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The Normative Status of Climate Change Obligations under International Law

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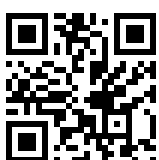
STUDY

Requested by the JURI committee



The Normative Status of Climate Change Obligations under International Law

'Yesterday's good enough has
become today's unacceptable'



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become today’s unacceptable’

Abstract

This study, commissioned by the European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs at the request of the JURI Committee, investigates the normative status of legal commitments of States in the field of international climate law. It concludes that the due diligence obligations of States to realize their nationally determined contributions (NDCs) qualifies as a norm of general international law, but at the moment not as a peremptory norm. It concludes that the legal impact of this norm currently lies in the sphere of interpretation and harmonization of existing international law rather than invalidation of conflicting rules.

This document was requested by the European Parliament's Committee on Legal Affairs.

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LIST OF ABBREVIATIONS

AI	Artificial Intelligence
AJIL	American Journal of International Law
App No	Application Number
Art(s)	Article(s)
BYBIL	British Yearbook of International Law
CAVV	Dutch Advisory Committee on Public International Law
CCRP	Climate Rights and Remedies Project
CETA	EU-Canada Trade and Investment Agreement
Cir	Circuit
CLQ	Cornell Law Quarterly
COP	Conference of Parties
CRC	Committee on the Rights of the Child
CUP	Cambridge University Press
Doc	Document
Disp Resol Int'l	Dispute Resolution International
ILC	International Law Commission
ECHR	European Convention on Human Rights
ECLI	European Case Law Identifier
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
Ed(s)	Editor(s)
Edn	Edition
Eg	<i>Exempli gratia</i> (for example)

EJIL	European Journal of International Law
eKLR	Kenya Law Reports (online)
EU	European Union
EWHC	England & Wales High Court (Administrative Court)
FCAFC	Federal Court of Australia: Full Court
Fn	footnote
GATT	General Agreement on Tariffs and Trade
GC	Grand Chamber
GHG	Greenhouse Gas
HRC	Human Rights Committee
IACmHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICJ Rep	International Court of Justice Reports
ICLQ	International and Comparative Law Quarterly
ICSID	International Centre for Settlement of Investment Disputes
ICTY	International Criminal Tribunal for the former Yugoslavia
le	<i>Id est</i> (that is)
ILA	International Law Association
ILC	International Law Commission
ILDC	Oxford Reports on International Law in Domestic Courts
Inc	Incorporated
IPCC	Intergovernmental Panel on Climate Change

ITLOS	International Tribunal for the Law of the Sea
JEL	Journal of Environmental Law
JWIT	Journal of World Investment and Trade
LJIL	Leiden Journal of International Law
MPEiPro	Max Planck Encyclopedia of International Procedural Law
MPEPIL	Max Planck Encyclopedia of Public International Law
NDC(s)	Nationally Determined Contribution(s)
No	Number
Nord J Int'l L	Nordic Journal of International Law
NYIL	Netherlands Yearbook of International Law
OECD	Organization for Economic Co-operation and Development
OJ	Official Journal
OSPAR	Convention for the Protection of the Marine Environment of the North-East Atlantic
OUP	Oxford University Press
PCA	Permanent Court of Arbitration
Phil Trans R Soc A	Philosophical Transactions of the Royal Society A: Mathematical, Physical and Engineering Sciences
RDS	Royal Dutch Shell
RIAA	Review of International Arbitral Awards
SCC	Stockholm Chamber of Commerce
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law

UNFCCC	United Nations Framework on Climate Change
UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series
USA	United States of America
v	versus
VCLT	Vienna Convention on the Law of Treaties
viz	<i>videre licet</i> (namely)
WHO	World Health Organization
WLR	Weekly Law Reports
WTO	World Trade Organization
YBILC	Yearbook of the International Law Commission
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

EXECUTIVE SUMMARY

In March 2023, the Intergovernmental panel on Climate Change (IPCC) published its most recent report confirming its earlier findings on the urgency of international climate action, that ‘climate change is a threat to human well-being and planetary health’ and that ‘the choices and actions implemented in this decade will have impacts now and for thousands of years’. As eloquently noted by the Supreme Court of the State of Hawaii in 2023 ‘[y]esterday’s good enough has become today’s unacceptable’.

In this wider context, the European Parliament Committee on Legal Affairs requested a study on: ‘The legal nature of climate goals (2° or 1.5°C) and of the actions foreseen by the Paris Agreement to achieve them and its impact on the international legal system’. More specifically the Committee seeks an answer to the question whether the climate goals and the actions foreseen by the Paris Agreement can be regarded as peremptory norms of international law (*jus cogens*) and what the consequences of such a qualification would be.

To start, the reference in the Paris Agreement to the universally shared objective of keeping the temperature rise limited to preferably 1.5°C reflects the *underlying rationale and values of the climate law regime*. Such references contribute to formulating norms of general international law, with the potential of obtaining in the future the status of peremptory norm.

The definition currently adopted by the International Law Commission in 2022, in its Draft Conclusions on *Jus Cogens*, allows for an interpretation, such that a peremptory norm related to climate may emerge in international law, although this does not seem to be the case at the moment. Were such a norm to emerge, in principle it would not be too difficult to argue that the purported general norm reflects universal values and is a norm of general international law accepted by the community of States as a whole. The acceptance of the existence of a peremptory climate norm would have as a consequence the fact that States will not be able to opt out or derogate from this norm, even if, for instance, a particular treaty would allow for withdrawal. Such a peremptory norm could be modified or replaced *only* by a subsequent peremptory norm.

However, one of the main issues with the potential emergence of peremptory climate norm is that it would be difficult to ascertain the *precise content* of the general norm, *given that the core obligation of climate law is formulated as a due diligence norm*. Hence, it would be also difficult to establish when such a peremptory climate norm, construed as a positive obligation, has been derogated from or violated. There is a fine line between not doing enough and a refusal to recognize the existence of a duty to do your best.

That is not to say that the obligations contained in the various climate change instruments are of limited value. Far from it. The number of legally binding obligations in the Paris Agreement may be limited, but the Paris Agreement as a whole in the context of the dynamic and continuous process of global cooperation, and aiming at keeping climate change under control, has immense legal value. The core norms contained in it can be considered as belonging to the domain of general international law and could potentially achieve the status of peremptory norm, in particular the obligation to exercise due diligence to formulate, maintain and enhance over time ambitious domestic climate goals, as well as the duty to meaningfully cooperate at the international level in a transparent way. The universally shared ambition of the Paris Agreement to keep temperature rise limited to preferably 1.5°C, is not a legal obligation as such, but is essential for the determination of compliance with the relevant climate norms.

In climate-related litigation at the domestic, regional or international levels, there are significant indications that courts and tribunals can play a meaningful role in the future development of this area

of international law, although as seen in trade and investment law, general international climate law does not easily set aside other legal obligations.

The International Court of Justice, the International tribunal for the Law of the Sea and the Inter-American Court of Human Rights, through requests for advisory opinions which have been submitted to them, will have the opportunity to provide a better insight into the current state of international climate law. States and other actors should encourage the courts to contribute to the progressive development of international law, rather than seeking a restrictive view on the impact of climate law, in the interests of present and future generations and the planet as a whole.

However, the debate on whether climate norms have or will ever achieve(d) peremptory status is not the alpha and omega of their relevance. In practice, it will not make much difference whether or not general international climate law has obtained or will obtain the status of a peremptory norm. The generality of the due diligence norm on climate makes it difficult to formulate a clear conflict with other norms of international law that can be solved by prioritizing one over the other.

What is important is that the virtually universal support for the existence of the general international climate norm, even without a peremptory status, gives it an enormous interpretative and compliance pull. This will affect the application and interpretation of other rules of international law. Efforts of States, international organizations, and non-State actors can be best focused on promoting harmonious interpretation, rather than engaging in a zero-sum game of arguing that norms conflict exist and then trying to prioritize one norm over the other.

Claiming that climate norms have the status of peremptory norms may be contested by States and lead to a heated legal debate but with little practical impact. On the contrary, taking into account the general norm(s) of international law on climate in the interpretation and application of legal rules from all areas of international law can prove to be a much more effective and far-reaching approach.

1. INTRODUCTION

'Yesterday's good enough has become today's unacceptable'.¹ This citation in the title of this study symbolizes the dynamic developments in the field of climate law, as well as a sense of urgency. The Supreme Court of the State of Hawaii concluded its decision of 13 March 2023 with this statement regarding the rejection of permission for a power plant which would operate by burning woody biomass, mainly locally-grown eucalyptus trees. The resulting massive greenhouse gas (GHG) emissions were to be compensated by planting trees. The authorization process began in 2012. However, in the ten years that followed, thinking about the climate issues developed rapidly. Among others, the Supreme Court decided in 2017 that the article in the Constitution on the right to a clean and healthful environment includes 'that express consideration be given to reduction of greenhouse gas emissions',² and in 2021 the State of Hawaii declared a climate emergency.³ The Supreme Court of Hawaii recognized the urgency of the climate problem and added to the citation above that: 'The PUC [the relevant State authority] was under no obligation to evaluate an energy project conceived of in 2012 the same way in 2022. Indeed, doing so would have betrayed its constitutional duty'. This decision underlines that the climate urgency requires flexibility, also when it comes to the interpretation and application of the law.

In March 2023 the Intergovernmental panel on Climate Change (IPCC) published its most recent report confirming its earlier findings on the urgency of international climate action:

Climate change is a threat to human well-being and planetary health (very high confidence). There is a rapidly closing window of opportunity to secure a liveable and sustainable future for all (very high confidence). Climate resilient development integrates adaptation and mitigation to advance sustainable development for all, and is enabled by increased international cooperation including improved access to adequate financial resources, particularly for vulnerable regions, sectors and groups, and inclusive governance and coordinated policies (high confidence). The choices and actions implemented in this decade will have impacts now and for thousands of years (high confidence).⁴

Whereas the urgency of taking adequate action is repeated year after year, by States, international organizations, scientists and civil society organizations, in the (international) legal domain many debates remain focused on establishing whether or not the commitments that States have accepted to combat climate change and to ensure timely adaptation constitute a binding legal commitment that can be enforced, or whether they are a soft law and merely a set of policy aspirations. The questions developed in this study show uneasiness with this situation. It basically asks the question whether the rules of international law dealing with this most urgent topic are norms of the highest normative order and should therefore be prioritized over other competing or conflicting rules of international law; in other words, whether these climate norms are peremptory norms (*jus cogens*). While States continue to be reluctant to accept precise and enforceable legal rules at the international level, they have accepted a wide range of legal and non-legal commitments regarding climate. However, it remains

¹ *In re Hawai'i Electric Light Co, Inc* (13 March 2023) Supreme Court of Hawaii, No SCOT-22-0000418, 19, available at: <<https://law.justia.com/cases/hawaii/supreme-court/2023/scot-22-0000418.html>> (last accessed 13 June 2023).

² *In re Application of Maui Electric Company Ltd* (14 December 2017) Supreme Court of Hawaii, 141 Haw 249, 264-5.

³ State of Hawaii, 'Senate Concurrent Resolution: Declaring a Climate Emergency and Requesting Statewide Collaboration Toward an Immediate Just Transition and Emergency Mobilization Effort to Restore a Safe Climate' (2021) SCR 44, SD 1, HD 1, 31st Leg, Reg Sess (2021) available at: <https://www.capitol.hawaii.gov/sessions/session2021/bills/SCR44_SD1_.HTM> (last accessed 13 June 2023).

⁴ IPCC, 'Climate Change 2023: Synthesis Report – Summary for Policy Makers' (IPCC, 2023) 24, C.1, available at: <https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf> (last accessed 13 June 2023).

unclear what the impact is of these commitments on international and domestic normative competition and conflict between climate rules and other rules of law. In the example from Hawaii, the State and its courts seem to have taken a clear position by giving significant weight to climate considerations while recognizing its dynamic character. Also, other domestic courts and judicial institutions have given meaningful content to the commitment to undertake climate action, but are sometimes accused of judicial activism. At the international level, courts and tribunals have not clearly expressed themselves on these matters, but several cases are pending. Finding a proper balance between recent climate law and international agreements concluded decades ago, as in the fields of international investment law or human rights law, is complex from a legal point of view. Should climate law have more priority than it sometimes seems to be given? Has yesterday's good enough been overtaken by today's unacceptability?

To address some of these issues, the European Parliament Committee on Legal Affairs requested a study on: 'The legal nature of climate goals (2° or 1.5°C) and of the actions foreseen by the Paris Agreement to achieve them and its impact on the international legal system'. More specifically the Committee seeks an answer to the question whether the climate goals and the actions foreseen by the Paris Agreement can be regarded as peremptory norms of international law (*jus cogens*) and what the consequences of such a qualification would be. In this study we will explain that making such a qualification requires a rather innovative approach to international law, recognizing a new planetary dimension in international law. Yet, given the broad support for the climate goals and the urgency of effective domestic and international measures, the existence of a peremptory norm on climate does not seem inconceivable. This will be explained in this study, but it will also discuss the legal consequences of such a qualification and show that it will not be a panacea in solving the climate puzzle.

The study will show in Chapter 2 that a peremptory norm of climate law is theoretically conceivable, although its acceptance is very unlikely. One of the criteria for the existence of a peremptory norm is the existence of a norm of general international law. Whether such a norm exists in climate law and what its content is, will be explained in Chapter 3. A peremptory norm of international law is by definition a norm of general international law, but not every norm of general international law is a peremptory norm. The findings of Chapters 2 and 3 will be combined in Chapter 4 that will analyze the consequences of the existence of general international climate law for its interaction with other branches of international law. Interestingly, qualifying the norm of general international climate law as a peremptory norm will not lead to major differences in comparison to accepting a general international climate law without such qualification when considering competition, conflict or interaction with other legal regimes. In Chapter 5 the general conclusions and recommendations will be presented.

In this study mostly the term 'peremptory norm' rather than rule of *jus cogens* is used. This is not a principled choice but a pragmatic one. Both terms can be used interchangeably. The study is focused on public international law, but of course the interaction with regional and domestic law can and will not be ignored. The study is based on collecting and assessing the relevant sources of law, on the application and interpretation thereof by relevant actors, mostly judicial actors and scholars. The study is a legal study and does not engage with the political, economic, ecological, philosophical or other disciplines.

2. NORMATIVE HIERARCHY IN INTERNATIONAL LAW: IS A PEREMPTORY NORM OF INTERNATIONAL LAW ON CLIMATE CONCEIVABLE?

2.1. Introduction

In this Chapter the concept of peremptory norms of international law will be introduced based on the work of the International Law Commission (ILC) on this topic in recent years. In 2022 the ILC adopted the '*Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens) with commentaries*' and submitted them to the United Nations General Assembly (UNGA).⁵ This text can be considered as the most authoritative reflection on the current status of the concept of peremptory norms in international law. However, the completion of the work by the international law experts of the ILC does not mean that the content of its Draft conclusions shows a consensus among States.

The concept has been intensively debated ever since it was proposed for inclusion in the 1969 Vienna Convention on the Law of Treaties (VCLT).⁶ Article 53 VCLT, entitled *Treaties conflicting with a peremptory norm of general international law (jus cogens)* states:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 64 VCLT further stipulates: 'If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates'. These provisions can be regarded as a new approach at a time when the international legal system was still dominated by the idea of sovereignty of States, which entailed an unrestricted freedom for States to adopt and consent to treaties with any kind of content. In other words, international law constituted a *jus dispositivum* that permitted States to mold it into whatever shape and form they preferred.⁷ In its 1966 commentary, in proposing provisions on peremptory norms, the ILC took the opposing view that 'there are certain rules from which States are not competent to derogate at all by treaty arrangement'.⁸ It recognizes that there is a common interest in protecting certain fundamental norms over the sovereign freedom of States. Which rules were to be considered peremptory norms was left 'to be worked out in State practice and in the jurisprudence of international tribunals'.⁹ At the time it was suggested that treaties dealing with the unlawful use of force, acts criminal under international law, or acts such as trade in slaves, piracy or genocide, would be contrary to peremptory norms.

⁵ ILC, 'Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*jus cogens*) and Commentaries' (2022) UN Doc A/77/10, reproduced in [2022/II – Part Two] YBILC 11 (hereinafter ILC, 'Draft Conclusions on *Jus Cogens*').

⁶ 1969 Vienna Convention on the Law of Treaties (adopted 23 May 1969; entered into force 27 January 1980) 1155 UNTS 331.

⁷ A Verdross, '*Jus Cogens and Jus Dispositivum in International Law*' (1966) 60/1 AJIL 55-63; see also much earlier, A Verdross, '*Forbidden Treaties in International Law: Comments on Prof Garner's Report on "The Law of Treaties"*' (1937) 31/1 AJIL 571-7.

⁸ ILC, 'Reports of the International Law Commission on the Second Part of its Seventeenth Session and on its Eighteenth Session: Draft Articles on the Law of Treaties with Commentaries' (1966) UN Doc A/6309/Rev.1, reproduced in [1966/II] YBILC 187, Commentary to Art 50 (renumbered 53), 247 [1] (hereinafter ILC, '1966 Draft Articles with Commentaries').

⁹ ILC, '1966 Draft Articles with Commentaries' (n 8), Commentary to Art 50 (renumbered 53) 248 [3].

This study will not attempt to summarize the historical development of the concept and its application in practice.¹⁰ It will be limited to presenting the necessary conceptual elements in order to assess the relevance of the concept in the normative framework regarding the climate. Section 2.2 will present and reflect on the core elements of the concept as included in the ILC Draft conclusions 2022. Section 2.3 will discuss several general complexities when applying the concept to climate law, while in Section 2.4 some preliminary conclusions will be drawn.

2.2. General characterization of peremptory norms

2.2.1. Essential characteristics

In its Conclusion 2, the ILC observed that:

Peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community. They are universally applicable and are hierarchically superior to other rules of international law.

The first essential characteristic in this provision relates to the fundamental values of the international community reflected and protected by particular peremptory norms.¹¹ The ILC has declined to specify the fundamental values concerned in the abstract, but has observed that such values are often, although not necessarily exclusively, humanitarian in nature.¹² When conveying the suggested examples of peremptory norms, their humanitarian nature is obvious for the prohibitions of genocide, crimes against humanity, racial discrimination and apartheid, slavery, and torture, and basic rules of international humanitarian law. These are all concerned with protecting the life, limb, autonomy and freedom of human beings. However, for the prohibitions of aggression and genocide, and for the right of self-determination, the existence and freedoms of States, certain specified groups (national, ethnical, racial and religious) and peoples stand out, over above the protection that is also afforded by these norms to individual human beings. In other words, these concern group or collective rights.¹³ It may be noted, however, that peremptory norms do not reflect and protect the underlying fundamental values in their entirety and for all purposes, but rather shield against particularly serious infringements or qualified violations. For instance, not all human rights are regarded as peremptory norms, although the underlying value may be the same for the right to life and the prohibition of torture, while only the latter is regarded as a peremptory norm.

The second essential characteristic is that peremptory norms are universally applicable. According to the ILC, this entails that they are binding on all subjects of international law addressed by the norm.¹⁴ The ILC specifies that the universal applicability of peremptory norms carries with it two implications. First, that the persistent objector rule is not applicable, which means that an individual State cannot 'opt out' from the rule; and second, that peremptory norms do not operate on the regional or bilateral

¹⁰ See eg, D Tladi (ed), *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations* (Brill 2021); R Kolb, *Peremptory International Law – Jus Cogens: A General Inventory* (Hart Publishing 2015); D Shelton, *Jus Cogens* (OUP 2021).

¹¹ See generally P Galvão Teles, 'Peremptory Norms of General International Law (*Jus Cogens*) and the Fundamental Values of the International Community' in D Tladi (ed), *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations* (Brill 2021) 44.

¹² ILC, 'Draft Conclusions on *Jus Cogens*' (n 5) Commentary to Conclusion 2 [7].

¹³ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23, observing that genocide involves: 'a denial of the right of existence of entire human groups'.

