

## CASE NOTE

# THE INTERNATIONAL COURT OF JUSTICE'S ADVISORY OPINION ON CLIMATE CHANGE

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### I SETTING THE SCENE

The effects of climate change have been playing out across the world with alarming severity in recent years: record temperatures, devastating wildfires, flash floods, tropical storms, droughts and other extreme weather events. In response, the international community continues to gather, year on year, in order to discuss how to address this growing crisis. In the global stocktake of climate action carried out under the *Paris Agreement* in 2024, it was recognised that

despite overall progress on mitigation, adaptation and means of implementation and support, ... significantly greater emission reductions are required to align with global greenhouse gas emission trajectories in line with the *Paris Agreement* temperature goal,<sup>1</sup>

with a warning that ‘there is a rapidly narrowing window for raising ambition and implementing existing commitments in order to achieve it’.<sup>2</sup> At the same time, frustration with the slow pace of international negotiations has led to an increased turn to law in an attempt to inspire more urgent action.

There has been intense interest in the academic community in recent years about the potential for international litigation to respond to the shortcomings of the international climate regime,<sup>3</sup> with a particular focus on the potential role of

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<sup>1</sup> Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement on its Fifth Session, Held in the United Arab Emirates from 30 November to 13 December 2023*, UN Doc FCCC/PA/CMA/2023/16/Add.1 (15 March 2024) Decision 1/CMA.5 [2], [21] (*‘Outcome of the First Global Stocktake’*).

<sup>2</sup> *Ibid* [24].

<sup>3</sup> See, eg, Ivano Alogna, Christine Bakker and Jean-Pierre Gauci (eds), *Climate Change Litigation: Global Perspectives* (Brill Nijhoff, 2021); Francesco Sindico et al (eds), *Research Handbook on Climate Change Litigation* (Edward Elgar Publishing, 2024).

advisory opinions in this context.<sup>4</sup> Speculation on how an international court or tribunal could address these issues has been rife. Suddenly, within a period of less than 18 months, there have been three advisory opinions on the subject,<sup>5</sup> including the *Advisory Opinion on Obligations of States in Respect of Climate Change* ('*Advisory Opinion*'), delivered by the International Court of Justice ('ICJ') on 23 July 2025.<sup>6</sup> Scholars therefore have much material to engage with and there will inevitably be much detailed academic debate of the advisory opinions in the years to come. The intention of this brief case note is to provide an overview of the *Advisory Opinion* itself, to contextualise the findings of the Court, and to offer some preliminary views on the reasoning of the Court on some of the most important issues raised by the *Advisory Opinion*.

## II EXPECTATIONS OF THE *ADVISORY OPINION*

Given the status of the ICJ as the principal judicial organ of the United Nations,<sup>7</sup> expectations were high that the Court would deliver a significant contribution to the legal debates concerning climate change. Those expectations were partly a result of the breadth of the questions that had been posed to the Court, which granted the ICJ much greater leeway to deal with a range of climate change obligations compared to the advisory proceedings before other, more specialised, international courts and tribunals. The request to the ICJ was intentionally framed to allow a response that took into account all relevant international legal rules that might be applicable to climate change.<sup>8</sup> Yet, not all participants agreed that the *Advisory Opinion* should cover such a wide scope. Some states argued that the

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<sup>4</sup> See, eg, Richard Barnes, 'An Advisory Opinion on Climate Change Obligations Under International Law: A Realistic Prospect?' (2022) 53(2–3) *Ocean Development and International Law* 180; Rozeemarijn J Roland Holst, 'Taking the Current When it Serves: Prospects and Challenges for an ITLOS Advisory Opinion on Oceans and Climate Change' (2023) 32(2) *Review of European, Comparative and International Environmental Law* 217; Maria Antonia Tigre and Armando Rocha (eds), *The Role of Advisory Opinions in International Law in the Context of the Climate Crisis* (Brill Njilhoff, 2025); Muiyiwa Adigun, 'Climate Change Litigation before International Human Rights Tribunals in Africa: The Role of Advisory Opinions' (2025) 27(1–2) *International Community Law Review* 136; Lisa Benjamin and Cymie Payne, 'The ITLOS Advisory Opinion on Climate Change and International Law: A Solid Legal Foundation for State Obligations on Climate Change' (2025) 39(1) *Ocean Yearbook Online* 27; Sebastián Rioseco, 'The ITLOS Advisory Opinion on Climate Change and International Law: A Deep Dive into External Rules and Materials' (2025) 74 (Supplement) *International and Comparative Law Quarterly* 195.

<sup>5</sup> *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law (Advisory Opinion)* (International Tribunal for the Law of the Sea, Case No 31, 21 May 2024) ('*ITLOS Advisory Opinion*'); *Climate Emergency and Human Rights (Interpretation and Scope of Articles 1(1), 2, 4(1), 5(1), 8, 11(2), 13, 17(1), 19, 21, 22, 23, 25 and 26 of the American Convention on Human Rights; 1, 2, 3, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 'Protocol of San Salvador', and I, II, IV, V, VI, VII, VIII, XI, XII, XIII, XIV, XVI, XVIII, XX, XXIII, and XXVII, of the American Declaration of the Rights and Duties of Man (Advisory Opinion)* (Inter-American Court of Human Rights, AO-32/25, 19 May 2025) ('*IACtHR Advisory Opinion*').

<sup>6</sup> *Obligations of States in Respect of Climate Change (Advisory Opinion)* (International Court of Justice, General List No 187, 23 July 2025) ('*Advisory Opinion*').

<sup>7</sup> *Charter of the United Nations* art 92.

<sup>8</sup> See, eg, 'Written Statement Submitted by the Republic of Vanuatu', *Obligations of States in Respect of Climate Change (Advisory Opinion)* (International Court of Justice, General List No 187, 21 March 2024) 11 [5] ('Written Statement of Vanuatu').

international climate change treaties were the only relevant rules to guide state action and '[t]he imposition of legal obligations that go beyond what States agreed to in these multilateral agreements would undermine the importance of cooperation embedded within these instruments'.<sup>9</sup> They thus argued that the *Advisory Opinion* should be limited to considering these core treaty rules.

