

This article is published in a peer-reviewed section of the Utrecht Law Review

## Climate Justice: A Constitutional Approach to Unify the *Lex Specialis* Principles of International Climate Law

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### Introduction

The paper starts with the assumption that disputed norms underpin the controversy surrounding climate justice at the global level. Fundamental legal principles relating to international climate law are notoriously debated and contested.<sup>1</sup> Identifying relevant legal principles is therefore important;<sup>2</sup> but to reach consensus there is a need for some type of unity and order. Attaining a constitutional normative consensus may provide a pathway to universal climate justice.<sup>3</sup>

The context leads to the purpose of this article, which is to outline a universal approach by which to reach a constitutional consensus on unifying the *lex specialis* principles of international climate law.<sup>4</sup> Gupta has recently supported the thesis that there is a ‘need for consensus on norms.’<sup>5</sup> Green,<sup>6</sup> and Cooter,<sup>7</sup> inferred earlier that legal fragmentation is a type of normative problem that requires a normative solution.

The article suggests that ‘constitutionalism’, in the sense of giving coherence to fundamental governing legal principles and their consequential legal norms, could be one potential solution to help reach consensus on disputed norms. The significance of the article, however, is in proposing a universal

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1 Japan Branch Committee on Climate Change, *The Legal Principles Relating to Climate Change, Preliminary Issues on the Methodology and Scope of the Work*, (International Law Association), July 2009.

2 Committee on The Legal Principles Relating to Climate Change, *Legal Principles Relating To Climate Change*, (Sofia Conference, 2012), (International Law Association, Sofia 2012) (Second Report).

3 According to the *Oxford Dictionary*, a constitution is ‘a body of fundamental principles or established precedents according to which a state or other organization is acknowledged to be governed’, *Oxford Dictionaries*, 2010. Oxford University Press. <<http://oxforddictionaries.com/definition/english/constitution>> (last visited 27 September 2012).

4 This article is limited to exploring the interrelationship between international law and the UNFCCC and the interpretation of *lex specialis* principles of international climate law. It is not concerned in any direct way with the judicial interpretation of national legislation or statutory rules. For a discussion about *lex specialis* regimes (*lex specialis* as an elaboration or application of general law in a particular situation; *lex specialis* as an exception to the general law; prohibited *lex specialis*; and the relational character between the general and special) see UN General Assembly, *Report of the study group on the fragmentation of international law*, finalized by Martti Koskenniemi, A/CN.4/L.682, 58th session of the International Law Commission, 2006.

5 J. Gupta, ‘Negotiating Challenges and Climate Change’, 2012 *Climate Policy, Special Issue: Negotiating Climate Change* 12, no. 5, p. 631. J.T. Roberts, ‘Multipolarity and the New World (Dis)order: US Hegemonic Decline and the Fragmentation of the Global Climate Regime’, 2011 *Global Environmental Change* 21, no. 3, pp. 776-784.

6 A. Green, ‘Norms, Institutions, and the Environment’, 2007 *University of Toronto Law Journal* 57, no. 1, pp. 105-128 (assesses the potential for government to influence environmental values and norms).

7 R. Cooter, ‘Normative Failure Theory of Law’, 1996-1997 *Cornell Law Review* 82, no. 5, p. 949 (‘Just as regulations ideally correct failures in markets, laws ideally correct failures in social norms’).

approach. As observed by Parks and Roberts, ‘norms and principles of fairness can help cement a collaborative equilibrium’.<sup>8</sup>

The article presents an extract from a much broader piece of cumulative work on the constitutionalism of international law.<sup>9</sup> In other words, the article intervenes in a process of legal reasoning. Accordingly, the introduction needs to provide a brief summary of the background inputs before proceeding further.

In brief, if consensus on the fundamental legal principles of international climate law has gone astray, and it is the *will* of the international community to govern this ‘normative gap’, then what is this normative gap, where is it and what is needed to respond to the challenges of normative fragmentation? If there is a normative legal gap then right from the onset it could be worthwhile to examine the nature of norms. In particular, it could be worthwhile to start by trying to understand the meaning, scope and application of legal norms.<sup>10</sup> For the purposes of this article, norms are a shared societal standard of behaviour. As determined by its specification, a legal norm legitimises a norm and makes it lawful.<sup>11</sup> Giving legitimacy to normative order is of considerable importance: it entails a question of justice.

If one considers justice as the universal conscience of humanity manifest in norms then one may also consider legal justice as the universal juridical conscience of humanity manifest in legal norms. In writing on the *Access of Individuals to International Justice*, Cançado Trindade refers to the source of the transcendent norm:

‘The universal juridical conscience, as the ultimate material source of all law, has nowadays reached a degree of evolution that acknowledges the permanent need to secure the individuals’ right of direct access to international justice.’<sup>12</sup>

According to Cançado Trindade, ‘breaches of social justice offend the universal conscience’.<sup>13</sup>

For the purposes of this study, legal norms include legal principles, legal rules and legal standards. Legal norms are not interchangeable but they are interrelated and interdependent. They are subject to both static and dynamic specifications. If controversy surrounds securing consensus on legal norms and this controversy underpins controversy in international climate law, then how should international law govern these norms?

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8 Ibid., p. 147. Parks and Roberts refer to the work of Goldstein and Keohane in defining principled beliefs as ‘normative ideas that specify criteria for distinguishing right from wrong and just from unjust’ in J. Goldstein & R. Keohane (eds.), *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change*, 1993, p. 9. B.C. Parks & J.T. Roberts, ‘Climate Change, Social Theory and Justice’, 2010 *Theory, Culture and Society* 27, no. 2, pp. 134-166.

9 The broader study comprises several volumes and is work in progress. It begins by examining the foundations of the legal norm, and the fundamental legal principles of international climate law, and proceeds to contradistinguish consequential legal norms. It is the first study on international climate law to be framed in the form of any inquiry.

10 ‘The rule of law must be embraced by nations as a set of norms before it can be implemented as part of an overall pattern of behaviour in accord with these norms’, R. Bowen, ‘International Imposition and Transmission of Democracy and the Rule of Law: Lessons from Central America’, in D.W. Jackson et al. (eds.), *Globalizing Justice: Critical Perspectives on Transnational Law and the Cross-Border Migration of Legal Norms*, 2010, p. 174.

11 J.S. Ela, ‘Law and Norms in Collective Action: Maximizing Social Influence to Minimize Carbon Emissions’, 2009 *UCLA Journal of Environmental Law and Policy* 27, no. 1, pp. 93-144 (discusses social norms). K.F. Kuh, ‘Capturing Individual Harms’, 2011 *Harvard Environmental Law Review* 35, no. 1, pp. 155-204 (‘norms are obligations that guide behavior without relying on enforcement through formal legal rules and sanctions’, p. 166). B. Druzin, ‘Law, Selfishness, and Signals: An Expansion of Posner’s Signaling Theory of Social Norms’, 2011 *Canadian Journal of Law and Jurisprudence* 24, no. 1, pp. 5-54 (discusses internalization as the underlying sense of universal obligation or duty to follow a norm). P. Stockburger, ‘The Responsibility to Protect Doctrine: Customary International Law, an Emerging Legal Norm, or Just Wishful Thinking’, 2010 *Intercultural Human Rights Law Review* 5, pp. 365-406 (reflection on norms as long-standing international commitments).

12 A.A. Cançado Trindade, *The Access of Individuals to International Justice*, 2011, p. 81.

13 Ibid. p. 175. For discussions on an alternative view and the alienation of the aesthetic conscious (social norms), see B. Krajewski, (ed.), *Gadamer’s Repercussions, Reconsidering Philosophical Hermeneutics*, 2004. The approach taken here is consistent with Cançado Trindade’s: the conscious informs the social norm and the social norm informs the legal norm. See the earlier writings of Stone on ‘universal conscience’: J. Stone, *Human Law and Human Justice*, 1965, p. 202. Stone also discusses the origin of justice as a ‘kind of metaphysical cosmological principle regulating the operation of the forces of nature on the elements of the universe’ at p. 11.

The article grapples with this question. It works from the premise that a normative gap reflects a constitutional gap in the legal system.<sup>14</sup> Disunity and divergence surface from a failure to reach consensus on the constitution of fundamental legal principles and their consequential norms.<sup>15</sup>

It is not clear as to whether a governance deficit results from inconsistencies, if any, in the United Nations Framework Convention on Climate Change (hereinafter UNFCCC),<sup>16</sup> or whether the debate only resides in giving effect to that treaty or perhaps even an alternative instrument found elsewhere. (In any event, the UNFCCC is a constitutive treaty that plays a key role in the governance of international climate law).

A more comprehensive response will depend on a plurality of factors. Considerations include the nature of the decision or dispute at hand and the degree to which the problem crosses a normative nexus, which is to say, seeps into other regimes, such as, trade, forestry and water law.<sup>17</sup> It is extremely difficult to address problems inter-regime if there is weak consensus on the constitutive elements of one specific regime that informs that normative nexus. Even if negotiating parties attain a thin consensus, say for instance, in the form of a plurilateral agreement on standards, a procedural accord or even a supplementary protocol, these solutions will still not resolve an underlying constitutional breakdown in normative consensus.

Brölmann supports this argument for constitutionalism by reference to judicial practice: ‘it appears from judicial practice that constituent treaties of international organizations are not only regarded as treaties but also as “constitutional” instruments.’<sup>18</sup> Amerasinghe,<sup>19</sup> and Sarooshi,<sup>20</sup> agree.

In 2007, a report of the Intergovernmental Panel on Climate Change (hereinafter IPCC) identified that there are ‘no authoritative assessments of the UNFCCC or its Kyoto Protocol that assert that these agreements have succeeded – or will succeed without changes – in fully solving the climate problem.’<sup>21</sup> It would of course be a false assertion to claim that the UNFCCC or the Kyoto Protocol promise redemption or ever set out to ‘solve the climate problem fully.’<sup>22</sup>

In Freestone’s view, there is either a pending train wreck or a need for a paradigm shift.<sup>23</sup> Freestone proceeds to observe that some say that the ‘UNFCCC process itself is “broken” and that if progress is not made then ‘there will inevitably be some serious re-examination of the whole UNFCCC processes and the modalities by which important agreements on climate change can be reached among the key players.’<sup>24</sup> In December 2011, the Red Cross / Red Crescent referred to a ‘collective failure’ in COP 17 climate change negotiations.<sup>25</sup> These controversies inflame the debate.

If a process needs fixing, or there is a conviction that negotiations ought to be put back on track, then it would be sensible for ensuing actions to have some sort of fundamental and unified cause. If there is to be constitutional reform, then an authoritative assessment of the constitutive elements (the fundamental principles and consequential norms) of international climate law is imperative.

14 D. Landau, ‘The Reality of Social Rights Enforcement’, 2012 *Harvard International Law Journal* 53, no. 1, pp. 189-248, (discusses ‘holding a norm constitutional only under the condition that it be interpreted a certain way’, p. 218).

15 On the interdependence of constitutional interpretation and practice see M.J. Perry, ‘Why Constitutional Theory Matters to Constitutional Practice and Vice Versa’, 1989 *Constitutional Commentary* 6, no. 2, pp. 231-250.

16 United Nations Framework Convention on Climate Change (UNFCCC), concluded 9 May 1992, entered into force 21 March 1994, 1771 UNTS 107; S. Treaty Doc no. 102-38; U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 ILM 849 (1992).

17 M.M. Naser, ‘Climate Change, Environmental Degradation, and Migration: A Complex Nexus’, 2012 *William & Mary Environmental Law and Policy Review* 36, no. 3, pp. 713-768.

18 C. Brölmann, ‘International Organizations and Treaties: Contractual Freedom and Institutional Constraint’, in J. Klabbers & A. Wallendahl, (eds.), *Research Handbook on the Law of International Organizations*, 2011, pp. 285-312, at p. 299.

19 C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2005.

20 D. Sarooshi, ‘Some Preliminary Remarks on the Conferral by States of Powers on International Organizations’, 2003, *Jean Monnet Working Paper* 4/03, p. 6.

21 B. Metz et al. (eds.), *Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, 2007, p. 768, Para. 13.3.1.

22 ‘A principle is a guiding light, it does not determine the exact route’: D. Cornell, ‘From the Lighthouse: The Promise of Redemption and the Possibility of Legal Interpretation’, in G. Leyh (ed.), *Legal Hermeneutics: History, Theory, and Practice*, 1992, p. 161.

23 D. Freestone, ‘From Copenhagen to Cancun: Train Wreck or Paradigm Shift’, 2010 *Environmental Law Review* 12, no. 2.

24 *Ibid.* p. 93.

25 IFRC press release: UNFCCC climate change negotiations; Red Cross/ Red Crescent Head expresses alarm over outcome COP 17 climate change negotiations; 11th December 2011, Durban; available at <<http://www.climatecentre.org/site/unfccc-climate-change-negotiations>> (last visited 26 September 2012).

The article proceeds in two cumulative stages. Consistent with the objective of providing some of the main guidelines on developing an ordered constitutional approach, the article begins by situating the nature of constitutionalism and legal principles of international climate law. Although the study results in a deep analysis of UNFCCC principles, the approach does not begin with, nor is it dependent on, treaty interpretation and so the article does not start there either. Nor does the article start with an analysis of consequential rules.

Instead, Part 1 of the article intentionally starts by explaining the methodology in reference to ‘constitutional construction’ and ‘systematics’.<sup>26</sup> The role of constitutional interpretation and construction is often to try to understand how various constitutive norms (fundamental legal principles, for instance) fit together and to draw the patterns (or systems) of normative order to enable us to constitute a working whole. For if there were no trees there would be no wood and if there were no principles there would be no rules.

Part 1 of the article therefore reflects on the nature of constitutional construction (the approach by which to leverage fundamental legal principles to attain normative order) and systematics (the study of international climate law as a dynamic legal system). The inquiry considers the relationship between international law, special regimes and international climate law. (International climate law does not reside in isolation from general international law). Next, the inquiry turns to international climate law and explains the relevance of legal hermeneutics and the legal science of interpretation.<sup>27</sup> Part 1 is founded on the disciplines of international law. It includes but is not limited to drawing on constitutional law, legal philosophy and legal theory. In short, Part 1 sets out the rationale for the interpretative application that follows.

Part 2 engages legal hermeneutics, which is a science of interpretation. Legal hermeneutics helps to consider the taxonomy of the *lex specialis* principles of international climate law. The classification of legal norms in an ordered system extends far from a random identification of legal norms.

