

INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS OF STATES IN RESPECT OF CLIMATE CHANGE

(REQUEST FOR ADVISORY OPINION)

WRITTEN COMMENT
OF THE REPUBLIC OF EL SALVADOR

14 August 2024

TABLE OF CONTENTS

I. Introduction.....	1
II. Preservation of sovereign and jurisdictional rights.....	2
III. Persons displaced due to climate change.....	7
IV. Conclusions.....	11

I. INTRODUCTION

1. The Republic of El Salvador, having submitted a Written Statement to the International Court of Justice on 22 March 2024, avails itself of the opportunity to file the present Written Comment on the submissions made by States and other entities in the proceedings of the *Obligations of States in Respect of Climate Change* Advisory Opinion.
2. Conscious of the fact that the Court is being presented with a substantial number of submissions and materials, the present Written Comment focuses on two specific legal issues: (i) the preservation of sovereign and jurisdictional rights in the face of climate change-induced sea level rise; and (ii) the rights of persons displaced due to climate change.
3. At the same time, El Salvador stands by the submissions it previously made in its Written Statement. In particular, it reaffirms the overarching systemic relevance for the questions addressed to the Court of:
 - a) The no harm rule, also referred to by participants in the proceedings as the “prevention principle”. While international law recognizes the sovereign right of States over natural resources within their territory, it imposes on them a general obligation to ensure that activities within their jurisdiction and control respect the environment of other States and the global commons. It follows that States must refrain from carrying out activities that cause significant harm to other States and to the global commons, and that they have a duty to take reasonable measures to prevent any entities under their jurisdiction or control from carrying out such activities. Without the full implementation of this principle on a global scale, the harm caused by climate change cannot be avoided.
 - b) The principle of common but differentiated responsibilities. A principled distinction between the obligations and capabilities of developed States and developing States remains a fundamental pillar of the international law on climate change. El Salvador shares the view expressed in Brazil’s Written Statement that “[f]ailure to uphold differentiation would seriously undercut the

legitimacy of the regime, including its universality”.¹ Developing States are placed in the unenviable position of having to shoulder the burden of the effects of climate change within their territories when their contribution to this global problem has been comparatively minimal. Developed States are thus expected to take greater responsibility for reducing emissions and, crucially, for providing new and additional financial and technological support to developing States. Essentially, any approach to the interpretation and application of international law that pays no regard to the principle of common but differentiated responsibility is an obstacle to achieving true climate justice.

II. PRESERVATION OF SOVEREIGN AND JURISDICTIONAL RIGHTS

4. The issue of the preservation of sovereign and jurisdictional rights in the context of sea level rise has been raised in at least thirteen Written Statements submitted to the Court.² The submissions all converge in substance, inviting the Court to rule that sea level rise caused by climate change do not affect the sovereign and jurisdictional rights of States. El Salvador respectfully asks the Court to accept this invitation for three main reasons.
5. First, how sea level rise affects the sovereign and jurisdictional rights of States is a distinctively legal question in which, as the Written Statements submitted to the Court attest, there is a genuine collective interest. As discussed at paragraphs 10-11 below, the question is also of great systemic relevance, for it invites the application of interlocking foundational principles of international law.
6. Secondly, the issue falls squarely within the UN General Assembly’s request for an advisory opinion. Some participants raised it in their submissions under question (a), framing it as an obligation relating to the protection of the environment from anthropogenic emissions.³ Others raised it in their submissions under question (b), framing it as a question relating to the legal consequences that flow from the

¹ Brazil WS, para. 12.

² Bahamas WS, paras. 217-226; COSIS WS, paras. 68-75; Costa Rica WS, paras. 125-128; Dominican Republic WS, paras. 4.34-4.42; El Salvador WS, paras. 52-58; Kiribati WS, paras. 190-195; Liechtenstein WS, paras. 74-77; Micronesia WS, paras. 114-117; Nauru WS, paras. 12-13; Salomon Islands WS, paras. 208-213; Sierra Leone WS, para. 3.91; Tonga WS, paras. 233-236; Vanuatu WS, paras. 582-588.

³ Bahamas WS, paras. 217-226; Dominican Republic WS, paras. 4.34-4.42; Liechtenstein WS, paras. 74-77; Micronesia WS, paras. 114-117; COSIS WS, paras. 68-75; Salomon Islands WS, paras. 208-213; Tonga WS, paras. 233-236.

significant harm that States and peoples have suffered and will continue to suffer.⁴ That goes to show that the impact of climate change-induced sea level rise on sovereign and jurisdictional rights cuts across the UN General Assembly's request.

