The ICJ and the UN Climate Regime: Clarifying Mitigation Obligations under the Paris Agreement

Christina Voigt[*]

I. An Opinion by the 'World Court'

The 2-hour reading of the climate change Advisory Opinion by the president of the International Court of Justice (ICJ/the Court), judge Yuji Iwasawa, on 23 July 2025 was a historical moment. The Court put forward its legal view on two fundamental questions of international law concerning an existential threat of planetary proportions that imperils all forms of life and the very health of our planet.[1] Not only had this case attracted the highest level of participation in both the history of the Court and that of its predecessor, the Permanent Court of International Justice;[2] it also concerned a legal issue never before addressed by the Court. In light of this, a commentator aptly noted: 'With this opinion, the ICJ really became the World Court'.

For those of us who were in the Great Hall of Justice that afternoon, this was tangible and audible by the gasps (and even tears) of euphoria and relief by several participants in the audience, especially by those who worked the hardest to get this case to the world´s highest court; who are most affected by the impacts of climate change.

The Court spoke with authority, clarity, consistency and comprehensiveness. By doing so, it left no doubt about the multiple, parallel and mutually supportive legal obligations of States to protect the climate system, stemming from various international treaties as well as customary international rules, based on a stringent due diligence standard – and about the legal consequences if these obligations are breached.

---

* Professor of Law, University of Oslo, Norway. Chair of the IUCN World Commission on Environmental Law, and lead legal counsel for IUCN in the ICJ AO proceedings.

1 ICJ, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025, para. 456.

2 ICJ Press release, 23 July 2025, available at < https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-pre-01-00-en.pdf>.

II. ICJ as the First International Court to Interpret the Paris Agreement

Much has been and will be written about the findings of the Court. Many aspects deserve deeper analysis.[3] However, in the following, I will focus on one aspect which may have the most immediate impact: the clarification by the Court of the mitigation obligations under the Paris Agreement.

As a court of general competence, the ICJ considered the UN climate treaties, i.e. the UNFCCC, Kyoto Protocol and the Paris Agreement, to be principal legal instruments regulating the international response to the global problem of climate change[4] among the directly relevant applicable

3 These include, for example, the customary obligations of harm prevention and cooperation in the context of climate change (see Jutta Brunnée, 'The Advisory Opinion on *Obligations of States in Respect of Climate Change*: Harm Prevention under Customary International Law', in this volume; Jannika Jahn and Nele Suchantke, 'The ICJ Advisory Opinion on Climate Change: From Carbon Sovereignty to Trusteeship of the Climate Commons', in this volume), the elements for determining strict due diligence (again see Jutta Brunnée, 'The Advisory Opinion on *Obligations of States in Respect of Climate Change*: Harm Prevention under Customary International Law', in this volume), the mutual supportiveness of different treaties (see Andrej Lang and Denise Koecke, 'Rising to the Occasion: The World Court as Architect of a Harmonious International Climate Law Framework', in this volume), human right to a clean, healthy and sustainable environment as a precondition for other human rights (see Hellen Keller, 'A Right to a Clean, Healthy and Sustainable Environment – or Perhaps not (yet)?', in this volume), the legal effects of sea level rise, such as the absence of an obligation of States to update charts of maritime zones (ICJ, *Obligations of States in Respect of Climate Change* (n. 1), paras. 358–362. See Rozemarijn Roland Holst, 'Climate Change Law and the Law of the Sea: Systemic Impacts of the ICJ and ITLOS Advisory Opinions Read Together', in this volume) and the presumption of the continuity of statehood even if constituent elements disappear (ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 363. See Dave-Inder Comar, 'The ICJ's Historic Nod to Self-Determination and Climate Change Impacts', in this volume), migration and the role of non-refoulement (ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 378. See Malavika Rao'Climate Displacement in the ICJ's Advisory Opinion: Recognised but not Resolved', in this volume), obligations *erga omnes* (see again Jannika Jahn and Nele Suchantke, 'The ICJ Advisory Opinion on Climate Change: From Carbon Sovereignty to Trusteeship of the Climate Commons', in this volume), the implications of non-repetition and cessation of internationally wrongful acts, as well as the consequences of State responsibility (see Phillip Paiement and Corina Heri, 'Strengthening International Climate Obligations Beyond Paris: Situating the ICJ's Opinion within a Comparative Legal Context', in this volume) – and many more.