To reiterate, the article takes this approach because, as mentioned right at the beginning, fundamental *lex specialis* principles are in dispute, there is no consensus on the unified normative framework and disaccord leads to no accord.<sup>28</sup> The article concludes by illustrating one scenario of an initial schema of the constitutive legal principles of international climate law.

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26 H. Kelsen, *Pure Theory of Law*, 1978, p. 31: ‘An “order” is a system of norms whose unity is constituted by the fact that they all have the same reason for their validity; and the reason for the validity of a normative order is a basic norm’. G. Teubner, *Autopoietic Law: A New Approach To Law And Society*, 1988, p. 77: ‘We shall content ourselves with maintaining that Kelsen’s conception of legal systematics is at many points very close to the view today being developed by way of autopoiesis’. Lindahl speaks of the constitutive role of boundaries and refers to Kelsen as being one of only a few legal theorists who has explicitly addressed the problem of legal boundaries within the framework of a general enquiry into the concept of law (H. Lindahl, ‘Boundaries and the Concept of Legal Order’, 2011 *Jurisprudence* 2, no. 1, pp. 73-98).

27 The subject has been developed by the evolution of theological hermeneutics and in law by the work of Francis Lieber which appeared in 1839 (*Legal and Political Hermeneutics, or, Principles of Interpretation and Construction in Law and Politics: with Remarks on Precedents and Authorities*, published by C.C. Little and J. Brown, now easily accessible on google books and a 2012 edition will be released). According to Lieber, ‘hermeneutics is that branch of science which establishes the principles and rules of interpretation and construction’, p. 64. For a primer on ‘constitutional hermeneutics’, see Lieber from p. 177. The following materials provide an overview of some of the diverging contemporary strands of scholarly literature on this subject. F.J. Mootz, *Law, Hermeneutics and Rhetoric, Collected Essays in Law*, 2010. Mootz refers to hermeneutics as getting to the ‘etymological root of the word’. He discusses Gadamer’s descriptive, as opposed to normative, hermeneutics; and, in contrasting this with Perelman’s view of justice as persuasion and not only conversation, presents an argument of justice as ‘rhetorical knowledge’. See also J. Mootz, *The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry*, 1986. G. Leyh (ed.), *Legal Hermeneutics: History, Theory, and Practice*, 1992, also covers extensive views on Gadamer but the chapter by Terence Ball is most relevant insofar that judges and ordinary citizens should not reframe what the framers put together (Constitutional Interpretation and Conceptual Change at p. 129). R.E. Palmer, *Hermeneutics. Interpretation Theory in Schleiermacher, Dilthey, Heidegger, and Gadamer*, 1969 (sets out a comparative review of some contemporary thinkers). S.E. Porter & J. C. Robinson, *Hermeneutics: An Introduction to Interpretative Theory*, 2011 (presents some of the modern influences from humanities and discusses the rationale for interpretation as a tool that may make or break consensus, historical distance is another phenomenon that can isolate interpretation). P.J. Nerhot, *Law, Interpretation and Reality: Essays in Epistemology, Hermeneutics and Jurisprudence (Law and Philosophy Library)*, 2012.

28 (If the dispute concerned simply social norms then the analysis would hinge principally on policy analysis. Such a discussion is also more suited to a separate article).

## 1. Constitutionalism of the legal principles of international climate law

### 1.1. *The nature of constitutional interpretation, construction and systematics*

The premise underlying the article is that international climate law could benefit if actors in the international climate change debate were to reach consensus on a unified normative system of law. By extension, and in terms of *lex specialis* regimes, such as climate law, it may be advantageous for the Contracting Parties thereto to subscribe to a constitutional instrument setting forth the fundamental principles that constitute, as it were, the foundations on which stand the structure of that special regime. (This is not to say that such a system or instrument does not exist but it does say that there is an undermining of its validity if it has no eventual effect).

One approach to examine this issue, but not the only one, is to employ legal science as a tool of constitutional construction (as a tool of normative interpretation and unification) and systematics (as a tool by which to study legal systems). This article presents some summary results from a scientific legal study that examines the systematic constitutionalism of the *lex specialis* principles of international climate law. It is an extract of perpetual work in progress.

The International Law Association's Committee on The Legal Principles Relating to Climate Change is also studying the principles of international law that relate to climate change;<sup>29</sup> but it is important to make a distinction between this study and the work of the International Law Association (hereinafter ILA). The ILA's Committee on The Legal Principles Relating to Climate Change is 'examin[ing] the basic principles of international law in the area of climate change'.<sup>30</sup> Conversely, this article uses the outputs of my earlier 'examination of the basic principles' as one of many inputs to propose the 'contextualisation', specification and constitutional unification of a universal systematic approach by which to guarantee and fulfil the legal principles of international climate law, and their consequential effects.

Inventorizing a norm as a principle, concept or notion differs from ascertaining the legitimate specification of a legal norm by which Contracting Parties agree to be governed. Identification of key principles is not the central thesis of this paper. Moreover, there is no intent to transcend international law to a new level. It is for the competent authority to acknowledge the normative constitution by which it is to be governed. The distinction is an important one because it could influence decision-making in different ways. An identification thesis may eventually recognise UNFCCC principles but it may interpret them differently or perhaps not reconcile them with a normative specification at all.

In contrast, this inquiry uses international law and the UNFCCC to orientate the *lex specialis* principles of international climate law. In other words, this study considers that there could be some benefit in reaching consensus on a constitutional '*fons principalis* of international climate law'. Put yet another way, reaching consensus on fundamental legal principles may have benefit for climate governance and legal justice. Principles incorporated within a treaty and endorsed by textual, contextual and supplementary means of interpretation may have legal effect and merit attention. The view posited here is that climate law is a subset of a broader body of international law, but the legal norms therein require some sort of universality and interoperability if they are to limit fragmentation in international law and contribute to climate justice.<sup>31</sup>

If climate change knows no borders then there may also be a need to reflect upon the traditional notion of state sovereignty, state constitutionalism and extra-territoriality. When law seeps into the commons and governs all peoples, a new form of constitutionalism may need to evolve at the normative nexus. A new axis may need to cement a cohesive body of legal norms that legitimises the constitutionalism of a new *jus gentium*.<sup>32</sup> In other words, the inquiry informs one hub in a broader whole.

29 Committee on The Legal Principles relating to Climate Change, *Legal Principles Relating To Climate Change*, (Sofia Conference, 2012), (International Law Association, Sofia 2012) (Second Report). See also P. Sands et al., *Principles of International Environmental Law*, 2012. For specific principles see, for example, A. Trouwborst, *Precautionary Rights and Duties of States*, 2006.

30 Japan Branch Committee on Climate Change, *The Legal Principles relating to Climate Change, Preliminary Issues on the Methodology and Scope of the Work*, (International Law Association, July 2009), p. 2.

31 W. Boyd, 'Climate Change, Fragmentation, and the Challenges of Global Environmental Law: Elements of a Post-Copenhagen Assemblage', 2010 *University of Pennsylvania Journal of International Law* 32, no. 2, p. 457, Fall 2010, University of Colorado Law Legal Studies Research Paper No. 11-01.

32 A.A. Cançado Trindade, *Humanization of International Law*, *International Law for Humankind : Towards a New Jus Gentium (II)*, General

This study proceeds on the basis that analysis must be conducted in due consideration of international law, environmental law and the interaction of climate law with other special legal regimes. A preliminary step is to analyse the *lex specialis* principles of international climate law in a systematic fashion. Efforts entail developing a doctrinal framework of the international legal principles of climate change. The underpinning inquiry necessitates specification of the legal principles of international climate law; and, a supporting taxonomy identifies and classifies the *lex specialis* principles of international climate law according to their legally recognised relationships.

The proposed methodology invokes a study of the dynamic interrelationships between the *lex lata* of general international law and the *lex lata* of special regimes, international climate law included. The distinction between 'what the law is' and 'what the law ought to be' is continuously evolving. Each legal norm incorporates its own dynamic construction depending on the position it secures within a given time and space. (A norm's temporal and spatial specificity requires explanation elsewhere).

In its dynamic context, say for instance, when a climate norm interacts with a water norm, an independent transcendent legal principle of one special regime may also be a transcendent legal principle of another legal regime but its consequential norms may differ. In any event, it is not possible to consider international climate law in isolation from other special regimes. The relationship between international law, special regimes and international climate law must be factored into an approach to constitutional construction.

### ***1.2. The relationship between international law, special regimes and international climate law***

In turning to the *lex lata* of international climate law, international climate law consists of layers of general international law, tiers of international environmental law, and legal norms distinct to its domain.<sup>33</sup> A survey of the relevant instruments of international public law brings the *lex lata* sources of public international climate law into perspective.

As with any discussion on international legal principles, a jurist often invokes Article 38 (1) of the Statute of the International Court of Justice (hereinafter the ICJ Statute).<sup>34</sup> Article 38 never mentions the word source. It does not infer any hierarchy. The ICJ Statute does not extend to all spheres of international law. Instead, Article 38 sets forth a two-fold framework by which the ICJ shall decide disputes.

Article 38 (1) of the ICJ Statute provides that in deciding disputes submitted to it, the International Court of Justice shall apply international conventions establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; judicial decisions and learned writings.<sup>35</sup> Article 38 (2) of the ICJ Statute does not prejudice the power of the Court to decide a dispute *ex aequo et bono*, in equity and justice, if the parties agree thereto.<sup>36</sup> Subject to agreement, the ICJ may decide a dispute on the basis of the transcendent social norm, that of justice. If not, the Court makes its decisions on international legal justice as bound by the Court's competence and terms of reference.

According to Article 38 (1) letter (c) of the ICJ Statute, the Court shall apply the general principles of law recognized by civilized nations in accordance with international law. Article 38 (1) (c) must refer to something distinctive in the Court's application of international law; otherwise it would be superfluous or redundant.<sup>37</sup> Lammers advances the view that 'the fact that a special paragraph was added to entitle the Court to render decisions *ex aequo et bono*, if the parties agreed thereto, implied also that the application of general principles of law by the Court was not to be confounded with such decisions either'.<sup>38</sup>

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*Course on Public International Law*, collected courses of the Hague Academy of International Law, Vol. 317, 2005. G.E. Sherman, 'Jus Gentium and International Law', 1918 *The American Journal of International Law* 12, no. 1, pp. 56-63 at p. 57.

33 For an introduction to climate law, economics and policy: S.H. Schneider et al. (eds.), *Climate Change Science and Policy*, 2010. N. Stern, *The Economics of Climate Change*, 2007. F. Yamin & J. Depledge, *The International Climate Change Regime - A Guide to Rules, Institutions and Procedures*, 2005.

34 *Statute of the International Court of Justice* (ICJ Statute 1945), concluded 26 June 1945, entered into force 24 October 1945, 3 Bevans 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215 (1945).

35 ICJ Statute 1945, supra note 34 Chapter II, Competence of the Court, Art. 38 (1).

36 *Ibid.*, Art. 38 (2).

37 J.G. Lammers, 'General Principles of Law Recognized by Civilized Nations', in H.F. van Panhuys et al., *Essays on the Development of the International Legal Order: in Memory of Haro F. van Panhuys*, 1980, p 55.

38 *Ibid.* p. 60.

To decide a dispute submitted to it in accordance with international law, Kelsen argues that there was never intent to extend an unrestrained extraordinary power to the ICJ to legislate.<sup>39</sup> While the construction of a unified constitution of international climate law entails legal science, there is never any suggestion put forward here that a judge ought to comprehend the equations that inform legal science. Whether or not municipal law is part of international law may not be particularly helpful to all national judges either.

Conversely, for a legal scientist, analysing and proposing the construction of the order of a new *jus gentium* within the context of international law entails a related but different skill set. Analytical reasoning and iterative deduction (repetitive testing) is essential to support the contextualisation and verification of the legal norm within a uniform and universal constitutional structure. The substance of this article is therefore likely to be of interest to a narrow body of jurists, these being the legal philosopher and legal scientist, and of course civil society and competent authorities who acknowledge and authenticate the construction of the legal norm (those like the UNFCCC Conference of the Parties, hereinafter UNFCCC COP).

While Article 38 (1) of the ICJ Statute sets out an inventory that includes the general principles of law recognized by civilized nations, not all principles are legal norms. A competent authority, such as a state engaged in negotiating and contractually agreeing climate norms, may judge general principles by a moral threshold; but such general principles may not necessarily be legal norms or have the effect of law. On entering the legal system, properly specified legal principles become subject to certain rights and obligations and have the effect of law.

At times, the effectiveness of such principles of international environmental law only relate to a certain conduct rather than a result. The nomenclature is familiar to civil lawyers.<sup>40</sup> According to Bodansky, ‘international environmental lawyers commonly refer to requirements to do particular things as *obligations of conduct*, and obligations to achieve particular results as *obligations of result*’.<sup>41</sup> An ‘obligation of result’, which may also be referred to as an ‘obligation of effect’, implies an obligation of conduct and ‘obligates a state to *achieve specific targets* to satisfy a detailed substantive standard’.<sup>42</sup> This point is relevant because while consensus may be reached on the legitimate specification of a legal norm, there is still a need to make that norm effective. The article refers to a distinction between factual legitimacy and effect.

Besides general international law, the normative framework comprising inter alia the Stockholm Declaration (1972),<sup>43</sup> the principles incorporated in the World Charter for Nature,<sup>44</sup> the Rio Declaration (1992),<sup>45</sup> and Agenda 21 (1992),<sup>46</sup> and so on, is also an important point of reference for considering the *lex specialis* principles of international climate law.<sup>47</sup> The aforementioned environmental instruments set forth part of the normative framework within which international climate law resides and functions.<sup>48</sup> The legal consequences arising from the application of these instruments vary from case to case and often depend on the precise nature of the consequential international commitment entered into by the state, or competent authority, concerned.

39 H. Kelsen, *Principles of International Law*, 1952. Reprinted 2003, p. 394.

40 J.J.H. Van Kempen, ‘Countering the Obscurity of Obligations in European Environmental Law, Illustrated by an Analysis of Article 4 of the European Water Framework Directive’, 2012 *Journal of Environmental Law*, no. 3.

41 D. Bodansky, *The Art and Craft of International Environmental Law*, 2009, p. 76.

42 S.L. Joseph, *Research Handbook on International Human Rights Law*, 2010, p. 43. S. Leckie & A. Gallagher (High Commissioner), *Economic, Social, and Cultural Rights: A Legal Resource Guide*, 2006, p. 466.

43 UN, *Declaration of the United Nations Conference on the Human Environment 1972* (Stockholm Declaration 1972), concluded 16 June 1972, U.N. Doc. A/Conf.48/14/Rev. 1(1973), 11 ILM 1416 (1972).