7. Whether the issue is viewed as one of mitigation for territorial losses caused by climate change or one of legal restitution for those losses, the request is more than sufficiently broad to include it. In this respect, the Court is in a completely different position than the International Tribunal for the Law of the Sea, which, in its Advisory Opinion of 24 May 2024, declined to address “the consequences of sea level rise for base points, baselines, claims, rights or entitlements to the maritime zones established under the [UN Convention on the Law of the Sea], or maritime boundaries, and the corresponding obligations” on the grounds that if the Commission of Small Island States on Climate Change and International Law (COSIS) had wished to include the issue in its request for an advisory opinion it would have done so expressly.⁵ The request submitted to ITLOS was indeed a narrow one, focused on marine pollution. In contrast, the General Assembly's request to the Court not only comprises two broadly worded questions but also evinces a global interest in wide-reaching guidance on the rules of international law that are triggered by climate change. While the Court will have to exercise judgement in selecting which issues to cover in its opinion, the preservation of sovereign and jurisdictional rights is a vital legal question which cannot be justifiably omitted. That does not mean, of course, that the Court needs to give a detailed answer about every facet of the issue. A general statement of principle, which can provide the starting point for the working out of practical problems when and as the need arises, would suffice.
8. Thirdly, the Court stands on solid legal ground to confirm that the sovereign and jurisdictional rights of States are not affected by climate change-induced sea level rise.
9. On the one hand, State practice and *opinio juris* are steadily building, especially as regards the preservation of jurisdictional rights under the law of the sea through the

⁴ Costa Rica WS, paras. 125-128; El Salvador WS, paras. 52-58; Kiribati WS, paras. 190-195; Vanuatu WS, paras. 582-588.

⁵ *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion of 21 May 2024, para. 150.

“freezing” of baselines. The emergence of a broad agreement around this issue is evidenced by the reactions of States to the 2021 Declaration on Preserving Maritime Zones in the Face of Climate Change-Related Sea-Level Rise issued under the auspices of the Pacific Islands Forum. As COSIS persuasively shows in its Written Statement, “at least 104 States – representing a strong majority of island and coastal States – acknowledge that maritime baselines remain fixed at their current coordinates notwithstanding physical coastline changes brought about by sea-level rise”.⁶ That practice is sufficiently widespread and representative to ground a rule of customary international law on this point.

10. On the other hand, the proposition that climate change resulting from human conduct must not affect the basic sovereign and jurisdictional rights of States is underpinned by interlocking foundational principles of the international legal system, including:

- a) The principles of legal certainty and stability. As the Republic of Bahamas noted in its Written Statement, the stability and finality of land and maritime boundaries has not only “long been affirmed by the Court and international arbitral tribunals” but is also expressed in the “legal recognition of historic title” that “reflects the desire by States to equitably preserve existing entitlements over waters”.⁷ The principles of legal certainty and stability are also at the forefront of the International Law Association’s work on international law and sea level rise.⁸ The ILA has recently adopted Resolution 01/2024, where it endorsed the following propositions:

“On the grounds of legal certainty and stability, provided that the baselines and the outer limits of maritime zones of a coastal or an archipelagic State have been properly determined..., these baselines and limits are not required to be redetermined should climate change related sea level rise affect the geographical reality of the coastline...”

⁶ COSIS WS, para. 72 and footnote 209. See also the analysis in International Law Association, Final Report of the Committee on International Law and Sea Level Rise (2024), pp. 41-43 (available at <www.ila-hq.org/en_GB/documents/01-final-report-committee-on-international-law-and-sea-level-rise>).

⁷ Bahamas WS, para. 223.

⁸ International Law Association, Final Report of the Committee on International Law and Sea Level Rise (2024), pp 41-43 (available at <www.ila-hq.org/en_GB/documents/01-final-report-committee-on-international-law-and-sea-level-rise>).

“The principle that the existing recognition of a State is unconditional and irrevocable legitimately provides for and supports the objective of international law to facilitate legal certainty and stability. It should therefore be recognized as the key guidance for addressing the unprecedented challenge faced by low-lying SIDS in a mid- to long-term perspective, when most of their land territory may become uninhabitable or submerged in consequence of sea level rise. Thus, as recognized by some States, climate change-related sea level rise should not cause the loss of statehood of any State nor its membership in the United Nations, its specialized agencies, or other international organizations.”⁹

- b) Territorial integrity, self-determination, and permanent sovereignty over natural resources. As Kiribati, Liechtenstein, and COSIS noted, the exercise of the inalienable right to self-determination is premised upon the preservation of the link between a people and its territory, and the fact that that territory may be submerged as a result of climate change cannot as such extinguish that right or exempt other States from their obligation to respect it.¹⁰ The principle of territorial integrity and the right of permanent sovereignty over natural resources point in the same direction. As COSIS observed in its Written Statement:

“For a State’s territorial integrity to be ‘inviolable’ and for it to have ‘permanent sovereignty’ of its natural resources, international law requires that States continue to recognize the continuity of other States’ territorial integrity on the basis of existing entitlements, particularly in light of conduct outside a State’s own control that negatively impacts those entitlements. In the context of global warming, inviolability thus requires the continuity of sovereign entitlements for small island States,

⁹ International Law Association, Resolution 2024/1, available at: <https://www.ila-hq.org/en_GB/documents/ila-resolution-1-committee-on-international-law-and-sea-level-rise-en-1>. The ILA makes specific reference to the UN Convention on the Law of the Sea. El Salvador’s reference to the ILA’s work is without prejudice to the legal position of States, such as El Salvador, that are not party to that Convention.