The Court's response was to emphasise the interrelated nature of international rules on this topic, noting that '[t]he fact that the climate change treaties have been carefully negotiated and represent a calibrated set of interrelated rules does not, in and of itself, provide ... an indication' that the climate change treaties are meant to exclude 'general customary international law or other treaty rules on the protection of the environment'.<sup>10</sup> It follows that the *Advisory Opinion* offers a multifaceted understanding of not only how international law has been actively applied to address the challenges of global climate change, but also how climate change has influenced the development of other fields of international law. As a result, the Court's analysis spans several distinct legal regimes, which the Court stresses are complementary and collectively provide 'a single set of compatible obligations'.<sup>11</sup> At the same time, each of these regimes offers a subtly different perspective on how states should respond to the climate crisis.

Value was also attached to the nature of advisory proceedings before the Court, which were seen as a forum for the elucidation of these legal issues involving a broad range of states. Procedure and participation in international proceedings matter because they add to the legitimacy of the outcome.<sup>12</sup>

In the case at hand, written submissions were received from more than ninety states and international organisations, with many of them also participating in the oral proceedings, which took place over two weeks in December 2024. Not only does this demonstrate the importance attached to climate change by the international community, but it also means that the *Advisory Opinion* benefited from an exchange of arguments drawing upon a diversity of views on the applicable law.

At the same time, we must be conscious of the limited role that an international court or tribunal can play in the broader response to climate change, expressed so aptly by Judge Tladi when he said in his declaration appended to the *Advisory Opinion* that '[n]o number of advisory opinions, no matter how robust or thoughtful, can save the planet from the ongoing climate crisis'.<sup>13</sup> Nevertheless, we should not dismiss the role to be played by international law in forging

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<sup>9</sup> 'Written Statement of the Kingdom of Saudi Arabia', *Obligations of States in Respect of Climate Change (Advisory Opinion)* (International Court of Justice, General List No 187, 21 March 2024) 72 [5.22]. See also, 'Written Statement of the Russian Federation', *Obligations of States in Respect of Climate Change (Advisory Opinion)* (International Court of Justice, General List No 187, 21 March 2024) 19–20, arguing that the climate change treaties are *lex specialis* and '[t]hey are not part of customary international law'; 'Written Statement: The State of Kuwait', *Obligations of States in Respect of Climate Change (Advisory Opinion)* (International Court of Justice, General List No 187, 22 March 2024) 8 [8], arguing that the climate change treaties constitute '*lex specialis* rules and obligations under international law which regulate [greenhouse gas] emissions ... [and] prevail over more general international law rules and obligations that may otherwise have applied to [greenhouse gas] emissions'.

<sup>10</sup> *Advisory Opinion* (n 6) [170].

<sup>11</sup> *Ibid* [165].

<sup>12</sup> See, eg, Jutta Brunnée and Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, 2010) 20–55.

<sup>13</sup> *Advisory Opinion* (n 6) [38] (Judge Tladi).

solutions to the climate crisis. Climate change can only be tackled if all states take action to reduce their greenhouse gas ('GHG') emissions, which means that international cooperation is essential. However, states are unlikely to take the requisite action unless they have assurances that other states are also doing their part. Legal rules are an important means of offering such an assurance as they

represent a higher level of commitment by states than non-legal arrangements, with correspondingly higher reputational costs for violation ... [and they] therefore better reflect what states are, in fact, prepared to do.<sup>14</sup>

However, to support effective cooperation, legal rules must also provide sufficient clarity as to what is expected from states.<sup>15</sup> This is where advisory proceedings come in as a means of seeking an authoritative understanding of the law. In the climate change sphere, the need for clarification of the legal rules, and an understanding of how different legal rules interact, was emphasised by many states contributing to the debate in March 2023 in which the request for an advisory opinion was adopted by the UN General Assembly.<sup>16</sup> The hope was that a clear message about the demands of international law may either spur states to increase their level of action or, if not, it may provide a basis for considering further legal recourse against the states concerned.<sup>17</sup> The request addressed both the primary rules relating to what conduct can be demanded from states in relation to climate change, and also 'the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system'.<sup>18</sup> The following sections will consider the main legal issues addressed by the Court and how they have advanced our understanding of the international legal framework relating to climate change.

### III THE CURTAIN RISES: THE CLIMATE CHANGE TREATIES IN THE SPOTLIGHT

For good reason, the climate change treaties occupy centre stage of the *Advisory Opinion*. After all, the *United Nations Framework Convention on Climate Change* ('UNFCCC'), the *Kyoto Protocol to the United Nations Framework Convention on Climate Change* ('Kyoto Protocol') and the *Paris Agreement* have been specifically negotiated to provide a legal framework dedicated to mitigating

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<sup>14</sup> Daniel Bodansky and Elliot Diringer, 'The Evolution of Multilateral Regimes: Implications for Climate Change' (Research Paper, Pew Center on Global Climate Change, December 2010) 7.

<sup>15</sup> See, eg, Abram Chayes and Antonia Handler Chayes, 'On Compliance' (1993) 47(2) *International Organization* 175, 188–92.

<sup>16</sup> See *Report of the International Court of Justice: Draft Resolution*, UN GAOR, 77<sup>th</sup> sess, 64<sup>th</sup> plen mtg, Agenda Item 70, UN Doc A/77/PV.64 (29 March 2023), including statements of Vanuatu, Bangladesh, the European Union, Costa Rica, Trinidad and Tobago, Liechtenstein, Singapore, Germany, Latvia and Norway.

<sup>17</sup> See, eg, 'Written Statement of Vanuatu' (n 8) 237 [491]:

The legal ambiguity surrounding the legality, in principle, under international law of the Relevant Conduct must be removed once and for all. At present, it is preventing any progress in the protracted climate negotiations. The process remains captured by a crass illegality that is hiding in plain sight.