44 UNGA Resolution A/RES/37/7, *World Charter for Nature*; Annex thereto; 48th plenary meeting, 28 October 1982.

45 UN, *Rio Declaration on Environment and Development 1992* (Rio Declaration), concluded 13 June 1992, UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992).

46 UNCED, *Agenda 21, Programme of Action for Sustainable Development*, adopted 14 June 1992 at the United Nations Conference on Environment and Development in Rio, (at the UNCED), the Earth Summit, U.N. GAOR, 46th Sess., Agenda Item 21, UN Doc A/Conf.151/26 (1992).

47 P. Sands et al., *Principles of International Environmental Law*, 2012. D. Bodansky et al. (eds.), *The Oxford Handbook of International Environmental Law*, 2007.

48 D. Shelton, ‘Human Rights, Environmental Rights, and the Right to Environment’, 1991 *Stanford Journal of International Law* 28, no. 1, pp. 103-138 at p. 109.

At a more specific level, authenticated treaty-based state responsibility differs from declaratory responsibility. Entering into a contractual commitment to bind emission reduction targets imposes certain obligations.<sup>49</sup> An Article 4.2 commitment provided for by the UNFCCC could still contain an obligation to prevent harm but it does not necessarily constitute an obligation of result. Specific rules stemming from the UNFCCC may create obligations of result. Verheyen observes, 'looking at the entirety of Article 4.2 in conjunction with Article 2 [objective of the UNFCCC] allows a finding of an "obligation of conduct" on Annex I states to modify long-term trends of greenhouse gas emissions. Such an interpretation is mandated and restricted by the methods prescribed in the VCLT.'<sup>50</sup>

The distinction between an obligation of conduct and an obligation of result also depends on the specification of the legal norm creating the obligation. In terms of general principles of law, as to be applied by the ICJ, such principles must be legally valid, which is a factor of making a decision that is consistent with international law, and they must be recognized by civilized nations.

Article 38 (1) of the ICJ Statute does not provide for an exhaustive list of applicable legal norms. Nor is the list absolute. The inventory is not restricted. Nor is it complete. A legal norm, legal principles included, may take on a different application depending on the frame of reference. Just as kaleidoscopic views differ, normative frames of reference differ but they still form part of a broader whole.

Turn a kaleidoscope one way and the relationships within the interior change but remain synonymous with a heterarchy of legal norms. Turn the kaleidoscope another way, and different relationships emerge; but the heterarchy remains intact. Moreover, and throughout this entire viewing of a frame within a frame, the systematic structure remains intact. (There is a hierarchy of transcendent norms vis-à-vis inferior norms on the circumference. There is heterarchy in the centre).

International law, for instance, recognises a special place for certain transcendent norms, such as, *jus cogens*.<sup>51</sup> To cite Brownlie, 'in the recent past both doctrine and judicial opinion have supported the view that certain overriding principles of international law exist, forming a body of *jus cogens*.'<sup>52</sup> In this sense, *jus cogens* norms possess the features of a whole class of special norms. In a similar fashion, *jus cogens* norms govern a body of prevailing transcendent normative principles of international climate law.

The constitutional framing of legal norms (legal principles, rules and standards) may help establish priorities. A principle justifies a rule but a rule satisfies a principle.<sup>53</sup> Legal principles guide the legal decision-making process and may necessitate outcomes, which may be evidenced in the form of policy, other principles or express rules.

Rules are generally far more explicit than principles. Rules may also give effect to a legal principle by establishing a more specific norm; but this is not to say that a transcendent *lex specialis* principle creates any hierarchy in general international law. It does not. It supports a heterarchy, which implies a dynamic system of legal norms and a hierarchy at certain points in time and space but not at all times.<sup>54</sup>

'Heterarchical' systems ('autopoietic' systems that are 'self-referential' and 'self-perpetuating') are at the base of virtually all theoretical models of advanced networked systems.<sup>55</sup> Self-perpetuating systematic interactions are required in times of 'deep uncertainty' but they are only operational if, inter alia, there is a correct specification of the legal norm. At some point, there must be a regression to a transcendent legal node or norm. Such circulation of the legal norm, as opposed to 'verticalisation' where the norm may fall off the bottom rung or out of the legal system altogether,<sup>56</sup> does not mean that systematic logic imposes

49 D. Freestone & C. Streck, (eds.), *Legal Aspects of Carbon Trading: Kyoto, Copenhagen and Beyond*, 2009.

50 R. Verheyen, *Climate Change Damage and International Law: Prevention, Duties and State Responsibility*, 2005, p. 82.

51 V.C. Tomuschat & J.-M. Thouvenin, (eds.) *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes*, 2006.

52 I. Brownlie, *Principles of Public International Law*, 2008, p. 510.

53 This may be explained briefly by the fact that a cause differs from a consequence.

54 G. Scelle, *Précis de droit des gens: principes et systématique*, Vol. 2, 1934. G. Scelle, *Précis de droit des gens. Principes et systématique*, 2008. H. Kelsen, *Qui doit être le gardien de la constitution*, 2006. H. Kelsen, *Théorie générale des normes*, 1999. A.A. Cançado Trindade, *Evolution du droit international au droit des gens*, 2008.

55 A. D'Amato, 'International Law as an Autopoietic System', in R. Wolfrum & V. Röben (eds.), *Developments of International Law in Treaty Making*, 2005, pp. 335-399. For foundations on heterarchy in English see: W.S. McCulloch, 'A Heterarchy of Values Determined by the Topology of Nervous Nets', 1945 *Bulletin of Mathematical Biophysics* 7, pp. 89-93. See also: R.M. Ehrenreich et al. (eds.), *Heterarchy and the Analysis of Complex Societies*, (No. 6, Archaeological Papers of the American Anthropological Association, AAA Publications, 1995).

56 B. Desai, *Multilateral Environmental Agreements: Legal Status of the Secretariats*, 2010, p. 13. 2003 *Revue européenne de droit public* 15, pp. 1-736, p. 160. N.D. White, *The United Nations System: Toward International Justice*, 2002, p. 300.

circular logic. (See Wolff,<sup>57</sup> Kelsen,<sup>58</sup> Sohm;<sup>59</sup> Van de Kerchove and Ost,<sup>60</sup> the work of the Russian Academy of Sciences on the principle of heterarchy in international law,<sup>61</sup> D'Amato's writing on cybernetics and autopoietic systems,<sup>62</sup> and that of Teubner).<sup>63</sup>

Transcendent *lex specialis* principles interact in different ways depending on the time and space of their application. General principles of international law may inform principles of environmental law, which inform specialist systems of environmental law. Turn the kaleidoscope another way, and *lex specialis* principles may interact at a different nexus, say at the intersection between human rights, trade, climate law and water law or at the nexus between climate law and migration. Besides these dynamic inter-regime specifications, the specification of the legal norm will also have a dynamic intra-regime specification that operates within the confines of a certain regulatory context, such as a treaty-based framework. One may refer to such a point of reference as a 'root element'.<sup>64</sup> An example will unfold whereby the UNFCCC serves as the root element for analysing the *lex specialis* principles of international climate law.

### 1.3. Legal hermeneutics and the science of the interpretative schema

The root element is a type of radical of the legal climate norm insofar as it proceeds to the origin of the legal norm.<sup>65</sup> The root element identifies the origin of the specification of the *lex specialis* principles of international climate law, at least as far to the point of existing consensus. For the purposes of deducing *lex specialis* principles, if a treaty regime governs a *lex specialis* body of law then one may assume that the *lex specialis* principles of that treaty regime could inform the *lex specialis* principles of that particular body of law. If the UNFCCC governs the *lex specialis* body of international climate law then the *lex specialis* principles of the UNFCCC could inform the *lex specialis* principles of international climate law.<sup>66</sup> General analysis proceeds to the particular.

In terms of addressing future action on climate change at the global level, the UN General Assembly confirmed in 2005 that the UNFCCC is the treaty of reference.<sup>67</sup> By virtue of UNGA Resolution A/RES/60/1, the General Assembly,

'[Members of the Assembly] emphasize[d] the need to meet all the commitments and obligations [they have] undertaken in the United Nations Framework Convention on Climate Change and other relevant international agreements, including, for many of [them], the Kyoto Protocol. *The Convention is the appropriate framework for addressing future action on climate change at the global level;*' (emphasis added).<sup>68</sup>

57 C. Wolff, *The Law of Nations Treated According to a Scientific Method* (1749), translated by J.H. Drake, 1934, Vols. 1-2.

58 H. Kelsen, *Pure Theory of Law*, (*Reine Rechtslehre*, second revised and enlarged German edition [first edition published 1934], 1960), translated by M. Knight, 1967.

59 R. Sohm, *The Institutes: A Textbook of the History of Roman Private Law*, 1907.

60 M. Van De Kerchove & F. Ost, *Legal System Between Order and Disorder*, 1994. F. Ost, 'Between Order and Disorder: The Game of Law', in G. Teubner, *Autopoietic Law: A New Approach To Law And Society*, 1988, p. 72

61 Russian Academy of Sciences, Center for Civilization And Regional Studies, Faculty Of History, Political Science And Law, Third International Conference; Hierarchy And Power In The History Of Civilizations, Moscow, June 18-21, 2004, 'Heterarchy and Homoarchy as Evolutionary Trajectories' (Convenor: Dmitri M. Bondarenko).

62 A. D'Amato, 'International Law as an Autopoietic System', in R. Wolfrum & V. Roben, (eds.), *Developments of International Law in Treaty Making*, 2005, p. 335. A. D'Amato, 'International Law as a Unitary System', in D. Armstrong (ed.), *Routledge Handbook of International Law*, 2009, p. 101.

63 G. Teubner, *Autopoietic Law: A New Approach To Law And Society*, 1988. See also A. Beck, 'Is Law an Autopoietic System?', 1994 *Oxford Journal of Legal Studies* 14, no. 3, pp. 401-418.

64 The dynamic root element is found at the nexus between intersecting transcendent legal principles and opens the door to a corridor of consequential norms that may govern multiple legal systems.

65 A decision tree is another way to display a normative algorithm. Legal decisions are often complex and involve a sort of sequence of interacting decision trees or dynamic system analysis.

66 United Nations Framework Convention on Climate Change (UNFCCC), concluded 9 May 1992, entered into force 21 March 1994, 1771 UNTS 107; S. Treaty Doc no. 102-38; U.N. Doc. A/AC.237/18 (Part II)/Add.1; 31 ILM 849 (1992).

67 Ibid.

68 UNGA Resolution A/RES/60/1, *2005 World Summit Outcome*, Resolution adopted by the General Assembly at its 60th session, 8th plenary meeting, 16 September 2005, Para. 51.

On 2 December 2011, the UNFCCC COP reinforced earlier decisions. The UNFCCC COP reported that the foundational element of governing climate change is to ‘work within the existing UNFCCC framework and its decisions and based on its principles and objectives.’<sup>69</sup> UNFCCC COP 17 decided in Durban (December 2011) that a shared vision for long-term cooperation ‘should be guided by the principles of equity and common but differentiated responsibilities and respective capabilities’, an Article 3 (1) UNFCCC provision.<sup>70</sup>

The fact that the UNFCCC has near universal membership also supports turning to the UNFCCC. As of September 2012, there were 195 Parties to the UNFCCC (194 States and the EU as the only regional economic integration organisation).<sup>71</sup> It is common practice for decision-makers engaged in making special regimes operational to refer to their constitutive governing treaties. Practice of the Parties to the United Nations Convention on the Law of the Sea (UNCLOS) is an example in this regard.<sup>72</sup>

In a similar fashion, the *lex specialis* principles of the UNFCCC treaty regime inform the *lex specialis* principles of international climate law. Methodologically, therefore, it is indispensable that any evaluation of the legal principles of the *lex specialis* regime of climate change starts with the specific UNFCCC treaty regime and proceeds by invoking Article 31 of the 1969 Vienna Convention on the Law of Treaties (hereinafter VCLT).<sup>73</sup> International law has its own tools of legal hermeneutics. The VCLT is the correct vehicle for interpretative admission of UNFCCC legal norms.

Article 31 of the VCLT establishes the general rules of treaty interpretation and, by extension, the modalities by which to interpret the legal principles of the UNFCCC. Article 32 provides for supplementary means of interpretation in the event Article 31 fails in the sense of the result being ambiguous or obscure.

Rather than ignore an Article 31 VCLT application to the UNFCCC, the inquiry centres on a logical interpretation of the legal principles of international climate law derived from the UNFCCC. In addition, although an application of Article 31 to the UNFCCC does not fail, the study reinforces the Article 31 interpretation by reference to supplementary means of interpretation. On the one hand, a reviewer may say that this approach is repetitive or that only one means of interpretation is necessary or that the VCLT is superfluous. On the other hand, a more thorough interpretation may advance the quality of the interpretation. A VCLT interpretative application is required if one is to act in good faith.

In reference to Article 31 (1) of the VCLT 1969: ‘a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’ In accordance with Article 31 (1) of the VCLT 1969, interpretation of the legal principles governing the climate change regime is to be within the ordinary meaning to be given to those principles within the light of their object and purpose.

Recall too Article 31 (2) of the Vienna Convention on the Law of Treaties 1969. Article 31 (2) stipulates,

‘the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.’

By extension, Article 31 (2) of the VCLT 1969 prescribes that deduction of the object and purpose of the legal principles of climate change extends to encompass interpretation of the text of the UNFCCC,

69 UNFCCC, COP 17, CMP 7, *Indaba: The Big Picture*, Durban, South Africa, release of 2 December 2011.

70 UNFCCC; Report of the Conference of the Parties on its seventeenth session, held in Durban from 28 November to 11 December 2011. Addendum. Part two: Action taken by the Conference of the Parties at its seventeenth session; FCCC/CP/2011/9/Add.1; 15 March 2012, Decision 2/CP.17, Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, VII. Review: further definition of its scope and development of its modalities; p. 28; Para. 160.

71 Climate Change Secretariat; Status of Ratification of the Convention; available at <[http://unfccc.int/essential\\_background/convention/status\\_of\\_ratification/items/2631.php](http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php)> (last visited 26 September 2012).

72 United Nations Convention on the Law of the Sea (UNCLOS), concluded 10 December 1982, entered into force 16 November 1994, 1833 UNTS 3; 21 ILM 1261 (1982).

73 Vienna Convention on the Law of Treaties (VCLT 1969), signed at Vienna 23 May 1969, entered into force 27 January 1980, UN Doc. A/Conf.39/27 / 1155 UNTS 331 / 8 ILM 679 (1969) / 63 AJIL 875 (1969).

including its preamble and annexes, and decisions of the UNFCCC COP. (Decisions of the UNFCCC COP are included if they are accepted by the Parties to the UNFCCC as an instrument related to the treaty).

