

**The UNFCCC and Paris Agreement and the question of *lex specialis***

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**Query:**

1. Are the United Nations Framework Convention on Climate Change (“**UNFCCC**”) and the Paris Agreement ‘*lex specialis*’ (special rules) under international law?
2. Please comment on the International Tribunal for the Law of the Sea’s (“**ITLOS**”) Climate Change Advisory Opinion, paragraph 224, and on the International Court of Justice’s (“**ICJ**”) Advisory Opinion on climate change paragraphs 113–171, regarding whether the UNFCCC and the Paris Agreement are *lex specialis*?
3. What other possibilities does international law offer to give the UNFCCC and Paris Agreement special consideration?

**Advice:**

**I. SUMMARY**

4. Subject to specific consideration as between particular regimes (in particular those not addressed by ITLOS and the ICJ), the Advisory Opinions from ITLOS and the ICJ suggest that the rules contained in the UNFCCC and the Paris Agreement are unlikely to be characterised as *lex specialis* in respect of other overlapping rules of international law located in treaties or customary international law.
5. The ITLOS Climate Change Advisory Opinion confirmed that the relationship between obligations in the UNFCCC and the Paris Agreement, on the one hand, and obligations in the UNCLOS, on the other hand, was not one of *lex specialis* but rather one of harmonious interpretation.
6. Despite not constituting *lex specialis*, the UNFCCC and the Paris Agreement can be given “special consideration” in relation to other rights and obligations under international law. This is achieved by these treaties being taken into account as relevant rules of international law in the interpretation of other obligations that bear on the environment sourced in treaties and

customary international law, as envisaged through the customary rule of treaty interpretation reflected in Article 31(3)(c) of the Vienna Convention on the Law of Treaties (“VCLT”) (and the equivalent principle which is applicable to the interpretation of customary rules).

7. This note of advice proceeds in the following parts. In the following section, we address the general principles applicable to the conflict of norms or rules of international law (Section II). We then explain in more detail the theory of *lex specialis* and how it operates (Section III), taking into account situations that are similar to but distinguishable from true applications of the *lex specialis* principle. Finally, we provide answers to the questions asked (Section IV).

## II. GENERAL PRINCIPLES OF NORM TENSION AND CONFLICT

8. It is well-established that rules of international law can overlap, i.e. deal with the same general subject matter and even the same specific issues. The likelihood of overlap increases with the proliferation, diversification and specification of rules of international law arising as a matter of treaty or custom. In many instances, different rules concerning the same or overlapping subject matter can co-exist without any inconsistency arising between them. However, overlap brings with it a risk of normative conflict or tension between two or more rules of international law.
9. The UN International Law Commission (“ILC”) has articulated a set of generally accepted principles and techniques for dealing with situations of normative conflict or tension between two or more rules. The report thereby codifies rules for facilitating cohesion between different rules of international law. They include:<sup>1</sup>
  - a. Interpretation by reference to the rule reflected in Article 31(3)(c) of the VCLT – which requires the interpreter of a treaty to take into account “any relevant rules of international law applicable in the relations between the parties”, with the effect that normative tension or perceived conflicts are often capable of resolution by interpreting two rules of international law harmoniously.
  - b. *Lex specialis* – a principle that provides, in broad terms, that where two rules of international law deal with the same subject matter, priority should be given to the norm that is more specific (addressed further in Section III below).
  - c. Self-contained regimes – a group of rules concerned with a particular subject matter that may operate to prevail over general rules of international law on the same subject matter (e.g. the rules on diplomatic relations<sup>2</sup>), subject to general rules playing

<sup>1</sup> See ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, UN Doc. A/CN.3/L.682 and Add. 1, 13 April 2006 (“**ILC, Fragmentation Report**”) (available at [https://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf)).

<sup>2</sup> *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* I.C.J. Reports 1980, p. 40, para. 86 (“The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State’s obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving States to counter any such abuse”).

a gap-filling function where necessary. As the ILC noted, this is a somewhat ambiguous designation, and (at least in some forms) may be a manifestation of *lex specialis*.<sup>3</sup>

- d. *Lex posterior* – a principle grounded principally in the rule of treaty interpretation reflected in Article 30 of the VCLT, that provides that when parties to an earlier treaty conclude a later treaty on the same subject, the later treaty prevails over the earlier treaty to the extent of any inconsistency.
  - e. Hierarchical norms – (i) norms of *jus cogens* are accepted and recognised by the international community as a whole as norms from which no derogation is permitted<sup>4</sup> and as such no rules can prevail over or displace them; and (ii) Article 103 of the UN Charter provides that obligations under the UN Charter shall prevail over obligations imposed by other inconsistent treaty rules.
10. The questions asked of us concern *lex specialis* in particular, and so the following section addresses this principle in more detail.

### III. LEX SPECIALIS AND RELATED SITUATIONS

11. There is general agreement that the principle of *lex specialis* requires, in respect of two rules dealing with the same subject matter, that priority be given to the more specific rule. There are, however, differing views as to what it means to *give priority to* a specific rule over a more general one. There are three situations that are often spoken about as being instances of the application of the principle of *lex specialis*.

#### First situation: true conflict

12. The **first situation** is where there is a true conflict between two international law rules owed between the same parties such that it is impossible for the State to comply with both at the same time. For example, a general rule might prohibit doing X, but the specific rule might oblige the State to do X. In this case, the more specific rule will apply, and the more general rule will be disapplied such that it will not be capable of being breached in that particular instance.<sup>5</sup> This is sometimes referred to as the only situation of “genuine *lex specialis*”.<sup>6</sup>
13. One example of such true conflict is referred to in Article 55 of the ILC’s Articles on the Responsibility of States for Internationally Wrongful Acts (“**ARSIWA**”)<sup>7</sup>, which is titled “*Lex specialis*” and provides:

<sup>3</sup> ILC Fragmentation Report, paras. 123-124.