¹⁴ ILC, 'Draft Conclusions on *Jus Cogens*' (n 5) Commentary to Conclusion 2 [10].

plane.¹⁵ The universal applicability is closely related to the non-derogability of the norm: The universal application of peremptory norms of general international law (*jus cogens*) is both a characteristic and a consequence of peremptory norms of general international law (*jus cogens*).¹⁶

The third and final essential characteristic is the hierarchical superiority of peremptory norms. It signifies its predominance over treaties, customary international law, resolutions, decisions or other acts of international organizations and unilateral acts of States and is to a large extent predicated upon the finding of a norm conflict. This follows implicitly also from Conclusion 20, which stipulates that 'where it appears that there may be a conflict between a peremptory norm of general international law (*jus cogens*) and another rule of international law, the latter is, as far as possible, to be interpreted and applied so as to be consistent with the former'. Its commentary specifies that conflict entails 'the situation where two rules of international law cannot both be simultaneously applied without infringing on, or impairing, the other'.¹⁷ However, the commentary also observes that the Draft conclusions do not define conflict.¹⁸ Perhaps this is just as well, as widely divergent conceptions and sometimes overly broad constructions of norm conflict can be detected within the literature.¹⁹ This is a relevant point which will be further discussed in the next subsection and in Section 4.2.

The existence of these essential characteristics, the ILC observes, may be seen as context for assessing the evidence for the identification of peremptory norms and they may hence be used in a supplementary manner to affirm peremptory status.²⁰ However, identification should take place primarily with reference to two criteria (Conclusion 4), namely:

- the existence of a norm of general international law; and
- acceptance and recognition by the international community of States as a whole of this norm as one from which no derogation is permitted and which can be modified only by a norm having the same character.

2.2.2. Norms of general international law

The existence of a norm of general international law, is further elaborated upon by the ILC in Conclusion 5, which concerns the possible bases of peremptory norms. What can be considered as a norm of general international law may provoke intense academic debate. While it is generally accepted that the basis for such a norm is, first and foremost, customary international law (Conclusion 5(1)), the ILC adds that treaties and general principles of law may also serve as bases for peremptory norms (Conclusion 5(2)).²¹ In a more restricted view one can disagree and argue that the treaties necessarily only bind

¹⁵ Ibid, Commentary to Conclusion 2 [13]; Commentary to Conclusion 1 [8]; and Conclusion 14(3) and Commentary thereto [9-13].

¹⁶ Ibid, Commentary to Conclusion 2 [10].

¹⁷ Ibid, Commentary to Conclusion 20 [1].

¹⁸ Ibid, Commentary to Conclusion 20 [1].

¹⁹ See J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (CUP 2003) 164-88; E Vranes, 'The Definition of "Norm Conflict" in International Law and Legal Theory' (2006) 17(2) EJIL 395; R Kolb, 'Conflicts entre normes de *jus cogens*' in *Droit du pouvoir, pouvoir du droit : mélanges offerts à Jean Salmon* (Bruylant 2007) 481, 483; J Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (Routledge 2011), 141-6; F Boudreault, 'Identifying Conflicts of Norms: The ICJ Approach in the Case of the Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)' (2012) 25 LJIL 1003. See also V Jeutner, 'Rebutting Four Arguments in Favour of Resolving *Jus Cogens* Conflicts by Means of Proportionality Tests', 89(3) Nord J Int'l L 453, 455. For broad conceptions of norm conflict, including obstacles to implementation or enforcement, see A Orakhelashvili, *Peremptory Norms in International Law* (OUP 2008) 320, and C Espósito, '*Jus Cogens* and Jurisdictional Immunities of States at the International Court of Justice: "A Conflict Does Exist"' (2012) XXI Italian Yearbook of International Law 161.

²⁰ ILC, 'Draft Conclusions on *Jus Cogens*' (n 5) Commentary to Conclusion 20 [19].

²¹ Ibid, Commentary to Conclusion 5 [7].

States and international organizations that have become parties,²² and that principles do not clearly impose obligations. The International Court of Justice (ICJ) stated that 'general or customary rules and obligations, by their very nature, must have equal force for all members of the international community'.²³ On that basis the ILC noted that treaties are not general international law 'since they do not usually have a general scope of application'.²⁴ Interestingly, in the same case the ICJ also held that for a treaty rule 'to (...) become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself'.²⁵ In international law it is generally accepted that treaties may codify already existing rules of customary international law, and that they can form the basis for the emergence of customary law in the future having general application.²⁶ Finally, for both treaties and general principles of law the ILC noted, in passing, that 'little practice' can be found in support of these sources as bases for peremptory norms.²⁷

This discussion on the basis for the existence of general international law is particularly relevant in the context of climate law as a new branch of international law. On the one hand there is virtually universal support for the climate agreements. On the other there is not much clarity on the existence of customary international law. There is not much doubt about the *opinio juris* of States in this area regarding the need to address climate change, but it is less clear to which specific rule(s) of climate law this relates and how this is supported by sufficient evidence in State practice. What is clear is that there is a strong overlap between treaty law and customary law, and arguably even general principles of law in this area. As will be further explained below in more detail in this chapter and in particular in Chapter 3, it is possible to identify core norms of climate law as expressed in the climate treaties, in particular the Paris Agreement, that may be regarded as general international law. Without necessarily disentangling the overlap between treaty law, customary law and general principles of law, it is possible to accept the existence of norms of general international law addressing climate change. The core norms of climate law are in the view of the authors of this study the due diligence obligation related to mitigation and the obligation to international cooperation. In this study we will refer to this as general international climate law.

2.2.3. Non-derogation

The second criterion mentioned above is seen as 'a single composite criterion' comprising the following elements: acceptance and recognition by the international community; a norm from which no derogation is permitted; and modification only by norms having the same character.²⁸ It is critical to observe, quoting the ILC, that:²⁹

the essence of the second criterion is the acceptance and recognition by the international community of States as a whole, not just that the norm is one from which no derogation is permitted, but also that it can be modified only by a subsequent norm of general international law having the same character.

²² Art 26 VCLT read together with Arts 34-37 VCLT.

²³ *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (Judgment) [1969] ICJ Rep 3 [63]; ILC, 'Draft Conclusions on *Jus Cogens*' (n 5) Commentary to Conclusion 5 [2].

²⁴ ILC, 'Draft Conclusions on *Jus Cogens*' (n 5) Commentary to Conclusion 5 [8].

²⁵ *North Sea Continental Shelf* (n 23) [73].

²⁶ ILC, 'Draft Conclusions on *Jus Cogens*' (n 5) Commentary to Conclusion 5 [8].

²⁷ *Ibid*, Commentary to Conclusion 5 [7] and fn 94.], Despite the lack of practice, the ILC adds that this cannot exclude *a priori* that these sources may form the basis for peremptory norms.

²⁸ *Ibid*, Commentary to Conclusion 4 [3].

²⁹ *Ibid*, Commentary to Conclusion 4 [4].

And making the point even stronger, it observes that the second and third elements are not criteria themselves but ‘form an integral part of the “acceptance and recognition” criterion’.³⁰ The commentaries do not provide much detail as to what constitutes derogation, or how the process of modification of a peremptory norm (by a norm of the same character) would unfold.³¹ What can be gleaned from the Conclusions and commentaries is that derogation involves an attempt to displace or change a peremptory norm through some legal or normative act. Hence, in particular Conclusions 10, 14, 15 and 16, and possibly 18, all entail that a legal or normative act leading to conflict with a peremptory norm do not produce the effect(s) intended by those involved.

2.3. General application of the concept of peremptory norms to climate law

2.3.1. The world-wide climate ambition to limit global temperature rise as peremptory norm?

The development of international climate law is based upon the recognition ‘that climate change is a *common concern* of humankind since climate is an essential condition which sustains life on earth’.³² With the increase of scientific knowledge, States consistently expressed the urgency to protect the climate in international conventions, non-binding resolutions of international organizations or other statements, including in the context of the meetings of parties to the United Nations Framework Convention of Climate Change (UNFCCC), the Kyoto Protocol and the Paris Agreement.³³ The two most important conventions for this study, the UNFCCC and the Paris Agreement, enjoy a virtually universal support of States. States parties to these conventions meet every year and have confirmed their support for the objectives formulated in these agreements.³⁴ The objective of the UNFCCC is the

stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.

The objectives of the Paris Agreements formulate the more specific aim of holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.

³⁰ Ibid, Commentary to Conclusion 4 [4].

³¹ But see *ibid*, Commentary to Conclusion 2 [10]: ‘The fact that a norm is non-derogable, by extension, means that it is applicable to all, since States cannot derogate from it by creating their own special rules that conflict with it’. See also *ibid*, Commentary to Conclusion 14 [7]: ‘That a rule of customary international law could only derogate from, and thus modify, a peremptory norm of general international law (*jus cogens*) if such a rule of customary international law also had a peremptory character (...)’ and ‘which (...) stated that their “derogation by States through treaties or rules of customary law not possessing the same status was not permitted”’.

³² For the first time in UNGA, ‘Resolution 43/53: Protection of Global Climate for Present and Future Generations of Mankind’ (6 December 1988) UN Doc A/RES/43/53.

³³ 1992 United Nations Framework Convention on Climate Change (adopted 9 May 1992; entered into force 21 March 1994) 1771 UNTS 107; 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997; entered into force 16 February 2005) 2303 UNTS 162; 2015 Paris Agreement (adopted 12 December 2015; entered into force 4 November 2016) 3156 UNTS.

³⁴ Most recently, during COP27, see: UNFCCC, ‘Decision -/CP.27: Sharm el-Sheikh Implementation Plan’ (20 November 2022) available at: <https://unfccc.int/sites/default/files/resource/cop27_auv_2_cover%20decision.pdf> (last accessed 13 June 2023).

To further underline the urgency, the UNGA adopted Resolution 77/276 on 29 March 2023, in which it recognizes that 'climate change is an unprecedented challenge of civilizational proportions and that the well-being of present and future generations of humankind depends on our immediate and urgent response to it' and requests the International Court of Justice to give an advisory opinion on, among others, the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations.

In this Resolution the UNGA reiterates earlier decisions such as of 28 July 2022 in which it recognizes 'the right to a clean, healthy and sustainable environment as a human right'³⁵ and of 22 December 2022 on the protection of the global climate for present and future generations of humankind in which it recognizes that 'the global nature of climate change calls for the widest possible international cooperation'.³⁶

It is obvious that States have accepted clear aims and objectives in the mentioned agreements and in resolutions, but what does this mean in terms of international law? This is a most relevant question for the determination whether or not it is possible to understand whether the specific aim of the Paris Agreement to limit temperature rise can be seen as belonging to the realm of peremptory norms.³⁷ As explained above, peremptory norms take an exceptional place in international law by expressing fundamental values of the international community from which no derogation is allowed. Do the aims and objectives of the Paris Agreement fulfill the criteria for the acceptance as a peremptory norm of international law, and if accepted what would be the precise content of this norm?

A first step for answering this question is to go back to the traditional doctrines of sources in international law as expressed in article 38 of the Statute of the ICJ, referring to treaties, custom, general principles of law, and decisions of courts and writings of eminent scholars.³⁸

It is undeniable that from a perspective of positive international law, the objective to limit global temperature rise in the Paris Agreement, and the general statements in UNGA resolutions, do not lay down specific rules of conduct for States. They neither contain an obligation to do something specific, nor to refrain from certain conduct, and it will therefore be difficult to qualify these as legally binding rules of law. Collectively States agree to aim at the limitation of global temperature rise, but this is a factual target based on scientific insights, not one prescribing a legal obligation for States. The broad, if not universal, support for its normative value is high, but the temperature goals can only have a more indirect impact on what is expected of States from a legal perspective, as will be further explained below. It would stretch our understanding of international law beyond the limit to understand this aim or target as a rule of treaty or customary international law.

Can this aim then be regarded as establishing a general principle of law? There is a lively debate in international law on what exactly constitutes general principles of law and their place in international

³⁵ UNGA, 'Resolution 76/300: The Human Right to a Clean, Healthy and Sustainable Environment' (28 July 2022) UN Doc A/Res/76/300.

³⁶ UNGA, 'Resolution 77/165: Protection of Global Climate for Present and Future Generations of Humankind' (14 December 2022) UN Doc A/Res/77/165.

³⁷ Art 2 of the Paris Agreement mentions other aims, but these will not be considered in this study.

³⁸ 1945 Charter of the United Nations and Statute of the International Court of Justice (adopted 26 June 1945; entered into force 24 October 1945), available at: <<https://treaties.un.org/doc/Publication/CTC/uncharter.pdf>> (last accessed 13 June 2023), Art 38 of the ICJ Statute.

legal argumentation.³⁹ It is not necessary, nor possible to explore this debate at this place. For the present analysis it is sufficient to refer to the fact that the normative ambitions as expressed in the Paris Agreement and in UNGA Resolutions refer to and build upon recognized general principles of international law. The most important ones include the principle of prevention, (intra- and intergenerational) equity, the common but differentiated responsibilities and respective capabilities⁴⁰, precaution, sustainable development and arguably the common concern of mankind, which have found, or are finding, their way into international law since the United Nations Conference on Environment and Development in 1992 in Rio de Janeiro.⁴¹ However, it will be legally difficult to argue that the ambition to keep the temperature rise limited is as such a principle of law. The principles mentioned are or can become instrumental for the realization of this aim, but the collective temperature target in itself is too indeterminate to assess whether a State (or other actor) sufficiently respects this as a legal norm in its decision making. However, as we will see below, the principle of due diligence may require States to undertake significant steps to contribute to meeting this target, but this does not make the target itself a legal principle.

Article 38 of the Statute of the ICJ also allows recourse to decisions of domestic courts, which are increasingly confronted with climate litigation and are compelled to express their opinion on the effect of the international commitments regarding the climate expressed in conventions, resolutions and other statements of, for instance, the conferences of parties. In some instances, courts have in their judgments given effect to these commitments in the application and interpretation of domestic law, while in other cases they denied such effects.⁴² There are no cases in which domestic courts have found a direct applicability as law of the temperature targets, however, they provide the context and direction to assess the legal obligations of States or other actors although they are not regarded as the legal norm itself. At the international level some case law on climate is developing, in particular in the human rights context, but also in that context there is no reference to the temperature target as a legal norm. This will be further discussed in Chapter 3.

If the general climate objectives and the temperature target do not qualify as legal norms, what then is the international legal relevance of the universal support for them, if any? Arguably, for the present discussion the most important conclusion is that the general statements, and their reiteration in the past decades, on the objectives of the climate regime clearly represent a shared understanding by the global community of the urgency of climate action and of the shared value of protecting the planetary ecological balance. Earlier recognition of this can be found in the Nuclear Weapons advisory opinion of the ICJ: 'The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn'.⁴³ As explained in Section 2.2.1., shared values are an indispensable element for determining the existence of a peremptory norm of international law. Expressed in more positive international legal

³⁹ See the work of the ILC since 2017 (ILC, 'Analytical Guide to the Work of the International Law Commission' (ILC, 2023) available at: <https://legal.un.org/ilc/guide/1_15.shtml> (last accessed 13 June 2023)); see also, eg, I Saunders, *General Principles as a Source of International Law: Art 38(1)(c) of the Statute of the International Court of Justice* (Hart Publishing 2020); H Thirlway, *The Sources of International Law* (OUP 2019); M Andenas and L Chiussi, 'Cohesion, Convergence and Coherence of International Law' in M Andenas et al (eds), *General Principles and the Coherence of International Law* (Brill 2019) 9–34.

⁴⁰ In particular Art 3 UNFCCC; Art 2(2) Paris Agreement.

⁴¹ See UN, 'United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992' (UN, 1992) available at: <<https://www.un.org/en/conferences/environment/rio1992>> (last accessed 13 June 2023).

⁴² Eg the *Urgenda* case, See *Urgenda Foundation v the State of the Netherlands* (Judgment of 24 June 2015) Hague District Court, Case No 200.178.245/01; *The State of the Netherlands v Urgenda* (Judgment of 9 October 2018) Hague Court of Appeal, Case No 200.178.245/01. For other cases see <<https://www.urgenda.nl/en/themas/climate-case/global-climate-litigation/>> (last accessed 13 June 2023); see further Section 3.

⁴³ Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226 [29].

terminology, the temperature goal(s) can be referred to as the object and purpose of the climate law regime. The object and purpose inform the parties to a treaty about the general intention behind the more specific international commitments that States enter into. The object and purpose of a treaty, for instance, play an important role in the interpretation of specific treaty provisions and their normative implications.⁴⁴

Conclusion 1:

The reference in the Paris Agreement to the universally shared objective of keeping the temperature rise limited to preferably 1.5°C reflects the underlying rationale and values of the climate law regime. The references to limiting temperature rise do not literally formulate a value, but are a significant expression of the value attached to the planetary dimension of protecting civilization for present and future generations. It contributes to formulating norms of general international law, with the potential of obtaining in the future the status of peremptory norm.

2.3.2. Complexities of a potential peremptory climate norm

Having established that the temperature target does not qualify as a peremptory norm, but that a shared value exists that can be the basis for the assertion that there is a norm of general international law on climate that could possibly obtain the status as peremptory norm, we now turn to discussing which issues have to be considered before being able to make a determination about the potential existence of such norm. Three such issues will be discussed in this subsection. First, whether there is a qualitative difference between the ILC suggestions of peremptory norms and a purported norm on climate? Second, what is the role of science in determining the content of the norms and the achievements of States, and third, is there any difference regarding the option of failure to comply with the peremptory climate norm?

The ILC suggests a non-exhaustive list of peremptory norms of international law: (a) The prohibition of aggression; (b) The prohibition of genocide; (c) The prohibition of crimes against humanity; (d) The basic rules of international humanitarian law; (e) The prohibition of racial discrimination and apartheid; (f) The prohibition of slavery; (g) The prohibition of torture; (h) The right of self-determination. A first observation is that it does not include any reference to the possible existence of a peremptory norm related to the environment or to climate. Despite some assertions in literature that such a norm exists, there has been limited discussion on this aspect among States or in case law.⁴⁵ In the 1970s the ILC referred to international crimes of States in article 19, proposed in 1976, and adopted in first reading in 1980, of the Draft Articles on State Responsibility, as breaches of 'an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime'.⁴⁶ The crimes would include violating obligations 'of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive

⁴⁴ Art 31 VCLT.

⁴⁵ See eg, LJ Kotzé, 'Constitutional Conversations in the Anthropocene: In Search of Environmental Jus Cogens Norms' (2015) 46 NYIL 241-71; LJ Kotzé, 'In Search of a Right to a Healthy Environment in International Law: Jus Cogens Norms' in JH Knox and R Pejan (eds), *The Human Right to a Healthy Environment* (CUP 2018) 136-54; N Oral, 'Environmental Protection as a Peremptory Norm of General International Law, Is It Time?' in D Tladi (ed), *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations* (Brill 2021) 575-99.

⁴⁶ ILC, 'Report of the International Law Commission on the work of its Thirty-second session' (5 May – 25 July 1980) UN Doc A/35/10, reproduced in [1980/II – Part Two] YBILC 1, 32.

pollution of the atmosphere or of the seas'. However, this distinction was abandoned by special rapporteur Crawford in the 1990s, as it proved too difficult to find consensus among States on the distinction between crimes and delicts. Without further explanation in the commentaries to the 2022 Draft conclusions on peremptory norms, while referring to article 19 of the abandoned draft, the ILC decided not to include a norm related to the environment in its list.⁴⁷

Looking at the list of suggested peremptory norms, with the exception of the right of self-determination, all the examples of peremptory norms are formulated as prohibitions. They are formulated as negative obligations for States to refrain from certain conduct that is considered as contrary to values of the international community of States, notably the value of maintaining the stability of the international community of States (prohibition of aggression) or related to the protection of fundamental human values or the protection of humanity. The right of self-determination is exceptional in this list, but it is unclear what the scope of this peremptory right is. Does it only refer to the narrow scope of the right of colonial peoples, peoples living in non-self-governing territories, or peoples subject to alien domination to determine their own future, particular their entitlement to establish their own State, or does it also include the broader right to internal self-determination of (indigenous) people living within the territory of existing States? In the narrow meaning it can be phrased as a negative obligation on States not to frustrate the rights of these peoples. In a broader meaning, it may also include positive obligations of States to ensure that (indigenous) peoples in their territories have a meaningful opportunity to express their own identity as a people and to participate in their own governance and in the governance of the State.

The core question for our purpose is whether peremptory norms are confined to negative obligations, or can also include norms prescribing positive obligations, that is a duty of due diligence in the realization of the norm and to prevent, suppress and punish violations of such norm. This discussion can be illustrated by, for instance, asking the question whether the prohibition of genocide, or torture, include a duty to prevent and punish genocide or torture as part of the peremptory norm. The ILC in its 2022 commentary to the proposed peremptory norms, does not pay any attention to this aspect.