4 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 116.

law sources.[5] This allowed it to be the first international court to interpret the provisions of the Paris Agreement with a profound level of detail.[6]

This situation was not unexpected. Many participants had during the proceedings pointed to the Paris Agreement in their written and oral statements. The challenge, however, was that the legal weight and views regarding the Agreement differed significantly: from being worth nothing, to being the only game in town, but with only discretionary, voluntary commitments. The Court proved both ends of this spectrum of opinions wrong.

By applying a careful and diligent legal analysis, it interpreted the provisions of the Paris Agreement in light of its the object and purpose and context. In doing so, it established the clear content of the Agreement's climate change mitigation provisions. This is not a small feat, especially given the long and contentious negotiations of the Agreement[7] and its high degree of complexity and ambiguity.[8]

III. The Relationship between UNFCCC and the Paris Agreement

The Court clarified the relationship between the UNFCCC and the Agreement (and the Kyoto Protocol) as both being independent international treaties with their own decision-making bodies – the COP and the CMA (and CMP), respectively. It also reiterated that the Paris Agreement is not a protocol to the UNFCCC.[9] Yet, they complement each other.[10] While the UNFCCC serves a foundational and coordinating purpose for its related

5 Which also included the UN Charter, UNCLOS, international human rights treaties, CBD, the Ozone treaties (Vienna Convention and Montreal Protocol), UNCCD, customary norms, i.e. harm prevention and cooperation, and relevant principles.

6 ITLOS and the IACtHR in their respective climate change Advisory Opinions had referred to the Paris Agreement as relevant in the interpretations of the legal treaties under their jurisdiction but did not provide a detailed interpretation of the Agreement.

7 Daniel Klein, Daniel Klein, María Pía Carazo, Meinhard Doelle, Jane Bulmer, Andrew Higham (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford University Press 2017); Lavanya Rajamani, 'The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations', JEL 28 (2016) 337–358.

8 Daniel Bodansky, 'The Legal Character of the Paris Agreement', RECIEL 25 (2016), 142–150.

9 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 193.

10 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 120.

legal instruments on climate change, including the Paris Agreement,[11] the Agreement translates the basic principles and general obligations of the UNFCCC into a set of more specific, interrelated obligations.[12]

While the Court recognizes the Paris Agreement as the most recent and most comprehensive universal treaty addressing climate change, it did not consider it to be *lex posterior* nor *lex specialis* to the UNFCCC.[13] The Court based this finding on the absence of any incompatibility between the two treaties. In particular the explicit reference in the chapeau of Art. 2 of the Agreement to 'enhancing the implementation of the Convention, including its objective' considered the Court to indicate that the Paris Agreement furthers the UNFCCC's ultimate objective of 'stabilization of the greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system' (UNFCCC, Article 2) – and does not conflict with it.[14] It even went so far to consider the UNFCCC's overall objective to constitute the object and purpose of the Paris Agreement, with the temperature goal of the Agreement providing a means for achieving this object and purpose.[15] The Court therefore found that not only are the two treaties not incompatible, but are mutually supportive, with the Paris Agreement providing greater specification to the general obligations contained in the UNFCCC.[16]

In this context, the Court also clarified that while the UN climate treaties are the principal instruments with respect to climate change obligations, they do not constitute *lex specialis* in relation to other rules with respect to climate change – both treaty and customary international law.[17] The Court could not find any actual inconsistencies between the climate change treaties and other relevant ules and principles of international law.[18] Rather, it considered them a single set of compatible obligations;[19] informing and complementing each other in a mutually supportive manner.[20]

---

11 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 117.
12 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), paras. 120, 195.
13 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 223.
14 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 194.
15 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 225.
16 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 195.
17 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 163.
18 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 168.
19 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para 165.
20 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), paras. 324, 329, 334. See Andrej Lang and Denise Koecke (n. 3), in this volume.

IV. The 1.5°C Temperature Goal

One of the most surprising elements in the interpretation of the Paris Agreement is the Court´s dealing with the temperature goal. The Court first established that the Agreement´s aim of 'holding the increase in the global average temperature to well below 2°C above pre-industrial levels' and pursuing efforts 'to limit the temperature increase to 1.5°C above pre-industrial levels' in Art. 2.1(a) represents an 'important concretization',[21] and 'specification and quantification'[22] of the UNFCCCs overall objective of preventing dangerous interference with the climate system.