<sup>4</sup> VCLT, Article 53. Well-established examples include the prohibitions on aggression, slavery, genocide, torture, breaches of the basic rules of international humanitarian law and racial discrimination/apartheid.

<sup>5</sup> ILC, Fragmentation Report, para. 57 (“where two legal provisions ... are both valid and applicable, are in no express hierarchical relationship, and provide incompatible direction on how to deal with the same set of facts ... instead of the (general) rule, one should apply the (specific) exception”); Pauwelyn, *Conflict of Norms in Public International Law* (2003), p. 327.

<sup>6</sup> ILC, Fragmentation Report, para. 88 referring to the approach of the WTO.

<sup>7</sup> These represent a codification of the customary international law on State Responsibility.

‘These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.’

The commentary to Article 55 of the ILC ARSIWA specifies that:

‘For the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; *there must be some actual inconsistency between them* (emphasis added).’<sup>8</sup>

14. It is important to stress that there is a strong presumption against normative conflict in international law,<sup>9</sup> a true conflict will only emerge if the inconsistency between the two rules cannot be resolved by interpretation, i.e. if compliance with both rules at the same time is actually impossible. Where, in contrast, it is possible to interpret the two rules together in a harmonious fashion, there will be no true conflict, and the general rule will not be displaced unless one of the other situations applies (as addressed below).
15. For example, in the *Pulp Mills* case at the ICJ, Uruguay had argued that provisions of the 1975 Statute of the River Uruguay providing for compensation for pollution of the River Uruguay were “*lex specialis*” in relation to other forms of reparation in the customary international law rules on State responsibility. The ICJ held that ‘it cannot be inferred from these Articles, which specifically concern instances of pollution, that their purpose or effect is to preclude all forms of reparation other than compensation’ for breaches of the 1975 Statute.<sup>10</sup>
16. The result was that both the specific and general rules on reparations applied simultaneously. If, however, the parties in that case had intended that the specific regime would apply to the exclusion of the general regime, this would fall within the third situation which is addressed below. The ILC expressly recognised this in its commentary.<sup>11</sup>
17. A further example is what the ICJ referred to in the *Nuclear Weapons* and *Wall* Advisory Opinions in relation to the application of international human rights law (“*IHRL*”) (a relatively general regime) in situations of armed conflict, which is governed by the more specific regime of international humanitarian law (“*IHL*”). The ICJ stated:

‘the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an

<sup>8</sup> ILC, ARSIWA, with commentaries, UN DOC A/56/10, 2001 (“**ILC, ARSIWA**”) (available at [https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf)), Article 55 and commentary para. 4.

<sup>9</sup> ILC, Fragmentation Report, para. 37.

<sup>10</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, p. 103, paras. 271-272.

<sup>11</sup> ILC, ARSIWA, Article 55, commentary para. 4: “For the *lex specialis* principle to apply... there must some actual inconsistency between [the general rule and the specific rule], or else a discernible intention that one provision is to exclude the other”.

arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.’<sup>12</sup>

Accordingly, a death that occurs during armed conflict and which is lawful under IHL cannot be “arbitrary” under IHRL, and thus the two rules<sup>13</sup> are interpreted together, remain concurrently applicable, and can be complied with at the same time. This latter situation may be better thought of as an example of harmonious treaty interpretation under Article 31(3)(c),<sup>14</sup> rather than a true application of the *lex specialis* principle falling within the first situation.

#### Second situation: specific rule as exhaustive application of a general rule for particular circumstances

18. The **second situation** is where a specific rule is an exhaustive application of a general rule in particular circumstances. In such cases, the specific rule falls entirely within the scope of, and does not derogate from, the general rule. There is no conflict between the two rules, both apply concurrently, and both must be complied with. Compliance with the more specific rule will automatically result in compliance with the general rule.
19. An example might arise in relation to technical implementation rules designed to implement a general framework obligation in particular circumstances. Article 2 of the Vienna Convention for the Protection of the Ozone Layer, for example, obliges States Parties to ‘take appropriate measures [...] to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer’. That obligation is implemented through the technical obligations in the Montreal Protocol on Substances that Deplete the Ozone Layer.<sup>15</sup>
20. That compliance with (or breach of) the more specific rule will always result in compliance with (or breach of) the general rule is logical insofar as, absent the specific rule, the general rule would always require certain conduct in its application in particular circumstances. Whatever is required by the general rule in the particular circumstances, is simply spelled out in the specific rule. Hence, compliance with that specific rule is the same as complying with what the general rule requires in those particular circumstances.
21. It is important to stress that this effect — compliance with/breach of the specific rule automatically results in compliance with/breach of the general rule — arises only where the general rule does not require *more than* what is required by the specific rule to be discharged

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<sup>12</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory opinion, I.C.J. Reports 1996*, p. 240, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, pp. 177-178, para. 105.

<sup>13</sup> The two rules in question consisting of: (i) any or all of the IHL rules that determine the legality of conduct which causes death, such as the prohibitions on attacks which target or indiscriminately/disproportionately affect civilians; and (ii) the IHRL rule that it is prohibited arbitrarily to deprive someone of life.

<sup>14</sup> And the equivalent principle when interpreting custom: see generally Merkouris, *Article 31(3)(c) and the Principle of Systemic Integration* (2015), Chapter 4: “Interpretation of Customary International Law by Reference to the Customary Law Equivalent of Article 31(3)(c)”.