<sup>18</sup> *Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change*, GA Res 77/276, UN GAOR, 77<sup>th</sup> sess, Agenda Item 70, UN Doc A/RES/77/276 (4 April 2023, adopted 29 March 2023) 3.

anthropogenic impacts on the climate system, galvanising action for climate adaptation, and addressing the financial implications connected with the climate crisis.<sup>19</sup> With 198 parties, the *UNFCCC* is one of the most widely accepted international treaties and it is the institutions established by the *UNFCCC* and related instruments which have driven the climate change negotiations over the last three decades. Given these instruments have never been the subject of international dispute settlement proceedings, the ICJ advisory proceedings offered an important opportunity to interpret the treaties for the first time.

At the outset, the ICJ noted that all three treaties remained applicable and they should be understood as ‘mutually supportive, with the *Kyoto Protocol* and *Paris Agreement* providing greater specification to the general obligations contained in the *UNFCCC*’.<sup>20</sup> The Court thus rejected arguments that the *Paris Agreement* superseded the earlier treaties as *lex posterior*.<sup>21</sup> The Court also emphasised the dynamic nature of the treaties and the need to understand the treaty obligations in light of the wider institutional framework established to oversee their implementation. In this respect, the Court held that ‘[i]n interpreting their obligations under the climate change treaties, States also need to have recourse to the relevant decisions of the governing bodies of these treaties’,<sup>22</sup> including as subsequent agreements of the parties under art 31(3)(a) of the *Vienna Convention on the Law of Treaties* (‘*VCLT*’).<sup>23</sup> Of course, not all Conference of the Parties (‘COP’) decisions will necessarily be relevant to the interpretation of the treaties, nor will they all necessarily qualify as subsequent agreements. There is still a need for evidence that the parties are engaged in an interpretative exercise,<sup>24</sup> which will depend on both the content of the decisions and the context of their adoption. It is clear that the *Advisory Opinion* could not offer an authoritative account of the normative influence of every COP decision, but it does provide a number of pertinent examples.

Perhaps the most illuminating example is the way that the Court approached the overall objective of the climate change treaties. Whereas the original objective of the *UNFCCC* was to ‘prevent dangerous anthropogenic interference with the climate system’,<sup>25</sup> the *Paris Agreement* introduced a quantitative target of inter alia ‘[h]olding the increase in the global average temperature to well below 2°C

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<sup>19</sup> *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994) (‘*UNFCCC*’); *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 11 December 1997, 2303 UNTS 162 (entered into force 16 February 2005) (‘*Kyoto Protocol*’); *Paris Agreement*, opened for signature 12 December 2015, 3156 UNTS 79 (entered into force 4 November 2016).

<sup>20</sup> *Advisory Opinion* (n 6) [195].

<sup>21</sup> *Ibid* [189]. The Court noted in this connection that ‘[t]he mere fact that the treaties regulate the same subject-matter does not necessarily constitute a conflict or result in one superseding the other.’

<sup>22</sup> *Ibid* [184].

<sup>23</sup> *Ibid*; *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(3)(a).

<sup>24</sup> See especially conclusion six of the Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries: International Law Commission, *Report of the International Law Commission of the Work of Its Seventieth Session*, UN GAOR, 73<sup>rd</sup> sess, Supp No 10, UN Doc A/73/10 (2018) ch IV(E)(2) 43–51.

<sup>25</sup> *UNFCCC* (n 19) art 2.

above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels'.<sup>26</sup> This target was the result of a compromise, leaving significant ambiguity about the precise level of ambition to be pursued. However, subsequent COPs have noted that 'the impacts of climate change will be much lower at the temperature increase of 1.5°C compared with 2°C' and the COP has thus 'resolve[d] to pursue efforts to limit the temperature increase to 1.5°C'.<sup>27</sup> Whilst not formally binding, these decisions have been reiterated over time.<sup>28</sup> The Court confirmed that

these decisions express the 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, paragraph 3 (a) of the [VCLT]<sup>29</sup>

with the effect that 'the 1.5°C threshold ... [is] the parties' agreed primary temperature goal for limiting the global average temperature increase under the *Paris Agreement*'.<sup>30</sup> Thus, the Court translates non-binding COP decisions into binding commitments, even if it appears to ignore the 'intensely political' nature of the negotiations underpinning the COP process.<sup>31</sup> Indeed, the significance of this finding is not limited to clarifying the overall objective of the climate change treaties, as it will also influence the nature of the measures that must be taken. In particular, the COP has also consistently recognised that achievement of this target requires 'the urgent need for immediate, deep, rapid and sustained reductions in global greenhouse gas emissions by Parties across all applicable sectors'.<sup>32</sup> Thus, this evolutionary interpretation of the objective will help to inform the benchmark against which to judge the action of the parties.

Another key finding of the Court concerned the nature of the obligations held by parties to the *UNFCCC* and the *Paris Agreement*. On their face, both instruments focus on the procedural obligations of states, providing for the exchange of information about GHG emissions and the mitigation and adaptation actions they propose to take.<sup>33</sup> Nevertheless, neither instrument specifies the content of the measures that must be adopted. In what is perhaps one of the most significant interpretations advanced by the Court, the obligations under both the *UNFCCC* and the *Paris Agreement* were held to have both a procedural and a substantive dimension. On the one hand, the Court pointed out the obvious when it said that a 'failure to prepare, communicate and maintain successive [Nationally

<sup>26</sup> *Paris Agreement* (n 19) art 2(1)(a).

<sup>27</sup> Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Twenty-Sixth Session, Held in Glasgow from 31 October to 13 November 2021: Addendum Part Two*, UN Doc FCCC/CP/2021/12/Add.1 (8 March 2022) Decision 1/CP.26 [16].

<sup>28</sup> See, eg, Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Twenty-Seventh Session, Held in Sharm el-Sheikh from 6 to 20 November 2022: Addendum Part Two*, UN Doc FCCC/CP/2022/10/Add.1 (17 March 2023) Decision 1/CP.27 [7] ('*Sharm el-Sheikh Implementation Plan*').

<sup>29</sup> *Advisory Opinion* (n 6) [224].

<sup>30</sup> *Ibid.* A similar position had been adopted by ITLOS: *ITLOS Advisory Opinion* (n 5) 78 [216].