Article 31 (2) excludes the Kyoto Protocol and cap and trade regimes from this analysis. Although the Kyoto Protocol is an agreement relating to the UNFCCC, not all Parties to the UNFCCC have ratified it. Further, although the Kyoto Protocol derives instruments relating to the UNFCCC, not all Parties to the UNFCCC accept that these instruments create a binding obligation on them. The Kyoto Protocol does not therefore serve as the root element for the analysis.

In the absence of agreement on a framework of *lex specialis* principles of international climate law, UNGA Resolution A/RES/60/1 and Article 31 of the VCLT direct the analysis to the terms of the UNFCCC. Two preliminary questions arise when turning to examine whether the terms of the UNFCCC provide for legal principles by which to govern international climate law. First, did the Contracting Parties thereto express any specific legal principles? In other words, within the construction of the UNFCCC, do any ubiquitous legal values govern the climate change regime? Second, and by virtue of the VCLT, if the Parties to the UNFCCC provided for legal principles by way of express terms, what is the ordinary meaning of these terms within: a) the context of the UNFCCC; and b) within the light of the UNFCCC's object and purpose?

The object and purpose of the UNFCCC finds expression in Article 2 of the UNFCCC. Article 2 stipulates, 'Determined to protect the climate system for present and future generations, the Parties to the UNFCCC have agreed that the objective of the UNFCCC is to achieve the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.'<sup>74</sup> In essence, the object of the UNFCCC is 'to protect the climate system for present and future generations'. The UNFCCC legitimises the obligation to protect the global atmosphere. The means by which to achieve this obligation to protect is to set forth a structure for the control of greenhouse gases. In brief, the 'greenhouse effect' means that solar radiation trapped near the ground warms the earth and changes the climate. According to the IPCC, 'human activities, primarily the burning of fossil fuels and clearing of forests, have greatly intensified the natural greenhouse effect, causing global warming.'<sup>75</sup>

On the subject of whether the UNFCCC contains any explicit terms that may give effect to 'legal principles', the UNFCCC expressly mentions the word 'principle'. It does so on three occasions. In recalling the principles of international law and reaffirming the principle of the sovereignty of states, the preamble to the UNFCCC cites the word 'principle' twice. Article 3 of the UNFCCC cites the word 'principles' once.

Besides the text to the UNFCCC, the preamble to the UNFCCC may also establish the relevant context by which to interpret the legal principles of international climate law (Article 31 (2) of the VCLT). In returning to the preamble to the UNFCCC, the Parties to the UNFCCC recalled that, 'States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction'. In addition to setting the limits of state sovereignty, the Parties *reaffirmed* the principle of state sovereignty while cooperating internationally to address climate change.

The preamble to the UNFCCC therefore provides that the principle of sovereignty be subject to the Charter of the United Nations and the principles of international law. This does not necessarily mean that state sovereignty trumps international climate protection. The position on people's rights or a *jus gentium* is not entirely for jusnaturalists and it is not only limited to legal philosophy or policy. In 1992, Jouve observed that the Universal Declaration of Human Rights of 10 December 1948 proclaims 'des droits de l'homme comme l'idéal commun à atteindre par tous les peuples et toutes les nations (...)' (emphasis

74 UNFCCC, Art. 2.

75 IPCC, *Fourth Assessment Report: Climate Change 2007*, Frequently Asked Question 1.3, What is the Greenhouse Effect? <[http://www.ipcc.ch/publications\\_and\\_data/ar4/wg1/en/faq-1-3.html](http://www.ipcc.ch/publications_and_data/ar4/wg1/en/faq-1-3.html)> (last visited 26 September 2012).

added).<sup>76</sup> In translation, Jouve points to ‘human rights as a *common ideal* for all peoples and all nations *to achieve*’. When a state enters into a legal obligation to protect the global climate system, it may forfeit a degree of its sovereignty by delegating responsibility to an international organisation or other actors.

The principles of international law include both general principles and those particular to special regimes. By extension, the legal principles of climate law connect to: a) the Charter of the United Nations; b) the general principles of international law; c) the principles of special regimes within which climate law forms a subset; and, d) other principles of special regimes with which climate law intersects.

To interpret the *lex specialis* principles provided for by virtue of Article 3 of the UNFCCC, there is a need to look to the text of Article 3. Any interpretation of Article 3 is with the view to interpreting the ordinary meaning of the terms therein. Expressed in a treaty, an Article 3 principle is admissible evidence of a *lex lata* principle.

Within the core of the treaty, the Parties have even facilitated the investigation in two main ways: first, they entitled Article 3 ‘principles’; and, second, they proceeded to provide for explicit *principles* that ought to govern the international climate change regime. Article 3 of the UNFCCC expresses specific principles as they exist, rather than as we hope them to be or as we think they ought to be.

The preface to Article 3 of the UNFCCC provides that,

‘in their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, inter alia, by the following [principles].’

Article 3 then proceeds to set out an inventory of agreed principles. Article 3 of the UNFCCC in no way prescribes the Parties thereto to ignore the agreed principles of international climate law and devise their own set of principles.

The words ‘shall be guided’ are an important element of the objective validity of Article 3 principles. The word ‘shall’ refers to an imperative modal specificity. When the word ‘shall’ is appended by the words ‘be guided’, then the construction ‘shall be guided’ refers to the range specificity of the listed principles.

The words ‘inter alia’ simply mean that the extension of the principles is not exhaustive. Parties to the UNFCCC have an avenue to supplement Article 3 legal principles if they so wish. However, if the Parties to the UNFCCC make this decision then they ought to do so collectively and they must construct the supplementary legal norm in the proper way.

Article 3 principles exist. A competent authority has issued them in a valid way and therefore established them. Article 3 principles are valid. They are binding. The objective test, which is one of factual legitimacy, has been met.

The subjective test is one of behavioural rights and responsibilities. In other words, does an Article 3 principles provision direct a subjective meaning of an act of will to the norm-addressee?

The objective and subjective tests come from making a distinction between questions of factual legitimacy and questions of effect. (These tests have been developed more fully in the broader work that informs this article).

Another distinction made here is that the norm conveys society’s act of will. Whereas, on construction, the legal principle conveys a lawful meaning of the act of will. A competent authority establishes a valid legal principle by proper construction. A judge assesses validity by proper interpretation and the result is a qualified interpretation.

A legal norm binds from its existence. Once binding, the legal norm joins a legal discipline as a system of norms. Norms are not necessarily limited by the sense of penalties or rewards, but by the sense as to whether they lawfully sanction conduct, and in certain circumstances, results, of certain actors (individuals, states, international organisations and so on).

In a Kelsenian way, a legal norm may prescribe, command, permit, or authorise certain behaviour; or, it may come into being by omission; or, by the failure to prohibit, and so on. As principles, legal

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<sup>76</sup> R. Wolfrum & C. Kojima, (eds.), *Solidarity: A Structural Principle of International Law*, 2010. E. Jouve, *Le droit des peuples*, PUF, ‘Que sais-je ?’, n°2315, 1992, 2è éd.. See also E. Jouve, *Où en est le droit des peuples à l’aube du III ème millénaire?*, Actes de la cinquième réunion préparatoire au symposium de Bamako: La culture démocratique (juin 2000), Sofia (Bulgarie), 22-24 juin 2000. UNGA Resolution, *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

norms of special regimes may serve as ubiquitous governing legal values. They govern behavioural rights and responsibilities. An interpreter finds the subjective application of Article 3 principles in whether Article 3 is effective.

Interactions with the norm of *pacta sunt servanda* are also important. By virtue of *pacta sunt servanda*, 'every treaty in force is binding upon the parties to it and must be performed by them in good faith'.<sup>77</sup> *Pacta sunt servanda* incorporates two main conditions. First, a treaty that is in force is binding upon the Parties to it. Second, there is a performance obligation of good faith.

Ratification of Article 3 principles by the Contracting Parties to the UNFCCC thereby creates a legal obligation on the Ratifying Parties subjecting them to be bound by a specific legal system, that of international climate law. In addition, the Parties must perform their obligations in good faith.

To concretise these obligations, reference may be made once more to the preface to Article 3 of the UNFCCC for it is there that the Parties undertake to be guided inter alia by the principles 'in their actions to achieve the objective of the Convention and to implement its provisions'. Effectiveness is not only limited to achieving the objective of the Convention. If this were so, then the Parties could far too easily say that any action they take to combat the adverse affects of climate change contributes to the UNFCCC's universal objective.

The Parties must also implement the Convention's provisions, which is a question of the application of, and adherence to, their undertakings. The prefaced clause is expressed in the imperative. It is mandatory. It therefore reinforces the methodology hereto.

With respect to good faith: under scrutiny, it is lucid that the Parties to the UNFCCC explicitly enumerate legal principles in Article 3 that will bind them to perform in good faith.<sup>78</sup> The Parties thereby endorse a series of obligations governing international climate law. Notwithstanding, there has never been any thorough examination of these principles as comprising an all-embracing architecture that could inform the constitutional foundations of international climate law.

Prima facie, the language of Article 3 of the UNFCCC may seem rather convoluted to some and not worth a second look. To attain the course actually set out by the VCLT, it is nonetheless important to embrace the language of Article 3 of the UNFCCC in good faith and endeavour to decipher the *lex lata* principles therein. The aim of this study is to delimit legal principles as they exist, not as we hope them to be. The approach thereby rejects the invention or import of new principles of international climate change law at this stage but does not do so later. The current tack is to extrapolate and give meaning to the existing legal principles as provided for by Article 3 of the UNFCCC.

Linguistic interpretation proceeds 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. The examination proceeds as such, methodically, clause-by-clause.

Part 1 has concentrated on setting out the rationale for the interpretation that follows. It explains in some depth as to why the identification of principles is not the core thesis. Part 1 has centred on some basic instruments of international law but this has been required due to the myriad of different approaches that lead to fragmentation and dispute. The focus has been on developing a contemporary approach to legal hermeneutics and legal analysis as system analysis. The same type of approach could inform the approach to assess an inter-regime normative gap or to advance inter-regime negotiations; say, for instance, at the nexus between climate and water law; between climate law and migration; between climate law, human rights, disaster law; and so on.

## 2. Taxonomy of the *lex specialis* principles of international climate law

Article 3 UNFCCC principles are indicative of ubiquitous legal values that give expression to the object and purpose of the UNFCCC. As a starting point, attention turns to these principles in order to set forth one set of the parameters of the doctrinal framework aforementioned. The aim of this analysis is not to

<sup>77</sup> VCLT. Art. 26.

<sup>78</sup> M. Bedjaoui, *Keynote Address, Conference on Good Faith, International Law, and Elimination of Nuclear Weapons: The Once and Future Contributions of the International Court of Justice*, 1 May 2008, Geneva, p. 17-18, available at <<http://www.lncp.org/disarmament/2008May01eventBedjaoui.pdf>> (last visited 26 September 2012).

structure new principles of international climate law or to confound general principles of international public law with specific legal principles of climate change. Instead, the aim is to extrapolate and give meaning to special *lex lata* principles, which is to say, the existing legal principles as provided for by virtue of Article 3 of the UNFCCC.

### **2.1. Article 3 (1) of the UNFCCC**

Article 3 (1) of the UNFCCC stipulates:

‘the Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.’

Turning first to the ordinary textual meaning of the syntactic construction of Article 3 (1), that ‘the Parties should protect the climate system for the benefit of present and future generations of humankind’ establishes the object and purpose of Article 3 (1). Whereas, ‘on the basis of equity’ infers that ‘equity’ forms the basis, or foundation, of Article 3 (1). The ideology is one of equity, but is such an ideology admissible as legitimate?<sup>79</sup> Apparently, it is legitimate: it is incorporated within a treaty, it has met the objective and subjective tests and the Contracting Parties have agreed to it.

Irrespective of the theoretical and technical problems in proving whether equity has become binding as customary law between nations, expressed in a legal treaty, any such custom transforms equity into a principle of legal significance. Universal principles, or values, transform into legal principles when they take the form of a legal norm.

The UNFCCC’s definition distinguishes between equity in two specific ways; first, it is equitable to benefit ‘present generations’; and, second, it is equitable to benefit ‘future generations’. In its first expression (‘that it is equitable to protect the climate system for the benefit of present generations of humankind’), equitable treatment is of an ‘intra-generational’ type. Equity is for the benefit of present generations of humankind. In the second expression (‘that it is equitable to protect the climate system for the benefit of future generations of humankind’), equity is of an ‘inter-generational’ nature.<sup>80</sup> Equity is for the benefit of future generations of humankind. Humankind is subject to conditions. These conditions find expression as obligations to present and future generations.

Other interpretations may be claimed, such as, the need to protect all species of animal. Humankind may be an animal but not all animals are of a human kind. While a positive externality of protecting the climate system may be the protection of fauna or flora, these are indirect objects. This interpretative approach would suggest that the UNFCCC takes a human rights approach towards climate change.

The purpose, or objective, of an Article 3 (1) provision finds expression in the phrase ‘should protect the climate system for the benefit of present and future generations of humankind.’ The promise and attendant obligation is on the subject, which is, on the Ratifying Parties serving as the norm-addressee. To the extent that the Parties may outsource their obligations may be a function of treaty interpretation; but outsourcing responsibility does not simply, in and of its own accord, reduce the duty owed. The ultimate responsibility for safeguarding the interests of present and future generations of humankind is on the Ratifying Parties. Having said this, there is no absolute limit on shared responsibility. To be more exact, consequential duties rest on a plurality of actors but this point requires further discussion elsewhere.<sup>81</sup>

Just as it would be incorrect to interpret the object of an Article 3 (1) construction being something other than humankind, or as a specially selected class of humankind, it would be equally wrong to interpret equity to traverse past, present and future generations. There is a need for further explanation.

79 J. Keme, ‘Equity, environmental justice and sustainability: incomplete approaches in climate change politics’, 2003 *Global Environmental Change*, no. 13, pp. 195-206.

80 E. Brown Weiss, ‘Climate Change, Intergenerational Equity, and International Law’, 2008 *Vermont Journal of Environmental Law* 9, no. 3, pp. 615-628.