Yet, Art. 2.1(a) mentions two goals: 'well below 2°C' and '1.5°C'. Here, the Court clarified that 1.5°C has become the 'scientifically based consensus target under the Paris Agreement' and is the 'primary temperature goal'.[23] It bases its finding on decisions by the CMA after the Agreement was adopted, especially the Glasgow Climate Pact (Decision 1/CMA.3) and the Outcome of the First Global Stocktake (Decision 1/CMA.5), which, in the Court's view, express agreement in substance between the parties regarding the interpretation of Articles 2 and 4 of the Paris Agreement, and thus constitute subsequent agreements in relation to the interpretation of the Paris Agreement within the meaning of Article 31.3(a) of the Vienna Convention on the Law of Treaties. This finding in the context of the temperature goal provides helpful guidance on the relative importance of the temperature goals to each other and on the question of to which goal to adhere.

This finding by the Court may have relevant implications in future negotiations under the CMA. It puts considerable legal weight on CMA decisions. While this can be a positive development, it may also complicate further the process of reaching consensus, if parties expect that their consensus expressed in, from the outset non-binding, CMA decisions can be interpreted as binding subsequent agreements.

V. Mitigation Obligations in the Paris Agreement

In the Advisory Opinion in general, and in the analysis of the Paris Agreement in particular, the Court put significant focus on mitigation

21 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 223.
22 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 270.
23 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 224.

obligations as those are most directly linked to 'protecting the climate system'. The Court therefore set out to clarify the mitigation obligations in the Paris Agreement, which are found in art. 4.[24] It distinguished them in obligations of result and obligations of conduct, although admitting that these categories are not always clear cut and are mutually supportive.[25] In interpreting the provisions in art. 4, the Court took into account the temperature goal contained in Article 2 and referenced in Article 4, paragraph 1, which constitutes, in addition to the object and purpose of the Agreement, the 'context' relevant for the interpretation of obligations in the Paris Agreement.[26]

1. Obligations of Result

With respect to mitigation, the Court identified several obligations of result: Art. 4.2 (to prepare, communicate and maintain successive NDCs), Art. 4.9 (every 5 years), Art. 4.13 (accounting) and Art. 4.12 (registration in public registry).[27] Although these are obligations of result (and procedural in nature), the Court noted that the 'mere formal preparation, communication and maintenance of successive NDCs is not sufficient to comply with the obligations under Article 4'.[28] It explained that 'an obligation of result, such as, for example, an obligation to "adopt national policies and take corresponding measures on the mitigation of climate change", cannot be met merely by the adoption of any policies and the taking of corresponding measures. To comply with this obligation of result, the policies so adopted, and the measures so taken must be such that they are able to achieve the required goal. In other words, the adoption of a policy, and the taking

24 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 230.
25 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 228.
26 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 231.
27 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 235. Other obligations of result, such as to submit Biennial Transparency Reports under Art. 13.7 PA, to participate in the Facilitative Multilateral Consideration of progress under Art. 13.11 PA, and the communication of biennial information under Art. 9.5 PA (see for these obligations: Decision 20/CMA.1, para 22.1(a)) were not considered by the Court.
28 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 236.

of related measures, as a mere formality is not sufficient to discharge the obligation of result.'[29]

This led the Court to consider obligations with respect to the *content* of NDCs.

2. Obligations of Conduct

a) Content of NDCs

The legal status of NDCs, especially regarding their content, was one of the most contentious issues during the negotiations of the Paris Agreement. Several parties wanted NDCs to be legally binding, for example by being annexed to the Paris Agreement. Other Parties were of the view that the 'pledge and review' concept which emerged from the Copenhagen Accord was the appropriate way forward, where submitting NDCs would be merely a procedural obligation, but their content, and especially their achievement, would not fall within the legally-binding scope of the Agreement. The compromise was the formulation in Art. 4.2, which is silent on the content of NDCs, and the ambiguous formulation in Art. 4.2, second sentence, on the aim to achieve NDC. Ever since the adoption of the Agreement, it was therefore often (misleadingly) characterised as 'bottom-up' and NDCs as voluntary and discretionary.

The ICJ smashed this characterisation by clearly confirming that both the content and the implementation and achievement of NDCs are obligations of conduct, based on a stringent due diligence standard.

It explained that States do not enjoy unfettered discretion when preparing NDCs.[30] Rather, their discretion is limited.[31] As an obligation of conduct, parties are obliged to exercise due diligence when putting forward their NDC. Accordingly, NDCs must satisfy certain expectations and standards under the Paris Agreement that apply to parties in preparing their NDCs, as set out in Art. 4.3.[32]

29 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 208.
30 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 270.
31 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 245.
32 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 249.