<sup>15</sup> See, e.g., Preamble, paras. 1-2: “*Being Parties to the Vienna Convention for the Protection of the Ozone Layer, Mindful of their obligation under that Convention to take appropriate measures to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer ... have agreed as follows...*”.

in the particular circumstance. Where it does, the situation will simply be one in which two rules fall to be interpreted harmoniously according to the ordinary rule in Article 31(1)(c) of the VCLT,<sup>16</sup> with both rules co-existing with their own free-standing validity and effect. In such cases the specific rule cannot be used to ‘read down’ the general rule to displace its broader requirements.

22. To take a very simple example: a general rule might prohibit the doing of X, Y and Z. If a specific rule prohibited the doing of X, compliance with the specific rule would not exhaustively satisfy the general rule because the State must also not do Y nor Z. In the *Southern Bluefin Tuna* case, for instance, Japan argued that the Convention on the Conservation of Southern Bluefin Tuna (“CCSBT”) exhaustively implemented and fulfilled more general UNCLOS rules relating to the conservation of marine species. The arbitral tribunal rejected that argument, noting various ways in which “UNCLOS may be viewed as extending beyond the reach of the CCSBT”.<sup>17</sup>
23. Whether a given set of circumstances falls within this second situation may to some degree turn on the manner in which those circumstances are characterised. For instance, the above-mentioned examples from the *Nuclear Weapons* and *Wall* Advisory Opinions concerning killing in IHL and IHRL (in the discussion about, though not as an illustration of, the first situation) may be characterised as an example of the second situation if one took the view that the rules governing permissible killing in IHL are an exhaustive application of the more general prohibition on arbitrary deprivation of life in IHRL in the particular context of armed conflicts.<sup>18</sup>

### Third situation: explicit displacement of a rule through a treaty

24. The **third situation** is where States conclude a treaty<sup>19</sup> with the intention of *displacing* (between them) certain general rules of international law which would otherwise be applicable in their relations (and sometimes replacing them with different or more specific rules contained in the new treaty). This can occur where States agree by treaty to displace:

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<sup>16</sup> And the equivalent principle when interpreting custom: see footnote 14. In addition to the specific rule elucidating the content and scope of the general rule, the general rule can also be used to aid in the interpretation of the specific rule: ILC, Fragmentation Report, paras. 100-102; *Amoco International Finance Corporation v. Iran*, Iran-US. C.T.R., vol. 15 1987-II, p. 222.

<sup>17</sup> *Southern Bluefin Tuna (New Zealand/Japan; Australia/Japan)*, Award on Jurisdiction and Admissibility (2000) XXIII RIAA 1 at p. 23, para. 38(c) and pp. 40-41, paras. 50-52.

<sup>18</sup> As is intimated in ILC, Fragmentation Report, para. 96 (“when it came to determine what was an ‘arbitrary deprivation of life’ under Article 6 (1) of the Covenant, this fell ‘to be determined by the applicable *lex specialis*, namely the law applicable to armed conflict’. In this respect, the two fields of law applied concurrently, or within each other”).

<sup>19</sup> It is in theory possible for States to create local custom as between themselves, but it is questionable whether such practice would be clear enough to express a specific intention to displace general rules (as opposed to creating a more specific local customary rule that is in conflict with and therefore is an exception to the general rule, i.e. the first situation identified above). On a specific local practice prevailing over any general rules see *Case concerning the Right of Passage over Indian Territory (Portugal v. India) (Merits)* I.C.J. Reports 1960 p. 44 (“such a particular practice must prevail over any general rules”).

- a. obligations that exist in other multilateral treaties to which they are party (subject to certain limitations);<sup>20</sup> or
  - b. obligations that exist in customary international law,<sup>21</sup> provided they are not norms of *jus cogens* (as mentioned in paragraph 5.5 above) or obligations *erga omnes*, that are obligations with a subject matter of importance to the international community as a whole.<sup>22</sup>
25. In situations of this kind, the displaced obligation is excluded from being applied between the parties agreeing to such displacement, and thus is no longer capable of being breached. In this respect, this third situation is similar to the first situation identified above, because in both situations the general rule is disapplied. The distinction between the two situations turns on *what causes the displacement of the general rule*. In the first situation, it is the existence of the rule conflict (i.e. the impossibility of a State complying with both rules) and the principle of *lex specialis* itself that tells us that the more specific rule will displace the general rule. In the third situation, the general rule is disapplied as a result of the States' intention and their consent to that disapplication through the creation of a new treaty.
26. That displacement is *not dependent on there being a true conflict* between the general and specific rule (though there may be). In other words, unlike in the first situation, in the third situation it may be *possible* to comply with both the general and the specific rules, but the States in question have agreed that as between themselves they are obliged to comply only with the specific rule and not the general one.
27. Sometimes this third situation is described as being an application of the principle of *lex specialis*, i.e. the new specific treaty rule is *lex specialis* to the general rule that it is displacing.<sup>23</sup> In our view, however, because the operative force of the displacement is the States' intent, not the existence of a conflicting specific rule, this situation is better conceptualised as a distinct situation of States 'contracting out' of obligations (agreeing by contract / treaty that certain obligations do not apply), rather than as an application of the *lex specialis* principle.

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<sup>20</sup> See VCLT, Article 41(1): "Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if: (a) the possibility of such a modification is provided for by the treaty; or (b) the modification in question is not prohibited by the treaty and: (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole."

<sup>21</sup> *North Sea Continental Shelf cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* I.C.J. Reports 1969, p. 42, para. 72 ("it is well understood that, in practice, rules of [customary] international law can, by agreement, be derogated from in particular cases or as between particular parties").

<sup>22</sup> An exception may be where all States to whom the *erga omnes* obligation is owed are also parties to the treaty displacing the *erga omnes* obligation.