<sup>31</sup> Stephen Humphreys, '1.5 at the ICJ', *EJIL:Talk!* (Blog Post, 25 August 2025) <<https://www.ejiltalk.org/1-5-at-the-icj/>>.

<sup>32</sup> *Sharm el-Sheikh Implementation Plan* (n 28) [11].

<sup>33</sup> *UNFCCC* (n 19) art 4; *Paris Agreement* (n 19) arts 3–4, 7.

Determined Contributions (‘NDCs’)], to account for them and to register them would constitute a breach’ of the procedural obligations in the *Paris Agreement*.<sup>34</sup> Yet, the Court was not prepared to simply treat this provision as an obligation of result, noting that ‘some obligations may exhibit characteristics of both obligations of conduct and obligations of result’.<sup>35</sup> On this basis, the Court goes on to find that ‘[t]he content of the NDCs is equally relevant to determine compliance’.<sup>36</sup> The Court seeks to justify this conclusion by reference to the *Paris Agreement* itself, which says that ‘each Party’s successive [NDC] will represent a progression beyond the Party’s then current [NDC]’ and it must ‘reflect its highest possible ambition’.<sup>37</sup> The Court also refers to the objective of the treaty in support of the view that ‘the content of a party’s NDCs must ... be capable of making an adequate contribution to the achievement of the temperature goal’, as interpreted by the Court.<sup>38</sup> Ultimately, this approach required the application of a due diligence standard, which would allow a court or tribunal to review the NDC prepared by a state against these objectives. This is not the first time that due diligence has been invoked by the Court as a measure of states’ international environmental obligations.<sup>39</sup> Due diligence has become a central concept that has been employed by other international adjudicatory bodies,<sup>40</sup> described in some scholarship as a global regulatory standard.<sup>41</sup> Yet, the Court went one step further in the present context by saying that

the standard of due diligence to be applied in preparing the NDCs is stringent ... [which] 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.<sup>42</sup>

Thus, due diligence is used as a means for demanding a higher level of action from states in responding to climate change. Nor is the stringent due diligence standard only applied to the preparation of an NDC, but also to its implementation,<sup>43</sup> and to action in relation to adaptation.<sup>44</sup>

This is an important clarification of the legal character of the climate change treaties, which dismisses the view, advanced by some participants in the proceedings, that states have ‘unfettered discretion’ in their preparation of NDCs.<sup>45</sup> The result is a set of legal obligations that have significantly more legal bite compared to what had perhaps been the prevailing understanding of the

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<sup>34</sup> *Advisory Opinion* (n 6) [236].

<sup>35</sup> *Ibid* [175].

<sup>36</sup> *Ibid* [236]. See also [208] in relation to the *UNFCCC*.

<sup>37</sup> *Paris Agreement* (n 19) art 4(3).

<sup>38</sup> *Advisory Opinion* (n 6) [242].

<sup>39</sup> See especially *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment)* [2010] ICJ Rep 14, 55–6 [101], 77 [187], 79–80 [197] (‘*Pulp Mills*’).

<sup>40</sup> See, eg, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion)* [2011] ITLOS Reports 10.

<sup>41</sup> Caroline E Foster, *Global Regulatory Standards in Environmental and Health Disputes: Regulatory Coherence, Due Regard and Due Diligence* (Oxford University Press, 2021) 104.

<sup>42</sup> *Advisory Opinion* (n 6) [246].

<sup>43</sup> *Ibid* [253], [254].

<sup>44</sup> *Ibid* [258].

<sup>45</sup> *Ibid* [239].

primarily procedural character of the obligation to prepare and communicate a NDC under the *Paris Agreement*. However, the result may not be as radical as it seems. Despite the Court's assertion of an objective standard that must be met, it does not follow that states have no discretion at all. By definition, a due diligence standard is contextual, requiring multiple factors to be taken into account, including the 'national circumstances of the party in question'.<sup>46</sup> In the first instance, it is the state concerned that must determine the level and pace of ambition based upon its particular circumstances. The assertion of a stringent due diligence standard does permit a court to exercise a heightened degree of scrutiny over a state's decision-making process, demanding a clear and coherent justification from states for measures that are taken.<sup>47</sup> Nevertheless, there are limits to such a judicial review process. Arguably an international court or tribunal must give some deference to the state to determine the overall level of ambition in their NDC, which after all involves a complex balancing of economic and political interests.

As one of the few climate change cases to have been decided by an international court or tribunal on the merits, the decision of the European Court of Human Rights ('ECtHR') in *Verein Klimaseniorinnen Schweiz v Switzerland*<sup>48</sup> is illuminating as to what the due diligence standard might demand in practice, as well as the limits of judicial scrutiny. In that case, the Grand Chamber also adopted a due diligence standard,<sup>49</sup> reasoning that the grave risks posed by climate change called for the application of a reduced margin of appreciation as regards the state's commitment to combatting climate change and setting requisite aims and objectives.<sup>50</sup> However, it went on to admit that some deference still needed to be granted to the state, particularly in relation to how reductions should be achieved given the complex balances and trade-offs that must be made.<sup>51</sup> In this respect, the Grand Chamber expressly noted that '[w]hile it is not in the Court's remit to determine what exactly should have been done, it can assess whether the authorities approached the matter with due diligence and gave consideration to all competing interests'.<sup>52</sup> In other words, the task of the court or tribunal is to scrutinise the reasoning and choices of the state, rather than to determine for itself the measures to be taken by the state. The shortcomings that were identified in that case were largely concerned with the lack of a binding regulatory framework,<sup>53</sup> the failure to adopt intermediate reduction goals up to the point of net neutrality,<sup>54</sup> and the limited review mechanisms that had been put in place.<sup>55</sup> Another important factor was the inconsistency of the state's action compared with the internal advice

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<sup>46</sup> Ibid [247].

<sup>47</sup> Ibid [248].

<sup>48</sup> *Verein Klimaseniorinnen Schweiz v Switzerland* (European Court of Human Rights, Grand Chamber, Application No 53600/20, 9 April 2024) ('*Verein Klimaseniorinnen Schweiz*').