¹⁰ Kiribati WS, paras. 193-194; Liechtenstein WS, paras. 75-76; COSIS WS, paras. 74-75.

including maritime baselines, notwithstanding changes to the physical geography of their territory attributable to climate change.”¹¹

c) The right of States to survival affirmed by the ICJ itself in the *Nuclear Weapons* advisory opinion. As the Dominican Republic submitted in its Written Statement, the right of States to survival supports both a “presumption of continuity of statehood” and “an obligation of States to respect the legal measures set forth by the affected States to preserve their territory”.¹²

11. That all those foundational principles call for the preservation of sovereign and jurisdictional rights in the face of climate change-induced sea level rise speaks to the systemic relevance of the issue. That is in itself a reason for the Court, as the principal judicial organ of the United Nations and the only international tribunal with general jurisdiction, to engage with it and draw the threads together. Just as human life needs to adapt to the physical changes caused by climate change, so does the international legal system as a whole. The sovereign and jurisdictional rights vested in statehood have long been viewed as resilient, and the present proceedings provide the Court with the opportunity to join the International Law Commission and the International Law Association in confirming that resilience. The Court can do so by affirming that States are entitled under international law to fix their baselines so that jurisdictional rights under the law of the sea are not affected by sea level rise, and by affirming a presumption of continuity of statehood for the extreme cases in which sea level rise causes the submersion of a State’s territory.

12. In this connection, El Salvador reiterates the position that it took in its Written Statement to the effect that:

“[T]he loss of territory caused by climate change to vulnerable coastal and island States is not damage of the kind that can be addressed through a traditional application of the remedies prescribed by the law of State responsibility. It is, rather, damage that leads to the diminution of sovereign and jurisdictional rights in ways that directly affects the injured parties’ statehood, legal personality, and status as sovereign equal. International law cannot plausibly treat that kind of damage as if it were ‘a vicissitude of life’, a factual

¹¹ COSIS WS, para. 71.

¹² Dominican Republic WS, para. 4.42.

change that must produce the ordinary legal effects – not when that factual change is a direct result of the wrongful conduct of third States. Instead, international law must treat the preservation of sovereign and jurisdictional rights over maritime spaces as a form of legal restitution”.¹³

III. PERSONS DISPLACED DUE TO CLIMATE CHANGE

13. The Republic of El Salvador takes the opportunity to supplement the observations made in its Written Statement about the issue of climate migration. El Salvador respectfully invites the Court to address, in its consideration of human rights obligations triggered by climate change, the special legal challenges posed by the displacement of people and populations. In this connection, it wishes to make three points.
14. First, as the Inter-American Court of Human Rights has observed in its landmark advisory opinion on *The Environment and Human Rights*, the “right to not be forcibly displaced” is one of the human rights that are “particularly vulnerable to environmental impact”.¹⁴ The Inter-American Court has also observed that “displacements caused by environmental deterioration frequently unleash violent conflicts between the displaced population and the population settled on the territory to which it is displaced”, thus compromising the right to peace.¹⁵
15. Secondly, El Salvador finds itself in agreement with the Bahamas in that “States’ obligation to cooperate in addressing the harmful impacts of climate change includes cooperation with respect to displaced persons, including beyond their territorial jurisdiction”.¹⁶ The ILC’s Draft Articles on the Protection of Persons in the Event of Disasters and the ILA’s Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise, both cited by the Bahamas in its Written Statement, are authoritative documents the Court can have regard to in determining what that obligation of cooperation entails. El Salvador agrees with the Bahamas that cooperation may include humanitarian relief, the offering of legal

¹³ El Salvador WS, para. 56.

¹⁴ Advisory Opinion OC-23/17 of November 15, 2017, Requested by the Republic of Colombia, para. 66, available at: <https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf>. The other rights listed by the Inter-American Court as particularly vulnerable to environmental impact were the rights to life, personal integrity, private life, health, water, food, housing, participation in cultural life, and property.

¹⁵ Ibid.