The ICJ did to a certain extent refer to this. In the Myanmar genocide case, it held that:

All the States parties to the Genocide Convention thus have a common interest to ensure the prevention, suppression and punishment of genocide, by committing themselves to fulfilling the obligations contained in the Convention. As the Court has affirmed, such a common interest implies that the obligations in question are owed by any State party to all the other States parties to the relevant convention; *they are obligations erga omnes partes*, in the sense that each State party has an interest in compliance with them in any given case (...).⁴⁸

The Court did not qualify the duty to prevent, suppress and punish as a peremptory norm, but limited itself to qualify it as an *erga omnes* obligation entitling all States to invoke the responsibility of a State that violates this norm. It does not suggest that States, including third States are under a positive obligation to prevent, suppress and punish the commission of genocide by a State as a peremptory norm. In the Bosnia genocide case the Court, while referring to earlier cases that 'the norm prohibiting genocide was assuredly a peremptory norm of international law (*jus cogens*)', did express itself on the status of the duty to prevent and punish genocide.⁴⁹ Later in the judgment (in para 428) it held that

⁴⁷ ILC, 'Draft Conclusions on *Jus Cogens*' (n 5) Commentary to Conclusion 23 [15].

⁴⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Judgment of 22 July 2022) [107] available at: <<https://www.icj-cij.org/sites/default/files/case-related/178/178-20220722-JUD-01-00-EN.pdf>> (last accessed 13 June 2023).

⁴⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 [167] and [428-32].

'the Court does not purport to find whether, apart from the texts applicable to specific fields, there is a general obligation on States to prevent the commission by other persons or entities of acts contrary to certain norms of general international law'. To add to the complexity of determining the status of a duty to prevent, the Court stated that

a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit. However, if neither genocide nor any of the other acts listed in Article III of the Convention are ultimately carried out, then a State that omitted to act when it could have done so cannot be held responsible *a posteriori*, since the event did not happen which, under the rule set out above, must occur for there to be a violation of the obligation to prevent.⁵⁰

This seems to create uncertainty as to when a violation of the duty to prevent can be invoked, in particular if the prohibited behaviour has not yet materialized. If the duty to prevent would have been considered as a clear peremptory norm, the Court would not have needed such a cautious approach. Similarly, the ICJ judgment in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* approached the matter from an *erga omnes* rights perspective rather than a duty that follows from the recognition of the prohibition of torture as a peremptory norm.⁵¹ Belgium had the right to request extradition of a person alleged of torture, but there is no indication that there would exist a duty to do so arising from the peremptory norm status of the prohibition of torture.

A purported peremptory norm related to the protection of the climate, would, at least for the time being, be formulated in the form of positive obligations of States to cooperate and to undertake efforts to reduce the emission of greenhouse gasses (GHGs). It is unlikely that in the near future quantitative emission-reduction obligations will be accepted. While in theory it is possible to formulate such a negative obligation, as can be seen in the Kyoto Protocol in which binding, but very modest, reduction obligations were adopted for industrialized States, it is a political no-go in the current negotiations. Therefore, the core legal framework of the Paris Agreement is built on the commitment of States to do their best to achieve the common goals through nationally determined voluntary contributions, or in other words is based on the due diligence of States. This will be further discussed in the next Chapter.

⁵⁰ Ibid [431].

⁵¹ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 422 [99]; in this respect Kleinlein pertinently observes: 'In order to establish a genuine conflict and a substantial hierarchy between jus cogens and State immunity, a peremptory norm would need to create a positive obligation, for instance, to put torturers on trial or to compensate torture victims. However, this would need to be demonstrated. It should not be taken for granted that jus cogens demands 'affirmative action'. Even if positive obligations to enforce the prohibition existed, it could be questioned whether they share the peremptory status. Rather, the peremptory character may be limited to the so-called negative obligations of States' (footnotes omitted); T Kleinlein, 'Jus Cogens as the "Highest Law"? Peremptory Norms and Legal Hierarchies' (2015) 46 NYIL 173, 192.

Conclusion 2.1:

In the current context, a peremptory climate norm would almost by definition have to be a norm formulating positive obligations. While not *per se* unimaginable, it has to be recognized that this is a fundamental conceptual deviation from the hitherto accepted notion of what a peremptory norm entails and will be encountered with much skepticism. A due diligence obligation leaves it to the discretion of the state as to how to act and it is dependent on the availability of means. This gives low determinacy to the norm.

This sits uncomfortable with the element of non-derogation of a peremptory norm as will be discussed in the next subsection.

It is difficult to build an argument on what exactly the purported peremptory norm entails, in particular what the content is of the norm of general international law, because the core obligation is formulated as a due diligence norm. What is precisely expected of States in light of the objective to keep the global temperature rise limited? Other peremptory norms as for instance on torture, aggression or genocide are defined in international law in a manner that can be translated to individualized behaviour that is prohibited or that has to be prevented or punished.

Conclusion 2.2:

The content of the norm relating to climate change and temperature rise requires collective, cooperative and inter-dependent action. This makes it more difficult to conceive it as a peremptory norm.

A different conceptual understanding of what a peremptory norm is would be required to resolve this issue.

Another qualitative difference is the underlying interest, or the nature of the values on which the peremptory character of the norm can be based. Why would States be willing to accept this status of a climate norm? Whereas the prohibition of aggression can be based on the interest of States in protecting State sovereignty and the stability of the State system, and the other peremptory norms can rely on the moral values of humanity or human dignity, the basis for a climate norm is more difficult to establish. It can be based on a purely anthropogenic approach and can be seen as an extension of the human rights norms, but in fact it goes much beyond that. It can be regarded in terms of survival for some States, like island States, and as an immense threat to stability for many others, due to the effects climate change may have. However, ultimately it is a value that supersedes, like the moral basis related to human rights, the individual interests of States. It is a value that expresses the concern with the ecological equilibrium of the entire planet. This planetary dimension of the problem of climate change has been recognized by States, but as a driver for law it is a new phenomenon. It goes beyond security or morality as accepted drivers of law, but is based on predictions by scientists of how the climate will develop in light of our action or inaction and what the consequences of changes in the climate will be. Although the role of the IPCC is widely acknowledged as probably the most important factor in keeping a strong pull on the worldwide consensus on the urgent need to take climate action, the fundamental consequences of being driven not by economic, geopolitical or moral interests, but by science, has not

yet been meaningfully investigated. This is not only relevant at the global level, but also at the domestic level where governments are struggling to translate the scientific realities into policies that their constituencies are willing to support. Scientific insights are a difficult basis for this. The responsiveness of (international) law to the scientific considerations is still uncertain, but that the law will have to play an important role in this, ranging from the emergence of global legal norms, to bottom-up re-interpretation of legal notions in domestic law due to climate litigation, seems certain.

Conclusion 2.3:

The global community will have to deal with formulating new rules of international law. In this context, science, not only related to climate, but also on other areas such as the environment, health, or AI, will have an important role to play, adding, thus, a new and highly relevant dimension to law in the 21st century.

If, how and to what degree scientific consensus can contribute to the emergence of a peremptory climate norm requires further consideration.

A final potentially complicating dimension of a peremptory climate norm, is the risk that is involved in failing to comply with the norm. Whereas the failure to comply with the peremptory norms mentioned by the ILC will create enormous impact for humans and human societies concerned, they will not lead to complete systemic failures that cannot be remediated, possibly with the exception of world-wide nuclear, chemical or bacteriological warfare. However, failing to comply with the ambition to limit the global temperature rise will with high scientific certainty lead to ecological changes that are beyond control of the global human society and the manner in which it is organized.

Conclusion 2.4:

The existential threat generated by climate change and temperature rise does not give the global community the luxury to wait, even less so for the potential emergence of a peremptory climate norm.

Holding one or more States responsible in 2050 or 2100 for failing to have taken adequate measures in the past will be pointless if life-sustaining natural systems have become fundamentally disrupted.

Contrary to what was suggested in the *Genocide* case, the obligation to prevent the occurrence of global warming would have to be considered as a violation of the norm even before the temperature rise has occurred.

In consequence, the duty to prevent must be part of the scope of the peremptory norm.

This consideration adds to the urgency of qualifying climate norms as of fundamental importance and formulating adequate responses to violation of such norms.

2.3.3. What constitutes 'derogation' of a peremptory climate norm?

As explained in the previous subsection, a possible peremptory norm on climate would be formulated in the form of positive obligations of States. For the acceptance of such a norm, this was identified above as a possibly major obstacle. This will be further exacerbated when looking at the aspect of

derogation. In case of the prohibitions of genocide, aggression or torture, it is clear that the norm will be derogated from when it can be established that States rely on a different norm that would allow or require such behaviour. For a positive or due diligence obligation it will be more difficult to establish that a State has derogated from the peremptory norm. Due diligence is by definition a relative concept, leaving a wide measure of discretion for the States to determine when and in what manner they wish or are able to implement this obligation. Moreover, as it is an obligation of conduct, it will be relatively easy to claim that due diligence is being exercised, while at the same time continuing to act according to other international norms that may negatively impact the achievement of the climate law ambitions. Or in other words, claiming that an existing treaty, for instance on trade law, would be contrary to and therefore imply a derogation from the peremptory climate norm would be rather complicated, as such treaty, or a particular obligation therein, would not derogate as such from the climate due diligence obligation; States may still have various options to exercise due diligence while respecting the norms in the other treaty. For a third party, such as a judicial body, it would be difficult to assess whether the non-compliance with the trade treaty would be the only available means for a State to exercise its due diligence. However, as will be discussed in Chapter 4, a judicial body should try to interpret the obligations in a harmonious manner to avoid norm conflict.

Whether an actor lives up to a due diligence obligation will often require the assessment by a third party, such as a court, human rights committee, or non-compliance body. In international environmental law there are various examples of relatively strong non-compliance procedures, but a general reference of environmental disputes to international courts has not been accepted in general. The UNFCCC and the Paris Agreement do not contain strong third-party mechanisms; rather to the contrary, the non-compliance procedure under the Paris Agreement in article 15 has been substantially weakened compared to the procedure under the Kyoto Protocol. Article 14 of the UNFCCC and by reference article 24 of the Paris Agreement provide for the option for States to accept dispute settlement through arbitration. The parties accept compulsory third party conciliation, but due to the nature of the climate problem as a collective responsibility rather than an inter-State issue it is unlikely that such a mechanism will be used in a dispute between States. Although, admittedly, also the other suggested peremptory norms do not always allow for easily available judicial or other third-party mechanisms to establish a derogation, they sometimes do refer to such mechanisms more strongly, like the referral disputes under the Genocide Convention to the ICJ unless a State has opted out from this.

The ILC in its Draft conclusions and commentaries thereto is not helpful in clarifying what derogation entails, making it even more difficult to apply the notion of derogation to the due diligence norm in the Paris Agreement. An obvious way to derogate would be an outright denial of the existence of the norm requiring States to exercise significant due diligence regarding the universally accepted aims and objectives. This would in effect deny the scientific consensus related to climate change and universal recognition of the seriousness and urgency. Linked to this, a second form of derogation, would be an explicit denial of the duty to internationally cooperate in order to achieve the stated objectives. Thirdly, a clear and explicit refusal to take any domestic measures to give effect to or acting deliberately contrary to the agreed need to reduce the emission of GHGs would be a form of forbidden derogation. Finally, undermining of the peremptory climate norm, through the conclusion of international agreements that would deliberately frustrate its implementation, would constitute a derogation, as well as relying on preexisting international law that would make the exercise of the due diligence obligations of States completely impossible.

Conclusion 2.5:

If a peremptory climate norm were to emerge or considered to exist, determining violations of such a norm when derogations or deviations from it are deliberate and explicit would be obvious.

The situation is more difficult when a state undertakes efforts but is also in a position to do more than it is doing. Not doing enough, or claiming to not be able to do more, would not in and of itself be regarded as a derogation from the peremptory norm. It could potentially violate the due diligence obligation, but that is arguably not enough to establish a derogation from a potential peremptory norm.

Conclusion 2.6:

The acceptance of the existence of a peremptory climate norm would have as a consequence the fact that States will not be able to opt out or derogate from this norm, even if, for instance, a particular treaty would allow for withdrawal.

A peremptory norm can only be modified or replaced by a subsequent peremptory norm.

2.4. Conclusion of Chapter 2

General Conclusion 2:

In theory it is possible to argue that a peremptory norm related to climate may emerge in international law. The definition used by the ILC in 2022 does allow for such an interpretation.

It will not be too difficult to argue that the purported general norm reflects universal values and is a norm of general international law accepted by the community of States as a whole. However, it will be difficult to ascertain the precise content of the general norm, given that the core obligation is formulated as a due diligence norm.

Even if this were possible, it would be difficult to establish that a peremptory norm construed as a positive obligation has been derogated from. There is a fine line between not doing enough and a refusal to recognize the existence of a duty to do your best.

3. A LEGAL CHARACTERIZATION OF THE PARIS AGREEMENT AS GENERAL INTERNATIONAL LAW AND ITS APPLICATION IN INTERNATIONAL AND DOMESTIC JUDICIAL PRACTICE

In this Chapter the Paris Agreement will be analyzed in further detail in order to answer questions regarding the normative content and the legal character of its obligations. Section 3.1 will scrutinize the legal obligations of the Agreement. What are the legal commitments that the States parties have accepted? In Section 3.2 the question will be answered whether these commitments can be regarded as 'general international law', that is having a status that exceeds the norm as purely a treaty norm, but rather as a general norm applicable to the international community of States and other actors. This is of relevance for the consideration in Section 3.3 of the intersection of these norms with other norms in international law, notably in international human rights, trade and investment law, and their impact on international and domestic judicial decision making. International climate law, or specific obligation therein, will in this Chapter not be regarded as peremptory norms that would trump conflicting rules or norms in other international legal regimes. In Chapter 2 the possibility of considering climate law as belonging to the hierarchically higher order of peremptory norms was considered and it was concluded that although theoretically this cannot be excluded, it is unlikely that this will be accepted as such by the international community of States as a whole. International climate law will therefore in this and in the next chapter be regarded as having in principle an equal status to other norms of international law. In Section 3.4 conclusions will be presented.

3.1. General assessment of the Paris Agreement as a legal building block in the international climate regime

With 195 States Parties the Paris Agreement is nearly universally accepted; only Iran, Libya and Yemen have signed but not ratified it. All 198 States are a party to the UNFCCC. The European Union (EU) has ratified the UNFCCC and Paris Agreement. This represents a strong commitment to the law and governance framework created to deal with climate change. However, it should be noted that the commitments the States parties have entered into are atypical for international legal agreements, as they create a normative basis for cooperation and are grounded in nationally determined commitments rather than laying down specific rules of international law that can be legally enforced. The 1992 UNFCCC is a framework convention which formulates general commitments of the States to cooperate towards developing a law and governance structure based on general principles (Article 3) with the aim to further the ambitions of the community of States as a whole to avoid 'dangerous anthropogenic interference with the climate system' (Article 2). The Convention does not include specific targets and timetables for States and international organizations. For the purpose of this study, it does not seem necessary to enter into further detail describing the Convention.⁵² Instead, the focus will be on the Paris Agreement which can be seen, together with the Kyoto Protocol, as related legal instruments to the UNFCCC specifying more concrete obligations and other commitments of the States Parties.

⁵² Generally see, D Bodansky, J Brunnée, and L Rajamani, *International Climate Change Law* (OUP 2017).

The background to the Paris Agreement and the negotiation history has been authoritatively described sufficiently elsewhere, for instance in the chapter on international cooperation to Working Group III for the 6th Assessment Report of the IPCC in 2022.⁵³

Whereas the UNFCCC intends to create the general framework for cooperation and lays down the principles on which that cooperation is based, the Paris Agreement goes further by formulating more specific objectives and substantive commitments, particularly on: the general aims; mitigation; adaptation; finance; technology; and capacity building. In terms of formulating procedural – or governance-related – commitments, one can distinguish commitments on reporting, transparency, cooperation, support, implementation and compliance.

The general aims of the Paris Agreement are formulated in article 2, notably the aim to 'holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels'. The article also includes aims related to adaptation and finance that will not further be discussed here. The wording of the article does not allow for the conclusion that the States intended to create a legal obligation to comply with these temperature goals. It provides a general statement on the object and purpose of the Agreement but does not contain a legal norm.⁵⁴ This does not mean that these temperature goals are without legal significance. Rather to the contrary, without these aims, it will be impossible to determine what States need to do to respond to the threat of climate change. It allows for scientific determination and assessment of the pathways available to States and the community of States as a whole and is therefore crucial for answering whether they do enough to significantly reduce the risks and impacts of climate change.

The core of the Agreement is the obligation of all parties to undertake and communicate ambitious efforts and to prepare, communicate, and maintain nationally determined contributions (NDCs) which state, among others, the emission reduction targets of a party. More specifically, 'Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions' (Article 4(2)). Every five years they are expected to determine their 'successive nationally determined contribution [that] will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition' (Article 4(3)). This obligation is formulated as a binding legal obligation using the word 'shall'. However, its content is an obligation of conduct and not of result, as 'each Party shall prepare, communicate and maintain successive nationally determined contributions that it *intends to achieve*' (Article 4(2), emphasis added). In other words, a legal duty to exercise due diligence.

In terms of legal bindingness, the abovementioned obligations related to the NDCs represent the most, and arguably only truly legally, binding substantive norms for 'each Party'. Many other provisions are either addressed to 'the Parties' in general or do not have an addressee but are general statements of intent. With the exception of certain procedural provisions on transparency in article 13, mandatory obligations are either qualified ('as appropriate'), formulated in general terms that limit their effect as a binding legal norm, or not formulated as a legal norm at all. As summarized in the Report for the 6th IPCC assessment:

The legal character of provisions within a treaty, and the extent to which particular provisions lend themselves to assessments of compliance or non-compliance, depends on factors such as

⁵³ IPCC, 'IPCC Sixth Assessment Report – Working Group III: Mitigation of Climate Change' (2022) Chapter 14: International Cooperation, Section 14.3.1, 1460-3, available at: https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_Chapter14.pdf (last accessed 13 June 2023).

⁵⁴ See for a more elaborate discussion, L Rajamani and J Werksman, 'The Legal Character and Operational Relevance of the Paris Agreement's Temperature Goal' (13 May 2018) 376 Phil Trans R Soc A 20160458.

the normative content of the provision, the precision of its terms, the language used, and the oversight mechanisms in place. Assessed on these criteria, the Paris Agreement contains the full spectrum of provisions, from hard to soft law and even 'non-law', provisions that do not have standard-setting or normative content but which play a narrative-building and context-setting role. The Paris Agreement, along with the UNFCCC and the Kyoto Protocol, can be interpreted in light of the customary international law principle of harm prevention according to which States must exercise due diligence in seeking to prevent activities within their jurisdiction from causing extraterritorial environmental harm.⁵⁵

When providing a detailed overview of the spectrum of bindingness of the various provisions of the Paris Agreement, Rajamani recalls that in the negotiations certain States opposed any inclusion of obligations of result and hence even the hard obligations are formulated as obligations of conduct.⁵⁶ This led to the complex mix of legal formulations in the Paris Agreement. For instance, in core Article 4 on mitigation, in Article 4(2) the word 'shall' is used to express the legally binding due diligence obligation, while in Article 4(3) the word 'will' is used and not 'shall' to reflect that the duty to make successive NDCs more ambitious is not a strict legal duty but a reflection of ambitions. In Article 4(4) the duty of developed States to take the lead in undertaking emission reduction targets is formulated in a soft manner by using the word 'should'. What becomes clear from a close reading of the text of the Paris Agreement is that it lays down only a limited number of hard legal obligations on substance, in particular the due diligence obligation in Article 4(2), a number of hard procedural rules on reporting and implementation, many soft legal undertakings, and also a number of provisions that are no more than aspirational. This unique mix in an international convention reflects the unprecedented complexities of trying to build a shared legal framework on climate for the community of States as a whole. Clearly, the outcome shows that the need to find consensus has a price in terms of legal clarity and certainty.