<sup>49</sup> Ibid [538(e)].

<sup>50</sup> Ibid [543].

<sup>51</sup> Ibid [543]. See also [547].

<sup>52</sup> Ibid [538].

<sup>53</sup> Ibid [549].

<sup>54</sup> Ibid.

<sup>55</sup> Ibid [554].

that it had received.<sup>56</sup> The result was a finding that Switzerland had failed to meet its due diligence obligations, although it was left to the state to determine how to bring itself into compliance and how to redesign its mitigation measures.

This case demonstrates that a due diligence standard can be a useful tool for scrutinising state's compliance with their international obligations, but international courts and tribunals are likely to be wary of second-guessing complex balancing processes by dictating precisely what is to be done by the state concerned, meaning that some deference to states is still to be expected.

#### IV THE PLOT THICKENS: THE ROLE OF CUSTOMARY INTERNATIONAL LAW

As important as the Court's interpretation of the core climate change treaties is, there are obvious limits to the treaty regime, not least the ability of states to withdraw from their treaty commitments. The *UNFCCC*,<sup>57</sup> *Kyoto Protocol*<sup>58</sup> and *Paris Agreement*<sup>59</sup> all contain withdrawal clauses and states have demonstrated that they have been willing to use them.<sup>60</sup>

One of the most anticipated aspects of the *Advisory Opinion* was therefore the question of what duties might exist for states under customary international law, independently of the climate change treaties. This was an issue on which divergent views had been expressed during the proceedings, with some states denying that there was any customary international law on this matter at all.<sup>61</sup>

For its part, the Court took a rather straightforward approach, finding that the well-established customary duty to prevent significant transboundary environmental harm, established through its previous rulings,<sup>62</sup> 'also applies with respect to the climate system and other parts of the environment'.<sup>63</sup> The boldness of the Court in its assertion of custom can be contrasted with the caution exercised by the International Law Commission ('ILC') when it considered the rules relating to the protection of the atmosphere a few years ago. For its part, the ILC made a careful distinction between pollution of the atmosphere, which covered transboundary harm caused by one state to another state, and degradation of the atmosphere, which covered global issues such as ozone depletion and climate change. Whilst the ILC agreed that '[i]n the context of transboundary atmospheric pollution, the obligation of States to prevent significant adverse effects is firmly

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<sup>56</sup> Ibid [558]–[559]. The actual target that had been set by the Swiss Government did not follow internal assessments carried out by the Swiss Federal Council showing that industrialised countries should limit their GHG emissions by 25–40% by 2020.

<sup>57</sup> *UNFCCC* (n 19) art 25.

<sup>58</sup> *Kyoto Protocol* (n 19) art 27.

<sup>59</sup> *Paris Agreement* (n 19) art 28(2).

<sup>60</sup> Canada withdrew from the *Kyoto Protocol* in 2011, just one year before the end of the relevant implementation period: see End Note 2 to the Status of Ratifications, 'Kyoto Protocol to the United Nations Framework Convention on Climate Change' *United Nations Treaty Collection* (Web Page) <<https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXVII/XXVII-7-a.en.pdf>>. The US announced in January 2025 that it will withdraw from the *Paris Agreement*, with effect from January 2026: see *United States of America: Withdrawal*, UN Doc C.N.71.2025.TREATIES-XXVII.7.d (27 January 2025).

<sup>61</sup> See, eg, 'Written Statement of the Russian Federation' (n 9).

<sup>62</sup> See, eg, *Pulp Mills* (n 39) 55–6 [101]; *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 241–2 [29].

<sup>63</sup> *Advisory Opinion* (n 6) [134].

established as customary international law,' it went on to say that 'the existence of this obligation in customary international law is still somewhat unsettled for global atmospheric degradation'.<sup>64</sup> These nuances were lost in the treatment of the matter by the Court, which was of the view that

a risk of significant harm may also be present in situations where significant harm to the environment is caused by the cumulative effect of different acts undertaken by various States and by private actors subject to their respective jurisdiction or control, even if it is difficult in such situations to identify a specific share of responsibility of (sic) any particular State.<sup>65</sup>

It would seem that the Court bases this conclusion on the general principle that a state must not 'allow knowingly its territory to be used for acts contrary to the rights of other States'.<sup>66</sup> There is no attempt to ascertain supporting state practice or *opinio juris* to support the conclusion, although it could be speculated that such an exercise might reach a similar conclusion. After all, the Court has previously accepted that 'a very widespread and representative participation in ... [a] convention might suffice of itself, provided it included that of States whose interests were specially affected',<sup>67</sup> and if quasi-universal participation in the *UNFCCC* does not meet this criterion, then it is doubtful whether any treaty would. Furthermore, the consensus decisions of the climate change treaty bodies provide further support for the view that states must take appropriate action to tackle climate change and the Court acknowledges later in its opinion that 'COP decisions may ... be relevant for the identification of customary international law, in so far as they reflect State practice and if they express an *opinio juris* of States'.<sup>68</sup>

The next important question to be addressed by the Court concerned the nature of any customary rule applicable to climate change. In this respect, the Court falls back on the ubiquitous concept of due diligence.<sup>69</sup> Procedurally, the Court highlights the importance of environmental impact assessment, notification and consultation.<sup>70</sup> In terms of substance, the Court says that the

appropriate rules and measures [required of a state] include, but are not limited to, regulatory mitigation mechanisms that are designed to achieve the deep, rapid and sustained reductions of GHG emissions that are necessary for the prevention of significant harm to the climate system<sup>71</sup>

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<sup>64</sup> International Law Commission, *Report of the International Law Commission: Seventy-Second Session*, UN GAOR, 76<sup>th</sup> sess, Supp No 10, UN Doc A/76/10 (27 June 2024) ch IV(E)(2) 27–8 [8].

<sup>65</sup> *Advisory Opinion* (n 6) [276].

<sup>66</sup> *Ibid* [272], quoting *Corfu Channel (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 22.

<sup>67</sup> *North Sea Continental Shelf (Federal Republic of Germany v Denmark) (Judgment)* [1969] ICJ Rep 3, 42 [73].