81 ILC, *Draft Articles on The Responsibility of International Organizations*, 2011.

Within the ordinary meaning and the object and purpose of Article 3 (1) of the UNFCCC, there is absolutely no prescription to bestow benefits on ‘past’ generations. Within the ordinary meaning of equitable protection, as provided for by the UNFCCC, there is certainly no invocation of damage for historical wrongs; but this is not to say that the treaty closes such a claim due to impossibility. (In certain circumstances, decisions of the UNFCCC COP may also create law). Whether such a claim may derive from a breach of equitable treatment entails a far more thorough investigation of the specificity of the legal norm.<sup>82</sup>

Within the current context, though, equity is a legal principle. (It is not a mode of reasoning: the mode of reasoning is set out in Part 1). Equity, as a legal principle of climate change, is one of trusted guardianship that encompasses both intra-generational equity (protection for the benefit of present generations) and inter-generational equity (protection for the benefit of future generations).<sup>83</sup>

From a textual interpretation, the ubiquitous and universal governing value of Article 3 (1) is to protect the climate system ‘on the basis of equity’. The *lex specialis* legal principle of Article 3 (1) is one of equity.

Reports of preparatory work to the UNFCCC state that the principles were discussed and debated extensively. They give no indication that equity is not a fundamental principle.

UNGA reports present relevant information insofar as they do not refute the validity of equity as a legal principle. The UNGA’s report from Working Group I that considered matters under the item of ‘Principles’, confirmed in January 1992 that ‘statements had been made by representatives of 42 States, including one speaking on behalf of the European Economic Community and its member States and one on behalf of five Central American and Caribbean States members of the Working Group. A statement on behalf of the Group of 77 was also made (...) and subsequently formulated as A/AC.237/WG.I/L.8.’<sup>84</sup> In a February 1992 report, it was confirmed that ‘the Working Group had held 17 meetings and 5 informal meetings, and discussed the following topics: Principles, Objectives and Commitments.’<sup>85</sup>

In a report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of its Fourth Session, held at Geneva from 9 to 20 December 1991, but by no means conclusive evidence of the will of the Parties, two texts were proposed that resemble Article 3 (1). The draft text providing for the ‘principles’ identifies these proposals in Paragraph 3. The draft of the first text reads:

‘3. All States have an obligation to protect the climate [system] for the benefit of present and future generations of mankind on the basis of [inter-generational as well as intra-generational] equity. This obligation shall be carried out within different time frames for implementation in accordance with common but differentiated responsibilities and capabilities [between developing and developed countries] and taking fully into account that the largest part of emissions of greenhouse gases have been originating from developed countries and those countries have the main responsibility [and should take the lead] in combating climate change and the adverse consequences thereof.’<sup>86</sup>

The draft of the second text was presented as a possible alternative to the first text. It reads:

‘3. All inhabitants of the planet have an equal right to the atmosphere lying outside national jurisdiction. All States have an obligation to protect the atmosphere for the benefit of present and future generations of mankind on the basis of intra-generational as well as inter-generational

82 D.S.G. Thomas & C. Twyman, ‘Equity and Justice in Climate Change Adaptation Amongst Natural-Resource-Dependent Societies’, 2005 *Global Environmental Change*, no. 14, pp. 115-124.

83 D. Shelton, ‘Equity’, in D. Bodansky et al. (eds.), *The Oxford Handbook of International Environmental Law*, 2008, pp. 639-662.

84 UNGA, Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of its Fourth Session, held at Geneva from 9 to 20 December 1991, A/AC.237/15; 29 January 1992, p. 6, Para. 21.

85 UNGA, Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of its Fifth Session, held in New York from 18 to 28 February 1992, A/AC.237/L.12; 28 February 1992, p. 12, Para. 34.

86 UNGA, Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of its Fourth Session, held at Geneva from 9 to 20 December 1991, A/AC.237/15, 29 January 1992, II Principles, p 27, Para. 3.

equity. This common obligation to protect the atmosphere shall be equitably distributed between countries in accordance with developed and developing countries' common but differentiated responsibilities and capabilities and different time frames set out for implementation with a view to achieving convergence of anthropogenic carbon dioxide emissions at a common per capita level noting that the largest part of current emissions of greenhouse gases, both in historical and current terms, originates from developed countries, and that those countries [in the first instance have the main responsibility]/[shall take the lead] in combating climate change and the adverse effects thereof.<sup>87</sup>

According to the report of the fourth session, as at January 1992, 'the texts as they [then] stood were the product of a detailed fine scrutiny of the most fundamental questions which still required a process of intense negotiation'.<sup>88</sup>

The relevant draft text as submitted by the fifth session held in February 1992 reads as follows:

'3. All States have an obligation to protect the [global] climate system for the benefit of present and future generations of humankind on the basis of [inter-generational as well as intra-generational] equity, and in accordance with [their]/[developed and developing countries] common but differentiated responsibilities and capabilities [with a view to achieving convergence [of anthropogenic carbon dioxide emissions] at a common per capita level] and taking fully into account that the largest part of emissions of greenhouse gases has been originating from developed countries [and those countries have the main responsibility] [and should take the lead] in combating climate change and the adverse consequences thereof.'<sup>89</sup>

The March 1991 report of the first session of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, to which some 102 countries; UN offices, organs and specialized agencies; regional intergovernmental organizations, such as the European Community and Commonwealth Secretariat; and over 70 non-governmental organizations attended and contributed; reported the results from a general debate on the substance of a potential convention.<sup>90</sup> All participants agreed that commitments were required. Some countries were of the view that a framework convention should contain general principles and general obligations. Many countries emphasized that an effective convention and any related instrument should be based on two distinct principles: 1) equity; and, 2) common but differentiated responsibilities.

The need to increase energy efficiency was a commonly agreed theme but the prevailing intent of the Parties was the responsibility to protect the global atmosphere for humankind. Some countries referred to the precautionary principle. Participants debated the issue of special and differential treatment. Many countries emphasized concern about the special vulnerability of low-lying areas and small island countries to the effects of climate change and it was acknowledged that the participation of these countries in the negotiating process should be assured. Some countries referred to the 'polluter pays' principle as a 'cornerstone' of the framework convention but consensus was never reached on this proposal. The 'polluter pays' principle did not evolve as a fundamental legal principle. Others believed that there was a need for an integrated and comprehensive approach taking into account all greenhouse gases and that all countries should make commitments of some sort or another but many developing countries mooted that they were somehow entitled to derogate from an obligation to protect.

It should also be recalled that substantive meetings were held over a 10-day period, from 4 to 14 February 1991. The ensuing decisions reflect the depth of those considerations. As a result of the comprehensive inputs from hundreds of public and private sector participants, the Committee decided

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87 Ibid.

88 Ibid. p. 10, Para. 58.

89 UNGA, Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of the First Part of its Fifth Session, held in New York from 18 to 28 February 1992, A/AC.237/18 (Part I); 10 March 1992, p. 28, Para. 3.

90 UNGA, Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the work of its first session, held at Washington, DC, from 4 to 14 February 1991, A/AC.237/6, 8 March 1991 (attendees, p 7-8), (substantive debate, p 12-15).

to establish two working groups. Working Group 1's task was to prepare a text related to commitments while Working Group 2 would draft a text related to mechanisms. In preparing the text on commitments, Working Group 1 was tasked to 'take account that contributions should be equitably differentiated according to countries' responsibilities and their level of development'. The inputs from individual delegations were scrutinised and informed the discussions. As suggested by individual delegations, the terms of reference of Working Group 1 turned to incorporate the drafting of fundamental principles: so important were the legal principles of international climate change that they ought not to be left to any future uncertainty. There was concern even at that stage that consensus could unwind over time.

Preparatory work is not conclusive evidence of the will of the Parties but it is evidence that Working Group 1 did not cobble Article 3 of the UNFCCC together over night. Many contributors deserve just recognition. The public, private and civil society all contributed. Working Group 1 was an expert group that took a considerable amount of time to reflect on drafting precision.

From a reference to supplementary means of interpretation, equity was intended to be a superior norm to common but differentiated responsibilities. There was no drafting error in this regard. This is not to say that 'common but differentiated responsibilities' do not have a rightful place in the constitutional order but rather that they are not transcendental legal principles of international climate law.

From textual, contextual and supplementary means of interpretation, the ubiquitous and universal governing value of Article 3 (1) is to protect the climate system 'on the basis of equity'. The relevance of this statement is that there is no lawful discrepancy in interpreting the *lex specialis* legal principle of Article 3 (1)'s obligation to be one of equity.

## 2.2. Article 3 (2) of the UNFCCC

Article 3 (2) of the UNFCCC stipulates:

'the specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration.'

Like Article 3 (1), Article 3 (2) clearly encapsulates some meaning of fairness. Rather than aligning with substantive and procedural fairness, Article 3 (2)'s ideology of fairness is more akin to a type of distributive fairness.<sup>91</sup> The aim is to rebalance specific relative inequalities in the event of a natural calamity or excessive burden. Article 3 (2) could 'kick in' if Article 3 (1) fails but it also could 'kick in' in conjunction with Article 3 (1) and in many other ways as well.

An Article 3 (2) interpretation is twofold. First, fairness may supplement a deficit. In terms of climate change, the Parties to the UNFCCC should give full consideration to the special and differentiated treatment of developing and, in particular, the most vulnerable developing country Parties. Second, fairness is not isolated to developing countries. Fairness extends to all Parties that may suffer a disproportionate or abnormal burden under the Convention. Parties to the UNFCCC seek to reduce what would otherwise be an excessive burden resulting from some sort of disparity or inequality, or some other irregularity or aberration.

While fairness, in its different equitable forms, constitutes a fundamental component of Article 3 (2), it does not represent the ubiquitous governing value of Article 3 (2). To confound an Article 3 (1) fairness test with an Article 3 (2) fairness test would be erroneous. Likewise, it would be foolhardy to say that there are two ubiquitous governing values of Article 3 (2) and then say that these two values are fairness one and fairness one. The fundamental norms underlying Article 3 (2) are not the same. In other words, the two elements are not identical. Nevertheless, they may add to one or even more than one. There is therefore still a need to search for some sort of ubiquitous value within general international law, environmental law or an interfacing special regime within which climate law is a subset, articulate the ubiquitous value or hold that there is none. It would be difficult to say that the Parties to the UNFCCC simply decided on

<sup>91</sup> F. Soltau, *Fairness in International Climate Change Law and Policy*, 2011 (also 2009).

the *lex specialis* principles of international climate law on a flight of fancy. No agreement would have been possible without a framework of consensus.

The basis of Article 3 (2) has something to do with the community of climate change interests being greater than the sum of its parts. Parties thereto have a joint and several liability, albeit a conditional one. In essence, an Article 3 (2) obligation is all about how fair it is to aid those in difficulties.

It is fair to give full consideration to those who suffer the brunt of climate change calamities. It is fair to give full consideration to those who may suffer an excessive burden in implementing their treaty obligations. Fairness as expressed in Article 3 (2) is the debt relationship that binds those with assets (active solidarity) with those who suffer (passive solidarity).<sup>92</sup>

The overriding conviction of Article 3 (2) is that international climate law will reach all humanity and benefit all people. The ubiquitous and universal governing value of Article 3 (2) may therefore be one of solidarity. Following the preliminary analysis, the *lex specialis* legal principle of Article 3 (2) ought to be solidarity.

An interesting question arises concerning the logical interface between equity and solidarity. Equity and solidarity are both types of fairness. To answer this question more fully, a more thorough analysis is required of second order derivative norms or auxiliary norms. (The analysis of second order derivative norms is outside the limits of this article but the findings from this study will inform the analysis of second order derivative norms).

What is also interesting, but not at all surprising, is that with respect to the preparatory work concerning special treatment, virtually the entire focus was on the demands of developing countries. Yet, developed countries can also suffer adverse affects from climate change, such as, those related to extreme weather events. As to whether developed countries can protect their people any better relates inter alia to a question of respective capabilities and the degree of vulnerability, exposure and susceptibility to losses.<sup>93</sup>

In a report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of its Fourth Session, held at Geneva from 9 to 20 December 1991, the draft principle that contains the most relevant content is identified by Paragraph 4. The draft reads:

‘4. The Parties shall give full consideration to the specific needs and special circumstances of developing country Parties, especially those developing countries that are particularly vulnerable to the adverse consequences of climate change and also those developing countries which would have to bear a disproportionate or abnormal burden under the Convention.’<sup>94</sup>

The relevant draft text as submitted by the fifth session held in February 1992 was identical to the draft text reported on in the fourth session.<sup>95</sup>

However, there was a significant development between the draft and the final text. There is a very definite addition to the ratified Convention by the insertion ‘and of those Parties, especially developing country Parties’. Given the intensity of the negotiations and the rigour and commitment of Working Group 1, it can only be surmised until further preparatory work is made public that the supplementary text was intentionally added and that Article 3 (2) of the UNFCCC is meant to have a far broader norm-recipient than simply developing countries. The argument also reflects a broader view: climate change knows no boundaries therefore international climate law concerns not only a law of States but also a law of peoples’.

92 K. Wellens, ‘Revisiting Solidarity as a (Re-)Emerging Constitutional Principle: Some Further Reflections’, in R. Wolfrum & C. Kojima, *Solidarity: A Structural Principle of International Law*, 2010, pp 3-54.

93 The International Federation of Red Cross and Red Crescent Societies (IFRC), *What is Vulnerability?*, <<http://www.ifrc.org/fr/introduction/gestion-de-catastrophes/catastrophes/what-is-a-disaster/what-is-vulnerability>> (last visited 26 September 2012): ‘Human vulnerability is the relative lack of capacity of a person or social group to anticipate, cope with, resist, and recover from the impact of a hazard’. ‘Symposium on Environmental Justice’, 2012 *Rutgers Journal of Law & Public Policy* 9, no. 2, pp. 177-504. R.W. Adler, ‘Balancing Compassion and Risk in Climate Adaptation: U.S. Water, Drought, and Agricultural Law’, 2012 *Florida Law Review* 64, no. 1, pp. 201-268.

94 UNGA, Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of its Fourth Session, held at Geneva from 9 to 20 December 1991; A/AC.237/15, 29 January 1992, II Principles, p 28, Para. 4.

95 UNGA, Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of the First Part of its Fifth Session, held in New York from 18 to 28 February 1992, A/AC.237/18 (Part I); 10 March 1992, p. 28, Para. 4.

It is clear and unambiguous from the text that the ratified Article 3 (2) is precisely what the Parties intended. Otherwise, they would not have made the amendment and ratified an authentic version of the text. From textual, contextual and supplementary means of interpretation, the meaning of the will of the Parties as deducible from the *lex lata* Article 3 (2) provision remains that the fundamental legal principle of Article 3 (2) ought to be one of solidarity.

### 2.3. Article 3 (3) of the UNFCCC

Article 3 (3) of the UNFCCC stipulates:

‘the Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties.’

