

The master key to international law: systemic integration in climate change cases

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This article is the first scholarly examination of the function of systemic integration in the climate change context. The article assesses the role that the notion of ‘systemic integration’ is playing in making climate change justiciable internationally, and traces the path along which it brought the principle to become a key notion in climate litigation. It explores the fundamental question of how pre-existing legal norms (to the Paris Agreement) have been used to address questions about climate change. Systemic integration is a principle of treaty interpretation enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which requires consideration of other rules of international law in the course of interpreting a treaty. Often operating ‘as an unarticulated major premise in the construction of treaties’, its function is nevertheless ‘analogous to that of a master-key in a large building’ (McLachlan 2005). The underlying premise is that international law is, in essence, a system. This article looks into how the principle is currently operating in practice in climate litigation and, in doing so, it draws some reflections on the wider significance of the principle for international law more generally. The article explores the systemic integration arguments considered in the Torres Strait Islanders case, the first international case on climate change to be adjudicated on its merits, which set in motion a wave of international climate cases, and considers the function of systemic integration in the pending advisory opinions before international courts.

Keywords: *treaty interpretation, climate change, Paris Agreement, fragmentation, systemic integration*

1 INTRODUCTION

The Paris Agreement,¹ as adopted by 196 Parties at the UN Climate Change Conference (COP21) in Paris, on 12 December 2015, did not include an enforcement mechanism, albeit it set out key primary obligations of States in respect of the climate.² By the

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1. Paris Agreement to the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) TIAS No 16-1104: Adopted by 196 States Parties at the UN Climate Change Conference (COP21) in Paris, France, on 12 December 2015. It entered into force on 4 November 2016.

2. Monica Feria-Tinta, ‘The Role of International Law and Arbitration in Enforcing the Paris Agreement’ (Kluwer Arbitration Blog, 31 December 2016) <<https://arbitrationblog.kluwerarbitration.com/2016/12/31/the-role-of-international-law-and-arbitration-in-enforcing-the-paris-agreement/>> accessed 22 December 2023.

time the Paris Agreement entered into force, the impact of climate change on the planet was rapidly increasing. Sinking islands became part of a dystopian reality currently faced by a world increasingly affected by climate breakdown with ‘many islands ... slowly but surely being submerged’.³ A 2016 study found that five of the Solomon Islands had been lost since the mid twentieth century.⁴ Evidence of uncommonly rapid sea-level rise in Micronesia in the Northwest Pacific Ocean was observed by scientists.⁵ For low-lying and small island developing States, the threat of climate change became ‘existential in nature, and in the case of small island developing States, it concern[ed] their very survival’.⁶ Yet, by 2017, the idea that climate degradation (and its effects on human rights) could be made justiciable appeared distant or unlikely.⁷ There was nothing in the literature in international law that considered it possible to seek remedies for climate change harms through human rights (or other treaties)⁸ negotiated and adopted prior to the Paris Agreement before international courts of limited jurisdiction.

This article assesses the role that the notion of ‘systemic integration’ is playing in making climate change justiciable internationally and traces the path along which it brought the principle to become a key notion in climate litigation.

Martti Koskenniemi’s approach in the *Gentle Civilizer of Nations*⁹ (interested in how the ‘legal conscience of the civilised world’, international legal thought, developed in a historical context, in which international lawyers ‘live and work’) has somehow inspired me to delve into the history of how the notion of ‘systemic integration’ in the context of climate degradation was brought before international courts and to reveal the way international law thinking in its purest form, and reflected in the International Law Commission’s (ILC) Study on Fragmentation,¹⁰ came to be utilised in climate litigation.

3. Lyn Mettler, ‘13 Islands that Will Disappear in the Next 80 Years’ (Readers Digest, 14 June 2022, updated 16 December 2022) <<https://www.rd.com/list/islands-will-disappear-80-years/>> accessed 24 February 2024.

4. Alice Klein, ‘Eight Low Lying Pacific Islands Swallowed by Rising Seas’ (NewScientist, Queensland, 7 September 2017) <<https://www.newscientist.com/article/2146594-eight-low-lying-pacific-islands-swallowed-whole-by-rising-seas/>> accessed 24 February 2024.

5. Patrick D Nunn, Augustine Kohler and Roselyn Kumar, ‘Identifying and Assessing Evidence for Recent Shoreline Change Attributable to Uncommonly Rapid Sea-Level Rise in Pohnpei, Federate States of Micronesia, Northwest Pacific Ocean’ (2017) 21 *Journal of Coastal Conservation* 719.

6. *Ibid.*

7. See Monica Feria-Tinta’s criticisms of such a position in a 2018 presentation at a conference organised by BIICL and Institute of Small and Micro States on 6–7 September 2018. For the recorded proceedings of the presentation, see <https://www.youtube.com/watch?v=PJ4vzeuyKro&list=PL-M5JGQDtWUy9MBAvBm8_-D2tpgAZEbUw&index=4> accessed on 16 February 2018.