The Court clarified that Art. 4.3 is not a merely voluntary expectation. It stated that:

> 'While Article 4, paragraph 3, uses the term "will", rather than the prescriptive term "shall" in relation to the content of NDCs, the Court considers that the provision is not to be read as merely hortatory, as suggested by some participants. Rather, the term "will" is used here in a prescriptive sense, reflecting the expectation that "successive nationally determined contributions will represent a progression" and "reflect [a party's] highest possible ambition", without prescribing precisely what constitutes a progression, or what reflects a party's highest possible ambition. In these proceedings, it falls on the Court to shed light on the meaning and scope of the terms contained in Article 4, paragraph 3, thereby clarifying for parties their obligations relating to the content of their NDCs.'[33]

These standards require, first, that NDCs need to represent a progression, which the Court interpreted as a legal obligation of due diligence that 'a party's NDCs must become more demanding over time'.[34]

Second, the Court stated that, as a requirement of exercising due diligence, a party's NDCs must reflect highest possible ambition, to which many parties had referred to in their oral statements. It stated:

> 'While this term is not defined in the Paris Agreement, the Court considers that the level of ambition to be reflected in a party's NDCs has not been left entirely to the discretion of the parties. The provision […] reveals that the content of a party's NDCs must, in fulfilment of its obligations under the Paris Agreement, be capable of making an adequate contribution to the achievement of the temperature goal. In the present instance, the relevant context is to be found, inter alia, in Article 3, which sets the expectation that parties are to "undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of this Agreement as set out in Article 2. This provision reveals the necessity for the ambition contained in a party's NDC to relate to the object and purpose of the Agreement set out in

33 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 240.
34 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 241.

Article 2, i.e. to hold the increase in the global average temperature to below 1.5°C.'[35]

Literature had long pointed to such obligations of conduct contained in the Paris Agreement[36] and has recently provided more detail on the contours of 'highest possible ambition' in Art. 4.3.[37] It is suggested there that in the preparation of NDCs a State must do the best it can – its utmost – when preparing each successive NDC. The preparation of the NDC needs to be based on a comprehensive assessment of all mitigation options in all relevant sectors. Parties should deploy all political, legal, socio-economic, financial and institutional capacities and possibilities in defining their NDC objectives. Moreover, parties are expected to align their level of ambition with their respective responsibilities and capabilities, considering national circumstances. Parties also need to plan their climate strategies holistically and within a long-term period. In this context, it is important to align NDCs with long-term low greenhouse gas emission development strategies.

Third, parties must be informed by the outcomes of the Global Stocktake in the preparation of their NDCs, according to Arts. 14.3 and 4.9., and when communicating their NDCs must provide the information necessary for clarity, transparency and understanding, according to Art. 4.8.

All these elements determine the obligation of conduct to be exercised by parties when preparing the content of their NDC.

The standard applicable to this obligation of conduct is due diligence, which varies depending on a range of factors such as the risk of harm and the urgency involved, the need to take appropriate and, if necessary, precautionary measures, which take account of scientific and technological information, as well as relevant rules and international standards, and which vary depending on each State's respective capabilities, undertaking risk assessments and notifying and consulting other States, as appropriate.[38]

35 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 242.

36 Voigt, Christina, 'The Paris Agreement: What is the standard of conduct for Parties?', QIL 26 (2016), 17–28; Christina Voigt, 'The Power of the Paris Agreement in International Climate Litigation', RECIEL 32 (2023), 237 -249; Benoit Mayer, 'The 'Highest Possible Ambition' on Climate Change Mitigation as a Legal Standard' ICLQ 73 (2024), 285–317.

37 Voigt, Christina; Sauter, Philipp; Guerreiro Teixeira Rita; Rogelj, Joeri; Schleussner, Carl and Sulyok, Katalin, 'The Legal Power of Highest Possible Ambition – Setting Legal and Scientific Benchmarks to Assess Highest Possible Ambition under Article 4(3) of the Paris Agreement', CLLA 15 (2025), 1–24.

38 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 134.