The object and purpose of Article 3 (3) is ‘to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects.’ The objective is to be prudent in protecting the climate and managing uncertainties. Prudence demands foresight, due diligence and safeguards. The Parties thereto should ‘take precautionary measures’, for example, employ risk management to achieve the stated objective.

The ubiquitous governing value of Article 3 (3) is precaution. Like Trouwborst,<sup>96</sup> Cameron points to the expansive use of the precautionary principle in environmental treaties and policymaking.<sup>97</sup>

As with preceding legal principles of climate change, derivative or ‘sub-level’ principles thereof also exist. In terms of the precautionary principle applicable to international climate law, the first sub-level construct is that the Parties should take precautionary measures to ‘anticipate, prevent or minimize the causes of climate change’. The second is that the Parties should take precautionary measures to ‘mitigate’ the adverse effects of climate change. Mitigation includes cutting GHG emissions. Adaptation includes learning to live with global warming.<sup>98</sup>

The conjunction ‘and’ between these two sub-level or ‘auxiliary’ principles clearly signifies that, albeit different, adaptation and mitigation reside on the same plane. In terms of their shared vision for long-term cooperative action, the UNFCCC COP, affirmed at Cancun that ‘adaptation must be addressed with the same priority as mitigation.’<sup>99</sup> It is therefore illogical to elevate one above the other. In effect, adaptation and mitigation are risk regulation tools but they also have normative value when expressed as a legal norm. The Parties to the UNFCCC are to use risk regulation mechanisms as a means to be prudent in the management of uncertainties.

The ubiquitous and universal governing value of a textual interpretation of Article 3 (3) is one of precaution. By extension, the *lex specialis* legal principle of Article 3 (3) is the precautionary principle.

As to supplementary means of interpretation, reference the report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of its Fourth Session. The report is by no means conclusive evidence of the will of the Parties and the final text of Article 3 (3) seems dispersed amongst a variety of draft articles, one of which reads:

96 A. Trouwborst, ‘Prevention, Precaution, Logic, and Law: The Relationship between the Precautionary Principle and the Preventative Principle in International Law and Associated Questions’, 2009 *Erasmus Law Review*, no. 2, pp. 105-127.

97 J. Cameron, ‘The Precautionary Principle’, in G. Sampson & W.B. Chambers, (eds.), *Trade, Environment and the Millennium*, 1999.

98 D.S.G. Thomas & C. Twyman, ‘Equity and Justice in Climate Change Adaptation Amongst Natural-Resource-Dependent Societies’, 2005 *Global Environmental Change*, no. 14, pp. 115-124.

99 UNFCCC, Outcome of the work of the Ad Hoc Working Group on long-term Cooperative Action under the Convention, Draft decision -/CP.16; Para I.2 (b); advance unedited version.

‘5. In order [to achieve sustainable development in all countries and] to address the needs of present and future generations, precautionary measures to meet the climate challenge must anticipate, prevent, attack, or minimize the causes of, and mitigate the adverse consequences of, environmental degradation that might result from climate change. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing [cost-effective] measures to prevent such environmental degradation. The measures adopted should take into account different socio-economic contexts.’<sup>100</sup>

The objective here seems to be ‘to achieve sustainable development in all countries.’ The ‘ought’, the will of the Parties, is to take precautionary measures, which concurs with a legal principle of precautionary measures. Despite having a far shorter text, the later text reported by the fifth session concurs that the Parties ought to take precautionary measures.<sup>101</sup>

In reference to the report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of its Fourth Session, another relevant draft paragraph is evident:

‘9. Climate policies should be cost-effective to ensure global benefits at lowest possible costs. To achieve this, climate policies should be comprehensive, include all relevant sources and sinks of greenhouse gases, comprise all economic sectors, and may be implemented in cooperation with other Parties.’<sup>102</sup>

A similar text is reflected in the report of the fifth session subject to the amendment that ‘(...) all economic sectors, *include both limitation and adaptation measures* and may be implemented in cooperation with other Parties.’ (italics indicate the amendment).<sup>103</sup>

These accompanying provisions are not indicative of the fundamental legal principle. They refer to measures and legal standards that must be set to attain the fundamental legal principle.

From a reference to supplementary means of interpretation, the ubiquitous and universal governing value of Article 3 (3) is that the Parties ought to take precautionary measures. By means of textual, contextual and supplementary means of interpretation, the *lex specialis* legal principle of Article 3 (3) is the precautionary principle.

#### **2.4. Article 3 (4) of the UNFCCC**

Article 3 (4) of the UNFCCC stipulates:

‘the Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change.’

The fundamental object and purpose of an Article 3 (4) provision is clear. It is sustainable development.

The report of the Brundtland Commission crystallises further that the principle of sustainable development contains within it two concepts. The first concept is ‘the concept of “needs”, in particular the essential needs of the world’s poor, to which overriding priority should be given.’ The second concept conveys ‘the idea of limitations imposed by the state of technology and social organization on

100 UNGA, Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of its Fourth Session, held at Geneva from 9 to 20 December 1991, A/AC.237/15, 29 January 1992; II Principles, p 28, Para. 5.

101 UNGA, Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of the First Part of its Fifth Session, held in New York from 18 to 28 February 1992, A/AC.237/18 (Part I), 10 March 1992, p. 28, Para. 5.

102 UNGA, Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of its Fourth Session, held at Geneva from 9 to 20 December 1991, A/AC.237/15, 29 January 1992, II Principles, p 29, Para. 9.

103 UNGA, Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of the First Part of its Fifth Session, held in New York from 18 to 28 February 1992, A/AC.237/18 (Part I), 10 March 1992, p. 29, Para. 9.

the environment's ability to meet present and future needs'.<sup>104</sup> Other learned authorities have written extensively on the subject (see Boyle and Freestone's edited work,<sup>105</sup> and that of Schrijver and Weiss).<sup>106</sup>

Despite debates as to whether the principle of sustainable development is an established principle of general international law, Article 3 (4) of the UNFCCC's express provision of sustainable development as a legal norm of climate law establishes a *lex specialis* norm in the area of climate law. The precise commitment, and the effectiveness of that commitment, however, depends on the Parties' interpretation and application of the underlying derivative products of sustainable development.

In reference to the report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of its Fourth Session, the relevant draft text provides:

'All States have a duty to aim at sustainable development for the benefit of present and future generations. Protection of the global climate against human induced change should proceed in an integrated manner with economic development in the light of the specific conditions of each country, [without prejudice to the socio-economic development of developing countries]. Measures to guard against climate change should be integrated into national development programmes [taking into account that [evolving] environmental standards] valid for developed countries may have inappropriate and unwarranted social and economic costs in developing countries [and countries with economies in transition].'<sup>107</sup>

The relevant later draft text reported by the fifth session of the Negotiating Committee provides some modifications as follows:

'All States have a duty to aim at sustainable development for the benefit of present and future generations. Protection of the global climate against human induced change should proceed in an integrated manner with economic development in the light of the specific conditions of each country, [without prejudice to the socio-economic development of developing countries]. Measures to guard against *man-made* climate change should be integrated into *all relevant* national development programmes [taking into account that [evolving] environmental standards] valid for developed countries may have inappropriate and unwarranted social and economic costs *in particular* in developing countries [and countries with economies in transition]'. (italics to emphasise the amendments).<sup>108</sup>

The relevant preparatory work considers sustainable development as a duty of conduct (endeavour) and result (integration). It is clear from both texts that all states 'ought to' aim for sustainable development but that conduct alone is not sufficient.

Sustainable development extends beyond a mere concept or notion to embody a normative principle. Incorporated within a legal treaty a principle signifies a legal norm that takes the form of a legal principle. From a reference to supplementary means of interpretation, draft texts of preparatory work on the convention confirm the interpretation given to the final ratified convention.

From textual, contextual and supplementary means of interpretation, the ubiquitous and universal governing value of Article 3 (4) is sustainable development. The *lex specialis* legal principle of Article 3 (3) is the principle of sustainability.

104 Report of the World Commission on Environment and Development: *Our Common Future*, Transmitted to the United Nations General Assembly as an Annex to document A/42/427 - Development and International Co-operation: Environment; Chapter 2, Towards Sustainable Development, UN General Assembly A/RES/38/161, 4 August 1987.

105 A. Boyle & D. Freestone, (eds.), *International Law and Sustainable Development: Past Achievements and Future Challenges*, 2001.

106 N. Schrijver & F. Weiss, *International Law and Sustainable Development: Principles and Practice*, 2004.

107 UNGA, Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of its Fourth Session, held at Geneva from 9 to 20 December 1991, A/AC.237/15, 29 January 1992, II Principles, p 27, Para. 2.

108 UNGA, Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of the First Part of its Fifth Session, held in New York from 18 to 28 February 1992, A/AC.237/18 (Part I), 10 March 1992, p. 28, Para. 2.

## 2.5. Article 3 (5) of the UNFCCC

Article 3 (5) of the UNFCCC stipulates:

‘the Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.’

The language of Article 3 (5) is comprehensive and the range of potential second order derivative legal norms extensive. Ascertaining the ubiquitous value governing Article 3 (5) is therefore particularly challenging. Yet, conjecture is not evidence, presumption is not proof and moral certainties are merely a form of hunch.

As fundamental legal principles are of a material nature, there is a need to prove averments. Legal principles may be deducible but only if the argument is sound and the premises valid.

It is important not to force a legal norm where one does not exist. However, it is equally important to recognise when a legal norm may be superior or inferior to, or interfacing with, another.

The VCLT provides guidance as to the decision-making process. As with all other principles enumerated in Article 3, Article 3 (5) of the UNFCCC is to be interpreted in good faith. In using legal science to dissect the terms of Article 3 (5), there is a need to examine the terms critically and minutely for the ordinary meaning to be given to the terms in their context and in light of Article 3 (5)’s object and purpose.

Although the legal principle governing Article 3 (5) is not *prima facie* evident, that is not to say that some overriding principle does not cement its object and purpose. A process of elimination is one logical way by which to proceed with the aspiration of attaining some degree of confidence in finding a ubiquitous governing legal value.

The method is iterative. It begins by identifying the terms that seemingly have a high probability of not being fit for a ubiquitous governing value. The analysis then examines those terms first with the view to excluding them or deciding when to revert to them.

An obvious question arises as to whether the term ‘measures’ could have something to do with Article 3 (5)’s ubiquitous governing value. A ‘measure’ is normally a degree of something or the extent of a value. It is not an accepted rule or code of conduct. Nor is a ‘measure’ a fundamental tenet of conviction. A ‘measure’ may be a tool by which to evaluate a conviction but it is not a conviction or overarching value in its own right. If ‘measures’ do not equate to a ubiquitous legal principle then the constituent parts of ‘measures’ will probably not do so either. The constituent parts thereto may of course contain a subordinate legal principle and so caution is always advisable. There will certainly be a need to return to these constituent parts later to verify whether the derived ubiquitous legal principle is sound.

For now, the residual terms are isolated by holding the term ‘measures’ and its sub-components constant. Analysis of these residual terms may evoke a ubiquitous value governing Article 3 (5).

Going forward, assume that the ubiquitous value is somehow limited to the following text: ‘the Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change.’ The residual thus stated relates to an objective. As aforementioned, a ubiquitous value, a founding tenet or legal principle may incorporate a fundamental objective but not all objectives necessarily equate to an overriding ubiquitous value.

The end aim of the residual terms therein is to ‘enable them better to address the problems of climate change’; but this is surely the aim of the entire UNFCCC. The end aim of the residual terms expresses a generic conviction rather than a *lex specialis* principle pertinent to Article 3 (5). The syntactic construction, to ‘address the problems of climate change [better]’ is not the fundamental *lex specialis* principle of Article 3 (5).

Perhaps there is something in the terms ‘should cooperate’. That the Parties should ‘cooperate’ prescribes an action to help, work together, collaborate and even agree or accede. The outcome of cooperation is ‘to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties’. This later clause is the ‘object’ of cooperation because it completes the meaning of the verb ‘to cooperate’.

Consider too, for a moment, that in ‘promoting a supportive and open international economic system’, the end result is to attain ‘sustainable economic growth and development in all Parties’. Does the object simply allude to a reference to international trade law or WTO law? The answer is ‘no’. A minimalist approach would be defeatist and not admit that a *lex specialis* principle links economic growth and climate change.

Besides, the term ‘development’ is not isolated to ‘economic development’. The conjunction ‘and’ signifies that ‘sustainable economic growth’ and ‘development’ are on the same plane. Yet there is no reference as to the delimitation of the term ‘development’. However, if ‘sustainable economic growth’ and ‘development’ are on the same plane then perhaps the Parties thereto intended for ‘development’ to extend well beyond the economic sphere. As a logical consequence, ‘economic development’ and general ‘development’ are two different terms, orientated by two different values and, by extension, two different auxiliary principles.

The question then arises as to whether ‘economic development’ and general ‘development’ are independent or dependent terms of Article 3 (5)’s construct of a legal principle. Holding both terms constant isolates the term of impulsion and the impetus of ‘economic development’ and ‘general development’. The resulting term is a term of action, a verb that stimulates a positive obligation to cooperate. Cooperation may be the ubiquitous governing value of Article 3 (5).

Climate law is a subset of international law. The principle of cooperation is reflected in many international instruments so perhaps the analysis could stop here and it could be mooted that ‘cooperation’ is the ubiquitous governing value of Article 3 (5).<sup>109</sup>

However, several clues emerged at a much later stage when trying to give effect to cooperation that the legal norm was not properly nested. (Nesting, for the purposes of this study, means that a derived legal norm must always have a parent). To explain briefly, certain other legal norms may derive directly from Article 3 (5) but they are not necessarily the product of cooperation.

Parsing was also another tool that indicated on its application that cooperation was not well formed as a fundamental legal principle. In other words, some nth order derivatives seemed to go into a void. For these aforementioned reasons alone, uncertainty arises therefore as to whether ‘cooperation’ is the primary or auxiliary principle governing Article 3 (5).

To move ahead, recall that it was observed earlier that there would be a need to return to the terms providing that ‘Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.’ These terms are not properly nested.

‘To not constitute a means of arbitrary or unjustifiable discrimination or disguised restriction on international trade’ is the expression of a negative obligation. In terms of international trade, the Parties to the UNFCCC are not to discriminate and not to restrict trade. In other words, the terms invoke an injunctive responsibility to do no harm. To do ‘no harm’ is not on the same plane as to ‘cooperate’.

