulp Mills on the River Uruguay (Argentina v. Uruguay*), Judgment, I.C.J. Reports 2010 (I), p. 55 , 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 (II), pp. 706-707, para. 104*; Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia*), Judgment, I.C.J. Reports 2022, p. 648, para. 99

[14] See for instance the well known Alabama arbitral award of 14 September 1872, in relation to the obligation of States to act in conformity with its obligations of neutrality. Alabama Claims of the United States of America against Great Britain, Reports of International Arbitral Awards, vol. XXIX, p. 130.

[15] Of particular interest in this regard is the ITLOS advisory opinion on the Responsibilities and obligations of States with respect to activities in the Area (Advisory Opinion, 1 February 2011, ITLOS Reports 2011).

[16] *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, Advisory Opinion, ITLOS Rep 2011, para. 131.

(ii) The prevention principle

40. The prevention principle is a corollary of the duty of due diligence.[17] It has also been widely acknowledged and applied by the Court, including in cases in which the principle was advanced by Costa Rica.[18] It was already mentioned in the first judgment of the International Court of Justice sixty-five years ago: it is defined as the "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States"[19]

41. Later on, the Court further explained its scope:

> "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. This Court has established that this obligation "is now part of the corpus of international law relating to the environment" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 242, para. 29).[20]

42. As a result of this principle, in the *Pulp Mills* case the Court also established the specific obligation to conduct an environmental impact assessment in the following manner:

> "it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource".[21]

43. It must be noticed that this specific obligation exists under general international law in relation to *any possible significant adverse transboundary impact* and not exclusively in relation to a shared natural resource, as it was the particular case of the *Pulp Mills* dispute between Argentina and Uruguay.

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[17] The scope of the principle of due diligence is broader than the prevention principle. See Viñuales, Jorge E., "Due Diligence in International Environmental Law: A Fine-grained Cartography", in Heike Krieger, Anne Peters, Leonhard Kreuzer (eds.), Due Diligence in the International Legal Order (Oxford University Press, 2020), pp. 111-128, section 3.2.1.

[18] *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, I.C.J. Reports 1996, p. 226, paras. 27-29; *Gabcikovo-Nagymaros Project (Hungary/Slovakia),* Judgment, I. C. J. Reports 1997, p. 7, para. 140; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I), p. 55, 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 (II), p. 706, para. 104; *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*, Judgment, I.C.J. Reports 2022), pp. 644-645, para. 83, p. 648, para. 99

[19] *Corfu Channel (United Kingdom v. Albania*), Merits, Judgment, I.C.J. Reports 1949, p. 22

[20] *Pulp Mills on the River Uruguay (Argentina v. Uruguay*), Judgment, I.C.J. Reports 2010 (I), p. 56, para. 101

[21] Ibid. p. 83, para. 204.

44. In the context of these proceedings, this principle is particularly important because it is now well established that greenhouse gas (GHG) emissions have caused significant harm to the climate system itself as well as – directly and indirectly (through the adverse effects of climate change) – also to other parts of the environment. The prevention principle requires to avert this unfortunate outcome.

(iii) The obligation not to cause significant transboundary harm

45. Another key principle which has already been identified and applied by the Court that is of crucial importance here is the obligation not to cause significant transboundary harm. The principle of prevention precisely aims at avoiding causing that harm and indeed finds its justification in the need to avoid it. This need arises out of the existence of the principle of not causing significant transboundary harm from activities carried out in the territory of the State or under its control.

46. The Court has already the opportunity to ascertain the existence of this obligation in clear terms:

> "The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment."[22]

47. The Court also discussed the divergence of terms employed in conventional law and in its jurisprudence as to the threshold of the harm concerned in the analysis of the moment in which the obligation to notify and consult is triggered. In this regard "[t]he Court notes that even though the requirements of notification and consultation established in its jurisprudence and in Article 12 of the 1997 Convention are not worded in identical terms, both formulations suggest that the threshold for the application of the obligation to notify and consult is reached when the measures planned or carried out are capable of producing *harmful effects of a certain magnitude*."[23]

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[22] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 241-242, para. 29.

[23] *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia*), Judgment, I.C.J. Reports 2022, p. 652, para. 116.

48. The principle of not causing significant harm applies in relation to any activity carried out in the territory of the State, no matter whether it is performed by State organs or by private individuals or corporations. Also, it is not just a contemporaneous development of international law triggered by the awareness of the need to protect the environment. The often-quoted arbitral award in the *Trail Smelter* case stated:

> As Professor Eagleton puts in *(Responsibility of States in International Law,* 1928, p. 80): "A State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction." A great number of such general pronouncements by leading authorities concerning the duty of a State to respect other States and their territory have been presented to the Tribunal. These and many others have been carefully examined. International decisions, in various matters, from the Alabama case onward, and also earlier ones, are based on the same general principle, and, indeed, this principle, as such".[24]

49. The obligation not to cause significant transboundary harm is a corollary of the principle of sovereign equality of States and the obligation to respect the sovereignty and the territorial integrity of other States. The conduct within a State causing significant harm to the territory, the population or the environment of another State or to areas beyond national jurisdiction is incompatible with the idea that, being sovereign equals, States must respect the component elements of the others, and those that are common as well. As such, it can be said that the principle of not causing significant transboundary harm has existed since the very existence of a plurality of States having relations among them. What has evolved is the awareness upon its existence and the different manners in which this harm can be produced to the other components of the international community.