Such close (legal) reading of the Paris Agreement leads to a rather confusing conclusion. On the one hand, the world community has made it clear that it regards the Paris Agreement, and more generally the climate change regime, as an urgent and essential mechanism for international cooperation to combat climate change on which the future of the international society of mankind, if not of the whole planet, relies. On the other hand, the precise legal content of the Paris Agreement does not seem to match with the importance attached to taking effective and timely action against climate change. States have not been able to agree on a model for allocation of specific obligations for each of the States parties, for instance by allocating carbon budgets, and therefore had to fall back on relying on the innovative, but legally indeterminate, construction of binding intentions to achieve the nationally determined due diligence obligations regarding mitigation as the core of the regime. Lack of consensus left other commitments to be articulated in an ambiguously or non-legally binding manner, including those on other essential aspects of the legal regime, such as on adaptation, cooperation regarding implementation, technology development and assistance, and financial support and capacity building.

However, despite the complexities of finding adequate expressions of the degree of legal bindingness of the commitments, States have been engaged since the early 1990s, and continue to cooperate in dynamic and continuous climate negotiations. While this process does not show the global unity on legal obligations in a manner that lawyers are used to work with, it reflects a deeply-shared and world-wide commitment to finding adequate ways to realize the goal of keeping the temperature rise limited to preferably 1.5°C in the interests of all States and the planet generally. Potentially, this may create

⁵⁵ IPCC (n 53) 1464 (footnotes omitted).

⁵⁶ L Rajamani, 'The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations' (2016) 28(2) JEL 337, 354.

even better hope for achieving necessary climate goals than laying down commitments in an unequivocally binding legal manner but which may be outdated the moment a consensus has been reached. An example is the (initial) success of the Kyoto Protocol in a legal sense, but having limited impact on the climate problem. However, whether the community of States will be able in this manner to achieve its objectives is contested.⁵⁷

Since the adoption and entry into force of the Paris Agreement, the parties have worked on more specific, operational implementation measures in the so-called Paris Rulebook. These decisions clarify and further elaborate the procedural commitments in the Paris Agreement, in particular which information parties must make available, on transparency, on the mechanisms for the global stocktake, and on implementation and compliance. The Rulebook clarifies, but does not add new, substantive legal obligations. Also in the recent meetings of parties, such as in Glasgow (2021) and Sharm el-Sheikh (2022), small steps have been taken, such as the explicit recognition in 2021 on 'accelerating efforts towards the phasedown of unabated coal power and phase-out of inefficient fossil fuel subsidies'⁵⁸ and the decision in 2022 to 'establish new funding arrangements for assisting developing countries that are particularly vulnerable to the adverse effects of climate change, in responding to loss and damage', but without creating new legal commitments.⁵⁹

Conclusion 3.1:

The Paris Agreement's ambition to limit temperature rise to preferably 1.5°C determines the content of the obligations that States have accepted. These ambitions have been reiterated in all conferences of parties since 2015. It provides the scientific basis for assessing what States collectively need to do to achieve mitigation goals. The temperature goal may not be regarded as a legal obligation in itself, but it is essential and indispensable for the determination of what is expected of States. The most important commitment all parties have accepted is the due diligence obligation on their NDCs and the procedural obligations that form the essential basis for the dynamic governance of the individual and collective cooperation with the global stocktake, that takes place every five years, as its pivotal point.

3.2. The Paris Agreement and general international law on climate

Having analyzed the specific legal character of the commitments contained in the Paris Agreement, the question can be broadened by investigating to which extent the Paris Agreement reflects general international law binding on all States by expressing a core normative content of international law, independent of whether it is formulated as customary international law, treaty law, as principles of law or as (potentially) legal standards.⁶⁰ Accepting the core obligations of the Paris Agreement as having the status of general international law reflects its universally shared importance and will impact the

⁵⁷ IPCC (n 53) 1513.

⁵⁸ UNFCCC, 'Decision 1/CMA.3: Glasgow Climate Pact' (13 November 2021) [36] available at: <https://web.archive.nationalarchives.gov.uk/ukgwa/20230210173432mp_/https://unfccc.int/sites/default/files/resource/cma2021_10_add1_adv.pdf> (last accessed 13 June 2023).

⁵⁹ UNFCCC, 'Decision 2/CP.27: Funding Arrangements for Responding to Loss and Damage Associated with the Adverse Effects of Climate Change, Including a Focus on Addressing Loss and Damage' (6-20 November 2022) UN Doc FCCC/CP/2022/10/Add.1, 11.

⁶⁰ R Wolfrum, 'General International Law (Principles, Rules, and Standards)' [2010] MPEPIL 1408.

interpretation and application of other rules of international law. Virtually all States have accepted the obligations in the Paris Agreement and they continue to actively participate in the dynamic and continuous processes of further norm formation and implementation. This was discussed above in Section 2.2.2, notably the entangled overlap between treaty law and customary international law in this regard.

The acceptance of general international climate law underlines the atypical character of this area of international law. It is the outcome of engagement in a continuous process focusing on common interests rather than laying down specific rules for States. It aims at creating a law and governance framework that requires constant engagement with the ambition of realizing generally-formulated and often future-oriented ambitions that require complex changes in the laws and policies of States and international organizations. Recognizing the ambitions of the climate change regime in conjunction with the due diligence obligation created in the Paris Agreement as general international law, reflects the complexities of creating international law in the 21st century.

Climate law is linked to many other branches of international law as recently explained in the Report to the Working Group III in 2022. It presents a recent overview of these interlinkages,⁶¹ addressing it as the 'complementarity between the Paris Agreement and other agreements'.⁶² The Report does not specifically assess the legal impact of climate law on the interpretation and implementation of these other regimes, but rather provides a broad overview of the intersection between various governance and law regimes and the constraining effects as well as opportunities related to the compatibility and effectiveness of these regimes with climate policies. In some areas such as trade and investment there are many complex issues that still will require further development to realize complementarity with effective climate policies, while in other areas, such as on the intersection with human rights 'a growing receptivity among courts towards such arguments in climate change cases' can be seen. At the same time there are many 'procedural hurdles, such as standing, as well as substantive difficulties' that human rights courts will have to deal with.⁶³

Conclusion 3.2:

The recognition of the existence of general international law on climate is relevant for the consideration of the intersection of various areas of international law. Its acceptance will help to exert constant pressure on States and other actors to ensure that the general international law on climate has an impact on other international law regimes, such as on human rights, trade and investment. It should however also be recognized that it is neither a silver bullet that solves all problems, nor that it allows climate considerations to trump competing rules of international law. It may play a role in convincing decision makers, including courts, tribunals or other compliance bodies (such as on human rights), to consider climate-law consistent interpretations and applications of the rules within their respective fields.

⁶¹ IPCC (n 53) Sections 14.4 and 14.5, and Figure 14.3.

⁶² Ibid, 1481.

⁶³ Ibid, 1499.

3.3. The application of the Paris Agreement in international, regional and national judicial decisions

In the context of this study, it is impossible to provide a full overview of all judicial decisions that deal with climate issues. There are by now thousands of cases before domestic courts and also in international judicial decision making, as protection of the climate gains prominence.⁶⁴ A wealth of scholarly writings is available on this, which can only be reflected in this study to a limited extent.⁶⁵ In this part we will first highlight a number of developments at the international and regional level, followed by some considerations on the application in the domestic context.

3.3.1. The Paris Agreement in international and regional judicial decision making

In international judicial decision making, the interaction between climate law (or broader sustainability or environmental law) and other international legal rules is primarily visible in the areas of trade and investment law and human rights law. First of all, it should be noted that the dynamics within these areas are completely different. In international and regional human rights law, the focus is on exploring the options for the interpretation of existing human rights law, such as the right to life, in a manner that incorporates concern for the environment and climate. With the exception of the African Charter on Human and Peoples' Rights (Article 24), international or regional human rights treaties do not contain explicit provisions on the right to a clean environment or on climate.⁶⁶ In climate cases before human rights bodies, States are challenged by complainants arguing that the laws and policies regarding environmental or climate matters do not sufficiently protect their human rights. *The respondent State must do more*. Contrastingly, in the trade and environment context, notably in World Trade Organization (WTO), dispute settlement and in investor-State investment dispute settlement, the (quasi) judicial decision-making is primarily the result of applicants challenging a State for not respecting trade and investment rules that protect the interests of the applicants, when adopting domestic policies and law regarding the environment or climate. *The respondent State must do less*. Or at least compensate for the negative impact on trade or investment. Just as in the case of human rights, there are no general provisions on environmental protection or climate law in trade and investment agreements, or when there arguably are, such as in Article XX of the General Agreement on Tariffs and Trade (GATT), the applicants will seek an interpretation that restricts their application and respects their freedom to trade and the protection of investments. Due to these differences between on the one hand human rights and on the other trade and investment, these will be discussed separately below.

In international and regional human rights law environmental concerns are taken seriously in judicial or quasi-judicial decisions. However, these cases so far are related to the direct harmful consequences of environmental issues for the health and well-being of the applicant. When applicants claim to be the victim of climate change, the questions become more complex, as, firstly, those complaining are not necessarily already a victim at present, but are concerned that they will face effects of climate change on a longer term, and they claim that the States have to take more expeditious measures now in order

⁶⁴ See eg, Sabin Center for Climate Change Law, 'Climate Change Litigation Databases' (*Climate Case Chart*, 2023) available at: <<http://climatecasechart.com/>> (last accessed 13 June 2023); Climate Rights and Remedies Project, 'Climate Litigation Database' (CCRP, 2023) available at: <<https://climaterightsdatabase.com/>> (last accessed 13 June 2023); J Setzer and C Higham 'Global Trends in Climate Change Litigation: 2022 Snapshot' (Policy Report June 2022) available at: <<https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/08/Global-trends-in-climate-change-litigation-2022-snapshot.pdf>> (last accessed 13 June 2023).

⁶⁵ See for an overview of recent literature on climate change litigation, eg, J Peel and HM Osofsky, 'Climate Change Litigation' (2020) 16 Annual Review of Law and Social Science 21-38.

⁶⁶ 1981 African Charter on Human and Peoples' Rights (adopted 27 June 1981; entered into force 21 October 1986) 1520 UNTS 217.

to protect their human rights in the future. The Paris Agreement's ambitions on the limitation of global temperature rise, in conjunction with the due diligence obligations of the State concerned, are invoked to substantiate these claims. So far, international and regional human rights bodies or courts have not yet decided in favour of such claims.⁶⁷ In September 2022, the Human Rights Committee (HRC) recognized that the lack of appropriate measures by the State to tackle climate change may lead to a violation of human rights.⁶⁸ In regard of a possible violation of a right to life with dignity of the International Covenant on Civil and Political Rights (ICCPR) (Article 6) the Committee considered that:

such threats [to the right to life] may include adverse climate change impacts, and recalls that environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.⁶⁹

However, in this case, the HRC did not find a violation of Article 6, as it could not conclude that the adaptation measures being undertaken by Australia would be insufficient to protect the right to life with dignity now and in the future. The HRC did find a violation of Article 17 on the private, family and home life, and of Article 27 on the rights of minorities. It concluded that Australia failed to comply with its positive obligation to implement adequate adaptation measures and to protect the applicants' right to enjoy their minority culture. However, the findings on Articles 17 and 27 refer to present-day effects of climate change on the inhabitants of the islands rather than (further) impacts in the future. Moreover, nowhere in the decision does the Committee refer to the Paris Agreement or other climate law related international instruments to substantiate the positive obligations of the State. This is probably due to the fact that the case dealt with adaptation measures rather than the due diligence obligation on mitigation.⁷⁰ Further cases on climate and human rights can be expected, particularly since the Human Rights Council in 2021 in resolution 48/13 and the UNGA in 2022 in resolution A/RES/76/300 have determined that access to a clean, healthy and sustainable environment is a human right, referring to climate change in preambular paragraphs. Also, the Human Rights Council has created a mandate for a Special Rapporteur on climate and human rights.⁷¹

In the regional human rights context relevant developments can be found. For instance, the Inter-American Commission on Human Rights adopted a resolution in 2021 on the scope of Inter-American human rights obligations related to the climate emergency stating that:

the obligation to prevent transboundary environmental harm is manifested in the development and implementation of GHG mitigation targets that reflect a level of ambition consistent with the obligations of the Paris Agreement and other applicable instruments,

⁶⁷ For instance, a complaint on climate change related to human rights violations was submitted to the Committee for the Rights of the Child (CRC) but was found inadmissible due to the non-exhaustion of domestic remedies CRC, *Sacchi v Argentina* (Decision adopted on 8 October 2021) UN Doc CRC/C/88/D/104/2019 [10.18].

⁶⁸ HRC, *Billy v Australia* (Views adopted on 22 September 2022) UN Doc CCPR/C/135/D/3624/2019.

⁶⁹ *Ibid* [8.3].

⁷⁰ The Paris Agreement commitments on adaptation are formulated in a less legally binding manner; Art 7 formulates adaptation ambitions in general and only requires that '[e]ach Party shall, as appropriate, engage in adaptation planning processes and the implementation of actions, including the development or enhancement of relevant plans, policies and/or contributions' (Art 7(9)).

⁷¹ Human Rights Council, 'Resolution 48/14: Mandate of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change' (8 October 2021) UN Doc A/HRC/RES/48/14.

particularly with the obligation not to exceed global temperature to such an extent as to jeopardize the enjoyment of human rights.⁷²

Furthermore, in February this year Colombia and Chile requested an advisory opinion of the Inter-American Court of Human Rights (IACtHR) on the human rights obligations of States vis-à-vis the climate emergency, focusing among others on questions regarding the due diligence obligations of States and referring to the Paris ambitions of keeping temperature rise below 1.5°C.⁷³ However, to our knowledge no decisions in individual complaints have been taken that explicitly rely on the application of obligations under the Paris Agreement.

Regarding the European context, the Grand Chamber of the European Court of Human Rights (ECtHR) has held hearings in two of the three cases on the obligations of States related to climate change in March 2023. In the cases brought by the *Klimaseniorinnen and Others v Switzerland*,⁷⁴ *Carême v France*,⁷⁵ and *Duarte Agostinho and Others v Portugal and 32 Other States*,⁷⁶ it is claimed that the States concerned undertake insufficient action to prevent climate change, relying among others on the undertakings under the Paris Agreement, and that therewith they violate relevant provisions of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, ie the European Convention on Human Rights (ECHR). The outcome of these cases will be of utmost importance for further developments regarding the intersection of human rights and climate, but it is uncertain whether the Court will address the relevance of the Paris Agreement for the determination of the content of the positive obligations of States under the ECHR. The ECtHR may for instance find the cases inadmissible as the applicants may not qualify as victims under the ECHR.

Conclusion 3.3:

At the international level there are not yet any judgments or other judicial decisions on the application of climate law to human rights law that break new ground. There are, however, highly relevant pending cases and requests for an advisory opinion in the ECtHR and the IACtHR.

When considering the intersection between international trade law, notably in the context of the WTO, the debate is in an earlier stage. Although there have been various cases on the linkage between trade and the protection of the environment, specific cases that focus on climate obligations in contrast to trade obligations have only arisen in relation to renewable energy and on biofuels.⁷⁷ The cases on renewable energy were argued and decided on issues related to whether the measures to stimulate the use of renewable energy were unnecessarily restrictive of trade, eg by a different treatment of imported goods compared to locally produced goods. They were decided based on discrimination, not on the basis of an assessment whether the measures are reasonable or necessary in light of diligent

⁷² IACmHR, 'Resolution 3/2021: Climate Emergency – Scope of Inter-American Human Rights Obligations' (31 December 2021) [41] available at: <[https://www.oas.org/en/iachr/decisions/pdf/2021/resolucion_3-21_ENG.pdf%3e%20\(last%20accessed%2013%20June%202023\)](https://www.oas.org/en/iachr/decisions/pdf/2021/resolucion_3-21_ENG.pdf%3e%20(last%20accessed%2013%20June%202023))>.

⁷³ IACtHR, 'Request for an Advisory Opinion on the Climate Emergency and Human Rights Submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile' (IACtHR, 9 January 2023) available at: <https://www.corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf> (last accessed 13 June 2023).

⁷⁴ *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* (2020 – case pending) ECtHR [GC] App No 53600/20.

⁷⁵ *Carême v France* (2021 – case pending) ECtHR [GC] App No 7189/21.

⁷⁶ *Duarte Agostinho and Others v Portugal and 32 Other States* (2020 – case pending) ECtHR, App No 39371/20.

⁷⁷ For a discussion of relevant cases see eg H van Asselt, 'Trade and Climate Disputes before the WTO: Blocking or Driving Climate Action?' in I Alogna, C Bakker and J-P Gauci (eds), *Climate Change Litigation: Global Perspectives* (Brill 2021) 433-6.

climate law and policies. The disputes on biofuels seem to be of more relevance for the question whether climate action may be an acceptable ground for measures that are restrictive on international trade, such as anti-dumping measures or countervailing duties. The EU for instance has lost in several cases on biodiesel and has adapted its measures, but at the same time it has adopted other measures in support of its climate policies that may again be challenged under WTO law.⁷⁸ The most likely cases to arise in the future will be on border carbon adjustments, that is measures to offset a shift in production when carbon pricing is applied in a country or in the EU by imposing a charge on the import of products that are produced elsewhere without or with a lower carbon price.⁷⁹ It is uncertain how cases that may arise in such a context will end. It may require a re-interpretation in light of the Paris ambitions and obligations of the existing trade rules and case law that so far mostly precluded such measures. For the time being, the dispute settlement under the WTO has come to a partial standstill due to the controversy over appointment of new members to the Appellate Body. So far, to our knowledge, the Appellate Body has not yet assessed questions on the acceptability of restrictive trade measures that might be necessary for an effective implementation of the ambitions of the Paris Agreement.

Another area where there is much discussion about the compatibility of climate measures with other international rules is investment law. In particular in cases related to environmental protection and climate, the perception is that investment law poses obstacles to the freedom of States to adopt measures necessary in the public interest. Currently many disputes brought by investors against States under the 1994 Energy Charter Treaty (ECT) related to investment in fossil and renewable energy draw a lot of attention.⁸⁰ Often the impression exists, based on earlier arbitral decisions that international investment law structurally blocks States from taking measures in the public interest, or at least would allow foreign investors to claim huge compensation. Indeed, there are decisions which mostly rely on a strict interpretation of the investment agreements that protect investors' rights, and give less consideration to the arguments that the measures were taken to protect public interests regarding the environment or human rights. But there are also cases where the investors were unsuccessful in claiming that their interests had been violated when public interest measures had been taken. This is not the place to discuss in detail the debates on the substance of international investment law and its application and interpretation in the many arbitral cases and how this may further impact States in their public duties regarding the climate. In order to create more clarity, more recent bilateral or multilateral international investment agreements attempt to find a better balance between the public interests of the State and the private interests of the foreign investors. The EU-Canada Trade and Investment Agreement (CETA) is a prominent example of this.⁸¹ It attempts to find a new balance, both in its substantive provisions and in the dispute settlement procedures (the creation of an investment court system). Unfortunately, this study is too limited to discuss these developments further.

Even if changes in investment law are made, the arbitration procedures to solve disputes between foreign investors and States will remain relevant for the existing investments made under the

⁷⁸ Ibid.

⁷⁹ See European Commission, 'Carbon Border Adjustment Mechanism' (European Commission, 2023) available at: <https://taxation-customs.ec.europa.eu/carbon-border-adjustment-mechanism_en> (last accessed 13 June 2023).

⁸⁰ See eg, C Verburg, *Modernizing the Energy Charter Treaty; Facilitating Foreign Investment in the Renewable Energy Sector* (2019 PhD manuscript) available at: <<https://research.rug.nl/en/publications/modernizing-the-energy-charter-treaty-facilitating-foreign-invest>> (last accessed 13 June 2023); M Sharma, 'Integrating, Reconciling, and Prioritising Climate Aspirations in Investor-State Arbitration for a Sustainable Future: The Role of Different Players' (2022) 23 JWIT 746-77; S Robert-Cuendet, 'Protection of the Environment and International Investment Law' in M Krajewski and RT Hoffmann (eds), *Research Handbook on Foreign Direct Investment* (Edward Elgar 2019) 596-618.