If we were to put a frame around the principle to do ‘no harm’ then its complement may, in certain circumstances, be cooperation, and vice versa. It is therefore possible to consider the principle of ‘no harm’ and the principle of ‘cooperation’ within a broader set of legal norms.

If this is true, then Article 3 (5) contains two auxiliary principles. One invokes a positive obligation towards each other Party to promote, or facilitate, development. (Development includes, but is not limited to, economic development in all other Parties). The second auxiliary invokes a negative obligation to do no harm. (Subordinate to not harming another is that one Party must not discriminate against another Party).

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<sup>109</sup> According to Sands, ‘the obligation to co-operate is affirmed in virtually all international environmental agreements of bilateral and regional application’: P. Sands, *Principles of International Environmental Law*, 2003, p. 250.

It does not simply refer to equality or non-discrimination. The principle of non-discrimination finds expression in the Charter of the United Nations. Article 1, Paragraph 3, of the Charter states as one of the goals of the Organization:

‘To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all *without distinction as to race, sex, language, or religion.*’ (emphasis added)

Article 55 (c) of the Charter uses similar wording.

It is also clear that the principle of non-discrimination aims to ‘achieve international cooperation in solving international problems’ and ‘to promote and encourage human rights.’ (It would be useful to elaborate on the discussion elsewhere in terms of derivative norms).

Teleological interpretation is not complete. There is still a need to label these two auxiliary principles in some fashion that will help concretise the identified relationships thereto. For the purposes of this part of the study, the first auxiliary principle is referred to as ‘cooperation’ and the second as ‘no harm’, which in international law is the principle of *sic utere tuo ut alienum non laedas*, ‘to use your own as not to injure another’s property’. It is more commonly referred to as the ‘no harm’ principle.<sup>110</sup>

As there are two auxiliary principles, the principle of cooperation is not the ubiquitous governing value of Article 3 (5) and neither is the ‘no harm’ principle. They fail for impossibility. Cooperation does not necessarily infer ‘no harm’.

At this juncture, there comes that awkward test of identifying a ubiquitous legal principle that will serve both auxiliary principles. Alternatively, perhaps one could suggest that both auxiliaries are fundamental legal principles but we are unable to say that because they reside within the same frame. In other words, they need to be properly nested.

We know that both auxiliary principles (cooperation and ‘no harm’) nest in international law. We also know that climate law is a subset of international law. The intermediary fundamental legal principle, which is to say the transcendent *lex specialis* principle of international climate law that is in question, must also reside in international law.

Several different legal principles, rules and standards of international environmental law and general international law, that formed part of an original inventory, were tested via the various tools aforementioned (nesting, parsing, and so on). Many principles failed due to invalid specifications within the context of international climate law. Others produced unstable results due to invalid premises. For example, legal reasoning could fail due to a failure in *modus ponens* (if P, then Q; P, therefore Q) or *modus tollens* (if P, then Q; not Q, therefore not P). However, in almost all teleological interpretative analysis there was reversion to one fundamental legal norm.

It was within this context and for verification that the analysis turned to the social norm, the originator of the transcendent legal norm. Amongst the greatest transcendent commands is this: love thy neighbour as thyself.<sup>111</sup> The good neighbour principle is a universal social norm. Ecclesiastical law, Jewish Law and Islamic Law all give it credence. The good neighbour principle is a universal belief of Buddhists, Hindus, and others.

Besides the parable of the Good Samaritan, the good neighbour principle finds root elsewhere. It finds root in Jewish scripture, the Torah. Leviticus 19:34: love (the stranger) as thyself.<sup>112</sup>

Yusuf Ali’s translation of the Holy Quran confirms: ‘Serve Allah, and join not any partners with Him; and do good – to parents, kinsfolk, orphans, those in need, neighbours who are near, neighbours who are strangers, the companion by your side, the wayfarer (ye meet), and what your right hands possess:

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110 An inquiry into the consequential norms derived from this ‘no harm’ principle entails another substantial piece of work and is therefore excluded from this article.

111 *King James 2000 Bible*, Mark 12:31.

112 R. Hammer, *Entering Torah: Prefaces to the Weekly Torah Portion*, 2009, p. 176.

For Allah loveth not the arrogant (...).<sup>113</sup> Kamali's *Principles of Islamic Jurisprudence* cites a practical example: 'extending a water canal was to the manifest benefit of [a] neighbour'.<sup>114</sup>

International religious law is a type of universal law insofar as it extends beyond state boundaries to unify norms for a particular subset of people. In other words, religious law extends the effect of the norm to the conscience of a certain group of people. Even if one does not believe in such things, or thinks human dignity is a deception or an illusion or is 'smoke raised with the fume of sighs',<sup>115</sup> then replace it with the transcendent norm for there is never an uncontested conquest concerning universal values. (The challenge posed by reaching consensus on contested fundamental principles of climate change is therefore not surprising). However, once introduced into the international legal system, such principles take on the form of a legal principle, which is subject to rights and responsibilities. (Pictet derived a similar result when constructing international humanitarian law as a uniform and universal system of norms).<sup>116</sup>

National law also gives authority to the good neighbour principle. Lord Atkin's famous statement in the UK's House of Lords case of *Donoghue v Stevenson* (1932) has seeped the good neighbour principle from Scotland (delict) to England (torts) and on into the porous saps of common law jurisdictions.<sup>117</sup> Per Lord Atkin:

'The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.'

In the aforementioned snail in the opaque bottle of ginger beer case, a manufacturer was found to have a duty of care to ensure that his or her product was free from polluting defects likely to cause injury to health irrespective of there being a contract between a manufacturer and a consumer. To do no harm, the manufacturer's moral obligation imposes an equitable duty to consider a range of persons we ought to have in mind as our neighbours to ensure that foreseeable acts and omissions likely to cause harm do not occur.

Subsequent applications have resulted from this finding but are not elaborated on here.<sup>118</sup> In certain civil law jurisdictions, the approach to torts or civil wrongs will probably be different insofar that a legal obligation may be imposed by a legislative prerogative of risk liability. Another distinction between common and civil law concerns the principle of equality before public charges, which can be used as a theoretical basis for compensation. Notwithstanding, it is reiterated again that it is the derivation of the good neighbour principle that is important for the purposes of this inquiry.

113 A.A. Yusuf, *An English Translation of The Holy Quran*, 2001; (ءاسنلا ءروس), An-Nisa, Chapter #4, Verse #36).

114 M.H. Kamali, *Principles of Islamic Jurisprudence*, 1998, p. 247. N.J. Coulson, *A History of Islamic Law*, 1994. D. Powers, *Studies in Quran and Hadith*, 1986.

115 W. Shakespeare, *Romeo and Juliet*, 1978, Vol. 2; Act 1, Scene 1.

116 J. Pictet, International Institute of Human Rights, *Development and Principles of International Humanitarian Law: Course Given in July 1982 at the University of Strasbourg as Part of the Courses Organized by the International Institute of Human Rights*, 1985.

117 *East Suffolk Rivers Catchment Board v Kent*, [1941] AC 74, [1940] UKHL 3 (on the difference between statutory duties and powers to repair sea walls). *Anns v Merton London Borough Council* [1977] 2 All ER 118, [1978] AC 728, [1977] UKHL 4 (on establishing a duty of care: proximity or neighbourhood based on reasonable contemplation and reasons for refuting a duty of care). Per Lord Wilberforce, 'That, quite apart from such consequences as might flow from an examination of the duties laid down by the particular statute, there might be room once outside the area of legitimate discretion or policy, for a duty of care at common law; that it was irrelevant to the existence of that duty of care whether what was created by the statute was a duty or a power: the duty of care might exist in either case'. *Murphy v Brentwood District Council* [1991] 1 AC 398, [1990] 2 All ER 908, [1991] UKHL 2, [1991] AC 398 (physical injury). The House of Lords overruled the *Anns* test in *Caparo* and reverted to the incremental approach whereby an existing duty must be established under the prongs of reasonably foreseeable harm, proximity, fair, just and reasonable (*Caparo Industries Plc v Dickman* [1990] 1 All ER 568, [1990] UKHL 2, [1990] 2 AC 605). *Cooper v Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79, is a Supreme Court of Canada case (proximity test). While many common law cases point to the degree of proximity between a manufacturer and consumer, the main point being made here, though, is as to the derivation of the good neighbour principle.

118 UK, House of Lords; *Donoghue (or McAlister) v Stevenson*, [1932] All ER Rep 1; [1932] AC 562.

In international law there is a conception of a relationship between the legal norm and universal humanity, which gives rise to a duty of care: a care to do no harm and a care to cooperate.<sup>119</sup> Being a good neighbour may exist irrespective of the proximity between a party causing harm and an injured party. It may exist prior to harm occurring, in which case a good neighbourly relationship reflects a type of duty to cooperate.<sup>120</sup> The good neighbour principle exists irrespective of the proof of causation of historical responsibility. It exists because of a moral obligation that has become a legal norm.

Neither does Article 3 (5) confine proximity to direct connections between adjacent intermediaries. (The supply chain dynamic was alluded to earlier insofar that a manufacturer who distributes through a supplier may still be liable to a consumer). Equity and solidarity extend responsibility to the global commons whereby a person is bound to take care not to damage one's neighbour by a careless breach of a legal norm. In this age of developing information technology and globalisation, being good neighbours transcends state frontiers. Attribution may not only be to a specific state but to all states or to a collective of state and non-state actors or to non-state actors.

International law recognised the principle of no harm in the *Trial Smelter Arbitral Award*. Since at least 1941, states are obligated to regulate with due diligence in such a manner as not to cause injury by emitting fumes into a neighbouring territory.<sup>121</sup> It may be argued that from at least 1992, states are obligated to regulate with due diligence in such a manner as not to cause injury by emitting fumes into the global commons.

In giving express recognition to the UNFCCC, the Parties to the UNFCCC all considered with reasonable foresight (for the most part since at least 1992) that there will be loss and damage associated with the adverse affects of climate change. Article 4 of the UNFCCC sets out commitments as to how the UNFCCC COP is to allocate mechanisms' priority for compensation within the global commons. These commitments are also reflected in the Kyoto Protocol (Article 3.14 is illustrative).

As all fundamental *lex specialis* principles are interrelated, there is also a close connection between the no harm principle and the precautionary principle. However, the consequential legal norms that will regulate comprehensive risk assessment models for losses and damage due to climate change, such as, extreme weather events, have received little attention to date. Notwithstanding, the persons served by the UNFCCC (society) are so closely related and directly affected by the UNFCCC COP, that Members of the UNFCCC COP ought to have them in contemplation when directing their minds to acts or omissions that may adversely affect the climate and give rise to harm. These issues also relate to the responsibility of international organisations.<sup>122</sup>

The UNFCCC COP has recognized the issue of cooperating to find a solution to manage resultant loss and damages. The Nairobi Work plan gave greater attention to this concern.<sup>123</sup> Subsequent work ensued. More recently, a 2011 UN resolution calls on Member States to give impetus to implementing the 2005-2015 Hyogo Framework for Action to build the resilience of nations and communities to

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119 Consolidated Version of the Treaty on European Union, 2008, Art. 4 (3). Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties, OJ C 115, 9.5.2008, p. 1-388. Norwegian Refugee Council, *The Nansen Conference Climate Change and Displacement in the 21st Century*, Oslo, Norway, June 5-7, 2011, Principle 1: 'Responses to climate and environmentally related displacement need to be informed by adequate knowledge and guided by the fundamental principles of humanity, human dignity, human rights and international cooperation'.

120 UK, Duty to Cooperate Factsheet pursuant to Provision 110 of the *Localism Act 2011* for the benefit of local planning authorities. <<http://www.directionsplanning.co.uk/images/Directions%20Duty%20to%20Cooperate%20Factsheet%20010312.pdf>> (last visited 26 September 2012). For a US example, see the duty to cooperate concerning notices in insurance claims: *Berkley Regional Ins. Co. v. Philadelphia Indemnity Ins. Co.*, 2012 U.S. App. LEXIS 15998 (5th Cir. Aug. 2, 2012), the United States Court of Appeals for the Fifth Circuit, applied Texas law.

121 Reports of International Arbitral Awards; *Trail Smelter Case (United States, Canada)*; 16 April 1938 and 11 March 1941; Volume III, pp. 1905-1982; at 1965.

122 ILC Draft Articles on the Responsibility of International Organizations 2011, Art. 3; Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10, Para. 87).

123 UNFCCC, Integrating Practices, Tools and Systems for Climate Risk Assessment and Management and Disaster Risk Reduction Strategies Into National Policies And Programmes; FCCC/TP/2008/4, 21 November 2008. UNFCCC, Mechanisms To Manage Financial Risks From Direct Impacts Of Climate Change In Developing Countries, FCCC/TP/2008/9, 21 November 2008.

disasters.<sup>124</sup> From 26-28 March 2012, a UNFCCC expert meeting on assessing the risk of loss and damage associated with the adverse affects of climate change took place in Tokyo, Japan.<sup>125</sup>

While questions of liability and state attribution may arise, a preliminary analysis of the collective five fundamental *lex specialis* principles of international climate law (equity, solidarity, precaution, sustainability and good neighbourliness) indicate that liability is also, but not only, a question of attribution to other actors. Multiple attribution is possible.

Funding is another pernicious issue to reaching normative consensus. Certain funds have already been established, such as the Least Developed Countries Fund (LDCF),<sup>126</sup> but more financing arrangements are required, and not only for developing countries.<sup>127</sup>

The route of an advisory opinion from the ICJ is also another avenue by which to be guided as to the validity of the constitutive elements of international climate law. Such an opinion would not be binding as to result but would carry significant qualified authority in the interpretative schema. Such a discussion is relevant because the aim is to attain consensus on the constitutional normative order of fundamental legal principles and consequential legal norms.

A qualified legal opinion need not be limited to the no harm principle, or the good neighbour principle, it could extend to uncertainties as to the consequential legal norms deriving from all five fundamental principles. Such an opinion would be invaluable.

To illustrate, the ICJ could qualify legal questions concerning the harm caused by climate, and extreme weather events, via a request from a UN body. Given that the issue relates to third generation human rights, which are collective rights, the United Nations General Assembly is one of the most appropriate bodies to request a qualified opinion.

Advice could even be sought from the Court's specialised Chamber for Environmental Matters. Fundamental to the advice could be to ask whether the UNFCCC's delay in pronouncing on the legal principles and their legal consequences is appropriate and whether non-state actors are responsible for a failure to regulate emissions. If there is a fragile deal in UNFCCC commitments, such as the Kyoto Protocol, then the UNFCCC should step in. The question is not isolated to emissions trading but extends to the constitution of climate law. It extends even further to the nexus between special regimes, such as, between the UNFCCC and UNCLOS.