(iv) The ecosystem approach

50. The "ecosystem" has been defined in the Convention on Biological Diversity (CBD) in the following manner: ""Ecosystem" means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit."[25] The Conference of the Parties to the CBD at its Fifth Meeting

[24] *Trail Smelter case (United States v. Canada),* RIAA, vol. III, p. 1963
[25] Article 2 of the Convention on Biological Diversity

established among the principles of the ecosystem approach the fact that "cultural and biological diversity are central components of the ecosystem approach, and management should take this into account.[26] "Ecosystem managers should consider the effects (actual or potential) of their activities on adjacent and other ecosystems".[27] The explanation for this principle is that "[m]anagement interventions in ecosystems often have unknown or unpredictable effects on other ecosystems; therefore, possible impacts need careful consideration and analysis".[28]

51. The Court has for example the opportunity to apply this technical rule when examining the obligations of the parties in the *Pulp Mills* case:

> "This vigilance and prevention is all the more important in the preservation of the ecological balance, since the negative impact of human activities on the waters of the river may affect other components of the ecosystem of the watercourse such as its flora, fauna, and soil."[29]

52. Numerous international treaties, such as the United Nations Framework Convention on Climate Change (UNFCCC) and the Convention on Biological Diversity (CBD), explicitly recognize the interconnectedness of ecosystems and climate.[30] These treaties establish obligations on states to take necessary measures to protect and conserve both ecosystems and the climate system. The Paris Agreement, for instance, emphasizes the importance of ecosystem-based approaches in climate mitigation and adaptation efforts.[31]

53. The United Nations Sustainable Development Goals (SDG) recognize the interdependence between environmental protection, climate action, and sustainable development. Preserving ecosystems is integral to achieving several SDGs, including those related to climate action, life below water and on land, and biodiversity conservation, showcasing the global recognition of the significance of ecosystems in combating climate change.[32]

54. The interdependence of ecosystems and climate stability is one of the main elements of why States have legal obligations to ensure the protection of the climate system.

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[26] COP 5 Decision V/6, Principle 1
[27] Ibid., Principle 3
[28] Ibid, Rationale.
[29] *Pulp Mills on the River Uruguay (Argentina v. Uruguay*), Judgment, I.C.J. Reports 2010 (I), p. 77, para. 188.
[30] UNFCCC, arts. 2- 12; CBD, arts. 3-18.
[31] Paris Agreement, preamble, arts. 2-13.
[32] UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, 21 October 2015, goals 13 and 15.

Scientific evidence overwhelmingly supports the critical role of ecosystems in climate regulation. Ecosystems, such as forests, wetlands, and the ocean, act as carbon sinks, absorbing and storing significant amounts of carbon dioxide. Their preservation is fundamental in mitigating climate change by sequestering carbon and maintaining ecological balance, thereby directly impacting the stability of the climate system.

55. Ecosystems and climate change do not take into consideration national borders. Their degradation or protection affects not only the State where they are located but also other States and the global commons. States have the obligation under international law to ensure the conservation of ecosystems due to their transboundary impact on climate stability.

(v) The intergenerational equity

56. The idea of intergenerational equity is embodied in the very first paragraph of Resolution 77/226 requesting this advisory opinion, as well as in other prior and subsequent relevant resolutions. It is the idea that the protection of the global climate is not only a matter for the present but also -and it can be said above all- for future generations of humankind. This is also reflected in the fact that both questions raised by the General Assembly systematically refer to the present and *future* generations. The idea is also specifically mentioned in the UNFCCC and in the Paris Agreement, [33] among many other instruments. The International Court of Justice has reaffirmed that the environment represents the "living space, the quality of life, and the health of human beings, *including unborn generations*".[34] The Inter-American Court of Human Rights has also understood that the collective dimension of the right to a healthy environment includes *present and future generations*.[35] The Committee on the Rights of the Child explicitly "recognizes the principle of intergenerational equity and the interests of future generations".[36]

[33] UNFCCC, art. 3(1); Paris Agreement, preamble.
[34] See, *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, 8 July 1996, ICJ Reports, 1996, p. 241, para. 29 (emphasis added)
[35]Inter-American Court of Human Rights, Advisory Opinion 23/17, available at: https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf (emphasis added)
[36] Committee on the Rights of the Child, General Comment No. 26 on Children's Rights and the Environment, with a Special Focus on Climate Change (2023), para. 11.

57. The principle of intergenerational equity "places a duty on current generations to act as responsible stewards of the planet and ensure the rights of future generations to meet their developmental and environmental needs".[37]

(vi) The principle of common but differentiated responsibility (CBDR)

58. The CBDR principle recognizes that while all States share a responsibility to address global environmental issues, such as climate change, they do not bear the same responsibility, due to different historical and economic circumstances.
59. The CBDR principle has been included in several international agreements. It is explicitly stated in key international agreements related to climate change. The UNFCCC in its Article 3.1 acknowledges the principle, recalling that the Parties should act in accordance with their common but differentiated responsibilities and respective capabilities. Its GHG stabilisation targets,[38] as well as the Kyoto Protocol's GHG mitigation targets,[39] exclusively apply to developed countries. Article 2.2 of the Paris Agreement states that it "will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in light of different national circumstances".
60. The distinction between "differentiated responsibilities and capabilities" is important. It means that the former is a differentiation based on the contributions to the environmental harm. Developed countries, having historically emitted the majority of GHG, bear a higher responsibility for climate change mitigation and adaptation, compared to developing nations. This principle acknowledges the need for differential treatment while examining the obligations and their breaches.
61. International law imposes an obligation on States to prevent significant harm to other states and the global commons. Given that climate change poses a global threat affecting all states, the obligation to prevent harm implies a responsibility on all states to contribute to mitigating climate change. However, CBDR recognizes that while the obligation is universal, the manner and extent of the obligations and responsibility for their breach vary, based not only on the capacities and circumstances of each State, but

[37] Office of the United Nations High Commissioner for Human Rights, Analytical Study on the Relationship Between Climate Change and the Full and Effective Enjoyment of the Rights of the Child, U.N. Doc. A/HRC/35/13 (4 May 2017) (OHCHR Analytical Study), para. 35;
[38] "The Paris Agreement", Decision 1/CP.21, 12 December 2015, FCCC/CP/2015/10/Add.1, 21, Annex, Articles 4.2(a), (b).
[39] Kyoto Protocol to the United Nations Framework Convention on Climate Change, 10 December 1997, 2303 UNTS 162, Art. 3.

also on their specific responsibility in the production of the anthropogenic climate change and its consequences.