<sup>68</sup> *Advisory Opinion* (n 6) [288]. The Court goes on to say, '[w]hether a particular COP decision has such legal significance can only be determined *in concreto*': at [288]. It does not carry out any *in concreto* assessment.

<sup>69</sup> *Ibid* [280].

<sup>70</sup> *Ibid* [295]–[299].

<sup>71</sup> *Ibid* [282].

whilst also noting that adaptation measures are ‘also relevant for assessing whether a State is fulfilling its customary obligations’ by reducing risks of significant harm occurring.<sup>72</sup>

The Court furthers its interpretation of the applicable customary rule by explaining its understanding of due diligence, confirming that the standard is variable,<sup>73</sup> dynamic<sup>74</sup> and dependent on the individual capabilities of states.<sup>75</sup> Thus, due diligence must be interpreted in light of the principle of common but differentiated responsibilities, although the Court confirmed that the differential standards will be determined by individual circumstances, rather than any arbitrary distinction between developed and developing countries. It follows that, in the view of the Court, ‘as States develop economically and their capacity increases, so too are the requirements of [due] diligence heightened’.<sup>76</sup> This is a clear signal to the larger, more economically advanced developed countries that they must shoulder a proportionate burden of climate mitigation.

As a result of these findings, there is a strong synergy between the requirements of customary international law and the due diligence obligation of states under the climate change treaties, although the Court does emphasise the distinct existence of these two sources of obligation.<sup>77</sup> This ensures that states cannot escape legal scrutiny by exiting from the climate change treaties, even though their choice to do so will have implications for the manner in which compliance with their commitments can be overseen.

## V INTERNATIONAL BIODIVERSITY LAW: A FLEETING CAMEO APPEARANCE

A range of other multilateral environmental treaties were mentioned by the Court in its analysis of the legal framework, including the *Convention on Biological Diversity* (‘CBD’).<sup>78</sup> This is an important legal regime given that states have recognised that the climate crisis and biodiversity crisis are interlinked,<sup>79</sup> but this part of the *Advisory Opinion* does little more than summarise the most pertinent obligations under the *CBD*. Thus, the Court highlights the synergies between climate change and the conservation of biological diversity,<sup>80</sup> and the need to minimise the impact of climate change on biodiversity through mitigation and adaptation.<sup>81</sup> This may, for example, take the form of utilising nature-based solutions to tackle some of the threats to climate change,<sup>82</sup> including the

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<sup>72</sup> Ibid.

<sup>73</sup> Ibid [292].

<sup>74</sup> Ibid [284].

<sup>75</sup> Ibid [136].

<sup>76</sup> Ibid [292].

<sup>77</sup> Ibid [314].

<sup>78</sup> Ibid [325].

<sup>79</sup> See *Outcome of the First Global Stocktake* (n 1) Preamble para 11.

<sup>80</sup> *Advisory Opinion* (n 6) [329].

<sup>81</sup> Ibid [328].

<sup>82</sup> Conference of the Parties, UN Convention on Biological Diversity, *Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity on 1 November 2024*, 16<sup>th</sup> mtg, Agenda Item 25, UN Doc CBD/COP/DEC/16/22 (1 November 2024) para 3(b) (‘*CBD Decision 16/22*’). See also United Nations Environment Assembly, UN Environment Programme, *Resolution Adopted by the United Nations Environment Assembly on 2 March 2022*, 5<sup>th</sup> sess, UN Doc UNEP/EA.5/Res.5 (7 March 2022).

conservation and restoration of natural carbon sinks,<sup>83</sup> an issue highlighted by Judge Cleveland in their Separate Opinion.<sup>84</sup>

A perspective that is less prominent in the *Advisory Opinion* is the need to ensure that climate change mitigation and adaptation measures do not themselves have significant adverse impacts on biodiversity. This includes the need to assess the impacts on biodiversity of the roll-out of technology associated with carbon sequestration. This is a matter that had been addressed by the International Tribunal for the Law of the Sea ('ITLOS'), albeit briefly, in the context of geoengineering,<sup>85</sup> and it is a common refrain of *CBD COP* decisions.<sup>86</sup> Other multilateral environmental agreements have also urged states to carry out environmental impact assessments of clean energy projects, for example in relation to migratory species.<sup>87</sup> These factors should also inform the due diligence demanded of states when developing mitigation and adaptation actions, adding a further layer of complexity to this determination.

## VI ENCORE: HUMAN RIGHTS AND THE LAW OF THE SEA

There have already been separate decisions from other international courts and tribunals on the implications of climate change on human rights law and the law of the sea. Nevertheless, these two topics were explicitly included in the advisory opinion request to the ICJ, and thus the Court was expected to add to the debate in these areas.

On human rights, the focus of the ICJ was on the global human rights treaties, thus taking a slightly different perspective from the regional treaties that have been the focus of previous decisions in this area.<sup>88</sup> The Court also addresses the existence of a right to a clean, healthy and sustainable environment, which it describes as 'inherent' and 'essential for the enjoyment of other human rights'.<sup>89</sup> Whether or not the *Advisory Opinion* is read as confirming the existence of an independent right to a clean, healthy and sustainable environment is ambiguous,<sup>90</sup> and it may be too early to suggest that '[t]he debates about the right's existence, its relevance and its importance are over'.<sup>91</sup> Perhaps the more important aspect of this part of the *Advisory Opinion* is the clear confirmation that the adverse effects

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<sup>83</sup> See *Paris Agreement* (n 19) art 5(1).

<sup>84</sup> *Advisory Opinion* (n 6) [9] (Judge Cleveland).

<sup>85</sup> *ITLOS Advisory Opinion* (n 5) 83 [231].

<sup>86</sup> See, eg, *CBD Decision 16/22* (n 80) [8].

<sup>87</sup> Conference of the Parties, UN Convention on the Conservation of Migratory Species, *Wind Turbines and Migratory Species*, 12<sup>th</sup> mtg, UN Doc No UNEP/CMS/Resolution 7.5 (Rev.COP12) (October 2017).