<sup>23</sup> E.g. *Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Judgment)* I.C.J. Reports 1982 p. 38, para. 24 ("it would no doubt have been possible for the Parties to identify in the Special Agreement certain specific developments in the law of the sea [...], and to have declared that in their bilateral relations in the particular case such rules should be binding as *lex specialis*"). See also ILC, Fragmentation Report, paras. 78-82. As stated above, the ILC has taken the view in relation to the ARSIWA that the *lex specialis* may apply where there is "a discernible intention that one provision is to exclude the other": ILC, ARSIWA, Article 55, commentary para. 4.

28. Any such 'contracting out' needs to be expressed in clear terms.<sup>24</sup> Where, for example, a treaty addresses the same subject matter but remains silent on an issue on which there is a customary rule, the customary rule will not be displaced. In the *Certain Activities / Construction of a Road* cases before the ICJ, for example, Nicaragua argued that the customary obligation to notify and consult under general international law was displaced by a treaty concluded in 1858 (which it asserted constituted "*lex specialis*" with respect to procedural obligations) that did not require a duty to notify or consult with respect to dredging or works of improvement. The ICJ stated: "the fact that the 1858 Treaty may contain limited obligations concerning notification or consultation in specific situations does not exclude any other procedural obligations with regard to transboundary harm which may exist in treaty or customary international law".<sup>25</sup>
29. Similarly in the *Pulp Mills* case, as noted above, the ICJ held that treaty provisions requiring compensation to be paid for specific instances of pollution could not be interpreted as excluding all other forms of reparations under the customary rules on State responsibility.<sup>26</sup>
30. By way of summary, a decision-maker's approach to applying the *lex specialis* principle when considering two rules, in light of the different situations canvassed above, may follow these steps:
- a. **First**, assess whether there has been any express 'contracting out' of one of the rules, such that only one is left as the applicable rule in the relations between the relevant States (i.e. the third situation canvassed above).
  - b. If not, **second**, bearing in mind the need to interpret the two rules as harmoniously as possible, determine whether there is a true conflict between the two rules applicable between the same parties such that both cannot be complied with at the same time. If so, then apply the more specific rule and disapply the general rule (i.e. the first situation canvassed above).
  - c. If not, and it is possible to comply with both rules at the same time, **third**, ascertain whether it is the case that the more specific rule is an exhaustive application of the general rule in particular circumstances. If so, then apply the specific rule, and it will be determinative of compliance with the general rule as well (i.e. the second situation canvassed above).

<sup>24</sup> *Eletronica Sicula S.P.A. (ELSI)*, Judgment, I.C.J. Reports 1989, p. 42, para. 50 ("the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so").

<sup>25</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015, p. 708, paras. 107-108.

<sup>26</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 103, paras. 271-272.

- d. If none of the above apply, then, **fourth**, both rules must be separately complied with (i.e. it is not a *lex specialis* situation). Each rule may inform the interpretation of the content and scope of the other.<sup>27</sup>

#### IV. ANSWERS TO THE QUERIES

##### **Q1: Are the UNFCCC and the Paris Agreement 'lex specialis'?**

31. We understand the first question to be asking whether the UNFCCC and the Paris Agreement are *lex specialis* to any other rules of international law, whether sourced in (i) other treaties, such as the UNCLOS, human rights treaties and area or issue-specific environmental treaties; or (ii) customary international law.
32. Any assessment of *lex specialis* should ideally take place at the level of the individual rules, rather than treaties as a whole or subject matter regimes. Only then can it be determined, for example, whether two different rules can simultaneously be complied with and/or if States adhering to one of the rules have 'contracted out' of the other rule. Nonetheless, the four analytical steps set out at the end of the preceding Section of this note provide a useful guide and are followed here.
33. **First**, there is no evidence that States Parties to the UNFCCC and the Paris Agreement intended to 'contract out' of — i.e. displace or disapply — other specific rules sourced in treaties or custom (i.e. the third situation considered in Section III).
34. There is no express statement in either of the UNFCCC or the Paris Agreement to this effect.
35. To the contrary, the preamble to the UNFCCC expressly recalls, *inter alia*, the customary obligation "to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".<sup>28</sup> The preamble to the Paris Agreement acknowledges the need for States, "when taking action to address climate change, to respect, promote and consider their respective obligations on human rights".<sup>29</sup> This suggests an intention that the rules in the climate treaties co-exist with, rather than displace, other rules of international law.
36. A number of States made declarations when acceding to the UNFCCC and/or the Paris Agreement that "no provisions in the [Convention / Paris Agreement] can be interpreted as derogating from the principles of general international law".<sup>30</sup>

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<sup>27</sup> See, e.g., *South China Sea Arbitration (Philippines v. China)*, PCA Case No. 2013-19, Award, 12 July 2016, para. 941 ("The corpus of international law relating to the environment ... informs the content of the general obligation in Article 192" of UNCLOS).

<sup>28</sup> UNFCCC, preambular para. 8. The Stockholm Declaration is also recalled at preambular para. 7, which included in Principle 21 the same obligation to prevent damage to the environment. Preambular para. 13 recalled the Vienna Convention for the Protection of the Ozone Layer 1985 and the Montreal Protocol on Substances that Deplete the Ozone Layer 1987.

<sup>29</sup> Paris Agreement, preambular para. 11.