62. CBDR aligns with the broader goals of sustainable development. It recognizes that while all states must contribute to environmental protection, the manner in which they can do so should not hinder their pursuit of economic and social development. This principle ensures that environmental obligations are integrated into development strategies without impeding progress.
63. CBDR has been consistently taken into consideration within international forums and negotiations, including climate change conferences like the Conference of the Parties (COP) under the UNFCCC. Its continued inclusion and interpretation in these forums reflect its integral role in shaping international climate policies and legal frameworks.
64. CBDR plays a crucial role in addressing the issue of loss and damage caused by climate change. It acknowledges the disproportionate impact of climate change on vulnerable and developing countries, emphasizing the responsibility of developed States to assist affected countries in coping with and recovering from these impacts.

(vii) The protection of fundamental human rights

65. The reference to the Universal Declaration of Human Rights in Resolution 77/276 can be considered in the context of the recognition of those rights as having a customary character.[40] The Declaration is part of the Bill of Human Rights of the United Nations and this collection of instruments contains the relevant human rights, both individual or collective, that must be taken into account to address the questions raised by the current request for an advisory opinion.
66. It is undeniable that climate change has an impact on human beings at different levels, including food and water, physical and mental health, provoking displacement of populations and humanitarian crisis.[41] In general, those who have contributed the least to the environmental crisis are the most affected by it.
67. As a result of the above, specific human rights, both civil and political as well as economic, social and cultural, are concerned by the consequences of climate change.

[40] *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 1970, p. 32, paras. 33-34; *United States Diplomatic and Consular Staff in Tehran (USA v Iran*), I.C.J. Reports 1980, p. 42, para. 91

[41] See for instance: IPCC, Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policymakers, 2022, statement B.1.7; Dr Ian Fry, Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change, Promotion and protection of human rights in the context of climate change mitigation, loss and damage and participation, A/77/226 (26 July 2022)

Costa Rica wishes to contribute to these proceedings through the specific analysis of the human right to a healthy environment. A section below in this chapter is devoted to it (section b).

(viii) The Law of the Sea

68. The duty to protect and preserve the marine environment, codified in Article 192 of the UNCLOS as an 'obligation', is recognised as having customary grounding.[42] Other rules specifically refer to obligations relating to pollution in Part XII. These obligations exist vis-à-vis all maritime areas, those under the sovereignty or jurisdiction of coastal states and to the areas beyond national jurisdiction as well. UNCLOS contains specific application to the marine environment of the abovementioned principles, such as due diligence and the obligations of prevention and of not causing significant harm.

69. The UNCLOS' definition of pollution undoubtedly includes GHG emissions:

> "pollution of the marine environment' means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities".[43]

70. Anthropogenic climate change has produced ocean warming, acidification, losses of species and sea level rise. State conduct leading to these consequences engages the responsibility of the States having contributed to them. The matter is addressed while answering the second question referred to the Court by the General Assembly.[44]

(ix) The equality of rights and the right of peoples to self-determination

71. The principle of equality of rights and the rights of peoples to self-determination is enunciated in Article 1(2) of the Charter of the United Nations and in several

[42] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia),* Judgment, 21 April 2022, p. 311, para. 95
[43] Article 1(1)(4) of the UNCLOS
[44] See below, paras. 93-127

international instruments. It has also widely acknowledged and applied by the Court.[45] For the purposes of this advisory opinion, article 1 common to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights is of particular importance, since it clearly defines the holders and the content of this right:

> "1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
>
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."[46]

72. The economic aspect of self-determination is intrinsically linked to the principle of permanent sovereignty over natural resources, acknowledged by the Court as having a customary nature.[47] In the present context, particular attention can be drawn to the second paragraph of common article 1 and two of its elements: the free disposal of natural wealth and resources of the peoples and the obligation not to deprive them of their own means of subsistence. Anthropogenic climate change seriously impairs the exercise of this disposal and is depriving peoples of their means of subsistence.

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[45] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, ICJ Reports 1971, p. 31, para. 52; *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, p. 31, para. 55; *Frontier Dispute*, Judgment, I.C.J. Reports 1986, p. 567, para. 25*; East Timor (Portugal v. Australia*), Judgment, I.C.J. Reports 1995, p. 102, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, pp. 171-172, 199, paras. 88, 155-156*; Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Rep. 2019, pp. 131-132, para. 144-152

[46] International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, art. 1; International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3, art. 1

[47] *Armed Activities on the Congo (Congo v. Uganda),* Judgement, ICJ Reports 2006, p. 251, para. 244

(x) The principle of respect for the territorial integrity of States and peoples

73. As the Court has recognized, the obligation to respect the territorial integrity of States and peoples is an important principle of international law.[48]

74. Emissions of GHG are provoking climate change, which in turn leads to the phenomenon of sea level rise, affecting coastal States and in particular insular ones. As a document of the International Law Commission (ILC) describes:

> "Land inundation stemming from sea-level rise can pose risks to the territorial integrity of States with extensive coastlines and to small island States; at its most extreme, sea-level rise may threaten the continued existence of some low-lying States."[49]

b) Contribution to the existing human right to a healthy, clean and sustainable environment

75. The obligations of States in relation to the link between human rights and climate change are governed by a dense network of global and regional treaties, as well as customary international law. The recognition of the existence of specific human rights is the result of the awareness of the international community of the evolution of civilization and its environment. This sub-section refers to the evolution that led to the explicit recognition of the human right to a healthy environment.