<sup>88</sup> The court notes this regional practice: *Advisory Opinion* (n 6) [385].

<sup>89</sup> *Ibid* [393].

<sup>90</sup> Different views were expressed amongst judges on this topic: see generally Ramindu Perera, 'The ICJ's Recognition of an Autonomous Right to a Clean and Healthy Environment', *EJIL:Talk!* (Blog Post, 19 August 2025) <<https://www.ejiltalk.org/the-icjs-recognition-of-an-autonomous-right-to-a-clean-and-healthy-environment/>>.

<sup>91</sup> David R Boyd, 'A Right Foundational to Humanity's Existence: World's Highest Court Embraces the Right to a Healthy Environment', *Verfassungsblog* (Blog Post, 30 July 2025) <<https://verfassungsblog.de/icj-climate-right-to-a-healthy-environment/>>. For a more nuanced view, see Perera (n 90).

of climate change may significantly impair the enjoyment of a variety of human rights and therefore they need to be considered in relation to all rights.<sup>92</sup>

The ICJ says less about the content of the relevant human rights obligations and what might be required from states to comply. If it had done, then the Court might have once again turned to the concept of due diligence, which is a standard that human rights courts have tended to utilise when interpreting relevant obligations in the context of climate change.<sup>93</sup>

On the law of the sea, the ICJ largely followed the *ITLOS Advisory Opinion*,<sup>94</sup> although the Court did go further in relation to the implications of sea-level rise for the law of the sea in the context of climate change. This is a topic that has been the subject of intense debate in the past few years, particularly in the context of the work conducted by the Study Group on Sea-level Rise and International Law, established by the ILC. Indeed, the work of the ILC was arguably essential in allowing the Court to come to a clear conclusion on the topic. At the beginning of the ILC's work in 2018, the prevailing position appeared to be that territorial sea baselines were ambulatory,<sup>95</sup> meaning that they would shift with sea-level rise. However, the work of the ILC moved the debate on to such an extent that the Court could proclaim in the *Advisory Opinion* that

the final report of the Study Group ... [adopted in 2025] shows a convergence of views among States across all regions in support of the absence of an obligation of States parties to UNCLOS to update charts or lists of geographical co-ordinates relating to their maritime zones once they have been duly established, in conformity with UNCLOS.<sup>96</sup>

On this basis, the Court concluded that 'States part[y] to UNCLOS are under no obligation to update such charts or lists of geographical co-ordinates'.<sup>97</sup> Whilst this conclusion is expressed in terms of the treaty obligations of UNCLOS parties, it is likely that a similar situation prevails in customary international law for non-parties to UNCLOS.

The Court also addressed the question of statehood, concluding that 'once a State is established, the disappearance of one of its constituent elements would not necessarily entail the loss of its statehood'.<sup>98</sup> This is a much more cautious statement of the current law, which does little more than leave open the possibility for continuing statehood, whilst postponing any detailed answer to future analysis. This caution is perhaps warranted given the range of complex issues that would be raised if a state did disappear as a result of rising sea levels. In this connection, the most important conclusion of the Court is that states are under a duty 'to work together with a view to achieving equitable solutions, taking into account the rights

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<sup>92</sup> Ibid.

<sup>93</sup> See *Verein Klimaseniorinnen Schweiz* (n 48) [395], [538], [550].

<sup>94</sup> The Court noted that it was not obliged to follow the interpretation of ITLOS, but it would 'ascribe great weight' to it: *Advisory Opinion* (n 6) [338].

<sup>95</sup> See, eg, International Law Association, *Baselines Under the International Law of the Sea (Sofia Conference, 2012)* in in Coulter G Lathrop, J Ashley Roach and Donald R Rothwell (eds), *Baselines Under the International Law of the Sea: Reports of the International Law Association Committee on Baselines under the International Law of the Sea* (Brill, 2019).

<sup>96</sup> *Advisory Opinion* (n 6) [361].

<sup>97</sup> Ibid [362].

<sup>98</sup> Ibid [363].

of affected States and those of their populations'.<sup>99</sup> In other words, how to respond to the submergence of a state will have to be worked out through cooperation in a way that addresses all of the relevant issues, not least the rights of the people whose homeland has been lost.

#### VII UNRESOLVED PLOTLINES: RESPONSIBILITY FOR CLIMATE CHANGE HARM

If the Court's interpretation of the substantive rules relating to climate change was in many respects progressive, the approach of the Court to the question of responsibility was more conservative. The ICJ made clear that it was not required to identify the legal responsibility of any particular state or group of states, which could only be done 'on a case-by-case basis'.<sup>100</sup> Instead, the Court approached the answer to question (b) of the request on the basis of the general rules of state responsibility.<sup>101</sup> Yet, in doing so, the Court still made some important clarifications, in particular by recognising that the obligations of states under the climate change treaties are obligations *erga omnes partes* and the obligations of states under customary international law are obligations *erga omnes*.<sup>102</sup> It follows that any state may invoke a breach, regardless of whether or not they have been injured thereby, although the remedies that are available may differ. The Court also dealt with questions about diffuse responsibility, holding that

each injured State may separately invoke the responsibility of every State which has committed an internationally wrongful act resulting in damage to the climate system and other parts of the environment ... [and] where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.<sup>103</sup>

These findings are important because they potentially lay the groundwork for contentious cases to be brought by individual states. Yet, there would still be significant challenges for any state wanting to bring such a claim. The Court appears to have wanted to alleviate some of the concerns in this respect, when it said for example that

while the causal link between the wrongful actions or omissions of a State and the harm arising from climate change is more tenuous than in the case of local sources of pollution, this does not mean that the identification of a causal link is impossible in the climate change context.<sup>104</sup>

Furthermore, on the challenges of calculating compensation, the Court said that 'the form of compensation may be difficult to calculate, as there is usually a degree of uncertainty with respect to the exact extent of the damage caused', but it did not rule out compensation, noting that 'compensation in the form of a global sum, within the range of possibilities indicated by the evidence and taking into account

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<sup>99</sup> Ibid [365].

<sup>100</sup> Ibid [106].