⁸¹ 2016 Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one Part, and the European Union and its Member States, of the other part (adopted 30 November 2016; not yet in force) 11 OJ L 23 (14 January 2017).

traditional bilateral and multilateral investment agreements, such as the ECT. The investments made under such a treaty will remain protected by the treaty, even if a new treaty is concluded or the old treaty is terminated. In some treaties, this is explicitly provided, such as in the ECT, and otherwise it will be a subject of consideration under the doctrine of intertemporal law that cannot be discussed here.⁸² Furthermore, it should be noted that the constitution of the arbitral tribunals is decided on a case-by-case basis and it will remain uncertain how in a particular case the arbitrators will strike the balance between public and private interests. Arbitral tribunals are not required to follow precedent, so the outcomes may remain uncertain. This may provide foreign investors with an incentive to bring claims against States that take (climate) measures in the public interest but which have an impact on the investment. They may win, or it may be used to pressure the State to provide compensation instead of fighting it in an arbitration.

Conclusion 3.4:

In international trade and investment law the existence of general international climate law has not yet led to shifting the balance in arbitration and quasi-judicial dispute settlement away from the predominantly trade and investment law perspective. States should be driving the process of adapting trade and investment law to the norms of general international law, including on climate. The current trade and investment dispute settlement bodies do not seem inclined to take on this role.

Investment arbitral awards are not generally subject to appeal. The awards are binding on the parties, with the limited exception of setting aside and enforcement procedures before domestic courts. However, if the investment arbitration has been conducted in accordance with the relevant procedural rules, there does not seem to be much ground for domestic courts to set aside such awards.⁸³ A possible ground for setting aside or not enforcing the award is the incompatibility of the award with public policy.⁸⁴ Although public policy in international arbitration is a topic of private international law that falls largely outside the expertise of the authors of this study, we refer to recommendations of the Committee on Commercial Arbitration of the International Law Association (ILA) in 2002. The ILA proposes the concept of 'international public policy' of States, which includes:

- (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned
- (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as 'lois de police' or 'public policy rules' and
- (iii) the duty of the State to respect its obligations towards other States or international organisations.⁸⁵

In particular the third element is relevant in the present context. The ILA states that:

⁸² 1994 Energy Charter Treaty (adopted 17 December 1994; entered into force 16 April 1998) 2080 UNTS 95, Art 47(3); on intertemporal law see M Kotzur, 'Intertemporal Law' [2008] MPEPIL 1433.

⁸³ See eg, MF Nia, *The Enforcement of Foreign Arbitral Awards: a Closer Look at the New York Convention* (Nova Science Publishers 2017), Chapter 6 and literature cited therein.

⁸⁴ Ibid 110-28; see also, K-H Bockstiegel, 'Public Policy as a Limit to Arbitration and Its Enforcement' (2008) 2 *Disp Resol Int'l* 123.

⁸⁵ ILA, 'Resolution 2/2002: International Commercial Arbitration' (2002) Art 1(d), available at: <https://www.ila-hq.org/en_GB/documents/conference-resolution-english-new-delhi-2002-1> (last accessed 13 June 2023).

A court may refuse recognition or enforcement of an award where such recognition or enforcement would constitute a manifest infringement by the forum State of its obligations towards other States or international organisations.⁸⁶

In its commentary to this article, the Committee regards it as 'axiomatic' that a State must respect its obligations towards other States as treaties take precedence over national law and that enforcement of an award should be refused if it is a manifest violation thereof.⁸⁷ It provides two specific examples, the need to abide by United Nations (UN) Security Resolutions under Article 25 of the UN Charter and the Organization for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Officials in International Transactions. According to the Committee in 2000, the concept international public policy is restricted in scope, 'but of universal application – comprising fundamental rules of natural law, principles of universal justice, *jus cogens* in public international law, and the general principles of morality accepted by what are referred to as "civilised nations"'.⁸⁸

Conclusion 3.5:

The conclusion that the core norms of the Paris Agreement can be regarded as general international law and potentially as peremptory norms, may lead domestic courts to refuse the enforcement of arbitral awards that show a manifest disrespect for such norms as contrary to (international) public policy. There is no precedent for this in climate-related investment arbitration cases. As long as an arbitral tribunal attempts to find a balance between the international investment obligations of the state involved on the one hand, and the due diligence obligation on climate on the other, application of the (international) public policy doctrine will be possible only in extreme cases.

Finally, and to conclude this overview, reference must be made to potentially the most important recent developments regarding the clarification of the status of the climate-related obligations of States, namely the advisory opinions that have been requested from the ICJ and ITLOS. To start with the latter, the ITLOS is asked to give an opinion on the following questions:

What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (the "UNCLOS"), including under Part XII:

- to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?
- to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification.⁸⁹

⁸⁶ Ibid, Art 4.

⁸⁷ ILA, 'Committee on International Commercial Arbitration: Final Report on Public Policy' (2022) [54] available at: https://www.ila-hq.org/en_GB/documents/conference-report-new-delhi-2002-3 (last accessed 13 June 2023).

⁸⁸ Ibid [43].

⁸⁹ ITLOS, 'Commission of Small Island States on Climate Change and International Law: Request for Advisory Opinion' (12 December 2022) available at:

The request to the ICJ is formulated as follows:

Having particular regard to the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the United Nations Framework Convention on Climate Change, the Paris Agreement, the United Nations Convention on the Law of the Sea, the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment,

- What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations;
- What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:
 - (i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?
 - (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?⁹⁰

It is interesting to note that the ICJ request explicitly refers to the duty of due diligence separate from the two references to human rights, the UNFCCC and the Paris Agreement, the law of the sea and environmental law.

Conclusion 3.6:

The currently pending requests to the ICJ and ITLOS to deliver advisory opinions on climate change will certainly contribute to the further development of climate law. It will require States, and possibly international organizations and other actors, to present to the Tribunal and the Court their views on the international legal obligations on climate, in particular regarding the legal status of the due diligence obligations in light of the Paris temperature goals and whether they represent general international law or even a peremptory norm of international law. Ultimately the advisory opinions will give an authoritative judicial insight into the current state of international law on climate.

3.3.2. The impact on domestic judicial decision making

As explained above, the climate law architecture is of a hybrid nature.⁹¹ On the one hand it establishes at the international level ambitions, obligations, other commitments and procedures for a transparent

https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf (last accessed 13 June 2023).

⁹⁰ UNGA, 'Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change (29 March 2023) UN Doc A/RES/77/276.

⁹¹ D Bodansky and L Rajamani, 'The Evolution and Governance Architecture of the Climate Change Regime' in U Luterbacher and DF Sprinz (eds), *Global Climate Policy: Actors, Concepts, and Enduring Challenges* (MIT Press 2018) 13-66.

and timely implementation, while on the other hand effective climate policies will be dependent on the voluntary domestic adoption of climate law and policies and their implementation. These domestic ambitions and commitments of States are increasingly used in domestic litigation to argue that the State must take timely and effective measures at the national level. In a recent book, Pau de Vilchez Moragues has analyzed how courts in recent climate litigation cases invoke the UNFCCC and Paris Agreement in their decisions.⁹² Not unsurprisingly, the courts do not allow the direct invocation of the UNFCCC and the Paris Agreement by private litigants in domestic cases. After all, they are agreements between States and not formulated in a way that make their provisions self-executing, or in another way have a direct effect within the domestic legal order. Moreover, the decisions taken by the States Parties in climate conferences are not as such legally binding. However, as the Supreme Court of the Netherlands held in the *Urgenda* case: ‘the courts can assess whether the measures taken by the State are too little in view of what is clearly the lower limit of its share in the measures to be taken worldwide against dangerous climate change’.⁹³ This reflects the understanding that under the UNFCCC and the Paris Agreement ‘all countries will have to do the necessary’.⁹⁴ This provided the basis in the *Urgenda* case to assess what is required by the Netherlands under European human rights law, and that by failing this standard the human rights of the applicants are violated. Similar effects to international climate law were given in other cases such as in Norway, South Africa, New Zealand, the United Kingdom (UK) and Colombia.⁹⁵ The courts did not rely on international climate law directly, but uses it to determine the appropriateness of the climate measures of the State. However, other courts, as in Austria, denied such an effect.⁹⁶ The most far-reaching implementation of the temperature ambitions in the Paris Agreement have been given by Germany by incorporating them in the Federal Climate Change Act as the ‘fundamental orientation for climate action’,⁹⁷ both for the determination what is required from Germany nationally, as well as in the international context:

If the temperature target agreed in Art. 2(1)(a) PA proves inadequate to sufficiently prevent climate change, the obligation arising from Art. 20a GG to involve the international level in seeking to resolve the climate problem is also modified. In particular, attempts would have to be made to reach more stringent international agreements.⁹⁸

We concur with the conclusion by Pau de Vilchez Moraguez that:

Beyond the question of the direct applicability of these instruments [the UNFCCC and the Paris Agreement] at the domestic level, what arises from recent case law is the willingness of the courts to consider these agreements as a relevant and indispensable element of interpretation of States’ due diligence.⁹⁹

However, it must also be noted that in a recent case in Australia, the court held that: ‘if the relationship [between the Minister and the plaintiffs] and the uncontested evidence together call forth a duty, it is

⁹² P de Vilchez Moragues, *Climate in Court: Defining State Obligations on Global Warming Through Domestic Climate Litigation* (Edward Elgar 2022) 116-29, in particular Sections 3.2.2 and 3.2.3.

⁹³ *The State of the Netherlands v Urgenda Foundation* (Judgment of 20 December 2019) Supreme Court of the Netherlands (Hoge Raad): Civil Division, Case No 19/00135 [6.3].

⁹⁴ *Ibid* [5.7.4].

⁹⁵ de Vilchez Moragues (n 92) 126-9.

⁹⁶ *Ibid* 126.

⁹⁷ *Neubauer, et al v Germany* (Order of 24 March 2021) Federal Constitutional Court of Germany) [209] available at: <http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20210324_11817_order-1.pdf> (last accessed 13 June 2023).

⁹⁸ *Ibid* [211].

⁹⁹ de Vilchez Moragues (n 92) 131; see also Peel and Osofsky (n 65) 21-38.

political duty not a legal duty of care'.¹⁰⁰ The fact that several domestic courts have taken significant decisions to require the State to take the climate-related commitments more seriously, does not mean that from now on it will be the general trend.

The Paris Agreement has also been invoked in cases between private parties such as in the *Friends of the Earth v Royal Dutch Shell (RDS)*. The Paris Agreement does not bind these parties, although Shell had indicated that it would strive to contribute to the realization of the ambitions of the Paris Agreement. The Hague District Court nevertheless regards the Paris Agreement as significant for the case:

The court includes this broad consensus about what is needed to prevent dangerous climate change – viz. achieving the goals of the Paris Agreement – in its answer to the question whether or not RDS is obliged to reduce the Shell group's CO2 emissions via its corporate policy

and ordered RDS to reduce its emissions by 45% in 2030 compared to 2019.¹⁰¹ Whether the courts in appeal will follow this judgment remains to be seen.

Conclusion 3.7:

The domestic climate litigation cases show inconsistent approaches in determining what is expected of States or other actors regarding the unprecedented climate challenges and general international climate law. In some instances, innovative approaches have been adopted in applying general international climate law in the context of domestic litigation. Climate change litigation may be essential to ensure the effectiveness of the legal framework of climate change.

¹⁰⁰ *Minister for the Environment v Sharma* (15 March 2022) Federal Court of Australia [2022] FCAFC 35 [260] cited by Setzer and Higham (n 64).

¹⁰¹ *Friends of the Earth v Royal Dutch Shell (RDS)* (Judgment of 26 May 2021) Hague District Court, Case No C/09/571932 / HA ZA 19-379, ECLI:NL:RBDHA:2021:5339.

3.4. Conclusion of Chapter 3

General Conclusion 3:

The number of legally binding obligations in the Paris Agreement is limited, but the Paris Agreement as a whole in the context of the dynamic and continuous process of global cooperation, aiming at keeping climate change under control, has immense legal value. The core norms contained in it can be considered as belonging to the domain of general international law and could potentially achieve the status of peremptory norm, in particular the obligation to exercise due diligence to formulate, maintain and enhance over time ambitious domestic climate goals, as well as the duty to meaningfully cooperate at the international level in a transparent way. The universally shared ambition of the Paris Agreement to keep temperature rise limited to preferably 1.5°C, is not a legal obligation as such, but is essential for the determination of compliance with the relevant climate norms.

In climate-related litigation at the domestic, regional or international levels, there are significant indications that courts and tribunals can play a meaningful role in the future development of this area of international law, although as seen in trade and investment law, general international climate law does not easily set aside other legal obligations.

The ICJ, ITLOS and the IACtHR will have the opportunity to provide a better insight into the current state of international climate law in the pending advisory proceedings, and States and other actors should encourage the courts to contribute to the progressive development of international law, rather than seeking a restrictive view on the impact of climate law, in the interests of present and future generations and the planet as a whole.

4. CONSEQUENCES OF ACCEPTANCE OF A NORM OF GENERAL INTERNATIONAL LAW ON CLIMATE

4.1. Introduction

In this Chapter the consequences of the development of a norm of general international law on climate for the interaction with other norms of international law will be discussed. What will, can or should be the consequences of the acceptance of such a norm for the application or interpretation of other norms. Due to the importance of the climate norm as well as its broad support, there is an understandable tendency to suggest that this norm should have priority over other norms that may hinder the implementation of the climate norm, or that such an existing norm should be interpreted in a manner that in the best possible manner supports the implementation of the climate norm. However, from the perspective of international law such a position may not be easy to defend or even impossible to defend. The realities of international law require a careful analysis of these questions. Not because the environment or climate should not be given the required attention, but in order to ensure that the international legal system as a whole will remain a stable, coherent and legitimate system of law.

Chapters 2 and 3 addressed the (potential) existence of a general international climate law norm respectively as a peremptory norm (*jus cogens*) or as a 'normal' legal norm (ie as *jus dispositivum*). This distinction will be followed in this chapter, which will start with a discussion of the consequences of a rule of general climate law that would have the status of a peremptory norm of international law (Section 4.2), followed by a section in which we will discuss the consequences if such rule would not be this hierarchically higher category (Section 4.3). Our conclusion, in Section 4.4, will be that there are not that many differences between the two categories.

4.2. The general norm of international climate law as a peremptory norm

Chapter 2 concluded that it is not inconceivable to consider that a peremptory norm would be possible, but also that it is highly unlikely that this already has been or will soon be accepted by the community of States as a whole. However, this should not be equated with an acceptance that such a rule can never achieve that status. *Jus cogens* rules are neither static nor a *numerus clausus*. Legal rules are living instruments that evolve, change and adapt to new circumstances including transformation into a peremptory norm. It is for this reason that the following sections will address what the consequences would be, mainly following the ILC Draft conclusions 2022 on this. In doing so, it is important to consider the question when a rule conflicts with a peremptory norm. If it can be concluded that such conflict exists, then questions about the consequences arise for the continued existence of conflicting rules or obligations (Section 4.2.1). Besides looking at these conflict rules, it is also possible to assess whether the emergence of a new peremptory rule would affect the interpretation of existing international law (Section 4.2.2).

4.2.1. Effects of a conflict of a peremptory norm with another rule or obligation under international law

The fact that peremptory norms are by definition norms which 'are hierarchically superior to other rules of international law'¹⁰² and from which 'no derogation is permitted' has as a result that in case that a

¹⁰² ILC, 'Draft Conclusions on *Jus Cogens*' (n 5) Draft Conclusion 3.

peremptory rule conflicts with another rule (other than a peremptory norm) – ie, a treaty rule, a customary rule, or a general principle – the peremptory norm will prevail. In international law a lively debate exists about the question if and when legal norms conflict, but for the purpose of this study it does not seem necessary to go deep into detail on this.¹⁰³

The most cited definition of normative conflict is the one provided by Jenks. ‘A conflict in the strict sense of direct incompatibility arises only where a party to the two treaties [or a State bound by two legal rules of international law] cannot simultaneously comply with its obligations under both treaties [or both rules]’.¹⁰⁴ Others have suggested that definitions of normative conflict are dependent on one’s preconception of the international legal system and that ‘if one believes that international commitments should be understood in the light of some coherent international order, one favors narrow definitions of conflict’.¹⁰⁵ However, wider definitions have also been proposed, mainly arguing that a strict definition does not allow for a conflict to arise between a prescriptive norm and a permission.¹⁰⁶

Probably due to the different positions on this, the ILC decided not to provide a definition of conflict, but rather leave that to be decided on an *ad hoc* basis and through the process of interpretation.¹⁰⁷ This is closely connected with the fact that in international law, courts and tribunals and all ‘users’ of international law¹⁰⁸ function on the basis of a presumption against conflict.¹⁰⁹ Consequently, in most situations an alleged conflict between two legal rules would be resolved by harmonizing their content through interpretation.¹¹⁰

In its Commentary to Draft conclusion 20, the ILC, following this presumption against conflict seems to adopt, as far as normative conflict is concerned, an approach similar to the one propounded by Jenks, ie, that conflict should be viewed ‘as the situation where two rules of international law cannot both be

¹⁰³ See, eg, H Kelsen, *Pure Theory of Law* (University of California Press 1970); A Lindroos, ‘Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*’ (2005) *Nord J Int’l L* 27; J Pauwelyn (n 19) 13–24; N Matz-Lück, ‘Treaties, Conflicts between’ (December 2010) MPEPIL 1485; W Jenks, ‘Conflict of Law-Making Treaties’ (1953) 30 *BYBIL* 401, 427–9; H Lauterpacht, ‘Second Report on the Law of Treaties’ (8 July 1954) UN Doc A/CN.4/87, reproduced in [1954/II] *YBILC* 123, 137–8; W Czapliński and G Danilenko, ‘Conflict of Norms in International Law’ (1990) 21 *NYIL* 3; see also above note 19 and sources cited therein.

¹⁰⁴ Jenks (n 103) 426.

¹⁰⁵ See eg, J Trachtman and G Marceau, ‘TBT SPS, and GATT: A Map of WTO Law and Domestic Regulation’ in F Ortino and E-U Petersmann (eds), *The WTO Dispute Settlement System 1995–2003* (Kluwer Law International 2004) 275, 330–1; R Wolfrum and N Matz, *Conflicts in International Environmental Law* (Springer 2003) 4–11.

¹⁰⁶ H Aufricht, ‘Supersession of Treaties in International Law’ (1952) 37 *CLQ* 655, 655–6; Czapliński and Danilenko (n 103) 12–3; Pauwelyn (n 19) 436; SA Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties* (Martinus Nijhoff 2003) 5–6, 35 and 38; Study Group of the International Law Commission, ‘Report on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Finalized by Martti Koskenniemi’ (13 April 2006) UN Doc A/CN.4/L.682 [22 and 25] (hereinafter ILC Study Group on Fragmentation); *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America)* (Preliminary Objections) [1998] *ICJ Rep* 115; WTO, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (Panel Report adopted on 25 September 1997) WT/DS27/R [7.159 and fn 728].

¹⁰⁷ ILC, ‘Draft Conclusions on *Jus Cogens*’ (n 5) Commentary to Draft Conclusion 20 [1].

¹⁰⁸ On this term: E Roucouas, ‘The Users of International Law’ in M Arsanjani et al (eds), *Looking to the Future: Essays on International Law in Honor of W Michael Reisman* (Brill 2011) 217.

¹⁰⁹ Aufricht (n 106) 657; Jenks (n 103) 427–9; Lauterpacht (n 103) 137–8; M Akehurst, ‘The Hierarchy of the Sources of International Law’ (1977) 47 *BYBIL* 273, 275; see also the *Haya de la Torre* case, where the approach and legal justification provided by the court seems to have been based on this ‘presumption against conflict’; *Haya de la Torre Case (Colombia v Peru)* (Judgment) [1951] *ICJ Rep* 71, 82; *Right of Passage over Indian Territory (Portugal v. India)* (Preliminary Objections) [1957] *ICJ Rep* 125, 142; WTO, *Indonesia – Certain Measures Affecting the Automobile Industry* (Panel Report adopted on 23 July 1998) WT/DS54/R, WT/DS59/R and WT/DS64/R [14.28].

¹¹⁰ This has been considered a tool for conflict prevention or at least resolution; Matz-Lück (n 103) [20]; on the principle of harmonization see G Schwarzenberger, *International Law, Vol I: International Law as Applied by International Courts and Tribunals* (3rd edn, Stevens 1957) 474; Czapliński and Danilenko (n 103) 13; Pauwelyn (n 19) 240–4.

simultaneously applied without infringing on, or impairing, the other'.¹¹¹ That this leaves us with some unanswered questions has been noted in comments to the ILC Draft conclusions,¹¹² but for the purpose of the analysis in this study the ILC approach will be followed.