76. According to the IPCC Sixth Assessment Report of 2022, climate change will increase the number of deaths and the global burden of non-communicable and infectious disease Over nine million climate-related deaths per year are projected by the end of the century, under a high emissions scenario and accounting for population growth, economic development and adaptation. The United Nations estimates that environmental hazards kill over 8 million people each year.[50]

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[48] *Corfu Channel*, Judgment of April 9th, 1949: I.C.J. Reports 1949, p. 35*; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America*). Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 424, para. 73, p. 111, para. 213 and p. 128, paras. 251-252; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, p. 437, para. 80; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Rep. 2019p. 134, para. 160.

[49] ILC, "Sea-level Rise in Relation to International Law: Second Issues Paper" by Patrícia Galvão Teles and Juan José Ruda Santolaria, Co-Chairs of the Study Group on Sea-level Rise in Relation to International Law' UN Doc A/CN.4/752 (19 April 2022) para. 252(j).

[50] See: https://www.ohchr.org/en/press-releases/2018/10/environmental-hazards-kill-8-million-year-un-expert-urges-global-recognition?LangID=E&NewsID=23782

77. The evidence is clear in that the triple environmental crisis has devastating impacts on the enjoyment of all human rights of everyone, everywhere. However, not only some human rights are more susceptible than others to certain types of environmental harm, but climate change and environmental degradation do not affect all human beings equally.
78. Air pollution causes approximately 600,000 deaths of children under the age of 5 every year[51]. The World Health Organization has in turn estimated that together, ambient and household air pollution cause more than one half of all lower respiratory infections, such as pneumonia and bronchitis, in children under 5 in low- and middle-income countries, and that lower respiratory infections accounted for 15.5 per cent of deaths of all children under the age of 5 in 2015[52]. Lack of access to clean water causes the death of approximately 800,00 women and girls annually[53]. Lack of access to clean water increases the risk of pregnancy complications and death during childbirth[54].
79. Furthermore, it is the most vulnerable countries that are intensifying adaptation and mitigation efforts, while the largest carbon emitters and those responsible for the climate catastrophe continue to reproduce a status quo that, scientifically, we know is unsustainable. The International Energy Agency reports that the top 1% of emitters globally each had carbon footprints of over 50 tons of CO2 in 2021, more than 1 000 times greater than those of the bottom 1% of emitters.
80. Costa Rica has been a pioneer in the ascertainment of a specific human right to a healthy environment at the national and the international level. At the national level, it is enshrined in Article 50 of its Constitution.[55] At the international level, Costa Rica promoted the adoption of the Human Rights Council Resolution 48/13 on 8 October 2021 and the UN General Assembly Resolution 76/300 on 28 July 2022, both entitled "The human right to a clean, healthy and sustainable environment".

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[51] WHO, "Don't pollute my future! The impact of the environment on children's health" (Geneva, 2017), p. 3.
[52] WHO, "Don't pollute my future!", pp. 2–3.
[53] UN-Women and Department of Economic and Social Affairs, Progress on the Sustainable Development Goals.
[54] WHO and United Nations Children's Fund (UNICEF), Water, Sanitation and Hygiene in Health Care Facilities: Status in Low and Middle-Income Countries and Way Forward (2015).
[55] Constitution of Costa Rica, Article 50: *"The State will procure the greatest well-being to all the inhabitants of the country, organizing and stimulating production and the most adequate distribution of the wealth.*
All persons have the right to a healthy and ecologically balanced environment. For that, they are legitimated to denounce the acts that infringe this right and to claim reparation for the damage caused.
The State will guarantee, will defend and will preserve this right. The Law will determine the responsibilities and corresponding sanctions […]" (translation)

81. The preamble of Resolution 77/276 requesting the advisory opinion explicitly mentions General Assembly Resolution 76/300 and Human Rights Council Resolution 48/13. The former resolution was adopted with 168 votes in favor, 0 votes against and 8 abstentions. The latter was adopted within the Council without opposition and with 4 abstentions. Currently 155 countries recognize the right to a healthy environment in their national legislation.[56] UN GA Resolution 76/300 notes that a vast majority of States have recognized some form of the right to a clean, healthy and sustainable environment through international agreements, their national constitutions, legislation, laws or policies".
82. At this stage, it can be considered that the existence of an autonomous human right to a clean, healthy and sustainable environment meets the condition for its recognition as a customary general international law rule. **The ascertainment by the Court of this character would be an important contribution to the determination of the status of the law and the clarification of the applicable rules in the areas covered by the General Assembly request**.
83. The existence of this autonomous human right implies that individuals and communities are holders of it and that States have the concomitant obligation to adapt their conduct to the respect and promotion of this right.[57] In doing so, they must use their best efforts and apply their due diligence in order to insure the enjoyment of this right.
84. The right to a healthy environment "protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals".[58] It protects the quality of the environment *per se* that "constitutes a universal value that is owed to both present and future generations".[59] In this way, the collective dimension of the right operates in respect of present and future generations and also extraterritorially.[60]

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[56] Boyd, D., Chapter 2: The Right to a Healthy and Sustainable Environment *in* Aguila, Y. and Viñuales, J.E., 2019. A Global Pact for the Environment-Legal Foundations. *University of Cambridge*.
[57] Advisory Opinion OC23/17, 15 November 2017, Inter-American Court of Human Rights, Series A No. 23, para.59.
[58] Advisory Opinion OC23/17, 15 November 2017, Inter-American Court of Human Rights, Series A No. 23, para. 62; *Indigenous Communities of the Lhaka Honhat Association v Argentina*, Judgment of February 6, 2020 (Merits, reparations and costs), Inter-American Court of Human Rights Series C No. 400, para. 203.
[59] Ibid., para.59.
[60] See *Chiara Sacchi et. al. v. Argentina, Brazil, France, and Germany* (Communication Nos. 104-107/2019), CRC/C/88/D/104/2019, CRC/C/88/D/105/2019, CRC/C/88/D/106/2019, CRC/C/88/D/107/2019, 11 November 2021, paras. 10.5, 10.7; Advisory Opinion OC23/17, 15 November 2017, Inter-American Court of Human Rights, Series A No. 23, paras. 101, 103, 104.