Because of the seriousness of the threat posed by climate change, the Court considered that the standard of due diligence is stringent when preparing each party´s successive NDC.[39] According to the Court, this means that 'each party has to do its utmost to ensure that the NDCs it puts forward represent its highest possible ambition in order to realize the objectives of the Agreement'.[40]

NDCs must satisfy these standards under the Paris Agreement. A breach of this obligation of conduct would constitute an internationally wrongful act which can give rise to State responsibility.

b) Implementation and Achievement of NDCs

Further, not only the content of NDCs, but also their national implementation and achievement are obligations of conduct and are not voluntary. The Court noted that the obligation that parties 'shall pursue domestic mitigation measures' in Art. 4.2 (second sentence) is substantive in nature and creates an individual obligation of conduct for each party to the Agreement.[41]

This does not mean that parties are obligated to achieve their NDC targets, but rather that they must make best efforts, based on stringent due diligence to obtain such a result.[42] The Court considered that the obligation to 'pursue domestic mitigation measures' that aim to achieve the objectives of their NDCs requires States to be proactive and pursue domestic measures that are reasonably capable of achieving the NDCs set by them, including in relation to activities carried out by private actors.[43] These measures may include putting in place a national system, including legislation, administrative procedures and an enforcement mechanism, and exercising adequate vigilance to make such a system function effectively, with a view to achieving the objectives in their NDCs.'[44]

39 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 246.
40 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), paras. 246, 270.
41 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 251.
42 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 254. See also Jutta Brunnée (n. 3), in this volume.
43 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 252. See Harro van Asselt, 'The Private Life of the ICJ Advisory Opinion on Climate Change', in this volume.
44 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 253.

VI. The Role of Common but Differentiated Responsibilities and Respective Capabilities (CBDR-RC), In the Light of Different National Circumstances

The obligation of conduct to do the utmost when preparing NDCs that progressively represent highest possible ambition, and the obligation of conduct to deploy best efforts when pursuing domestic measures to implement and achieve the NDCs apply to all parties. However, consistent with the principle of common but differentiated responsibilities and respective capabilities, the standard varies.[45] The Court noted that CBDR reflects the need to distribute equitably the burdens of the obligations in respect of climate change.

The Court observed that CBDR does not categorically place different burdens on whether a State is a developed or developing country. Rather, in the view of the Court, the principle calls for taking into account the circumstances of the State in question, such as historical and current contributions to cumulative GHG emissions, and their different current capabilities and national circumstances, including their economic and social level of development and other national circumstances.[46] The Court also observed that this principle has been formulated in the Paris Agreement by the addition of the phrase 'in the light of different national circumstances' which adds nuance to the principle by recognising that the status of a State as developed or developing is not static.[47]

> Importantly, in this dynamic context, the Court notes that:
>
> 'on one end of the spectrum are the most developed States which have contributed significantly to the overall amount of GHG emissions since the Industrial Revolution, and which have resources and the technical capacity to implement wide-ranging emission reductions. On the other end are those least developed States that have contributed only minimally to

45 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 247.

46 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 148. See Lovleen Buhllar, 'The Advisory Opinion on Climate Justice and the "Global North-South Divide"', in this volume.

47 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 226. See on the nuanced and dynamic nature of CBDR, Christina Voigt and Felipe Ferreira, '"Dynamic Differentiation": The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement' TEL 5 (2016), 285–303.

> historical emissions and have only a limited capacity to transform their economies. In between are States that have progressed considerably in their development since the conclusion of the UNFCCC in 1992, in line with that instrument's expectation that "the share of global emissions originating in developing countries will grow to meet their social and development needs" (UNFCCC, third preambular paragraph), and some of which now contribute significantly to global GHG emissions and possess the capacity to engage in meaningful mitigation and adaptation efforts, as well as other States with significant resources and technical capabilities to contribute to addressing global climate change.'[48]

Here, the observations by the Court on CBDR in the context of the customary harm prevention rule are also of relevance. In referring to the International Tribunal of the Law of the Sea climate change Advisory Opinion, the Court noted that CBDR 'requires a State with greater capabilities and sufficient resources to do more than a State not so well placed', but that, based on CBDR, 'implementing the obligation of due diligence requires even the latter State to take all the means at its disposal to protect the climate system in accordance with its capabilities and available resources'.[49] It stated:

> 'The difference between the respective capabilities of States, as one of the factors which determines the diligence required, cannot therefore merely result from a distinction between developed and developing countries, but must also depend on their respective national circumstances. The multifactorial and evolutive character of the due diligence standard entails that, as States develop economically and their capacity increases, so too are the requirements of diligence heightened. Finally, the reference to available means and capabilities cannot justify undue delay or a general exemption from the obligation to exercise due diligence.'[50]