Conclusion 4.1:

International law functions on the basis of a presumption against normative conflict. Consequently, in most situations an alleged apparent conflict between two legal rules will be resolved by harmonizing their content through interpretation.

These considerations are relevant in the context of the present study as it is not easy to determine when a conflict exists between the potential peremptory general international law on climate and other rules of obligations. The conflict of the due diligence obligations under climate law will only in a limited number of cases directly conflict with other norms as explained in Chapter 2. For instance, human rights conventions will not easily conflict with climate obligations, and existing investment or trade treaties may allow for an interpretation and application that would not necessarily impair the implementation of the due diligence climate obligation. However, given the rather hypothetical situation of the acceptance of climate law as containing peremptory norms, this will not be further pursued. For the remainder of this section, it will be assumed that such conflict can be identified, and will discuss the effects thereof.

If a conflict can be found, what would be the effects of such a conflict? The VCLT provides guidance on the matter, but it is restricted only to conflict of a treaty with a peremptory norm. The ILC being keenly aware of this *lacuna*, expanded its discussion and in its Draft conclusions made references to binding international legal rules emerging from a variety of sources, which will be briefly analyzed. It is important to keep in mind that this can concern a new rule that conflicts with an existing peremptory norm, but also existing international legal rules that may come into conflict with a newly emergent peremptory norm.

Article 53 VCLT provides that a 'treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'.¹¹³ ILC Draft conclusion 10, in its paragraph 1 adopts identical language, and clarifies that 'the provisions of such a treaty have no legal force', ie, they never produce any effect and are null and void *ab initio*. On the other hand, when a new peremptory norm of general international law emerges, 'any existing treaty which is in conflict with that norm becomes void and terminates'.¹¹⁴ In such case, the treaty produces legal effects up until the point that the new and conflicting peremptory norm emerges.¹¹⁵

¹¹¹ ILC, 'Draft Conclusions on *Jus Cogens*' (n 5) Commentary to Draft Conclusion 20 [1].

¹¹² Eg, Dutch Advisory Committee on Public International Law (CAVV), 'Advisory Report on the Draft Conclusions of the International Law Commission on Peremptory Norms of General International Law' (27 July 2020) Advisory report No 37, available at: <https://www.advisorycommitteinternationallaw.nl/binaries/cavv-en/documenten/advisory-reports/2020/07/27/peremptory-norms-of-general-international-law/Peremptory_norms_of_general_international_law_CAVV-Advisory-report-37_202007.pdf> (last accessed 13 2023), 13 (hereinafter CAVV, 'Advisory Report on *Jus Cogens*').

¹¹³ The VCLT is considered to reflect customary international law, see eg, K Schmalenbach, 'Article 53' in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: a Commentary* (Springer 2018) 965, 966 [1].

¹¹⁴ ILC, 'Draft Conclusions on *Jus Cogens*' (n 5) Draft Conclusion 10(2). This formulation is inspired by Art 71(2)(a) VCLT.

¹¹⁵ ILC, 'Draft Conclusions on *Jus Cogens*' (n 5) Commentary to Draft Conclusion 10 [5].

Article 53 VCLT has rarely been invoked.¹¹⁶ While this has led to questions being raised as to its continued relevance,¹¹⁷ States never suggested that the rule should be abolished. Its rare invocation is more of the self-evident fact that 'States do not generally enter into treaties that conflict with peremptory norms of general international law (*jus cogens*)'.¹¹⁸

The ILC makes an interesting additional differentiation between these two scenarios regarding the potential severability (separability) of treaty provisions conflicting with a peremptory norm. In the case of an existing peremptory norm, a treaty which, at the time of its conclusion, conflicts with such a norm is void in whole. This stems from Articles 53 and 44(5) VCLT.¹¹⁹ In the case of a new peremptory norm, the treaty also becomes void and terminates in whole, unless three conditions are satisfied cumulatively:

- the provisions that are in conflict with a peremptory norm of general international law (*jus cogens*) are separable from the remainder of the treaty with regard to their application; (b) it appears from the treaty or is otherwise established that acceptance of the said provisions was not an essential basis of the consent of the parties to be bound by the treaty as a whole; and (c) continued performance of the remainder of the treaty would not be unjust.¹²⁰

Finally, when a treaty is void due to it conflicting with an existing peremptory rule, its parties have an obligation to:

- eliminate as far as possible the consequences of any act performed in reliance on any provision of the treaty which conflicts with the peremptory norm of general international law; and (b) bring their mutual relations into conformity with the peremptory norm of general international law.¹²¹

In the case of conflict with an emergent peremptory norm, an eventual voidance of the treaty:

- releases the parties from any obligation further to perform the treaty; (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.¹²²

The effect of peremptory norms is not limited to treaties. The VCLT naturally, due to its subject-matter, does not address the situation of conflict with rules emerging from other sources of international law, but similar approaches and solutions apply to such scenarios of conflict *mutatis mutandis*.¹²³ Consequently, a rule of customary international law will not come into existence if it were to conflict with an existing peremptory norm of general international law, while in the case of a newly emergent

¹¹⁶ *Aloeboetoe and Others v Suriname* (Judgment of 10 September 1993 on Reparation and Costs) IACtHR, Series C, No 15 [57]; *Prosecutor v Taylor, Case No SCSL-2003-01-I* (Decision of 31 May 2004 on Immunity from Jurisdiction) Appeals Chamber, Special Court for Sierra Leone [53].

¹¹⁷ D Costelloe, *Legal Consequences of Peremptory Norms in International Law* (CUP 2017) 55; S Kadelbach, 'Genesis, Function and Identification of *Jus Cogens* Norms' (2016) 46 NYIL 147, 161; C Maia, '*Jus Cogens* and (In)application of the 1969 Vienna Convention on the Law of Treaties in the Jurisprudence of the International Court of Justice' in D Tladi (ed), *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations* (Brill Nijhoff 2021) 342, 355.

¹¹⁸ ILC, 'Draft Conclusions on *Jus Cogens*' (n 5) Commentary to Draft Conclusion 10 [1].

¹¹⁹ See also *ibid*, Draft Conclusion 11(1).

¹²⁰ *Ibid*, Draft Conclusion 11(2).

¹²¹ Art 71(1) VCLT; see also almost identical wording in ILC, 'Draft Conclusions on *Jus Cogens*' (n 5) Draft Conclusion 12(1).

¹²² Art 71(2) VCLT; see also almost identical wording in ILC, 'Draft Conclusions on *Jus Cogens*' (n 5) Draft Conclusion 12(2).

¹²³ ILC Study Group on Fragmentation (n 106) [367].

peremptory rule the customary rule ceases to exist.¹²⁴ The superiority of peremptory norms over conflicting customary rules has been also confirmed in a number of international and domestic cases.¹²⁵ The ICJ, for instance, in *Jurisdictional Immunities*, noted and discussed, without indicating possible disagreement, Italy's proposal that '*jus cogens* rules always prevail over any inconsistent rule of international law, whether contained in a treaty or in customary international law'.¹²⁶

One may expect that a similar approach would apply in the case of conflict with a general principle. Surprisingly, however, this was not included in the Draft conclusions of the ILC. This may be explained possibly by an implicit acknowledgment and/or adoption of the view that general principles cannot be the source of independent obligations, ie, that they are in themselves 'not a source of obligation where none would otherwise exist'.¹²⁷ However, this seems to be inconsistent with its own work on General Principles, where the ILC in no uncertain terms acknowledged that general principles may serve 'as a basis for primary rights and obligations, as well as a basis for secondary and procedural rules'.¹²⁸ Moreover, in the commentary to the Draft conclusions on peremptory norms, the ILC considers the potentiality of conflict with 'another rule of international law' and suggests this is to be understood as:

referring to obligations under international law, whether arising under a treaty, customary international law, a general principle of law, a unilateral act or a resolution, decision or other act of an international organization.¹²⁹

Consequently, the same approach as with conflict with other rules should apply also in the case of general principles *mutatis mutandis*.

Other sources of law that may be relevant to be considered in this context are unilateral acts of States, and resolutions, decisions or other acts of international organizations. ILC Draft conclusions 15 and 16 suggest that similar approaches as with the previous categories of rules apply in cases of conflict with a peremptory norm.

A particular situation arises when there is a conflict with another peremptory norm. Although this is a highly improbable scenario, it remains theoretically possible.¹³⁰ In such a scenario the most likely outcome would be that such a conflict would have to be resolved on the basis of standard conflict-resolution techniques (eg *lex specialis derogat generali*, *lex posterior derogat priori* etc).¹³¹

¹²⁴ ILC, 'Draft Conclusions on *Jus Cogens*' (n 5) Draft Conclusion 14. This second scenario is not without its controversy. As the CAVV has noted it 'does not understand how this could be construed logically, unless the rule of customary international law were itself going through a process of change'; CAVV, 'Advisory Report on *Jus Cogens*' (n 112) 15-6.

¹²⁵ *Al-Adsani v the United Kingdom*, ECtHR [GC] (21 November 2001) App No 35763/97 [60]; *Prosecutor v Anto Furundzija* (Judgment of 10 December 1998) ICTY Trial Chamber, Case No IT-95-17/1-T [153]; *Siderman de Blake v Argentina*, United States Court of Appeals for the Ninth Circuit, 965 F.2d 699 (9th Cir 1992) 716; *Simón, Julio Héctor y otros s/privación ilegítima de la libertad* (Judgment of 14 June 2005) Supreme Court of Argentina, Case No 17.768, S. 1767. XXXVIII [48]; *The Kenya Section of the International Commission of Jurists v the Attorney-General and Others, Miscellaneous Criminal Application 685 of 2010* (Judgment of 28 November 2011) High Court of Kenya, [2011] eKLR; *C v Director of Immigration* (18 February 2008) HCAL 132/2006, [2008] 2 HKC 165, [2008] HKCFI 109, ILDC 1119 (HK 2008) [75]; *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048 (Admin), [2009] 1 WLR 2579 [142(ii)]; see also AC de Beer and D Tladi, 'The Use of Force Against Syria in Response to Alleged Use of Chemical Weapons by Syria: a Return to Humanitarian Intervention?' (2019) 79/2 Heidelberg Journal of International Law 217.

¹²⁶ *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (Judgment) [2012] ICJ Rep 99 [92-3].

¹²⁷ *Border and Transborder Armed Actions (Nicaragua v. Honduras)* (Jurisdiction and Admissibility) [1988] ICJ Rep 69 [94], in relation to the principle of good faith.

¹²⁸ ILC, 'General Principles of Law: Consolidated Text of Draft Conclusions 1 to 11 Provisionally Adopted by the Drafting Committee' (21 July 2022) UN Doc A/CN.4/L.971, Draft Conclusion 10(2)(b).

¹²⁹ ILC, 'Draft Conclusions on *Jus Cogens*' (n 5) Commentary to Draft Conclusion 20 [7] (emphasis added).

¹³⁰ The ILC itself seems to also allow for such a possibility, no matter how far-fetched it is; *ibid*, Draft Conclusions 3, 4 and 14; see also Kolb (n 19).

¹³¹ ILC Study Group on Fragmentation (n 106) [367].

Applying the above effects of a conflict of a peremptory norm on climate with another international rule or obligation will be dependent on formulating specific scenarios. This study is too limited to engage in the development and analysis of such scenarios. As an example, reference can be made to the debate on the consistency of the ECT with the purported peremptory climate obligation to intend to achieve the national NDCs. Since the treaty obligations under the ECT existed before the new peremptory rule arose, Draft conclusions 10(2), 11(2) and 12(2) as discussed above would apply. It would require a detailed analysis of whether the ECT would become null and void as a whole, or whether the separability rule of 11(2) would apply. Moreover, Draft conclusion 12(2) would require a further detailed analysis of whether the obligations based on the execution of the treaty prior to the emergence of the climate norm would infringe on the climate norm or can be maintained while respecting the due diligence obligations. Would for instance an obligation to pay foreign investors compensation for consequences of taking climate change mitigation measures, such as closure of fossil fuel plants, be contrary to the new peremptory norm? Finally, it would be necessary to consider if *ad hoc* arbitral tribunals constituted under the ECT treaty would be entitled to decide on these questions, or whether preferably a judgment of the ICJ should be sought under reference to Article 66(a) of the VCLT? As said, answering these questions would go beyond what is possible within the context of this study.

Conclusion 4.2:

In case of conflict between an existing peremptory (climate) norm and a subsequent treaty or customary international law, the conflicting treaty as a whole is void and the customary rule is deemed to have never come into existence.

In case of conflict between a peremptory (climate) norm and a pre-existing treaty, the latter will terminate unless conflicting provisions can be separated.

In case of conflict between a peremptory (climate) norm and pre-existing customary international law, the latter ceases to exist to the extent that it conflicts with the peremptory norm.

Whether a newly established peremptory (climate) norm will conflict with existing international obligations or not, and what will be the precise consequences of such conflict (ie termination, or separability), will be something that is situationally determined.

4.2.2. Peremptory norms as an interpretative aid and limit

If through the interpretative process, it appears that a rule of international law would be in conflict with a peremptory norm then the former 'is, as far as possible, to be interpreted and applied so as to be consistent' with the latter.¹³² This means that peremptory norms function in the context of interpretation both as an aid and as a limit.

Given that whether a conflict exists is to be determined through the process of interpretation,¹³³ peremptory norms 'generate strong interpretative principles which will resolve all or most apparent

¹³² ILC, 'Draft Conclusions on *Jus Cogens*' (n 5) Draft Conclusion 20.

¹³³ *Ibid*, Commentary to Draft Conclusion 20 [1]; D Costelloe, 'Peremptory Norms and Resolutions of the United Nations Security Council' in D Tladi (ed), *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations* (Brill 2021) 441, 443 et seq.

conflicts'.¹³⁴ Consequently, the interpreter would try to find an interpretation that would harmonize the two rules, and avoid conflict altogether. It is this strong interpretative pull of *jus cogens* norms that explains why the ILC in the Commentaries of Draft conclusions 10, 14, 15 and 16, which deal with the effects of conflict, was very explicit in stating that the application of these Draft conclusions was to 'be read together with the interpretative rule set out in draft conclusion 20'.¹³⁵ The entry point of peremptory norms in the interpretative process would most likely be through the principle of systemic integration, enshrined in Article 31(3)(c) VCLT, which reflects customary international law. Draft conclusion 20 'may be seen as an application of article 31, paragraph 3 (c), of the 1969 Vienna Convention'.¹³⁶ This principle and the VCLT provision will be analyzed in more detail below in Section 4.3. Of import is the fact that the interpretative principle is applicable to not only the interpretation of treaties, but also to other rules of international law such as customary rules and general principles.¹³⁷

However, despite the strong interpretative principles generated by peremptory norms, this does not mean that these are without any limit. Although harmonization will be the preferable option, such interpretation may not lead to a rewriting or revision of the rule being interpreted.¹³⁸ As noted by the ILC

the words 'as far as possible' in the draft conclusion are intended to emphasize that, in the exercise of interpreting rules of international law in a manner consistent with peremptory norms of general international law (*jus cogens*), the bounds of interpretation may not be exceeded. In other words, the rule in question may not be given a meaning or content that does not flow from the normal application of the rules and methodology of interpretation in order to achieve consistency with peremptory norms of general international law (*jus cogens*).¹³⁹

In such a case, the interpreter would have to find that harmonization through interpretation is not possible, and, thus, would have to find that a conflict exists with the corresponding effects regarding the non-applicability of the (non *jus cogens*) rule in question.

These considerations on the role of interpretation are pertinent to the object of this study.

Conclusion 4.3:

Given the fact that a potential peremptory norm on climate law would be in its core a due diligence obligation, it allows, and perhaps requires, more a harmonization of existing international law, within the limits indicated, than trying to trump one rule with another. The status as peremptory norm provides a strong pull for States to comply with it and (judicial) decision makers to give it effect and impact through interpretation in a wide range of international legal contexts, be it, for instance, investment law, human rights law, law of the sea, or trade law.

¹³⁴ ILC, 'Draft Conclusions on *Jus Cogens*' (n 5) Commentary to Draft Conclusion 20 [5]; ILC Study Group on Fragmentation (n 106) [42]; ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' [2001/II-Part Two] YBILC 31, Commentary to Art 26 [3].

¹³⁵ ILC, 'Draft Conclusions on *Jus Cogens*' (n 5) Commentary to Draft Conclusion 10 [8], Draft Conclusion 14 [14], Draft Conclusion 15 [8], Draft Conclusion 16 [5].

¹³⁶ Ibid, Commentary to Draft Conclusion 20 [4].

¹³⁷ Ibid, Commentary to Draft Conclusion 20 [5 and 7].

¹³⁸ Ibid, Commentary to Draft Conclusion 20 [2]; on limits to interpretation see P Merkouris, '(Inter)Temporal Considerations in the Interpretative Process of the VCLT: Do Treaties Endure, Perdure or Exdure?' (2014) 45 NYIL 121.

¹³⁹ ILC, 'Draft Conclusions on *Jus Cogens*' (n 5) Commentary to Draft Conclusion 20 [2].

4.3. The general norm of international climate law not having a peremptory character

As demonstrated in Chapter 3, the authors of the present report are of the view that the obligation to exercise due diligence with the aim of limiting global temperature rise can be considered as a norm of general international law. In Chapter 3 we did not take a position on whether only customary international law can be regarded as a general norm of international law, or whether it can also flow from other sources. For the purpose of this study this may be of less importance as virtually all States have accepted the due diligence obligation as a treaty norm and distinguishing it from a rule of customary international law with the same content would in practice not make much difference. As mentioned, State practice and *opinio juris* reveals that a positive obligation to protect the climate has emerged as a rule of customary international law. This also means that a future withdrawal from the Paris Agreement and the UNFCCC would not change, as far as this general rule is concerned, the obligation for the withdrawing State. Given the fact that there is no hierarchy among the formal sources of international law the question arises what happens if this general norm, either read as a treaty norm or as customary rule conflicts with other legal rules.

As already mentioned in Section 4.2.2, conflict tends to be an outlier in international jurisprudence. The critical point, and the one that has emerged with great frequency and forcefulness the last few years, is how the protection of the climate both as a rule of customary international law and as expressed and provided for in a specific treaties (eg Paris Agreement, UNFCCC etc.) can have a strong ‘interpretative pull’ when interpreting other treaties, irrespective of their subject-matter, be they environmental treaties, human rights treaties or even investment treaties to name but a few examples. This interpretative consideration of the wider ‘normative environment’ and how both the customary rule and treaty rules on the protection of climate have a pivotal role to play will be discussed below.

4.3.1. Resolution of Normative Conflict with Other Rules

As in the scenarios discussed under Section 4.2 the main issue is determining whether a conflict exists, and identical considerations apply here, irrespective of the hierarchical status or the source of the particular rule. If such a conflict emerges, then the follow-up question that needs to be addressed is with what type of rule the general climate rule conflicts.

If a conflict were to be identified with any legal rule other than of a *jus cogens* type,¹⁴⁰ then this normative conflict would have to be resolved on an *ad hoc* basis and through the application of one or more of the standard normative conflict-resolution techniques, such as conflict clauses, *lex specialis derogat generali*, *lex posterior derogat priori*.¹⁴¹

If the general rule on the protection of climate were to be found to be in conflict with a peremptory norm, then the consequences of such conflict as described in Section 4.2.2 would come into effect. Since it is difficult to imagine how general international law on climate would violate an existing peremptory rule, there is nothing to prevent the general rule on protection of the climate to have come into existence.¹⁴² If down the line a new peremptory norm emerges that would be in conflict with this

¹⁴⁰ For conflict between *jus cogens* norms, see Section 4.2.1, notes 130-1 and accompanying text.

¹⁴¹ On the issues with these techniques and the numerous problems with their application see Pauwelyn (n 19); Sadat-Akhavi (n 106); ILC Study Group on Fragmentation (n 106) [367].

¹⁴² ILC, ‘Draft Conclusions on *Jus Cogens*’ (n 5) Draft Conclusion 14(1).

rule on the protection of climate (also a highly improbable scenario), the climate rule would become void or severed to the extent of the conflict.¹⁴³

Conclusion 4.4:

If a conflict arises between a general international climate norm (not having the status of a peremptory norm) and another international legal obligation, then this normative conflict will have to be resolved on an *ad hoc* basis and through the application of one or more of the standard normative conflict-resolution techniques, such as conflict clauses, *lex specialis derogat generali*, *lex posterior derogat priori*, etc.