<sup>30</sup> UNFCCC, Declarations by Parties (available [here](#)), declarations of Fiji, Kiribati, Nauru, Papua New Guinea and Tuvalu (which declarations also confirmed expressly the continuing application of the customary rules on State responsibility); Paris Agreement, Declarations by Parties (available [here](#)), declarations of

37. **Second** (and subject to the caveat that this advice has not undertaken a rule-by-rule comparison of the UNFCCC and the Paris Agreement with all existing treaty and customary rules), there does not appear to be a true conflict, or unavoidable incompatibility, between the obligations in the UNFCCC and the Paris Agreement and other overlapping rules of international law (i.e. the first situation considered in Section III). States can comply with their obligations under the UNFCCC and the Paris Agreement, as well as their separate international law obligations relating to, for example, the protection of the marine environment under the UNCLOS, the protection of human rights such as the right to health, and area- or issue-specific environmental protection. These rules have compatible aims of protecting the environment and human rights connected to it. There is therefore no unavoidable conflict which would mean that, applying the principle of *lex specialis*, any rules of international law external to the UNFCCC and the Paris Agreement would be displaced by those agreements.
38. The resulting position is that the UNFCCC and the Paris Agreement *must apply concurrently* with other overlapping rules sourced in treaty or custom.
39. The **third** question is whether the particular obligations in the UNFCCC and the Paris Agreement are exhaustively determinative of what more general rules sourced in treaty or custom require. In other words, does compliance with the UNFCCC and/or Paris Agreement obligations automatically fulfil other more general obligations (the second situation considered in Section III)? While this depends on an examination of the rules / obligations in question, the authors are aware of no such situation in which a particular obligation in the UNFCCC or the Paris Agreement would automatically discharge a broader obligation. Some examples are illustrative:
40. In the ITLOS Climate Change Advisory Opinion, the Tribunal considered an argument that the obligation in Article 194(1) of the UNCLOS to take measures to prevent, reduce and control pollution of the marine environment “would be satisfied simply by complying with the obligations and commitments under the Paris Agreement”.<sup>31</sup> The Tribunal rejected this argument, noting that the obligation in Article 194(1) included, but was not limited to, measures to reduce emissions:

‘The Convention [i.e. UNCLOS] and the Paris Agreement are separate agreements, with separate sets of obligations. While the Paris Agreement complements the Convention in relation to the obligation to regulate marine pollution from anthropogenic GHG [i.e. greenhouse gas] emissions, the former does not supersede the latter. Article 194, paragraph 1, imposes upon States a legal obligation to take all necessary measures to prevent, reduce and control marine pollution from anthropogenic GHG emissions, *including* measures to reduce such emissions. If a State fails to comply with this obligation, international responsibility would be engaged for that State.’<sup>32</sup>

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the Cook Islands, the Federated States of Micronesia, the Marshall Islands, Nauru, Niue, the Philippines, the Solomon Islands, Tuvalu and Vanuatu. Similar statements were made by the Cook Islands, Kiribati, Nauru and Niue upon signing up to the Kyoto Protocol. See, Kyoto Protocol: Status of Ratifications, pp. 8-10 (available [here](#)).

<sup>31</sup> Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion, ITLOS, 21 May 2024 (“**ITLOS Climate Change Advisory Opinion**”), para. 223.

<sup>32</sup> ITLOS Climate Change Advisory Opinion, para. 223 (emphasis added).

41. This can also be illustrated by comparing the core obligations in the Paris Agreement and the customary obligation to prevent significant harm to the environment of other States and areas beyond national jurisdiction.<sup>33</sup> The Paris Agreement sets a temperature goal (“well below 2°C above pre-industrial levels”, with “efforts to limit the temperature to increase to 1.5°C above pre-industrial levels”<sup>34</sup>) and, under Article 4, obliges States to “prepare, communicate and maintain successive nationally determined contributions” (“**NDCs**”) to reduce greenhouse gas emissions with a view to achieving the temperature goal.<sup>35</sup> That procedural obligation — to prepare, communicate and maintain what is essentially a national climate action plan — plainly would not satisfy the entirety of the customary obligation of a State to use “all means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State”.<sup>36</sup> The customary obligation requires *more* of States in order to comply with it than what is required to comply with the obligations in Article 4 of the Paris Agreement. Indeed, even if Article 4 were interpreted as including a substantive obligation to *meet* the stipulated NDCs, in the authors’ view there is no sound basis to conclude that complying with this obligation would necessarily be sufficient to discharge a State’s obligation under customary international law to exercise due diligence to prevent activities on its territory from causing transboundary harm.<sup>37</sup>
42. This is similarly the situation with a State’s obligations under regional and international human rights treaties to uphold human rights in the context of climate change. Simply preparing, communicating and maintaining what is essentially a national climate action plan in compliance with Article 4 of the Paris Agreement would obviously not discharge States’ obligations to ensure (for example) the right to life, physical integrity and health, within their territory or to persons subject to their jurisdiction. Again, the human rights obligations require *more than* compliance to the Article 4 obligation in the Paris Agreement.<sup>38</sup>
43. This leaves the **fourth** and final stage of the analysis, which is that the specific rules in the UNFCCC and the Paris Agreement apply concurrently with other overlapping rules sourced in treaty and custom, each of which must be properly interpreted to identify its content and scope of application, and each of which must be complied with. This is not a situation of *lex specialis*, but rather a situation where two or more rules may be interpreted by reference to one another, as relevant.
44. There are many examples of situations where two overlapping rules have applied concurrently, without one displacing the other or fully discharging obligations under the

<sup>33</sup> On the customary status and content of the rule, see: *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, pp. 241-242, para. 29; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, pp. 55-56, para. 101; *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, ICJ Reports 2015, pp. 711-712, para. 118.

<sup>34</sup> Paris Agreement, Article 2(1)(a).

<sup>35</sup> Paris Agreement, Article 4(2).

<sup>36</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, pp. 55-56, para. 101.

<sup>37</sup> ICJ Climate Change Advisory Opinion, paras. 270; 281-300.