85. To some extent, it can be considered that the enjoyment of the right to a healthy, clean and sustainable environment is a pre-condition for the enjoyment of most of the other human rights. Areas such as health, housing, food, and even life for a great number of human beings are dependent on the environment.

E. The Questions to be answered by the Advisory Opinion

86. In this section, Costa Rica wishes to suggest a number of elements that in its view should be taken into consideration by the Court while answering the two questions raised by the request of an advisory opinion.

a) Obligations under International Law

87. The first question raised by the General Assembly is the following:

> "**What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations**?"

88. The question contains four elements: 1) the international legal obligations of States, 2) the aim thereof: the protection of the climate system and other parts of the environment, 3) the relevant conduct considered: the anthropogenic emissions of GHG, and 4) the subjects protected by those obligations: States and present and future generations as well.

89. There is a plurality of relevant obligations. Some are of conventional nature. Others are of customary character. Yet, some are both of conventional and customary character and some can even be considered enshrined in general principles of law later incorporated in conventional or customary law.

90. Conventional law, notably the UNFCCC, the Kyoto Protocol and the Paris Agreement are particularly relevant by setting goals, in particular the goal of curbing the increase in the global average temperature. They also establish specific means and procedures of cooperation, in finance, transfer of technology and capacity-building. They particularly refer to adaptation and mitigation obligations and nationally determined contributions.[61]

[61] UNFCCC, arts. 2-7; Kyoto Protocol, arts. 2-13; Paris Agreement, arts. 2-13.

91. Fulfilment of conventional obligations are not enough to fulfil all relevant obligations arising under international law to ensure the protection of the environment and that govern anthropogenic emissions of GHGs. For example, the mere respect of the obligations set out in Articles 4 of the UNFCCC and the Paris Agreement does not imply that the States have completed all their duties in relation to those emissions and the protection of the climate system and the environment. Above, under the heading of the applicable law,[62] Costa Rica has mentioned a number of principles and rules that also establish different relevant obligations. Indeed, one of the important aspects of the task of the Court in these advisory proceedings is precisely the identification of all relevant obligations incumbent to States in relation to climate change.[63]

92. In Costa Rica's view, the following obligations are relevant to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of GHGs for States and for present and future generations:

    (a) The obligation to employ due diligence when dealing with GHG emissions;

    (b) The obligation to prevent environmental harm through the emissions of GHGs from the territory under the State's sovereignty or control;

    (c) The obligation not to cause significant environmental transboundary harm to the territory of another State or to areas beyond national jurisdiction;

    (d) The obligation to protect ecosystems;

    (e) The obligation to take into account the consequences of GHG emissions for future generations;

    (f) The obligation to protect the marine environment;

    (g) The obligation to respect fundamental human rights, which includes:

        (i) The right to life

        (ii) The right to health

        (iii) The right to food and water

        (iv) The right to a clean, healthy and sustainable environment;

    (h) The obligation to respect the equality of rights and the right of peoples to self-determination;

    (i) The obligation to respect the territorial integrity of States and peoples

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[62] Supra, Section D.a), paras. 36-84

[63] In its explanation of vote to Resolution 77/276, Costa Rica stresses the importance of this aspect : "The adoption of the resolution therefore is a giant step forward when it comes to clarifying the legal obligations of States in addressing climate change" (General Assembly, Sixty-fourth plenary meeting, 29 March 2023, UN Doc A/77/PV.64, p. 10.)

(j) The obligation to repair the consequences of Internationally Wrongful Acts (IWAs)

(k) The general obligation to cooperation.

93. For the analysis of the relevance of obligations (a) to (i), we referred to **Section D. a)** of this Written Statement. Obligations (j) and (k) are examined below.

b) Legal Consequences

94. The second question raised by the General Assembly reads as follows:

> **(a) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:**
>
> **(i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?**
>
> **(ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?'**

95. To answer these questions, it is important to determine that causing significant harm to the climate system and other parts of the environment constitutes an international wrongful act. References to "loss and damage" and "common but differentiated *responsibility*" in different instruments, and the qualification of "injured" States in the second question clearly show that the matter falls under the law of international responsibility, as codified by the Articles on responsibility of States for internationally wrongful acts (ARSIWA) adopted by the ILC.[64]

96. The point here is not to identify particular States having breached the relevant international obligations. Instead, the task of the Court is to determine the legal framework under which States can analyse their conduct in order to determine whether, on the one hand, they have breached their international obligations or whether, on the other hand, they have been an injured State.