4.3.2. Utility and utilisation of a general international law on the protection of climate in the process of interpretation

Conflict lies at the end of the spectrum when the interpretative process has failed to find a way to harmonize different obligations. It is evident from this, thus, that interpretation has a crucial role to play in ensuring that climate change obligations are taken into account when interpreting other instruments or rules, irrespective of their type (eg human rights treaties, investment treaties, trade treaties etc.), and inform their content.

In Section 4.2 we saw that peremptory norms generate strong interpretative principles. The same also applies in the case of general international law on the protection of climate. The main 'point of entry' for these obligations to be considered in the interpretation of other instruments would be Article 31(3)(c) VCLT, which has already been used for the interpretation of treaties as diverse as investment treaties and human rights treaties in light of newly emerged environmental rights and obligations.¹⁴⁴ Article 31(3)(c) provides that as a general rule of interpretation account shall be taken, together with the context of 'any relevant rules of international law applicable in the relations between the parties'. Although the article provides for interpreting a treaty, it is also applicable in the case of interpretation of customary rules.¹⁴⁵ Consequently, in this manner the customary rules on the protection of the environment, or the climate, can be taken into account, and influence the interpretation of other treaties or customary rules, as long as it can be shown that it is relevant.

The proliferation of treaties and of international courts and tribunals has led to a 'flowering of case law'¹⁴⁶ where Article 31(3)(c) VCLT has been invoked. This provision is known as the principle of systemic integration.¹⁴⁷ A variety of terms have and continue to be used to describe what is essentially the same process, such as 'systemic interpretation',¹⁴⁸ 'systemic harmonization'¹⁴⁹ 'principle of

¹⁴³ Ibid, Draft Conclusion 14(2).

¹⁴⁴ See analysis and cases referred to in the Sections below.

¹⁴⁵ For the importance of the principle of systemic integration in the interpretation of customary rules, see P Merkouris, *Interpretation of Customary International Law: Of Methods and Limits* (Brill 2023) available at: <<https://tricolawofficial.files.wordpress.com/2022/12/merkouris-research-perspectives.pdf>> (last accessed 13 June 2023).

¹⁴⁶ R Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 290.

¹⁴⁷ A term popularised by C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54/2 ICLQ 279.

¹⁴⁸ *Ioan Micula and Others v Romania* (Final Award of 11 December 2013) ICSID Case No ARB/05/20 [307 and 310].

¹⁴⁹ *Al-Dulimi and Montana Management Inc v Switzerland* (Merits and Just Satisfaction) ECtHR (21 June 2016) [140] and Concurring Opinion of Judge Sicilianos [9].

systematic integration',¹⁵⁰ 'systematic interpretation',¹⁵¹ 'harmonious interpretation',¹⁵² and 'principe d'intégration'.¹⁵³

For the triggering of Article 31(3)(c) a number of elements need to be satisfied: i) what counts as a *rule*; ii) the rule needs to be *applicable*; iii) the rule needs to be applicable in the relations *between the parties*; and iv) it needs to be *relevant*. A final element that needs to be considered, but is often neglected because it does not feature explicitly in the text of Article 31(3)(c), is whether the rules to be taken into account are the rules at the time of the conclusion of the treaty/rule or the rules at the time of the interpretation of a treaty/rule. It is to these questions we shall turn our attention.

Conclusion 4.5:

As conflict lies at the end of the spectrum when the interpretative process has failed to find a way to harmonize different obligations, interpretation has a crucial role to play in ensuring that climate change obligations are taken into account when interpreting other instruments or rules. Article 31(3)(c) VCLT, which enshrines the principle of systemic integration, provides relevant guidance for interpreting a treaty, but (in its customary form) is also applicable in the case of interpretation of customary rules.

Application of the Article 31(3)(c) VCLT requires clarity on a number of elements: i) what counts as a rule; ii) the rule needs to be applicable; iii) the rule needs to be applicable in the relations between the parties; iv) the rule needs to be relevant; and v) it must be determined on the basis of the treaty being interpreted whether one can refer under Article 31(3)(c) to the rules that were in force at the time of the conclusion of the treaty/rule being interpreted, or to the rules that are in force at the time of the interpretation of the treaty/rule.

4.3.2.1 Rules

For the purposes of the principle of systemic integration 'rules' includes any rule stemming from the three formal sources of international law, ie treaties,¹⁵⁴ customary law,¹⁵⁵ and general principles.¹⁵⁶ In the context of our inquiry this would mean that the protection of the climate both as a customary rule

¹⁵⁰ *Hesham TM Al Warraq v Republic of Indonesia* (Final Award of 15 December 2014) Ad hoc Tribunal (UNCITRAL) [519]. On why the term 'systematic' is a misnomer see G Distefano and PC Mavroidis, 'L'interprétation systématique: le liant de l'ordre international' in O Guillod and C Müller (eds), *Pour un droit équitable, engage et chaleureux: Mélanges en l'honneur de Pierre Wessner* (Helbing Lichtenhah Bâle 2011) 743; P Merkouris, *Article 31(3)(c) and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Brill 2015) 266.

¹⁵¹ A Bleckmann, 'Zur Feststellung und Auslegung von Völkergewohnheitsrecht' (1977) 37 *ZaöRV* 504, 526; JHW Verzijl, *International Law in a Historical Perspective* vol VI (Sijthoff Leyden 1973) 324.

¹⁵² *Vattenfall AB and Others v Germany* (Decision on the Achmea Issue of 31 August 2018) ICSID Case No ARB/12/12 [158 and 167].

¹⁵³ J Combacau and S Sur, *Droit International Public* (Montchrestien 2004) 175.

¹⁵⁴ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (Judgment) [2008] ICJ Rep 177 [112-3]; *Selmouni v France*, Merits and Just Satisfaction, ECtHR (28 July 1999) [97-8]; *Urbaser v Argentine Republic* (Award of 8 December 2016) ICSID Case No ARB/07/26, [1197-8 and 1204-10].

¹⁵⁵ *Oil Platforms (Iran v USA)* (Preliminary Objections) [1996] ICJ Rep 803 [41]; *Council v Front Polisario C-104/16 P* (Judgment of the Court of 21 December 2016) Case C-104/16 P, ECLI:EU:C:2016:973 [86 et seq.]; *Arbitration Regarding the Iron Rhine ('Ijzeren Rijn') Railway, Belgium v the Netherlands* (Award of 24 May 2005) 17 RIAA 35 [59] (hereinafter *Iron Rhine Arbitration*).

¹⁵⁶ *Golder v UK* (Merits and Just Satisfaction) ECtHR (21 February 1975) Series A No 18 [35]; *Georges Pinson (France) v United Mexican States*, Decision No 1 (19 October 1928) 5 RIAA 327, 422 [50(4)].

and as individual provisions in climate change treaties would satisfy the requirement of rule-ness. An interesting development has arisen with respect to whether the acts of international organizations (the EU included) could also qualify as 'rules' for the purposes of Article 31(3)(c) VCLT. The jurisprudence on the matter is rather limited, but the Tribunal in *Iron Rhine* did hold that secondary legislation of regional organizations, such as EU Directives and Regulations, fell within Article 31(3)(c).¹⁵⁷ In any event even if these instruments were found by the interpreter to not fall under Article 31(3)(c) they could still have some interpretative sway as 'supplementary means of interpretation' as provided for in Article 32 VCLT.

In a recent number of cases revolving around the interpretation of the ECT, the European Commission raised the argument that EU law was a 'relevant rule'. However, the tribunals did not engage with this argument because, unfortunately, the European Commission simply referred to EU law *in toto*, without explaining which rule in particular was in its view relevant. Such a vague and non-specific reference to an entire system of law, failed to meet the threshold of a 'clearly determinable rule'.¹⁵⁸

4.3.2.2. Applicable

The term 'applicable' received little attention during the negotiating history of the VCLT, and also in international jurisprudence. It seems that the reason behind this may be because the term is used as referring to bindingness of the 'rules'. This means that non-binding rules are excluded,¹⁵⁹ and that the discussion on applicability tends to be bunched together with that of 'rules'. Such a reading is supported by the *OSPAR Arbitration*.¹⁶⁰ Consequently, it seems that the discussion on 'applicability' tends to be subsumed in the judicial reasoning on 'rules'.¹⁶¹

One of the few cases that have tackled head on the meaning of the term 'applicable' is the *RosInvest* case where the Tribunal opined that "[a]pplicable in the relations between the parties" must be taken as a reference to rules of international law that condition the performance of the specific rights and obligations stipulated in the treaty – or else it would amount to a general license to override the treaty terms that would be quite incompatible with the general spirit of the Vienna Convention as a whole'.¹⁶²

In our case, the applicability, and also the rule-ness, may be an issue when considering interpretation of another rule in the broader context of the climate agreements and the decisions made in the context of the conferences of parties. Can for instance the formally non-binding decisions of the parties be taken into account when making a systemic interpretation? In so far as we consider the existence of the due diligence rule of general international climate law as such to be taken into account in the interpretation of treaties or customary law, this would not be an issue. However, if for the interpretation it would be necessary to specify further what the content is of the 'climate due diligence', the decisions of conferences of parties may be indispensable to determine what this entails at a given moment in time, and hence be of influence on the interpretation of other treaties. As the climate legal regime develops dynamically, this underlines the relevance of the intertemporal element to be discussed below.

¹⁵⁷ *Iron Rhine Arbitration* (n 155) [58].

¹⁵⁸ *Vattenfall AB and Others v Germany* (n 152); *SunReserve Luxco Holdings SÀRL, SunReserve Luxco Holdings II SÀRL and SunReserve Luxco Holdings III SÀRL v Italian Republic* (Final Award of 25 March 2020) SCC Case No V2016/32 [394].

¹⁵⁹ ME Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) 433.

¹⁶⁰ *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v UK)* (Final Award of 2 July 2003) 23 RIAA 59 [99-105] (hereinafter *OSPAR Arbitration*).

¹⁶¹ There have been, though, instances where non-binding elements have been suggested to fall under Art 31(3)(c); *OSPAR Arbitration* (n 160), *Dissenting Opinion of Judge Griffith* [7-19]; *Southern Bluefin Tuna cases (New Zealand and Australia v Japan) (Provisional Measures)* [1999] ITLOS Rep 280, *Separate Opinion of Judge Treves* [10].

¹⁶² *RosInvest Co UK Ltd v Russian Federation* (Award on Jurisdiction of 1 October 2007) SCC Case No V079/2005 [39].

4.3.2.3. Relevant

Determining whether a rule is 'relevant' is the crucial aspect of the principle of systemic integration. Although in international case-law there is very little dedicated analysis of the term, some patterns do repeat themselves. All of these revolve around how close, how proximate the rules being interpreted and the rule being invoked under Article 31(3)(c) are. This common thread across all such approaches has been named the 'proximity criterion'¹⁶³ and manifestations of it are: linguistic identity or proximity;¹⁶⁴ temporal proximity;¹⁶⁵ subject-matter proximity¹⁶⁶ and actor proximity.¹⁶⁷

In our scenario of a general rule on the protection of the climate being invoked to assist in the interpretation of another rule, subject-matter, and actor proximity would most likely be satisfied. Depending on the situation, linguistic proximity and temporal proximity would also be most likely met. Similar considerations would also apply in the case of invocation of specifically treaty rules on climate change (beyond the general due diligence obligation), but there the degree to which these manifestations would be met will be dependent on the specific rule, the treaty it is included in and the wideness of State participation in that instrument.

4.3.2.4. Parties

This final word in Article 31(3)(c) VCLT has been a hotly contested one. Essentially, the argument has been on whether the term parties should be read as 'parties to the treaty' or '[any one of the] parties to the dispute'? Depending on what reading one chooses, this can make Article 31(3)(c) open to a wide number of rules or a more limited one. One thing to point out here is that this becomes relevant only when we are dealing with treaties. In the case of a general customary international law (and general principles), because it is binding on all States,¹⁶⁸ the manner in which the term parties is read makes absolutely no difference, as both ends of the spectrum (and everything in between) is satisfied. So, if the customary rule on protection of climate is invoked the term 'parties' is no bar at all. A full discussion on this issue is beyond the scope of this study; here two cases will be highlighted to illustrate the differences between the two approaches.¹⁶⁹

In *Vattenfall*, with respect to the interpretation of the ECT, the European Commission contended that EU law would be a 'relevant rule'. The Tribunal rejected this on the basis not only that the Commission had not specified a particular rule, but also because the Commission's approach 'would potentially allow for different interpretations of the same ECT treaty provision',¹⁷⁰ as States non-members of the EU were parties to the ECT. In the Tribunal's view, this

¹⁶³ For a detailed analysis of the proximity criterion as utilised to determine relevance under Art 31(3)(c) VCLT, see P Merkouris, 'Principle of Systemic Integration' [2020] MPEiPro 2866.

¹⁶⁴ *Affaire de la Compagnie d'Electricité de la Ville de Varsovie (Compétence) (France v Poland)* (30 November 1929) 3 RIAA 1669, 1675; *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* (Preliminary Objections) [2017] ICJ Rep 3 [91].

¹⁶⁵ *Compagnie d'Electricité de la Ville de Varsovie* (n 164) 1675; *Affaire des boutres de Mascate (France v UK)* (Award of 8 August 1905) 11 RIAA 83 et seq.

¹⁶⁶ *Oil Platforms (Iran v USA)* (Merits) [2003] ICJ Rep 161, Separate Opinion of Judge Higgins [46]; WTO, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (EC – Large Civil Aircraft)* (Appellate Body Report adopted on 18 May 2011) WT/DS316/AB/R, DSR2011:I [846]; *RosInvest Co UK Ltd v Russia* (n 162) [39]; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, (Advisory Opinion) [1980] ICJ Rep 73, Separate Opinion of Judge Mosler.

¹⁶⁷ The latter is connected to the discussion of the term 'parties'.

¹⁶⁸ With the exception of States that have persistently objected.

¹⁶⁹ For a detailed analysis of both liberal and more conservative constructions adopted by courts and tribunals see Merkouris (n 163).

¹⁷⁰ *Vattenfall AB and Others v Germany* (n 152) [155-6].

would create one set of obligations applicable in at least some 'intra-EU' disputes and another set of different obligations applicable to other disputes. This would bring uncertainty and entail the fragmentation of the meaning and application of treaty provisions and of the obligations of ECT Parties, contrary to the plain and ordinary meaning of the ECT provisions themselves.¹⁷¹

The Tribunal seems to argue in favor of a 'parties to the treaty' understanding of Article 31(3)(c) VCLT. However, the line of reasoning has flaws, and these need to be addressed not only because of the EU's approach for a more liberal understanding of Article 31(3)(c), but also because of its utility in the context of invoking climate change provisions in the interpretation of other instruments.

The *Vattenfall* Tribunal argued that 'parties to the dispute' would lead to incoherence as the 'relevant rules would be dependent on the parties to the dispute, whereas "parties to the treaty" ensures a single unified interpretation of each treaty provision'.¹⁷² However, this line of reasoning is flawed in two very important ways. First, 'relevance' is already designed to prevent incoherence through the application of the 'proximity criterion'.¹⁷³ Second, adopting a 'parties to the treaty' reading of Article 31(3)(c) does not necessarily lead to greater coherence. In fact the opposite seems to be the more likely outcome. The reason is quite simple. Every time any State accedes to or withdraws from the treaty being interpreted, or any other treaty of any of the States parties, the set of potential 'relevant rules' would also change even under the 'parties to the treaty' format.¹⁷⁴ Such a constant state of flux, that could be easily abused, is a far cry from the alleged stability and coherence that 'parties to the treaty' provides according to the *Vattenfall* Tribunal.

Consequently, it is more the focus on 'relevance' rather than a restrictive reading of Article 31(3)(c) VCLT that ensures greater interpretative coherence. It is not surprising that other investment tribunals dealing with the interpretation of the ECT, although repeating the need for coherence, focused on the 'non-revision/non-re-writing' limit of Article 31(3)(c), and on 'relevance' rather than on a discussion of the term 'parties'.¹⁷⁵

This discussion is extremely pertinent in the context of climate change as it was raised very recently in the HRC in the *Billy v Australia* case, also discussed above in Section 3.3.1. This is a landmark case, as it was the first time that at the level of an international quasi-judicial body the connection between climate change related obligations and human rights violations was actually decided on the merits.¹⁷⁶

In *Billy v Australia* an attempt was made to secure a finding that failure to meet climate change obligations was in and of itself a human rights violation under the ICCPR. The argument was raised as to whether climate change treaties could inform the interpretation of the Covenant if they were 'relevant rules applicable in the relations between the parties' as provided for in Article 31(3)(c) VCLT. The authors of the complaint were of the view that 'the State party's obligations under international

¹⁷¹ Ibid [158].

¹⁷² Ibid [156]. An argument could also be raised here as to whether the single unified interpretation, although a desirable result, and one that is quite compelling, is indeed a *sine qua non* of the interpretation of a treaty provision. For instance, in other parts of the VCLT the unified meaning and regulatory regime has been sacrificed on the altar of either ensuring greater participation (as in the case of reservations under Arts 19-22 VCLT) or greater applicability of the VCLT itself (as in the case of the interpretation of Art 4 VCLT as not being a *si omnes* clause).

¹⁷³ See *Merkouris* (n 145) and *Merkouris* (n 163).

¹⁷⁴ For an earlier detailed analysis of this, see: *Merkouris* (n 150) ch 2.

¹⁷⁵ *AS PNB Banka and others v Latvia* (Decision on the intra-EU objection of 14 May 2021) ICSID Case No ARB/17/47 [562-71]; *Silver Ridge Power BV v Italy* (Award of 26 February 2021) ICSID Case No ARB/15/37 [220-3].

¹⁷⁶ *Billy v Australia* (n 68).

climate change treaties constitute part of the overarching system that is relevant to the examination of its violations under the Covenant".¹⁷⁷ Australia countered by submitting that

there is no basis for the authors' argument that international climate change treaties are relevant to the interpretation of the Covenant, because there are stark and significant differences between the Paris Agreement and the Covenant. The two instruments have different aims and scopes. *16 States that have signed the Agreement have not signed the Covenant*. Accordingly, interpreting the Covenant through the Paris Agreement would be contrary to the fundamental principles of international law. The ordinary meaning of one treaty cannot be used to supplant the clear language of the Covenant;¹⁷⁸

and that

applying the principle of systemic integration described by the International Law Commission, relevant rules for the purpose of article 31 (3)(c) of the Vienna Convention on the Law of Treaties must concern the subject matter of the treaty term at issue. Climate change treaties do not provide evidence of the object and purpose of the Covenant, nor the meaning of its terms'.¹⁷⁹

Interestingly, Australia seems to have mixed up/reversed that argument by claiming '*16 States that have signed the Agreement have not signed the Covenant*'.¹⁸⁰ In essence, Australia claimed that because 16 States that have signed the Paris Agreement have not signed (and ratified) the Covenant, it does not fall under Article 31(3)(c) VCLT. Yet, it is the reverse that should be examined, ie, how many States that have signed and ratified the Covenant have not signed the Agreement. Thus, if one followed the language of Australia's argument, this would give the impression that all parties to the Covenant are parties to the Paris Agreement, thus the climate change treaty is relevant! However, as there are four States that currently are parties to the Covenant but not to the Paris Agreement (Eritrea, Yemen, Iran and Libya), we shall now examine if this would bar the relevance of the Paris Agreement for the interpretation of the Covenant.

Essentially, one of Australia's main arguments was that Article 31(3)(c) VCLT should be understood as referring to 'parties to the treaty'. That means that all parties of the treaty being interpreted need to be parties to the treaty being considered as relevant for the purposes of Article 31(3)(c) VCLT. The main crux of this argument is that by not doing so the principle of systemic integration would lead to incoherence, as the same provision would have a different meaning 'depending on the independent legal obligations entered into by one State or another, and depending on the parties to a particular dispute'.

However, this assumes that the principle of systemic integration does not have any other safety valve(s), and that once the 'parties' requirement is met, the rule would be immediately taken into account. That is not the case. This is exactly what the term 'relevant' is designed to do. To allocate the appropriate interpretative *gravitas* to a rule, by considering a number of factors that offer insight as to the true intention of the parties. Not every rule would be automatically considered as 'relevant'. In fact, 'actor proximity' together with other forms of proximity,¹⁸¹ would be taken into account to determine relevance.

¹⁷⁷ Ibid [3.2] (footnotes omitted).

