

**INTERNATIONAL COURT OF JUSTICE
ADVISORY PROCEEDINGS**

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

Audience of 4 December 2024

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**The duty to cooperate does not override obligations
under general international law**

I. Introduction

1. Mr. President, Members of the Court, there is one point on which everyone involved in these proceedings absolutely agrees: States have an obligation to cooperate in order to tackle the climate emergency. This cooperation essentially takes the form of treaties. But - and this would be a big "but" - it would be a poor legal exercise to confine the examination of States' international obligations in this area to the treaty regime alone.

2. Reducing greenhouse gas emissions is not simply a commitment that governments may see fit to accept. Nor is financing the loss and damage already caused or in progress a charitable gesture. The source of this reduction and funding lies not only in the agreements that States are willing to enter into, but also and above all in the well-established rules of international law, both substantive and relating to the responsibility of States.

3. This is one of the major challenges in the exercise of your advisory jurisdiction: to affirm that the duty to cooperate does not override other obligations under general international law. To answer question *a*), your task is essentially to identify all the relevant primary rules. To answer question *b*), your task is essentially to identify the conditions under which state responsibility for wrongful acts can be applied.

4. I will briefly touch on these three aspects. I will conclude by presenting Costa Rica's contributions to the answers you are called upon to give to the questions posed, which will allow me—at least—to mention other aspects that are no less important.

II. The *lex specialis* is not a limit to your jurisdiction

5. Those participants who invite you to reduce your analysis to what they call *lex specialis* have not considered a fundamental issue. *Lex specialis derogat legi generali* is relevant when there is a conflict between the rules applicable to the same question. Here, there is no question of derogation or of choosing one rule to the exclusion of another. In fact, all the rules invoked are relevant and can be applied without fear of contradiction, at different levels.¹

6. It is all very well for States to have agreed to cooperate in tackling climate change and to have adopted treaties. However, this neither diminishes nor erases all the rules of international law relevant to the various consequences produced by anthropogenic greenhouse gas emissions. On the contrary, these treaties must be interpreted and applied in the light, and within the framework, of the entire legal system in force². And not the other way round. The UNFCCC, the Kyoto Protocol, the Paris Agreement, COP decisions and other treaty instruments do not limit the scope of these obligations under general international law. In the 1996 Advisory Opinion, your Court did not confine itself to examining only the treaty regime applicable to nuclear weapons³. Even more so here, in view of the questions raised, you must examine all the applicable rules.

7. To mention just one example, the mechanism for implementing Article 15 of the Paris Agreement to facilitate compliance with its commitments does not replace the rules on State responsibility for unlawful acts.

8. Admittedly, there are differences of opinion among the participants. These differences do not concern the existence of a new rule of international law, but the interpretation and application of existing rules. It is precisely because of these divergent interpretations that your high-esteemed legal opinion is being sought by the General Assembly.

III. Interpretation of certain applicable rules

9. I will now briefly review some of these rules. The *duty of due diligence* and the *obligation not to cause significant transboundary harm* are obligations of general international law that you have

¹ See *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion, ITLOS Reports 2024*, p. 87, para. 224.

² *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West-Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 31, para. 53.

³ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 243, para. 34.

already recognised and applied, as have other judicial bodies⁴. There is nothing, absolutely nothing, to prevent these rules from being applied to greenhouse gas emissions that cause significant harm to other States and to areas beyond national jurisdiction.

10. Moreover, *the obligation not to cause transboundary harm* is not an obligation that arose only when it was explicitly stated. That obligation derives from a basic principle of international law: the sovereign equality of States. If they are obliged to respect each other, it is inconceivable that States were once allowed to harm each other's environment. And this is also true for areas that were considered common or not subject to national jurisdiction.

11. The *duty of due diligence* is necessarily high, as the International Tribunal for the Law of the Sea (ITLOS) has found, for the marine environment⁵, a finding that also applies to other relevant areas here.

12. The claim that *the obligation not to cause significant transboundary harm* applies only in the context of neighbourly relations has no basis in either law or logic. The essential question is whether the actions or omissions of a State cause such harm outside its territory, regardless of whether that harm occurs a few metres or thousands of kilometres away. Distance, Members of the Court, is not a circumstance precluding wrongfulness.

13. The *right to a clean, healthy and sustainable environment* is part of general international law⁶. It is not, as some have claimed⁷, a mere aspiration. Whether or not it is explicitly expressed in a standard-setting instrument, it derives from the simple observation that the effects of climate change on

⁴ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 241-242, para. 29; *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010 (I)*, pp. 55-56, 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. 706707-, para. 104; *Dispute Concerning the Status and Use of the Waters of the Silala River (Chile v. Bolivia), Judgment, I.C.J. Reports 2022 (II)*, p. 654, para. 126; *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion, ITLOS Reports 2024*, p. 93, para. 239.