[64] Annex to General Assembly Resolution 56/83 of 12 December 2001

97. In order to do so, it is important to establish, first, a) the factual element, which includes the existence of significant harm to the environment and the acts and/or omissions having produced it; b) the attribution of that harm to States having produced it, c) the international obligations breached by that conduct, d) the absence of any circumstance precluding wrongfulness and e) the legal consequences entailed by such conduct.

i) The factual element

98. At this stage, what the reasons for climate change are, is no longer an issue. This is the conclusion formulated in the Summary for Policymakers of the IPCC's 2023 Synthesis Report (6th Assessment Report):

> "Human activities, principally through emissions of greenhouse gases, have unequivocally caused global warming, with global surface temperature reaching 1.1°C above 1850–1900 in 2011–2020. Global greenhouse gas emissions have continued to increase, with unequal historical and ongoing contributions arising from unsustainable energy use, land use and land-use change, lifestyles and patterns of consumption and production across regions, between and within countries, and among individuals"[65]

99. With regard to the adverse effects of climate change, the same text concludes:

> "Widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred. Human-caused climate change is already affecting many weather and climate extremes in every region across the globe. This has led to widespread adverse impacts and related losses and damages to nature and people (high confidence). Vulnerable communities who have historically contributed the least to current climate change are disproportionately affected (high confidence)"[66]

100. There is scientific consensus that the dominant cause is the global warming as a result of anthropogenic emissions of GHG. As mentioned in the preamble of the request of the present advisory opinion, the General Assembly

> "*[n]ot[es] with utmost concern* the scientific consensus, expressed, inter alia, in the reports of the Intergovernmental Panel on Climate Change, including that anthropogenic emissions of greenhouses gases are

[65] IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers, statement A.1, available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/
[66] Ibid., statement A.2.

unequivocally the dominant cause of the global warming observed since the mid-20th century, that human-induced climate change, including more frequent and intense extreme events, has caused widespread adverse impacts and related losses and damages to nature and people, beyond natural climate variability, and that across sectors and regions the most vulnerable people and systems are observed to be disproportionately affected".

101. Sea level has risen faster since 1900 than over any preceding century in at least the last 3000 years, driven by human influence,[67] and it will continue to rise over the 21st century. [68]

102. Costa Rica refers the Court in this regard to the scientific analysis, made above all by the IPCC. Particularly telling is the link between the cumulative GHG emissions over time and global warming as result of the anthropogenic acts and omissions through time.[69] Of relevance is the role of fossil fuels and the fact that the COP 28 finally recognized it through the adoption of roadmap for transitioning away from fossil fuels.[70]

ii) The attribution to the States of the acts and omissions having caused climate change

103. GHG emissions are the product of human conduct in the territories of States. It is for the public organs to regulate human activities within the territory under the jurisdiction or control of States. The attribution to States to acts or omissions responsible for GHG emissions is possible in different manners, following the ARSIWA adopted by the ILC. Different situations can be depicted:

(i) If the GHG emissions are the direct product of public organs, then it can be considered as an act of the State.

(ii) If governmental organs provide support to private activities that are the main responsible for producing GHG emissions, this act is also attributable to the State. An example is the financial support, by way of subsidies or otherwise, for the production or consumption of fossil fuels.

[67] IPCC, Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policymakers, statement, available at: https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf
[68] Ibid., A.1.7, A.2.4
[69] See in particular IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6), Longer Report, Figure 2.2, page 9, available at: https://report.ipcc.ch/ar6syr/pdf/IPCC_AR6_SYR_LongerReport.pdf
[70] Outcome of the First Global Stocktake, 13 December 2023, Paragraph 28 d), doc. FCCC/PA/CMA/2023/L.17

(iii) States are also responsible for their legislative, administrative and judicial actions. As such, they have the power to regulate, control, prevent and adjudicate economic and other activities having an impact on the environment. Only the State has the power to do so. If it fails to adopt appropriate legislation and regulatory measures to avoid significant harm to the global environment, this omission also entails the responsibility of the State.

(iv) Finally, even if the major GHG emitters are private polluters, the fact that the State has not taken the appropriate measures to prevent keeping such emissions below the level of producing significant harm renders the conduct attributable to that State.

iii) The international obligations breached

104. Before mentioning the obligations breached in the conduct of some States it is worth recalling what the ILC established nearly half a century ago. Judge Roberto Ago, who previously was the ILC Special Rapporteur for State Responsibility, proposed a qualitative distinction of internationally wrongful acts ("IWAs") -depending on the gravity of them- in draft Article 19, which was provisionally adopted by the ILC in 1976. He called grave IWAs "international crimes". The definition of them was the following:

> "An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime."[71]

105. He went on providing incontestable examples, among them, one that can be considered as the "environmental crime" and was defined as follows:

> "a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas."[72]

106. Although Judge James Crawford, the last ILC rapporteur on the matter, did not follow the proposed terminology and decided not to provide examples, the final text kept the

[71] Art. 19 (1), Report of the ILC on the work of its forty-eight session, A/51/10 (1996), 60.
[72] Art. 19(2)(d), ibid.

distinction of IWAs depending on their gravity, distinguishing the "Serious Breaches of obligations under peremptory norms of general international law" from the others.[73] At this stage, there is no doubt that GHG emissions are producing a gradual massive pollution of the atmosphere and the seas.

107. The various obligations mentioned above are susceptible of being violated through the GHGs emissions causing climate change. The same actions or omissions can simultaneously produce a plurality of obligations breached. They can refer to conventional or customary obligations. They can be instantaneous, continuous or composite acts or omissions.

108. The duty to exercise due diligence in the prevention of reasonably foreseeable harm to other States, peoples, individuals or the global commons through the adverse effects of climate change is all the more necessary when the risk is higher. This duty exists from the very moment in which a given planned or even more -executed- activity is able to produce harm. This basic idea is consubstantial to the very existence of legal rules imposing obligations of conduct vis-à-vis others.