<sup>38</sup> Human Rights Committee, General Comment No 36 on Article 6: Right to Life para 62: “*The obligations of States parties under international environmental law should thus inform the content 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.*”

other, including where one rule is more specific than the other. In addition to those cases already discussed in this note, in the *Nicaragua* case, the ICJ recognised the well-established position that treaties and customs with the same content continue to apply concurrently.<sup>39</sup> In the *Iron Rhine* arbitration, the arbitral tribunal recognised the principle that “where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm”, and stated that “[t]his principle applies not only in autonomous activities but also in the activities undertaken in implementation of specific treaties between the Parties”.<sup>40</sup>

45. When interpreting the two rules, the general rule may be relevant to the interpretation of the specific rule (or *vice versa*).<sup>41</sup> This approach has been accepted by multiple authoritative international courts and tribunals. For example:

46. In the *South China Sea* arbitration, the Permanent Court of Arbitration held that “[t]he corpus of international law relating to the environment [...] informs the content of the general obligation in Article 192” of the UNCLOS.<sup>42</sup>

47. The ITLOS stated in the Climate Change Advisory Opinion:

‘In the view of the Tribunal, the UNFCCC and the Paris Agreement, as the primary legal instruments addressing the global problem of climate change, are relevant in interpreting and applying the Convention with respect to marine pollution from anthropogenic GHG emissions. In particular, the temperature goal and the timeline for emission pathways set out in the Paris Agreement inform the content of necessary measures to be taken under article 194, paragraph 1, of the Convention.’<sup>43</sup>

48. Similarly, in *Verein Klimaseniorinnen Schweiz and others v. Switzerland*, the ECtHR stated:

‘The interpretation and application of the rights provided for under the Convention can and must be influenced both by factual issues and developments affecting the enjoyment of the rights in question *and also by relevant legal instruments designed to address such issues by the international community*. The Court has consistently held that the Convention should be interpreted, as far as possible, *in harmony with other rules of international law*. [...] Moreover, a failure by the Court to maintain a

<sup>39</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, ICJ Reports 1984*, pp. 424-425, para. 73 (“The fact that the abovementioned principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions. Principles [...] continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated”).

<sup>40</sup> *Arbitration regarding the Iron Rhine (“Ijzeren Rijn”) Railway (Belgium/Netherlands)*, Award (2005) XXVII RIAA 35 at p. 67, para. 59.

<sup>41</sup> See ILC, Fragmentation Report, paras. 100-102; *Amoco International Finance Corporation v. Iran*, Iran-US. C.T.R., vol. 15 1987-II, p. 222.

<sup>42</sup> *South China Sea Arbitration (Philippines v. China)*, PCA Case No. 2013-19, Award, 12 July 2016, para. 941.

<sup>43</sup> ITLOS Climate Change Advisory Opinion, para. 222.

dynamic and evolutive approach would risk rendering it a bar to reform or improvement. [...]

The Court cannot ignore the pressing scientific evidence and the growing international consensus regarding the critical effects of climate change on the enjoyment of human rights. [...] This consideration relates, in particular, to the consensus *flowing from the international-law mechanisms to which the member States voluntarily acceded and the related requirements and commitments which they undertook to respect ..., such as those under the Paris Agreement. The Court must bear these considerations in mind when conducting its assessment under the Convention*'.<sup>44</sup>

49. A more pertinent question, however, is whether a specific rule, such as those in the UNFCCC and the Paris Agreement, can be used to interpret the general rule in a way that *modifies or limits the latter's scope or 'reads it down'* to require only conduct that is required by the more specific obligation.
50. In order to *change* the scope of the general rule in this way, the specific rule would have to derogate from or displace it in part. But in this fourth step of the reasoning, the situation is not one of *lex specialis* and thus there is no basis on which a more specific rule could be taken as displacing or derogating from part of the content of the general rule.<sup>45</sup> The ITLOS Climate Change Advisory Opinion confirms this approach in respect of the UNCLOS by rejecting any such 'reading down' approach. The Tribunal said at paragraph 224:

'The Tribunal also does not consider that the Paris Agreement modifies or limits the obligation under the Convention. In the Tribunal's view, the Paris Agreement is not *lex specialis* to the Convention and thus, in the present context, *lex specialis derogat legi generali* has no place in the interpretation of the Convention. Furthermore, as stated above, the protection and preservation of the marine environment is one of the goals to be achieved by the Convention. Even if the Paris Agreement had an element of *lex specialis* to the Convention, it nonetheless should be applied in such a way as not to frustrate the very goal of the Convention.'<sup>46</sup>

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<sup>44</sup> *Verein Klimaseniorinnen Schweiz and others v. Switzerland*, App. No. 53600/20, Grand Chamber, 9 April 2024, paras. 455-456 (internal citations omitted) (emphasis added). Other examples include the taking into account of environmental principles to interpret WTO obligations: see, e.g., WTO, *United States-Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body* (12 October 1998), paras. 168-171.

<sup>45</sup> To attempt to do so would essentially manufacture, through an exercise of interpretation, the situation considered above where the specific rule is exhaustive of what is required by the general rule in the particular circumstances (under 'third' in this Section IV, and the second situation considered under Section III).

<sup>46</sup> ITLOS Climate Change Advisory Opinion, para. 224. The last sentence provides a limit to any hypothetical derogation that might occur under the second situation considered under Section III.