¹⁷⁸ Ibid [4.1] (footnotes omitted).

¹⁷⁹ Ibid [6.5] (footnotes omitted).

¹⁸⁰ Australia should have been precise here, and referred to ratification or accession (rather than mere signing). This is a crucial point as the treaty needs to have entered into force for the parties.

¹⁸¹ On the 'proximity criterion' and the various manifestations of 'proximity' within Art 31(3)(c) VCLT both as treaty and as customary rule, see Merkouris (n 150) ch 1; Merkouris (n 163) [34-7].

Furthermore, relying on the 'parties to the treaty argument' more likely leads to incoherence, and constantly shifting meanings of provisions. The reason is simple. Every time a State acceded to or withdrew from the treaty being interpreted, or makes reservations, amendments and *inter se* modifications, the set of potential 'relevant rules' would also change. On the other hand, reading of the principle of systemic integration as referring to 'parties to the dispute', the focus is more on determining actual 'relevance' may increase the pool of potential 'relevant rules', but ensures greater stability and coherence as the 'actor proximity' is not the only decisive criterion, but needs to be supplemented by other forms of proximity, to a degree that would satisfy the interpreter. Thus, somewhat paradoxically, it is the expansive interpretation (that the EU has also argued for in international case-law) that better ensures the systemic coherence that Australia so fervently argued for.¹⁸²

The HRC, unfortunately but perhaps predictably, did not express itself on this issue but it refers to General Comment No 36,¹⁸³ which clearly states that

*obligations of States parties under international environmental law should thus inform the contents of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law.*¹⁸⁴

This is a straightforward acceptance of environmental law (and by association climate change treaties) as part of the 'normative environment' that are 'relevant rules' for the interpretation of human rights treaties. The focus is not on the term 'parties' but rather on whether they are 'relevant'. Especially in the case of human rights and environmental treaties, both domestic and international courts and tribunals seem to take this more liberal approach. This may be explained due to the particular nature of these treaties. But even in the case of treaties of a more bilateral (or bilateralizable) character such as investment treaties, courts and tribunals have also seemed to be open to the interpretative invocation under Article 31(3)(c) VCLT of treaties that do not meet the threshold of 'parties to the treaty'.¹⁸⁵ This is all the more important, regarding the potential utility and utilization of reading all types of treaties 'in the light of' both customary and treaty obligations on the protection of climate.

4.3.2.5. Intertemporality

A final question relating to the principle of systemic integration is that of the doctrine of intertemporal law as applying in the process of interpretation. The question that is raised is which rules can fall under Article 31(3)(c) VCLT: the rules that were in force at the time of the conclusion of the treaty/rule being interpreted, or the rules that are in force at the time of the interpretation of the treaty/rule? This issue was intentionally left out of the VCLT due to its complexity. The correct approach seems to be that the intertemporality of Article 31(3)(c) VCLT would be dependent on whether the treaty/rule being

¹⁸² This line of reasoning is also supported by the jurisprudence of other courts and tribunals, such as the ECtHR, (eg in *Demir and Baykara v Turkey* [GC] ECtHR, App No 34503/97 (12 November 2008) [67]; *National Union of Rail, Maritime and Transport Workers (RMT) v UK*, ECtHR, App No 31045/10 (8 April 2014) [76]) and the IACtHR (eg in *Ituango Massacres v Colombia* ((Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No 148 (1 July 2006) [157]; *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (Advisory Opinion) IACtHR Series A No 16 (1 October 1999) [112-5]).

¹⁸³ *Billy v Australia* (n 68) [8.4-8.5].

¹⁸⁴ HRC, 'General Comment No 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life' (30 October 2018) UN Doc CCPR/C/GC/36 [para 62] (emphasis added). For the violation of Art 27, the HRC also referred to United Nations Declaration on the Rights of Indigenous Peoples, using the 'in light of' expression, which is usually a dead giveaway for systemic integration, presumably relying on the fact that it is reflective of customary international law.

¹⁸⁵ In detail, Merkouris (n 163).

interpreted should be interpreted statically (applying the principle of contemporaneity) or whether it should be interpreted evolutively. In the first case, the relevant rules then would be those at the time of the conclusion of the treaty/rule, whereas in the latter it would be those existing at the time of the interpretation.¹⁸⁶ This was confirmed in *Armas and others v. Venezuela*.¹⁸⁷

In our case, given that most provisions, especially those where the customary or treaty rules relating to the protection of the climate would be invoked, would most likely be of an evolutive character, the relevant rules would be those contemporary to the time of the interpretation. The only problem that might arise would concern the rather unlikely scenario where the interpreted treaty/rule would be of a static nature, and thus the interpreter would have to examine whether the climate protection rules (customary or treaty rules) were already in existence at the time of the conclusion of the treaty/rule being interpreted. If not, they would then fall outside the scope of Article 31(3)(c) VCLT.

4.4. Conclusion of Chapter 4

In this chapter we have considered the consequences of the acceptance of a general international climate law, based on the distinction of such a norm as a peremptory norm or as an ordinary rule of international law. The focus was on general international climate law as identified in the earlier chapters as a due diligence obligation of States to actively engage individually and in international cooperation in taking measures to mitigate climate change. The consequences that this chapter focuses on are in particular related to potential conflict of norms and on avoiding or solving conflict through interpretation. The VCLT generally forms the framework for considering these issues, reflecting customary international law and general principles of law. The 2022 ILC Draft conclusions and commentaries on peremptory norms provide guidance on this in case of a conflict between a potential peremptory norm on climate and other rules of international law, whereas practice, case-law and literature provide guidance on these issues when norms of a same ranking may conflict.

The conclusions on both aspects however seem to point into a similar direction. In international law mostly a conflict-avoidance approach is preferred. Norms of international law will rarely be squarely in conflict with each other, requiring to give precedence to one norm over the other. It is far more common to seek a solution through interpretation of the respective norms. A distinction between peremptory norms and ordinary norms in this context is that the peremptory norms may have a stronger compliance pull and therefore may have a greater influence on specific questions of interpretation compared to interpreting norms that are of equal status.

The general conclusion of this chapter is the following:

¹⁸⁶ For an earlier detailed analysis of this, see: Merkouris (n 150) ch 2.

¹⁸⁷ *Manuel García Armas and others v Bolivarian Republic of Venezuela* (Award on Jurisdiction of 13 December 2019) PCA Case No 2016-08 [654] more generally see also [650-8].

General Conclusion 4:

It will not make much difference in practice whether or not general international climate law has obtained or will obtain the status of a peremptory norm. The generality of the due diligence norm on climate makes it difficult to formulate a clear conflict with other norms of international law that can be solved by prioritizing one over the other.

The virtually universal support for the existence of the general international climate norm, even without a peremptory status, gives it an enormous interpretative and compliance pull. This will affect the application and interpretation of other rules of international law. Efforts of States, international organizations, and non-State actors can be best focused on promoting harmonious interpretation, rather than engaging in a zero-sum game of prioritizing one norm over the other.

Claiming that climate norms have the status of peremptory norms may be contested by States and lead to a heated legal debate but with little practical impact. On the contrary, taking into account the general norm(s) of international law on climate in the interpretation and application of legal rules from all areas of international law can prove to be a much more effective and far-reaching approach.

5. CONCLUSIONS

This report has attempted to answer questions related to the status of the core norms of international climate law – the due diligence obligation related to NDCs and the duty to cooperate – as either *jus cogens* or *jus dispositivum* and the legal consequences deriving therefrom. Although these core norms form part of general international law and reflect and protect universal values, they do not currently appear to have peremptory status. Moreover, conceptually such norms are more difficult to conceive as peremptory norms, considering that they generate positive obligations and obligations of conduct. As such, ascertaining their precise content may be difficult, since the performance of such obligations varies for actors according to their circumstances and their availability of means. While it may seem attractive to be able to appeal to the (potential) peremptory status of such norms and their hierarchical superiority, the character of the obligations concerned make a finding of normative conflict unlikely except in extreme circumstances.

Of course, these and other questions relating to international climate law form the subject of requests for advisory opinions submitted to the ICJ, ITLOS and IACtHR, which may be expected to give guidance on the obligations of States and international organizations and the legal consequences in case of their breach. Both member States of the European Union and the organization itself will be in a position to submit statements containing their legal views to the ICJ (Articles 34 and 66 of the ICJ Statute) and ITLOS (Articles 138 and 133 of the Rules of the Tribunal),¹⁸⁸ and are recommended to make use of this option to promote the progressive development of international climate law. Considering recent reports of the IPCC and its findings on current trends, States and international organizations should be encouraged to do more rather than less, and on the basis of the legal findings of these judicial bodies adapt their laws and policies to better perform their obligations under international climate law and to promote its progressive development in future negotiations.

As our report has shown, promoting the peremptory status of core norms of international climate law would not have a strong practical impact on the implementation of the international climate law regime in any case. Even without such status, the international climate law regime generates a strong interpretative and compliance pull, and the presumption against normative conflict together with the principle of systemic integration should be able to ensure the harmonious interpretation of norms contained in different international law regimes. The virtually universal support for the international climate law regime should be maintained and built upon to ensure that yesterday's failures transform into tomorrow's successes.

¹⁸⁸ ITLOS, 'International Tribunal for the Law of the Sea: Rules of the Court' (25 March 2021) Doc ITLOS/8, available at: <https://www.itlos.org/fileadmin/itlos/documents/basic_texts/ITLOS_8_25.03.21.pdf> (last accessed 13 June 2023).

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ANNEX: ALL CONCLUSIONS

General Conclusion 1:

The reference in the Paris Agreement to the universally shared objective of keeping the temperature rise limited to preferably 1.5°C reflects the underlying rationale and values of the climate law regime. The references to limiting temperature rise do not literally formulate a value, but are a significant expression of the value attached to the planetary dimension of protecting civilization for present and future generations. It contributes to formulating norms of general international law, with the potential of obtaining in the future the status of peremptory norm.

Conclusion 2.1:

In the current context, a peremptory climate norm would almost by definition have to be a norm formulating positive obligations. While not *per se* unimaginable, it has to be recognized that this is a fundamental conceptual deviation from the hitherto accepted notion of what a peremptory norm entails and will be encountered with much skepticism. A due diligence obligation leaves it to the discretion of the state as to how to act and it is dependent on the availability of means. This gives low determinacy to the norm.

Conclusion 2.2:

The content of the norm relating to climate change and temperature rise requires collective, cooperative and inter-dependent action. This makes it more difficult to conceive it as a peremptory norm.

A different conceptual understanding of what a peremptory norm is would be required to resolve this issue.

Conclusion 2.3:

The global community will have to deal with formulating new rules of international law. In this context, science, not only related to climate, but also on other areas such as the environment, health, or AI, will have an important role to play, adding, thus, a new and highly relevant dimension to law in the 21st century.

If, how and to what degree scientific consensus can contribute to the emergence of a peremptory climate norm requires further consideration.

Conclusion 2.4:

The existential threat generated by climate change and temperature rise does not give the global community the luxury to wait, even less so for the potential emergence of a peremptory climate norm.

Holding one or more States responsible in 2050 or 2100 for failing to have taken adequate measures in the past will be pointless if life-sustaining natural systems have become fundamentally disrupted.

Contrary to what was suggested in the *Genocide* case, the obligation to prevent the occurrence of global warming would have to be considered as a violation of the norm even before the temperature rise has occurred.

In consequence, the duty to prevent must be part of the scope of the peremptory norm.

Conclusion 2.5:

If a peremptory climate norm were to emerge or considered to exist, determining violations of such a norm when derogations or deviations from it are deliberate and explicit would be obvious.

The situation is more difficult when a state undertakes efforts but is also in a position to do more than it is doing. Not doing enough, or claiming to not be able to do more, would not in and of itself be regarded as a derogation from the peremptory norm. It could potentially violate the due diligence obligation, but that is arguably not enough to establish a derogation from a potential peremptory norm.

Conclusion 2.6:

The acceptance of the existence of a peremptory climate norm would have as a consequence the fact that States will not be able to opt out or derogate from this norm, even if, for instance, a particular treaty would allow for withdrawal.

A peremptory norm can only be modified or replaced by a subsequent peremptory norm.

General Conclusion 2:

In theory it is possible to argue that a peremptory norm related to climate may emerge in international law. The definition used by the ILC in 2022 does allow for such an interpretation.

It will not be too difficult to argue that the purported general norm reflects universal values and is a norm of general international law accepted by the community of States as a whole. However, it will be difficult to ascertain the precise content of the general norm, given that the core obligation is formulated as a due diligence norm.

Even if this were possible, it would be difficult to establish that a peremptory norm construed as a positive obligation has been derogated from. There is a fine line between not doing enough and a refusal to recognize the existence of a duty to do your best.

Conclusion 3.1:

The Paris Agreement's ambition to limit temperature rise to preferably 1.5°C determines the content of the obligations that States have accepted. These ambitions have been reiterated in all conferences of parties since 2015. It provides the scientific basis for assessing what States collectively need to do to achieve mitigation goals. The temperature goal may not be regarded as a legal obligation in itself, but it is essential and indispensable for the determination of what is expected of States. The most important commitment all parties have accepted is the due diligence obligation on their NDCs and the procedural obligations that form the essential basis for the dynamic governance of the individual and collective cooperation with the global stocktake, that takes place every five years, as its pivotal point.

Conclusion 3.2:

The recognition of the existence of general international law on climate is relevant for the consideration of the intersection of various areas of international law. Its acceptance will help to exert constant pressure on States and other actors to ensure that the general international law on climate has an impact on other international law regimes, such as on human rights, trade and investment. It should however also be recognized that it is neither a silver bullet that solves all problems, nor that it allows climate considerations to trump competing rules of international law. It may play a role in convincing decision makers, including courts, tribunals or other compliance bodies (such as on human rights), to consider climate-law consistent interpretations and applications of the rules within their respective fields.

Conclusion 3.3:

At the international level there are not yet any judgments or other judicial decisions on the application of climate law to human rights law that break new ground. There are, however, highly relevant pending cases and requests for an advisory opinion in the ECtHR and the IACtHR.

Conclusion 3.4:

In international trade and investment law the existence of general international climate law has not yet led to shifting the balance in arbitration and quasi-judicial dispute settlement away from the predominantly trade and investment law perspective. States should be driving the process of adapting trade and investment law to the norms of general international law, including on climate. The current trade and investment dispute settlement bodies do not seem inclined to take on this role.

Conclusion 3.5:

The conclusion that the core norms of the Paris Agreement can be regarded as general international law and potentially as peremptory norms, may lead domestic courts to refuse the enforcement of arbitral awards that show a manifest disrespect for such norms as contrary to (international) public policy. There is no precedent for this in climate-related investment arbitration cases. As long as an arbitral tribunal attempts to find a balance between the international investment obligations of the state involved on the one hand, and the due diligence obligation on climate on the other, application of the (international) public policy doctrine will be possible only in extreme cases.

Conclusion 3.6:

The currently pending requests to the ICJ and ITLOS to deliver advisory opinions on climate change will certainly contribute to the further development of climate law. It will require States, and possibly international organizations and other actors, to present to the Tribunal and the Court their views on the international legal obligations on climate, in particular regarding the legal status of the due diligence obligations in light of the Paris temperature goals and whether they represent general international law or even a peremptory norm of international law. Ultimately the advisory opinions will give an authoritative judicial insight into the current state of international law on climate.

Conclusion 3.7:

The domestic climate litigation cases show inconsistent approaches in determining what is expected of States or other actors regarding the unprecedented climate challenges and general international climate law. In some instances, innovative approaches have been adopted in applying general international climate law in the context of domestic litigation. Climate change litigation may be essential to ensure the effectiveness of the legal framework of climate change.

General Conclusion 3:

The number of legally binding obligations in the Paris Agreement is limited, but the Paris Agreement as a whole in the context of the dynamic and continuous process of global cooperation, aiming at keeping climate change under control, has immense legal value. The core norms contained in it can be considered as belonging to the domain of general international law and could potentially achieve the status of peremptory norm, in particular the obligation to exercise due diligence to formulate, maintain and enhance over time ambitious domestic climate goals, as well as the duty to meaningfully cooperate at the international level in a transparent way. The universally shared ambition of the Paris Agreement to keep temperature rise limited to preferably 1.5°C, is not a legal obligation as such, but is essential for the determination of compliance with the relevant climate norms.

In climate-related litigation at the domestic, regional or international levels, there are significant indications that courts and tribunals can play a meaningful role in the future development of this area of international law, although as seen in trade and investment law, general international climate law does not easily set aside other legal obligations.

The ICJ, ITLOS and the IACtHR will have the opportunity to provide a better insight into the current state of international climate law in the pending advisory proceedings, and States and other actors should encourage the courts to contribute to the progressive development of international law, rather than seeking a restrictive view on the impact of climate law, in the interests of present and future generations and the planet as a whole.

Conclusion 4.1:

International law functions on the basis of a presumption against normative conflict. Consequently, in most situations an alleged apparent conflict between two legal rules will be resolved by harmonizing their content through interpretation.

Conclusion 4.2:

In case of conflict between an existing peremptory (climate) norm and a subsequent treaty or customary international law, the conflicting treaty as a whole is void and the customary rule is deemed to have never come into existence.

In case of conflict between a peremptory (climate) norm and a pre-existing treaty, the latter will terminate unless conflicting provisions can be separated.

In case of conflict between a peremptory (climate) norm and pre-existing customary international law, the latter ceases to exist to the extent that it conflicts with the peremptory norm.

Whether a newly established peremptory (climate) norm will conflict with existing international obligations or not, and what will be the precise consequences of such conflict (ie termination, or separability), will be something that is situationally determined.

Conclusion 4.3:

Given the fact that a potential peremptory norm on climate law would be in its core a due diligence obligation, it allows, and perhaps requires, more a harmonization of existing international law, within the limits indicated, than trying to trump one rule with another. The status as peremptory norm provides a strong pull for States to comply with it and (judicial) decision makers to give it effect and impact through interpretation in a wide range of international legal contexts, be it, for instance, investment law, human rights law, law of the sea, or trade law.

Conclusion 4.4:

If a conflict arises between a general international climate norm (not having the status of a peremptory norm) and another international legal obligation, then this normative conflict will have to be resolved on an *ad hoc* basis and through the application of one or more of the standard normative conflict-resolution techniques, such as conflict clauses, *lex specialis derogat generali*, *lex posterior derogat priori*, etc.

Conclusion 4.5:

As conflict lies at the end of the spectrum when the interpretative process has failed to find a way to harmonize different obligations, interpretation has a crucial role to play in ensuring that climate change obligations are taken into account when interpreting other instruments or rules. Article 31(3)(c) VCLT, which enshrines the principle of systemic integration, provides relevant guidance for interpreting a treaty, but (in its customary form) is also applicable in the case of interpretation of customary rules.

Application of the Article 31(3)(c) VCLT requires clarity on a number of elements: i) what counts as a rule; ii) the rule needs to be applicable; iii) the rule needs to be applicable in the relations between the parties; iv) the rule needs to be relevant; and v) it must be determined on the basis of the treaty being interpreted whether one can refer under Article 31(3)(c) to the rules that were in force at the time of the conclusion of the treaty/rule being interpreted, or to the rules that are in force at the time of the interpretation of the treaty/rule.

General Conclusion 4:

It will not make much difference in practice whether or not general international climate law has obtained or will obtain the status of a peremptory norm. The generality of the due diligence norm on climate makes it difficult to formulate a clear conflict with other norms of international law that can be solved by prioritizing one over the other.

The virtually universal support for the existence of the general international climate norm, even without a peremptory status, gives it an enormous interpretative and compliance pull. This will affect the application and interpretation of other rules of international law. Efforts of States, international organizations, and non-state actors can be best focused on promoting harmonious interpretation, rather than engaging in a zero-sum game of prioritizing one norm over the other.

Claiming that climate norms have the status of peremptory norms may be contested by States and lead to a heated legal debate but with little practical impact. On the contrary, taking into account the general norm(s) of international law on climate in the interpretation and application of legal rules from all areas of international law can prove to be a much more effective and far-reaching approach.

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, investigates the normative status of legal commitments of States in the field of international climate law. It concludes that the due diligence obligations of States to realize their nationally determined contributions (NDCs) qualifies as a norm of general international law, but at the moment not as a peremptory norm. It concludes that the legal impact of this norm currently lies in the sphere of interpretation and harmonization of existing international law rather than invalidation of conflicting rules.

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