¹⁶ Bahamas WS, para. 229.

status and benefits to people displaced by climate change, and the development of common legal frameworks both for the protection of those people's rights and for the facilitation of international cooperation.¹⁷

16. Thirdly, El Salvador is persuaded by Vanuatu's submission that the States whose wrongful conduct makes a significant contribution to climate change are under an obligation to provide restitution for the displacement of people. Vanuatu convincingly refers to some measures of restitution identified by the UN High Commissioner for Human Rights in a report to the Human Rights Council, including the requirements to:

“Promote and expand safe, regular, dignified and accessible pathways for human mobility that respect and protect the rights of persons affected by climate change, including through specific protection mechanisms...

Refrain from returning migrants to territories affected by climate change that can no longer sustain them and steadfastly uphold the fundamental principle of non-refoulement and other international human rights law obligations, to provide protection for persons who are unable to return to their homes as a result of climate change...

Facilitate the integration of climate change-related migrants in host communities, the regularization of their legal status and their access to labour markets...”¹⁸

17. The applicability of the principle of non-refoulement to persons displaced by climate change is a key issue to be considered in the Court's answer. It has been suggested that the 1951 Convention relating to the Status of Refugees does not apply, without more, to climate migrants.¹⁹ However, the interpretation of the concept of refugee in international law invites an evolutionary approach, one which takes into consideration situations that the drafters of the 1951 Convention may not have foreseen but which are analogous to the notion of “persecution” that the concept responds to. Some relevant subsequent practice points in that direction. For

¹⁷ Ibid., para. 231.

¹⁸ UN Human Rights Council, “Addressing Human Rights Protection Gaps in the Context of Migration and Displacement of Persons across International Borders Resulting from the Adverse Effects of Climate Change and Supporting the Adaptation and Mitigation Plans of Developing Countries to Bridge the Protection Gaps”, 23 April 2018, UN Doc A/HRC/38/21, para. 66.

¹⁹ Ibid., para 24.1.

example, the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa includes in its definition of refugee “any person who, as a result of foreign aggression, foreign occupation or domination, or events seriously disturbing public order in part or all of his or her country of origin, or the country of his nationality, is obliged to abandon his habitual residence to seek refuge in another place outside his country of origin or the country of his nationality”.²⁰ Likewise, the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama adopted, in 1984, the Cartagena Declaration on Refugees, which, “in view of the experience gained from the massive flows of refugees in the Central American area”, provides that “it is necessary to consider enlarging the concept of a refugee” so as to include “persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order”.²¹ More recently, the UN High Commissioner for Refugees observed that even under the narrower definition found in the 1951 Convention “the adverse effects of climate change and disasters on an entire community may strengthen rather than weaken the evidence that justifies the fear of an individual being persecuted”.²² It is thus advisable to take an open-minded approach to the concept of refugee that makes sense of how climate change can give rise either to persecution or to events seriously disturbing public order. El Salvador agrees with the Salomon Islands’ submission that “climate refugees should be afforded under the Refugee Convention, and that the principle of non-refoulement applies to those escaping environmentally hazardous due to climate change effects”.²³

18. Even when persons displaced do not qualify as refugees under international law, they may still be entitled to the protection of the principle of non-refoulement under other existing rules of international law. For example, in *Teitiota v. New Zealand*, the Human Rights Committee observed that “[t]he obligation not to extradite,

²⁰ OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969), Art. 1(2).

²¹ Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena Declaration on Refugees (1984), Conclusion 3, available at: <<https://www.unhcr.org/uk/media/cartagena-declaration-refugees-adopted-colloquium-international-protection-refugees-central>>.

²² United Nations High Commissioner for Refugees, ‘Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters’ (2020), para. 8, available at: <<https://www.refworld.org/policy/legalguidance/unhcr/2020/en/123356>>.

²³ Salomon Islands WS, para. 227.

deport or otherwise transfer, pursuant to article 6 of the [International Covenant on Civil and Political Rights], may be broader than the scope of the principle of non-refoulement under international refugee law, since it may also require the protection of aliens not entitled to refugee status”.²⁴ It went on to conclude that:

“[W]ithout robust national and international efforts, the effects of climate change in receiving States may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the non-refoulement obligations of sending States. Furthermore, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized.”²⁵

²⁴ *Teitiota v. New Zealand*, Communication No. 2728/2016 (2020), para. 9.3, available at: <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/127/D/2728/2016&Lang=en>.

²⁵ *Ibid.*

IV. CONCLUSIONS

19. In the present Written Comment, the Republic of El Salvador wishes not only to reaffirm the points made in its Written Statement but also to respectfully urge the Court to address two specific topics that are of great interest to the international community in general and to the States and communities most vulnerable to climate change in particular: the preservation of sovereign and jurisdictional rights, and obligations owed in connection with the displacement of people. The Salvadoran State is convinced that the International Court of Justice has a central role to play in elucidating how international law applies to climate change, and invites it to provide a robust and forward-looking answer that can help frame the responses of States, international organizations, and other entities for the decades to come.

14 August 2024

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