109. The manner in which the obligation not to cause significant transboundary harm is breached may vary in a number of circumstances. Global warming is causing significant harm. The ecosystem approach must be taken into consideration while examining the relevant conduct. The breach is produced if the State to which the conduct can be attributed caused that harm beyond its own territory (or from territory or engines under its control) no matter the distance.

110. The applicable human rights obligations require both an abstention and an action: refraining from infringing on such rights and protecting and fulfilling them. In the joint statement on "Human Rights and Climate Change" adopted by five human rights treaty bodies the conduct necessary to comply with human rights obligations is depicted as follows:

> "in order for States to comply with their human rights obligations and to realize the objectives of the Paris Agreement, they must adopt and implement policies aimed at reducing emissions. These policies must reflect the highest possible ambition, foster climate resilience and ensure that public and private investments are consistent with a pathway towards low carbon emissions and climate resilient development […]

[73] See Chapter III of the ARSIWA

> In their efforts to reduce emissions, States parties should contribute effectively to phasing out fossils fuels, promoting renewable energy and addressing emissions from the land sector, including by combating deforestation. In addition, States must regulate private actors, including by holding them accountable for harm they generate both domestically and extraterritorially. States should also discontinue financial incentives or investments in activities and infrastructure that are not consistent with low greenhouse gas emissions pathways, whether undertaken by public or private actors, as a mitigation measure to prevent further damage and risk."[74]

111. The obligation to protect the marine environment is breached if States do not take concrete action to preserve it and, all the more, if their action leads to its pollution. Acidification, warming, harm to marine ecosystems, among other impacts, can all be understood as a violation of the obligation enshrined in Article 192 of the UNCLOS.

112. The obligation to respect the equality of rights and the rights of peoples to self-determination is breached if the relevant conduct deprives them of their resources and thus making unviable their social and economic independent development. The fact that some peoples can be deprived of the territory where they have lived for generations is also constituting a breach to their right to self-determination.

113. The obligation to respect the territorial integrity of States and peoples is breached if the relevant conduct produces sea level rise, which in turn affects the coast of riparian States and their maritime areas. Of particular concern are the situation of injured small island developing States.

114. Breaches of all these obligations are also produced if the relevant conduct does not preserve, by not taking into account the injury caused to, the environment of future generations.

iv) Absence of circumstances precluding wrongfulness

115. The circumstances precluding the wrongfulness of the relevant acts are strictly codified in the ARSIWA.[75] Some of them appear irrelevant in the context of the present

[74] Statement on Human Rights and Climate Change, Joint statement by the Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities, 14 May 2020, HRI/2019/1, paras. 11 and 12, (footnotes omitted).

[75] Chapter V of the ARSIWA.

proceedings, such as consent, self-defence, countermeasures, or compliance with peremptory norms. Others appear to be of difficult implementation in this context, such as force majeure, distress, or necessity. In any event, these circumstances are subject to stringent conditions that render difficult their invocation. Negligence, even less ignorance, are not grounds for justification.

v) Reparation due

116. Given the nature of the obligations concerned, the obligation to repair by the responsible State may be owed to the direct injured States and to the international community as a whole.[76] The principle of common but differentiated responsibilities is of crucial importance for the determination of the legal consequences of the breaches of international obligations.

117. As a result of a request by Costa Rica, the Court, for the first time in its history, adjudged and granted compensation for environmental damage. This precedent is relevant for the present Advisory Opinion. In the case *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, besides declaring that Nicaragua had acted wrongfully for its illicit activities related to the military occupation of a sector of Portillos Island and the environmental damage caused therein, the Court ordered Nicaragua to compensate Costa Rica for the environmental damage caused.[77]

118. In its judgment the Court found that the direct environmental damage caused by Nicaragua occurred in 6.19 hectares of an internationally protected wetland under the Ramsar Convention, including the removal of vegetation and the felling of some 300 trees, many with an average age of 200 years, as well as the excavation of artificial channels.

119. To determine the financial cost of the damages, Costa Rica used the "ecosystem services approach", according to which the value of an environment is comprised of goods and services that may or may not be traded on the market.[78] In other words, this approach takes into account the value of the environmental goods and services that are no longer perceived as a consequence of the damage, instead of a more restrictive

[76] Article 33 of the ARSIWA

[77] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua),* Compensation, Judgment, I.C.J. Reports 2018, p. 15

[78] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua*), Memorial of Costa Rica on Compensation, paras. 3.6-3.9 and Annex 1; Reply of Costa Rica on Compensation, paras. 2.1-2.34 and Annex 1.

methodology which takes into account only the replacement cost of the environmental goods and services lost. Costa Rica's approach took into account six categories of affected environmental goods and services: standing timber, other raw materials, gas regulation and air quality, mitigation of natural disasters, soil formation and erosion control and biodiversity, with a conservative estimate of 50 years for its recovery.

120. In its ruling of 2 February 2018 on this matter, the Court acknowledged that although it had not previously adjudicated a claim for compensation for environmental damage,

> "it is consistent with the principles of international law governing the consequences of internationally wrongful acts, including the principle of full reparation, to hold that compensation is due for damage caused to the environment. Such compensation may include indemnification for the impairment or loss of environmental goods and services and payment for the restoration of the damaged environment. Payment for restoration accounts for the fact that natural recovery may not always suffice to return an environment to the state in which it was before the damage occurred. In such instances, active restoration measures may be required in order to return the environment to its prior condition, in so far as that is possible."[79]

121. Of the six categories of environmental goods and services presented by Costa Rica, the Court considered that the services related to mitigation of natural hazards and ecosystem erosion had not been sufficiently demonstrated. However, it did consider that concerning "the four other categories of environmental goods and services for which Costa Rica claims compensation (namely, trees, other raw materials, gas regulation and air quality services, and biodiversity)", sufficient evidence had been provided that Nicaragua's activities had "significantly affected the ability of the two impacted sites to provide the above-mentioned environmental goods and services".[80] The Court therefore concluded that impairment or loss of these four categories of environmental goods and services had occurred and that they required compensation.