<sup>101</sup> At the same time, the Court rejected the idea that the provisions on loss and damage under the *Paris Agreement* excluded the application of the general rules on state responsibility: *ibid* [415].

<sup>102</sup> Ibid [440].

<sup>103</sup> Ibid [431].

<sup>104</sup> Ibid [438].

equitable considerations, may be awarded'.<sup>105</sup> But of course, whether these obstacles could be fully overcome would depend on the particular circumstances of a future case and therefore we cannot draw too many firm conclusions from the Court's treatment of this topic.

There were members of the Court who thought that the Court could have gone further in its analysis of state responsibility for climate change. For example, Judge Yusuf was critical of the Court for failing to address the significant differences in the contributions made by states to the problem of climate change. In his view, these differences have important legal consequences that the Court failed to address, in what he describes as an 'excessively formalistic approach' to the issues at hand.<sup>106</sup> Vice-President Sebutinde also criticised the Court for failing to recognise

that there is an imbalance between the major polluters (constituting a small number of developed or industrialized countries) and the majority of States (comprising least developed and small island states) whose GHG emissions are negligible.<sup>107</sup>

These separate opinions reveal that a potential contentious case may elicit some sympathy from the bench, but we will have to wait and see whether a state chooses to take such a step.

#### VIII IMPLICATIONS OF THE CLIMATE CHANGE *ADVISORY OPINION*

Given the breadth of the questions, and the diversity of views that had been expressed in the proceedings, it would have been easy for the Court to deliver a relatively formulaic response to the request for an advisory opinion. However, on the substantive law, at least, the Court has stepped up and delivered important and progressive findings in relation to the interpretation of the climate change treaties, the complementary character of customary international law and the implications of climate change for human rights law and the law of the sea. Whilst not binding, it provides an authoritative statement of the law that is likely to be followed not only in future cases at the ICJ but also by other courts and tribunals operating at both the international and national level.<sup>108</sup> This is even more the case because the *Advisory Opinion* was adopted unanimously. Judges from China, the United States, South Africa, India, Japan, Uganda, Slovakia, France, Somalia, Germany, Australia, Brazil, Mexico and Romania were united in their view that international law imposes stringent obligations on states to respond to the climate crisis. This should not be taken for granted, and it is the only advisory opinion from the ICJ dealing with a substantive matter of international law to have been adopted unanimously in recent times.

Nor should the *Advisory Opinion* be evaluated in isolation. Much of the reasoning of the Court mirrors recent decisions of other international courts and tribunals. This is particularly true of the call for "stringent due diligence", a phrase

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<sup>105</sup> Ibid [454].

<sup>106</sup> Ibid [2] (Judge Yusuf).

<sup>107</sup> Ibid [5] (Vice-President Sebutinde).

<sup>108</sup> For the authority of ICJ Advisory Opinions, see *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v Maldives) (Preliminary Objections)* (International Tribunal for the Law of the Sea, Case No 28, 28 January 2021) [203].

that has been borrowed from the *ITLOS Advisory Opinion*,<sup>109</sup> but which also finds echoes in the *Inter-American Court of Human Rights Advisory Opinion*<sup>110</sup> and judgments of the ECtHR.<sup>111</sup> All of these decisions point in the same direction — states must act with urgency and ambition in taking measures to respond to climate change and their responses may be subject to a heightened degree of scrutiny by international courts and tribunals. Nor have we seen the last word on this topic, as further advisory proceedings are pending.<sup>112</sup> Even in the absence of litigation, the *Advisory Opinion* gives participants in climate change negotiations a new vocabulary with which to demand increased action from states which are perceived to be lagging behind in their level of ambition, although some commentators have also warned that the *Advisory Opinion* could also make future negotiations more difficult as states may be less willing to entertain entering into political commitments which may end up having a normative effect.<sup>113</sup>

Overall, we should not overemphasise the strides forward made by the *Advisory Opinion*. The reliance placed on due diligence throughout the *Advisory Opinion*, and other recent judicial decisions, is important, but it has limitations. In relation to individual states, the Court itself acknowledges that the application of a due diligence standard to a specific situation is ‘a complex operation due to the variable and evolving nature of the standard’.<sup>114</sup> The fact that due diligence can only ever be applied on a case-by-case basis means that it is largely reactive in character. It may be used to argue that a state has not taken sufficient action, and therefore is in breach of its international obligations, but the concept provides limited guidance as to what future action must be taken by states. Reliance on due diligence cannot therefore be a replacement for the sort of cooperative machinery that states have established under the climate change treaties. In this respect, it is significant that the Court underlined the importance of the duty to cooperate, not only as a part of the climate change treaties, but also as an independent obligation of customary international law.<sup>115</sup> Engaging in good faith with the processes established under the climate change treaties thus still represents the best hope for humanity to deal with the climate crisis, even if it is not the only legal regime that is relevant.

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<sup>109</sup> *ITLOS Advisory Opinion* (n 5) [241], referring to ‘enhanced due diligence’.

<sup>110</sup> *IACtHR Advisory Opinion* (n 5) [233], referring to a ‘reduced margin of appreciation’.

<sup>111</sup> *Verein Klimaseniorinnen Schweiz* (n 48) [543].

<sup>112</sup> See *Request for Advisory Opinion by the Pan African Lawyers Union on the Obligations of States With Respect to the Climate Change Crisis before the African Court on Human and People’s Rights (Advisory Opinion)* (Request No 001, 2 May 2025).

<sup>113</sup> See Daniel Bodansky and Susan Biniaz, ‘The ICJ’s Advisory Opinion on Climate Change: Does It Throw a Wrench into the Negotiator’s Toolbox of Diplomatic Problem-Solving Techniques?’, *EJIL:Talk!* (Blog Post, 23 September 2025) <<https://www.ejiltalk.org/the-icjs-advisory-opinion-on-climate-change-does-it-throw-a-wrench-into-the-negotiators-toolbox-of-diplomatic-problem-solving-techniques/>>.

<sup>114</sup> *Advisory Opinion* (n 6) [300].

<sup>115</sup> *Ibid* [140]–[142].