**Q2: Please comment on the ITLOS Climate Change Advisory Opinion, paragraph 224 (above) and of the ICJ Climate Change Advisory Opinion paragraphs 113-171 regarding whether the UNFCCC and the Paris Agreement are *lex specialis*.**

51. As follows from the answer provided to the first question, paragraph 224 of the ITLOS Climate Change Advisory Opinion confirms that the relationship between the obligations under the UNCLOS and those under the UNFCCC and the Paris Agreement article 194(1)<sup>47</sup> is not one of *lex specialis*, notwithstanding that the UNFCCC and the Paris Agreement rules might be more specific than rules under the UNCLOS that have a bearing on climate change. Rather, the two regimes provide different obligations that are to be interpreted in light of one another without the more specific rule having any displacing or derogating effect on the more general rule.
52. The ICJ also considered the question of *lex specialis* in the advisory opinion it issued on the 25<sup>th</sup> of July 2025 relating to states' obligations with respect to climate change.<sup>48</sup> The ICJ reiterates that *lex specialis* is an interpretation maxim that concerns cases in which several legal norms might be applicable to the same situation. *Lex specialis* is to determine which of the norms prevails, if they are incompatible or inconsistent, or whether they can coexist.<sup>49</sup>
53. The ICJ finds no inconsistency between provisions of the UNFCCC, Kyoto Protocol or Paris Agreement and other rules and principles of international law. The ICJ also reiterates that the preamble of the UNFCCC and Paris Agreement make references to other rules and principles, which shows that states parties to them acknowledge that mitigating climate change requires the application of many rules, including those outside of the climate change treaties.<sup>50</sup>
54. The ICJ also does not find any intent of parties to the UNFCCC and Paris Agreement to displace other applicable rules or principles, nor to exclude the application of customary international law and treaty law. It does so by looking at the object and purpose of those treaties and by highlighting the lack of provision expressing the intention to displace or exclude other rules and principles.<sup>51</sup>
55. The ICJ therefore considers *lex specialis* not to be applicable and thus not to lead to the exclusion of other rules of international law by the climate change treaties.<sup>52</sup> The ICJ found no inconsistencies between rules found in the climate change treaties and other applicable rules of international law. Besides the climate change treaties, the ICJ found that the most directly relevant applicable law includes the Charter of the UN, the UNCLOS, the ozone layer treaties, the biodiversity Convention, the Desertification Convention, the customary duty to prevent significant harm to the environment and the duty to co-operate for the protection of the environment, and international human rights law, as well as certain guiding principles for the interpretation of various applicable rules and principles (sustainable development, common

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<sup>47</sup> It is recognised that the Tribunal considered only Article 194(1) of UNCLOS, and then came to a general conclusion on the relationship between, seemingly, *all* the obligations in the UNFCCC and the Paris Agreement, and *all* the obligations in UNCLOS. That said, the authors are not aware of arguments pertaining to specific obligations in any of these treaties that would lead to a different outcome.

<sup>48</sup> ICJ AO paras. 162-171.

<sup>49</sup> *ibid* para. 166.

<sup>50</sup> *ibid* para. 168.

<sup>51</sup> *ibid* paras. 169-170.

<sup>52</sup> *ibid* para. 171.

but differentiated responsibilities and respective capabilities, equity, intergenerational equity, and the precautionary approach or principle).<sup>53</sup>

56. The ICJ also acknowledged the ITLOS advisory opinion and cites it throughout its opinion.<sup>54</sup> The ICJ also considers the obligations of States under the law of the sea and related issues, reiterating that the UNCLOS, the climate change treaties and other relevant treaties, in addition to customary international law, all inform each other.<sup>55</sup>

**Q3: What other possibilities does international law offer to give the UNFCCC and Paris Agreement special consideration?**

57. The key way in which the UNFCCC and the Paris Agreement are given “special consideration” is through being taken into account as relevant rules of international law in the interpretation of other rules of international law,<sup>56</sup> as envisaged in Article 31(3)(c) of the VCLT and its customary equivalent applicable to the interpretation of customary rules.<sup>57</sup> This interpretative technique of **systemic integration** plays an important role in ensuring coherence between different rules and regimes of international law that concern overlapping subject matter. Examples of such use of specific rules in this way to interpret more general rules in other treaties or customary international law were given in paragraphs (47 and 5545 above.
58. This rule of treaty interpretation found Article 31(3)(c) of the VCLT, which is the interpretative mechanism by which certain rules of international law can be taken into account in the interpretation of other rules, requires that the rules to be taken into account are “relevant rules of international law *applicable in the relations between the parties*”.<sup>58</sup> The traditional interpretation of this clause is that a treaty rule can be used to interpret another treaty rule only where *all the parties* to the second treaty are also parties to the first.
59. One issue that might arise in this context and which has not already been considered above in this advice is what happens if there are States which are parties to a particular treaty<sup>59</sup> (such as the International Covenant on Civil and Political Rights (“**ICCPR**”) but not parties to the UNFCCC and the Paris Agreement. In that case, the question may arise as to whether the specific rules in the UNFCCC and the Paris Agreement can be used to interpret provisions of the ICCPR (or other treaty).<sup>60</sup>

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<sup>53</sup> *ibid* para. 172.

<sup>54</sup> *ibid* paras. 140, 302, 304 on the customary international law obligation to cooperate; para. 252 on due diligence of private persons or entities; para. 291 on the capabilities of states.

<sup>55</sup> *ibid* para. 354.

<sup>56</sup> This is sometimes referred to as the “normative environment” against which rules fall to be interpreted: ILC, Fragmentation Report, para. 423; Fiera-Tinta, “The master key to international law: systemic integration in climate change cases” (2024) 13(1) Cambridge International Law Journal 20, p. 32.

<sup>57</sup> See ft 14.

<sup>58</sup> VCLT, Article 31(3)(c) (emphasis added).

<sup>59</sup> This issue does not arise in respect of the interpretation of customary rules, as custom binds all States (except for persistent objectors) and so will necessarily be co-extensive with the parties to the UNFCCC and the Paris Agreement. For completeness, the authors know of no persistent objectors to the most relevant customary international law obligations, such as the obligation of prevention and human rights obligations.

<sup>60</sup> See ft 38.