If Palau, Tuvalu, Kiribati, or any other Small Island Developing State, follows this route then they need to table a well structured terms of reference to the UNGA and have a clear understanding as to what they are seeking in terms of reparations.<sup>128</sup> Other UN Members could also contribute to forming the terms of reference.

An opinion emanating from the ICJ could then be used to advantage before a UNFCCC conciliation commission; and ultimately back in the ICJ. The question of commitments arises again within this context. For instance, there is the question of the mandatory binding norm on the Parties to the UNFCCC to 'take full account of the specific needs and special situations of the least developed countries in their actions with regard to funding and transfer of technology.'<sup>129</sup> An additional issue relating to the good neighbour principle may stem from the obligatory requirement to establish effective financial mechanisms, the commitment to which clearly resides with the UNFCCC COP but also extends to other actors.<sup>130</sup> Irrespective of any other rulings by the ICJ, the right to an effective remedy is a fundamental procedural right of UNFCCC equity but due to its scope requires elaboration elsewhere.

124 UN General Assembly Resolution A/RES/66/199, International Strategy for Disaster Reduction, Resolution adopted by the General Assembly at its 91st plenary meeting, 22 December 2011.

125 Information available at <[http://unfccc.int/adaptation/cancun\\_adaptation\\_framework/loss\\_and\\_damage/items/6597txt.php](http://unfccc.int/adaptation/cancun_adaptation_framework/loss_and_damage/items/6597txt.php)> (last visited 26 September 2012).

126 UNFCCC COP 7, Decision 27/CP.7: Guidance to an Entity Entrusted with the Operation of the Financial Mechanism of the Convention, for the Operation of the Least Developed Countries Fund, FCCC/CP/2001/13/Add.4, 8th plenary meeting, 10 November 2001.

127 Climate Finance Options; available at <<http://www.climatefinanceoptions.org/cfo/Funding%20Sources>> (last visited 26 September 2012).

128 UN News Centre; *Palau Seeks UN World Court Opinion On Damage Caused By Greenhouse Gases*; 22 September 2011, available at <<http://www.un.org/apps/news/story.asp?NewsID=39710&Cr=pacific+island&Cr1>> (last visited 26 September 2012).

129 UNFCCC. Art. 14.6; Art. 4. 9.

130 UNFCCC. Art. 11.

A parallel and longer-term endeavour is to suggest that the International Law Commission could make a significant contribution by progressively developing the *lex specialis* principles of international climate law and the consequential legal norms derived therefrom on the basis of legal science. Similar endeavours are also required concerning water law and the analysis of the nexus between environmental, economic law, human rights, and so on.

In sum, and to cite Kelsen, 'From the norm to love one's neighbour one can derive the norm not to harm one's fellow man, not to damage him physically or morally, to help him in need, and – particularly – not to kill him.'<sup>131</sup> The principle of cooperation invokes a positive obligation to aid one's neighbours and the principle of *no harm* invokes a negative obligation of not doing your neighbour wrong. Together, they reside within the frame of the good neighbour principle.

An exercise of substitution may help substantiate the principle within the context of international climate law. Such an exercise certainly helped to invalidate those proxy principles that proved circular or erratic.

Accordingly, the Parties to the UNFCCC 'should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change'. Further, in accordance with 'no harm' 'the Parties should not take measures to combat climate change that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade'. Article 3 (5) may provide for the auxiliary principles of cooperation and 'no harm' on the basis of the superior principle of good neighbourliness.

One could argue that the ubiquitous and universal governing value of Article 3 (5) is one of good neighbourliness while the auxiliary principles of cooperation and 'no harm' are subordinate thereto. For the purposes of this work, and from textual, contextual and teleological interpretation, the derivative *lex specialis* legal principle of Article 3 (5) is good neighbourliness.

As in assessing the other fundamental *lex specialis* legal principles, but more so concerning Article 3 (5) due to its obscurity, the question arises as to what supplementary means of interpretation may have to say on the result of interpreting Article 3 (5)'s object and purpose. In reference to the report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of its Fourth Session, the relevant draft text provides:

'6. States shall promote an open and balanced multilateral trading system. Except on the basis of a decision by the Conference of the Parties which should be consistent with the GATT, no country or group of countries shall introduce barriers to trade on the basis of claims related to climate change.

7. Measures taken to combat climate change should not introduce trade distortions inconsistent with the GATT or hinder the promotion of an open and multilateral trading system.'<sup>132</sup>

Paragraphs 6 and 7 remain intact in the relevant later draft text reported by the fifth session of the Negotiating Committee and, as above, reflect the 'no harm' principle.<sup>133</sup>

Preparatory work also included specific provisions on cooperation. Paragraph 10 of the drafted principles tabled by the Intergovernmental Negotiating Committee for the UNFCCC at its fourth session is illustrative:

'10. The principle of the sovereignty of States shall be adhered to and strictly respected in all fields of international cooperation, including that for the protection of the climate.'<sup>134</sup>

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131 H. Kelsen, *Pure Theory of Law*, 1978, p. 195.

132 UNGA, Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of its Fourth Session, held at Geneva from 9 to 20 December 1991, A/AC.237/15, 29 January 1992, II Principles, p. 28-29.

133 UNGA, Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of the First Part of its Fifth Session, held in New York from 18 to 28 February 1992, A/AC.237/18 (Part I), 10 March 1992, p. 28-29.

134 UNGA, Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of its Fourth Session, held at Geneva from 9 to 20 December 1991, A/AC.237/15, 29 January 1992, II Principles, p. 29.

The wording differs slightly in its fifth session but the substance remains intact:

‘10. In all fields related to the protection of the climate system, the Parties shall respect and act in accordance with the principle of sovereignty of States, which is applicable in any area of international cooperation.’<sup>135</sup>

Interestingly, and of some significance, the preparatory work made a clear distinction between the auxiliary principles to do no harm and to cooperate and then the Parties grouped them together under a single article (Article 3 (5)). Preparatory work to the UNFCCC does not discredit the textual, contextual or teleological interpretations of Article 3 (5). For the purposes of this work, textual, contextual, teleological and supplementary interpretations all suggest that the *lex specialis* legal principle of Article 3 (5) could be good neighbourliness.

For completeness, however, it should be pointed out that earlier preparatory works on the treaty included several other provisions on ‘principles’, which do not appear in the ratified convention. A myriad of other ideas as to the draft principles may also be relevant but none of these seemed to be fully supported; or, more precisely, none appeared in an identical format in the final authenticated text. The ideas, concepts and notions that may have been incorporated within the UNFCCC but were rejected are not part of the legal principles of international climate law.

The draft principles pertaining to state attribution to developed countries as drafted in earlier texts, for example, were contested and there are no identical provisions in the final ratified text. Few things have given rise to so much diversity of opinion as that of state attribution for climate harm, which is an important aspect of international climate law but a separate subject in its own right.

The final text of the UNFCCC confirms, however, that the provisions submitted by the fourth session of the Intergovernmental Negotiating Committee were excluded or at least so substantially modified that they are no longer identifiable. Examples of these draft provisions of *lex ferenda* are set out below:

‘1. The right to development is an inalienable human right. All peoples have an equal right in matters relating to reasonable living standards. Economic development is the prerequisite for adopting measures to address climate change. The net emissions of developing countries must grow to meet their social and economic development needs.

8. Alternative A. The developed countries responsible for causing damage to the environment through inducing climate change should bear the primary responsibility for rectifying that damage and the cost of prevention measures and should compensate for environmental damage suffered by other countries or individuals in other countries.

8. Alternative B. Those countries directly responsible for causing damage to the environment through inducing climate change should bear the responsibility for rectifying that damage. By openly demonstrating their direct responsibility or negligence, those countries shall compensate for environmental damage suffered by other countries or individuals in other countries.

11. The need to improve the international economic environment for the developing countries and to promote their sustained economic development are prerequisites for enabling developing countries to participate effectively in the international efforts to protect the global environment including climate protection.’<sup>136</sup>

The words of Waldock, a Special Rapporteur of the ILC in the preparation of the VCLT, could not be more relevant. Caution is needed in using preparatory works as a supplementary means of interpretation. They do not represent authentic legal norms of international climate law.

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135 UNGA, Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of the First Part of its Fifth Session, held in New York from 18 to 28 February 1992, A/AC.237/18 (Part I), 10 March 1992, p. 29.

136 UNGA, Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of its Fourth Session, held at Geneva from 9 to 20 December 1991, A/AC.237/15, 29 January 1992, II Principles, p. 27-29.

‘They are simply evidence to be weighed against any other relevant evidence of the intentions of the parties, and their cogency depends on the extent to which they furnish proof of the common understanding of the parties as to the meaning attached to the terms of the treaty. Statements of individual parties during the negotiations are therefore of small value in the absence of evidence that they were assented to by the other parties.’<sup>137</sup>

Notwithstanding, recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, has been helpful in confirming the meaning resulting from an application of Article 31 of the VCLT. The general obligatory rule of interpretation does not contradict the will of the Parties. Certain currents on state attribution were not incorporated within Article 3 legal principles but that does not invalidate the application of the general rule of interpretation. Article 3 of the UNFCCC is an authentic text.

Part 2 of the paper has set out a series of arguments to justify the fundamental legal principles of international climate law and some of their consequential norms. The arguments engage disciplines of international law but, in several instances, the study also refers to comparative national case law. Part 2 illustrates the potential results of applying the proposed approach. The study rejects grasping for legal principles in the ether and then trying to transcend international law to a new level. As an alternative, the study shows that there is merit in drawing on existing instruments of international law. The approach to reach normative consensus is process orientated. It finds its legitimacy in employing instruments of legal philosophy, such as philosophy of language; legal systematics, such as the study of legal systems; and legal hermeneutics, which is the legal practice of interpretation, to delineate, distinguish and unify *lex specialis* principles that could form the foundations of a universal constitutional framework of international climate law.

### 3. Conclusion

#### 3.1. Initial schema: the legal principles of international climate law

International climate law forms a subset of general international law and international environmental law. International climate law has an intrinsic relation to the legal principles of general international law, such as *jus cogens* and good faith, but it also has its own transcendent *lex specialis* principles of international climate law that have a more specific, targeted and special meaning.

For constitutional jurists and legal scientists, a very simple schema summarises the structural relationship between general international legal principles, *lex specialis* principles of international climate law and the residual:

International legal principles of climate change equate to  $\beta_0$  plus  $\beta_1$  (*lex specialis* principle of equity) plus  $\beta_2$  (*lex specialis* principle of solidarity) plus  $\beta_3$  (*lex specialis* principle of precaution) plus  $\beta_4$  (*lex specialis* principle of sustainability) plus  $\beta_5$  (*lex specialis* principle of good neighbourliness) plus  $\epsilon$ .

In other words, the legal principles of international climate law are a function of:

1. The ubiquitous legal principles of international law (the expected legal principles of international climate law when there are no *lex specialis* principles, which is referred to as the constant or dependent norm or  $\beta_0$ );  
plus
2. The change in the legal principles of climate change resulting from a unit change in the *lex specialis* principle of equity ( $\beta_1$ );  
plus
3. The change in the legal principles of climate change resulting from a unit change in the *lex specialis* principle of solidarity ( $\beta_2$ );  
plus

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137 H. Waldock, ‘Third Report on the Law of Treaties’, 1964 *ILC Yearbook*, vol II, 58, Para. 21. See also R.K. Gardiner, *Treaty Interpretation*, 2008, p. 307.

4. The change in the legal principles of climate change resulting from a unit change in the *lex specialis* principle of precaution ( $\beta_3$ );  
plus
5. The change in the legal principles of climate change resulting from a unit change in the *lex specialis* principle of sustainability ( $\beta_4$ );  
plus
6. The change in the legal principles of climate change resulting from a unit change in the *lex specialis* principle of good neighbourliness ( $\beta_5$ );  
plus
7. An error term or residual ( $\varepsilon$ ). (The error term groups all the aforementioned errors and variances including randomness and measurement error).

The constant, or  $\beta_0$ , encapsulates the principles of international law that apply regardless of the UNFCCC treaty regime. The legal principles of international climate law are a subset of principles of general international law, human rights law, environmental law and other relevant laws.

The fundamental *lex specialis* norms (equity, solidarity, precaution, sustainability and good neighbourliness) are independent norms. Their consequential norms may change depending on their relationship to other *lex specialis* norms. (There is a dynamic schema between the five *lex specialis* principles). These five *lex specialis* principles may also change as determined by their particular attributes and characteristics (each legal principle has its own static interpretative schema).

In sum, the legal principles of international climate law are a function of recognisable legal principles of international law, *lex specialis* principles distinct to the domain of international climate law and a residual. By a process of deduction and reference to the *lex lata* within which international climate law resides, the fundamental *lex specialis* principles of international climate law could emerge as equity, solidarity, precaution, sustainability and good neighbourliness.

Demonstrating that textual, contextual and supplementary means of interpretation all lead to the same transcendental *lex specialis* principles of international climate law may seem repetitive; or, at worst, signify the following of one ‘calf path of the mind’ to the exclusion of all others. Yet, a thread of hope remains in pursuing a methodical approach that considers climate justice as a function of the quality of the legal system.

### 3.2. Postscript – new insights

This paper offers at least five fundamental new insights to governance of the global commons. First, it shows that climate justice is a function of the quality of the legal system. Second, it suggests the importance of the constitutional cohesion of international climate law as a means to attain normative consensus. Third, it explains and demonstrates one way of bringing together the legal principles of international climate law into a unified and universal constitutional model. Fourth, it outlines how to mobilise such legal principles for effect. Fifth, it establishes a framework by which to legitimise and give effect to consequential legal norms.

Not only is it advisable for the Parties to the UNFCCC to extrapolate and scrutinise the fundamental *lex lata* principles of international climate law but they could also benefit by validating a constitutional *fons principalis* of international climate law. By making that constitution of normative principles effective, the Parties could work towards guaranteeing and fulfilling the constitutional order. The article’s contribution to legal science may also extend beyond the constitutionalism of international climate law to encompass a new approach that could apply to the constitutionalism of special regimes. To elaborate on the *lex specialis* principles of international climate law in far more detail, there will be a need to employ systematics to the taxonomy of *lex specialis* principles with the view to understanding their relevant characteristics, estimators and application. Study has been undertaken in this direction.

As a postscript, the tragedy of the commons is not that people acting together for a common goodwill deplete natural resources. Today, the tragedy is that there is no credence to a collective and cohesive systematic legal system by which to govern the interactions of humankind in the new *jus gentium*, not that there ever has been one.