⁵ *Request for an Advisory Opinion submitted by the Small Island States Commission on Climate Change and International Law, Advisory Opinion, ITLOS Reports 2024*, p. 95, para. 243.

⁶ United Nations, Human Rights Council, resolution 48/13 of 8 October 2021; General Assembly, resolution 76/300 of 28 July 2022; Inter-American Court of Human Rights, *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity - interpretation and scope of Articles 4(1) and 5(1) of the American Convention of Human Rights)*, Advisory Opinion OC-23/17, 15 November 2017, Series A No. 23, par. 56-68; *Indigenous Communities of the Lhaka Honhat Association v. Argentina*, Judgment of 6 February 2020 (*Merits, reparations and costs*), Series C No. 400, par. 202-209; Parliamentary Assembly of the Council of Europe, Recommendation 2211 (2021), 29 September 2021. See Costa Rica's written statement, paras. 85-95.

⁷ See Written Statement of the United States of America, footnote 373; Written Statement of Canada, para. 24; Written Statement of Indonesia, paras. 43-44; Oral Statement of Germany, CR 2024/35, p. 152, para. 29 (Germany).

the environment affect access to water, food, health and even life⁸. It is undeniable that, like the right of peoples to self-determination, the right to a healthy environment thus becomes a fundamental premise for the exercise of other human rights.

14. Your Court has already established that States are responsible for human rights violations even if they are committed outside their territory⁹. This criterion applies to all actions or omissions by States that violate human rights. The scope of human rights treaties should not be confused with the human rights obligations of States under customary international law. For the latter, at least, it is not the territorial jurisdiction that determines the obligation and its violation, but the result. Members of the Court, in view of what we have heard over the last few days, it is rather regrettable that we need to remind you that contemporary international law does not authorise States to violate the human rights of individuals outside their jurisdiction or control!

15. Fundamental principles of international law, such as the *right of peoples to self-determination* and *respect for territorial integrity*, are called into question when States and peoples are deprived of their living conditions, resources, territories and maritime areas.

16. *Intergenerational equity* is also a fundamental element of your analysis. Like the Inter-American Court, the European Court of Human Rights (ECHR) and other bodies, you have already recognised the importance of taking future generations into account when defining the environment and its protection.¹⁰

IV. The law of responsibility is fully applicable

17. Some participants invite you not to examine the question of international responsibility for a wrongful act within the framework of advisory proceedings. However, you have already done it many

⁸ See European Court of Human Rights, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], no. 53600/20, 2024, paras. 431-434.

⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004 (I), pp. 180-181, paras. 111-112; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment*, I.C.J. Reports 2005, p. 243, para. 216.

¹⁰ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996 (I), p. 241, para. 29; *-Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment*, I.C.J. Reports 1997, p. 78, para. 140; Inter-American Court of Human Rights, *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity - interpretation and scope of Articles 4(1) and 5(1) of the American Convention of Human Rights)*, Advisory Opinion OC-23/17, 15 November 2017, Series A No. 23; European Court of Human Rights, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], No.° 53600/20, 2024, para. 420; *Erste Senats des Bundesverfassungsgerichts* (First Senate of the German Federal Constitutional Court), Case 1 BvR 2656/18, 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, judgment of 24 March 2021, para. 61.

times¹¹. Moreover, no one is asking you to condemn any particular State. The invitation made to you by some to evade the question posed on the grounds of a supposed legal gap is no more convincing. The very purpose of this procedure is to clarify for States how the law of responsibility applies to transboundary harm caused by greenhouse gas emissions. It is then up to them to examine their behaviour and their situations - either as an injured State or as a wrongdoer State- in order to bring them into line with the law. Existing rules already allow this to be done.

18. The *principle of common but differentiated responsibilities*, set out in the Rio Declaration, has been consistently invoked and accepted by States¹². This principle also plays an important role in identifying the responsibility of States in the context of climate change.

19. The question is not whether a given emission of greenhouse gases by State A has directly caused loss and damage to State B. We now know that anthropogenic emissions are responsible for global warming. This is where the causal link lies.