122. Reparation for the loss and damage caused by anthropogenic climate change requires compensation that may adopt a variety of forms. It can be a monetary compensation but also include transfer of technology, capacity-building and the contribution to a fund by the States that have contributed the most to the global warming in favour of the injured

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[79] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua*), Compensation, Judgment, I.C.J. Reports 2018, pp. 28-29, paras. 41-43

[80] Ibid., p. 36, para. 75

States. The creation of the Loss and Damage Fund by the Parties of the UNFCCC is an example.

vi) Other secondary obligations (cessation, recognition, cooperation)

123. In the content of the international responsibility of States, the ARSIWA mentions that the legal consequences of an IWA do not affect the continued duty of the responsible States to perform the obligation breached, which leads to the obligation to cease that act and to offer appropriate assurances and guarantees of non-repetition if circumstances so require.[81]

124. Ceasing the relevant conduct includes taking mitigation action to achieve deep cuts in GHG emissions, consistent with the projections of the IPCC reports[82] and the pathways identified in the Production Gap[83] and Emissions Gap reports of the UNEP.[84]

125. The effect of sea level rise due to anthropogenic global warming affecting coasts and insular features does not lead to the loss of maritime areas. All States and other international actors are obliged to recognize the maintenance of the existing maritime areas as they were measured and communicated in accordance to international law or as decided by an international court or tribunal.

126. While the loss of land territory is a *physical* problem that ultimately requires confronting global warming, loss of maritime areas is merely a *legal* problem that can be resolved through the interpretation of the law. Unlike land and sea, which can recede and advance because of climate change, maritime areas, such as the territorial sea or

[81] Articles 29 and 30 of the ARSIWA

[82] IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers, March 2023, statement B.6 ("All global modelled pathways that limit warming to 1.5°C (>50%) with no or limited overshoot, and those that limit warming to 2°C (>67%), involve rapid and deep and, in most cases, immediate greenhouse gas emissions reductions in all sectors this decade"), statement C.2 ("Deep, rapid and sustained mitigation and accelerated implementation of adaptation actions in this decade would reduce projected losses and damages for humans and ecosystems … and deliver many co-benefits, especially for air quality and health … Delayed mitigation and adaptation action would lock-in high-emissions infrastructure, raise risks of stranded assets and cost-escalation, reduce feasibility, and increase losses and damages … Near-term actions involve high up-front investments and potentially disruptive changes that can be lessened by a range of enabling policies"), statement C.3.2 ("Net zero CO2 energy systems entail: a substantial reduction in overall fossil fuel use, minimal use of unabated fossil fuels"), available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/

[83] United Nations Environment Programme, Production Gap Report 2023: Phasing down or phasing up? Top fossil fuel producers plan even more extraction despite climate promises (November 2023), p. 27 ("to stay on track to achieve net-zero CO2 emissions by mid-century and limit long-term warming to 1.5ÅãC, global production of all three fossil fuels needs to decline substantially between now and 2050, in parallel with other key climate mitigation strategies such as reducing fossil fuel demand, increasing renewable energy generation, and reducing methane emissions from all sources, including oil and gas production activities").

[84] United Nations Environment Programme, Emissions Gap Report 2023: Broken Record. Temperatures reach new highs, yet world fails to cut emissions (again) (November 2023).

the exclusive economic zone, are *not* natural features, but human constructs that need *not* necessarily be affected by sea-level rise. The same applies to the legal construct of the continental shelf.

127. The explicit reference in Art. 76 (8) of the UNCLOS that the limits of the continental shelf shall be final is due to the fact that, in order to fix the outer limits of the continental shelf beyond 200 nautical miles, it is necessary to make a submission to the Commission on the Limits of the Continental Shelf (CLCS) and once these limits are adopted -following the recommendation of the CLCS- they are final and binding. None of this is applicable to the internal waters, archipelagic waters, territorial sea and the economic exclusive zone, because their maximum outer limits are pre-determined and do not depend on their physical configuration. It would be contradictory to state that the delimitation and delineation of the continental shelf are final whereas those for the other areas not. Indeed, the continental shelf can also suffer changes in its morphology. As a result, coastal States having suffered the consequences of sea level rise can maintain their maritime areas notwithstanding actual or potential changes in their baselines.

128. Finally, given the *erga omnes* character of many of the obligations concerned and the fact that they are incorporated in peremptory norms of international law, the duty of cooperation to cease their breaches and to fully repair the damages caused impose the cooperation of all States.[85] Indeed, this obligation also exists in the form of an autonomous one, irrespective of the commission of IWAs, in relation to the common but differentiated responsibility in the protection of the environment.

F. Conclusion

129. On the basis of the above, Costa Rica considers that the Court has jurisdiction to answer the questions raised by the General Assembly request for an advisory opinion and that there are no compelling reasons to decline the exercise of this jurisdiction. The Court has at its disposal abundant evidence of the existence and consequences of the anthropogenic climate change.

130. The Court has then the possibility to make a decisive contribution to the clarification of the existent legal obligations of States in the relevant field and the consequences of

[85] Article 41 of the ARSIWA

their disregard. This is all the more necessary given the urgency of the situation, as shown by the fact that Resolution 77/276 was adopted without opposition.

131. The conclusion the Court may reach is in fact straightforward: the conduct that interferes with the climate system and the environment as whole with massive adverse impacts for humans and other living species, the conduct that constitutes the most serious form of interference with the environment causing climate change, is prohibited under international law and generates international responsibility.

March 2024

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