60. This question arose in the *Torres Strait Islander* case before the UN Human Rights Committee.<sup>61</sup> The authors of the communication argued that Australia's obligations under the Paris Agreement were relevant to interpreting its obligations under the ICCPR in respect of a complaint that Australia had failed to undertake sufficient climate change mitigation and adaptation measures to protect the authors' rights to life, to home, private and family life, and to maintain their culture as a minority.
61. Australia, in contrast, pointed to the fact that there were 16 States Parties to the ICCPR that were not party to the Paris Agreement, and thus disputed that any Paris Agreement obligations could be taken into account in interpreting the ICCPR.<sup>62</sup>
62. While the UN Human Rights Committee did not address the issue directly in examining the merits,<sup>63</sup> it interpreted the Paris Agreement "in the context of [its] **normative environment** (emphasis added)"<sup>64</sup> by taking into account the factual existence of climate change and consequent environmental degradation as relevant in interpreting the content of Australia's obligations under Articles 6, 17 and 27 of the ICCPR, finding a breach of the latter two articles.
63. The approach taken by the ICJ, IACtHR Advisory Opinions on climate change and the ECtHR, addressed at paragraphs (54-4745 above, suggests that both bodies found States' obligations in the Paris Agreement to be relevant to the interpretation of their obligations under the UNCLOS and under the European Convention on Human Rights, despite the fact that both have different treaty parties to the UNFCCC and the Paris Agreement.
64. A justification that reconciles this approach with the language of Article 31(3)(c) may be found in the recent work of the ILC on subsequent practice, which observes that the words "the parties" in at least Article 31(3)(b)<sup>65</sup> can mean "the parties as a whole" in a more general sense, comprising positive practice by some States and silence by others. This may suggest that the words "applicable in the relations between the parties" in Article 31(3)(c) are sufficiently flexible to cover situations where the rule to be taken into account is formally applicable between the parties — because the same States are parties to both relevant treaties — and also where States have otherwise signalled their acceptance (or not signalled their disapproval) of the rule in question. However, this is a somewhat speculative rationale for the approach taken by ITLOS and the ECtHR. It may instead be that these bodies have considered that, when it comes to multilateral treaties with a large number of States parties, it is not essential that every party to the treaty being interpreted must also be a party to the treaty which is being used as an interpretive aid pursuant to Article 31(3)(c).<sup>66</sup>

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<sup>61</sup> *Daniel Billy and others v. Australia*, Human Rights Committee, Communication No. 3624/2019, 18 September 2023, UN Doc. CCPR/C/135/D/3624/2019.

<sup>62</sup> *ibid*, para. 4.1.

<sup>63</sup> The UN Human Rights Committee did address it in finding that arguments about the interpretation of the ICCPR by reference to the Paris Agreement was a matter going to the merits, rather than admissibility: *ibid*, para. 7.5.

<sup>64</sup> *ibid*, para. 5.6.

<sup>65</sup> VCLT, Article 31(3)(b): "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".

<sup>66</sup> Uncertainty as to the requirement for complete identity of parties is addressed in Gardiner, *Treaty Interpretation* (2015), pp. 311-314.

65. As a final note, we observe that our views on the UNFCCC and the Paris Agreement not being *lex specialis* does not undermine the importance of those agreements as a source of binding obligations for States. The view we have expressed above is simply that these treaties do not serve to derogate from, displace or exhaust any other rules of international law, such that, *in addition to* complying with the UNFCCC and the Paris Agreement, States are also required to comply with other international law obligations to their full extent.
66. Pursuant to our analysis in this section of this note, the UNFCCC and the Paris Agreement may well provide important guidance as to the scope of such other obligations. Namely by relying on the assessment reports of the IPCC as best available science, and by underscoring the temperature goal of 1.5°C in its reasoning, the ICJ provides elements of the obligation to prevent significant harm to the environment. These elements include (a) the environmental harm to be prevented and (b) due diligence as the required standard of conduct.<sup>67</sup>
67. As regards to the risk of significant harm, the ICJ identifies it by relying on the assessment reports of the IPCC, which amount to the best available science.<sup>68</sup>
68. As to the required standard of conduct, the Court lists elements that are particularly relevant when determining what due diligence requires from states in these circumstances. These elements include: appropriate measures; scientific and technological information; relevant international rules and standards; different capabilities; precautionary approach or principle and respective measures; risk assessment and environmental impact assessment; and notification and consultation.<sup>69</sup>
69. Here again, concerning scientific and technological information, the ICJ reaffirms the status of the IPCC reports as comprehensive and authoritative restatements of the best available science. This scientific evidence is an important factor in determining the standard of due diligence, the ICJ notes that generally recognised evidence causes the standard of due diligence to be more demanding.<sup>70</sup>
70. The elements outlined by the ICJ to determine the standard of due diligence may be used in the definition of harm under other regimes, should similar questions arise thereunder. In light of this, the interpretation of other regimes, for instance, investment and trade agreements, must be informed by the due diligence obligations states as underlined by the ICJ. This was stressed by Judge Cleveland, in her separate declaration to the advisory opinion, stated that '[...] the interpretation of investment instruments must be informed by States' obligations in respect of climate change under international law, including the stringent due diligence standard to which States are bound in implementing such obligations.'<sup>71</sup>
71. As such, the stringent standard of due diligence for the prevention of significant harm to the climate system confirmed by the ICJ sets a precedent for the definition of harm in the context of climate change, which may have repercussions in other regimes.

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<sup>67</sup> ICJ AO, para. 273.

<sup>68</sup> *ibid* para. 278.

<sup>69</sup> *ibid* paras. 281-99.

<sup>70</sup> *ibid* para. 275.

<sup>71</sup> Declaration of Judge Cleveland para. 22.