20. Individual responsibility is then determined based on historical and current contributions, so that *the proportion of damage* caused to the climate system and the environment is quantifiable. Far from being a matter of progressive development, this result stems from the law of responsibility as it exists today, which makes it possible to determine, where several States participate in an internationally wrongful act, the individual responsibility of each on the basis of their conduct, whether in the field of environment or in any other field¹³. As the International Law Commission stated in its commentary to article 47, "each State is separately responsible for the conduct attributable to it, such responsibility not being diminished or reduced by the fact that one or more other States also bear responsibility"¹⁴.

¹¹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West -Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 54, para. 118; *Dispute Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, p. 87, paras. 61-62; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 197, para. 147; *Legal Effects of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 197, para. 147. *I.J. Reports 2019 (I)*, pp. 138-139, para. 177; *Legal Consequences of the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion, I.C.J. Reports 2024 (I)*, para. 265.

¹² Written statement by Costa Rica, paras. 68-74.

¹³ See Article 47 of the Articles on State Responsibility drawn up by the International Law Commission; European Court of Human Rights, Case of *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], no.° 53600/20, 2024, para. 443.

¹⁴ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts and commentaries thereto, 2001, p. 337.

Scientific evidence shows that it is possible to determine the causal relationship between the greenhouse gas emissions of certain States and climate change¹⁵.

V. Answers to the questions asked

21. In conclusion, Members of the Court, we invite you to consider the following response elements¹⁶:

a) In response to question a), international law imposes the following obligations on States:

- 1) The obligation to exercise due diligence in dealing with greenhouse gas emissions;
- 2) the obligation to prevent environmental harm caused by greenhouse gas emissions originating in the territory under the sovereignty or control of the State;
- 3) the obligation not to cause significant transboundary environmental harm to the territory of another State or to areas beyond national jurisdiction;
- 4) the obligation to protect ecosystems;
- 5) the obligation to take into account the consequences of greenhouse gas emissions for future generations;
- 6) The obligation to protect the marine environment;
- 7) the obligation to respect fundamental human rights, including :
 - i) the right to a clean, healthy and sustainable environment,
 - ii) the right to life,
 - (iii) the right to health, and
 - iv) the right to food and water ;
- 8) the obligation to respect the equal rights and the right of peoples to self-determination;
- 9) the obligation to respect the territorial integrity of States and peoples;
- 10) the obligation to make reparation for the consequences of internationally wrongful acts ;
- 11) the general obligation to cooperate.

In fulfilling these obligations, States are required to take due account of

- i) the ecosystem approach,

¹⁵ UNEP, *The Closing Window. Emissions Gap Report 2022*, Executive Summary, p. V and *No more hot air . . . please. Emissions Gap Report 2024*, table ES.1, p. XIII.

¹⁶ See Costa Rica's written observations, para. 42.

- (ii) the principle of intergenerational equity, and
- iii) the principle of common but differentiated responsibility and the respective capacities of States.

b) In answer to question b) :

- 1) States held responsible for having violated the international obligations mentioned have the obligation to cease that act and to offer appropriate assurances and guarantees of non-repetition, if circumstances so require, and have the continuing duty to fulfil the obligations violated;
- 2) cease the behaviour in question includes taking mitigation measures to achieve a drastic reduction in greenhouse gas emissions;
- 3) States held responsible, through their actions or omissions, for the commission of internationally wrongful acts, by reason of their historical or current emissions of greenhouse gases, have an obligation to make reparation for the loss and damage caused to other States, peoples and individuals; this includes, depending on the circumstances, restitution, compensation and satisfaction;
- 4) the effect of sea level raise due to anthropogenic global warming on coasts and insular features does not result in the loss of maritime areas;
- 5) all States and other international actors are obliged to recognise the maintenance of existing maritime areas as measured and communicated in accordance with international law or as decided by an international court or tribunal;
- 6) States have a duty to cooperate in order to obtain the cessation of violations of the above-mentioned international obligations and full reparation for the loss and damage caused;
- 7) States have a duty to cooperate with regard to common but differentiated responsibilities and according to their respective capacities in the protection of the environment.

22. Mr President, Members of the Court, we are not asking you to transform yourselves into heroes saving the world through the law. We are not at all suggesting that you deliver an opinion *de lege ferenda*, or rule *ex aequo et bono*. What we are suggesting is that you exercise your advisory powers to the full extent¹⁷. If you fulfil your role, you will have taken a real step forward, a small one in terms of

¹⁷ See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 237, para. 18.

the extent of all that remains to be done, but a major one in terms of ensuring that general international law plays its rightful role. Like an alarm bell, your response could awaken the major global decision-makers to take, on the basis of the law and once and for all, the measures required to tackle the current ecological crisis.

23. Mr President, Members of the Court, thank you for your attention. This concludes the oral presentation by Costa Rica.