VII. Legal Consequences

The clarification by the Court of the mitigation obligations in the Paris Agreement is crucial. The Agreement, while not the only treaty to contain climate change mitigation obligations, is the most comprehensive and spe-

48 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 150.
49 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 291.
50 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 292.

cific one. It is also the one to which due to the annual meeting of the COP significant political and stake-holder attention is garnered. Moreover, its 5-year cycles are put in place to ensure that Parties consistently and repeatedly review and improve their mitigation ambition. Importantly, the Court showed that the characterisation of the Agreement as voluntary, discretionary or 'bottom-up' was unfounded. Rather, Parties have a set of concrete obligations of result and obligations of conduct which must be exercised with stringent due diligence. Nothing is voluntary!

In the clear words of the Court

> 'to comply with their mitigation obligations, all parties must take measures, in fulfilment of their obligations under the Paris Agreement, that make an adequate contribution to achieving the collective temperature goal; these measures must be reflected in parties' NDCs which must be adjusted to be more demanding every five years; and these NDCs must, when taken together, be capable of achieving the temperature goal and the purposes of the Agreement. While the scope and content of measures contained in the NDCs may vary in accordance with the means available to parties and their capabilities, parties do not enjoy unfettered discretion in the preparation of their NDCs. Each party has a due diligence obligation to do its utmost to ensure that the NDCs it puts forward represent its highest possible ambition in order to realise the objectives of the Agreement (Article 4, paragraph 2). Consequently, parties have an obligation to undertake best efforts to achieve the content of their NDCs.'[51]

The interpretation of the preparation of NDCs as an obligation of conduct with Art. 4.3 establishing due diligence requirements in this regard had already been put forward right after the adoption of the Paris Agreement.[52] Yet, it took years before it was taken up in academic writing more broadly.[53] It is, thus, an important development in the discourse on the Paris Agreement, that the ICJ embraced the same understanding and clearly reject the perception of NDCs falling entirely in the discretion of States. This finding

51 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 270.
52 Christina Voigt (n. 36); Voigt and Ferreira (n. 47).
53 Mayer (n. 36); Lavanya Rajamani, 'Due Diligence in International Climate Change Law' in Anne Peters, Heike Krieger and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (Oxford University Press 2020), 163–180.

by the ICJ sent a powerful, timely and important signal to Parties in the preparation of the NDCs not only in 2025 – but every 5 years thereafter.

Finally, the clarification of the legal obligations regarding NDC may have immediate impact in domestic climate litigation. The interpretation of article 4 that says that every State must do its utmost in adopting – and then use its best efforts when implementing – an NDC of its highest possible ambition will be useful in domestic legal proceedings where Courts are asked to review the effectiveness and legality of their countries' climate plans and their implementation. States must use their regulatory power to be proactive and pursue measures that are reasonably capable of achieving the NDCs. This might be the push needed to close the ambition and implementation gap in NDCs.

However, if states do not follow suit, the ICJ clearly stated the consequences:

> 'Failure of a State to take appropriate action to protect the climate system from GHG emissions — including through fossil fuel production, fossil fuel consumption, the granting of fossil fuel exploration licences or the provision of fossil fuel subsidies — may constitute an internationally wrongful act which is attributable to that State. The Court also emphasizes that the internationally wrongful act in question is not the emission of GHGs per se, but the breach of conventional and customary obligations identified under question (a) pertaining to the protection of the climate system from significant harm resulting from anthropogenic emissions of such gases.'[54]

This includes the mitigation obligations under the Paris Agreement.

VIII. Conclusions

In the, so far, 10 years of its existence, the Paris Agreement has often been dismissively characterised as 'soft', 'weak' or 'voluntary'. The Court set an end to such misleading characterisation.

When it comes to mitigation, there is no voluntarism.

All parties to the Paris Agreement have an obligation of result to prepare, communicate and maintain successive and progressive NDC, and a sub-

54 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 427.

stantive obligation of conduct to act with stringent due diligence in putting forward increasingly demanding NDCs at the level of their highest possible ambition, that make an adequate contribution to achieving the 1.5ºC goal, in accordance with their common but differentiated responsibilities and respective capabilities. They also must pursue, as a matter of obligation of conduct based on stringent due diligence, domestic mitigation measures capable of achieving the objectives set out in their NDCs.

While the ICJ Advisory Opinion contains many important, far-reaching findings. This one might have the most direct and immediate impact.