8. With the exception of a lucid analysis by the late Alan Boyle in relation to the United Nations Convention on the Law of the Sea (UNCLOS) presented in 2018: Alan Boyle, ‘Addressing Climate Change Impacts Through UNCLOS Part XV Dispute Settlement Mechanisms’ (2018) <<https://cil.nus.edu.sg/wp-content/uploads/2018/03/Panel-7-Session-1-Alan-Boyle.pdf>> accessed 1 February 2024.

9. Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (CUP, Cambridge 2001).

10. ILC, ‘Fragmentation of International Law: Difficulties Arising from the Diversification Expansion of International Law, Report on the Study Group of the International Law Commission (Finalised by Martti Koskenniemi)’ (13 April 2006) UN Doc A/CN.4/L.682 <https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf> accessed on 24 February 2024.

Systemic integration is a principle of treaty interpretation enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), which requires consideration of other rules of international law in the course of interpreting a treaty. Often operating ‘as an unarticulated major premise in the construction of treaties’,¹¹ its function is nevertheless ‘analogous to that of a master-key in a large building’.¹² The underlying premise is that international law is, in essence, a system. Campbell McLachlan, one of the foremost scholars on the principle of systemic integration, conceives this principle as an ‘impulse to integrate the disparate elements of international law into a coherent system’.¹³ His work has centred on critically examining the function of systemic integration in investment law and trade law, as well as in other specific cases, including those raising the application of the principle in the interpretation of human rights by reference to international humanitarian law.¹⁴

This article is the first examination of the function of systemic integration in the climate change context. It is a look into how the principle is currently operating in practice in climate litigation¹⁵ and, in doing so, it draws some reflections on the wider significance of the principle for international law more generally. The article explores the systemic integration arguments considered in the *Torres Strait Islanders* case,¹⁶ the first international case on climate change to be adjudicated on its merits, which set in motion a wave of international climate cases¹⁷ and paved the way for the current pending advisory opinions before the International Tribunal for the Law of the Sea (ITLOS),¹⁸ the Inter-American Court of Human Rights¹⁹ and, more recently, the International Court of Justice (ICJ).²⁰ The article closes with some observations in relation to the interpretation of the United Nations Convention on the Law of the

11. Campbell McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 *International and Comparative Law Quarterly* 279, 280.

12. *Ibid* 280–281.

13. Campbell McLachlan, ‘Why Systemic Integration Matters Now’ (Lauterpacht Centre for International Law Friday Lecture, 28 October 2022) <<https://www.sms.cam.ac.uk/media/4083213>> accessed 24 February 2024.

14. Campbell McLachlan, ‘Systemic Integration Revisited’ (Essex Public International Law Lecture Series, 22 March 2021).

15. In particular, in the areas of international human rights and law of the sea (namely UNCLOS) by reference to the Paris Agreement as ‘other law’.

16. Human Rights Committee, ‘Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 3624/2019’ (27 June–27 July 2022) UN Doc CCPR/C/135/D/3624/2019 (*Torres Strait Islanders* case).

17. UN Committee on the Rights of the Child, ‘Chiara Sacchi y otros’ (23 September 2021) UN Doc RC/C/88/D/104/2019; European Court of Human Rights, *Duarte Agostinho and Others v Portugal and 32 Other States* App no 39371/20 (ECtHR). See also *Senior Women for Climate Protection v Switzerland* App no 53600/20 (ECtHR), which alleged inadequate State efforts to curb emissions.

18. *Advisory Opinion on Climate Change and International Law* (Case no 31, pending) ITLOS.

19. *Request for an Advisory Opinion on the Scope of the State Obligations for Responding to the Climate Emergency* (pending) IACHR: on 9 January 2023, the Republic of Chile and the Republic of Colombia, both State Parties to the American Convention on Human Rights, jointly filed a request for an advisory opinion on the climate emergency and human rights before the Inter-American Court of Human Rights.

20. *Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change*, UNGA Res 77/276 (29 March 2023) UN Doc A/77/L58.

Sea (UNCLOS) and the inter-American instruments pending before ITLOS and the Inter-American Court respectively in their relationship with the Paris Agreement.

2 THE DANGER OF FRAGMENTATION

I first turned my attention to the issue of fragmentation in international law at the Hague Academy of International Law where I wrote an essay on the topic as part of the examination leading to the Hague Academy Diploma which I sat, following attendance at Pierre Marie Dupuy's general course that year (2000). I had come to the Hague after spending time in Geneva, at the International Law Seminar, imbued in the work of the International Law Commission, particularly in the discussions on the Draft Articles on State Responsibility. Dupuy's general course in 2000 was illuminating, and was titled 'The Unity of the International Legal Order'.²¹ As Dupuy recalled, the course 'was intended to combat the all-too-common idea that international law is in the process of "fragmentation"'.²²

To me (and I wrote this in the Hague Academy examination), international law is like a symphony. Played by different actors and different instruments, following different notes, it has inherent 'harmony' nevertheless. It has a master key which provides the harmonic foundation just as in a piece of music. One of the issues at the time was the rising contradictory decisions by different international courts in stating what international law was, given the proliferation of international courts and tribunals. To my mind, decisions that did not, in appearance, fit into this harmonious whole, like dissonant notes, were nevertheless part of the harmony. They did not deny the systemic nature of international law.

The best view, of course, is by Rosalyn Higgins (highlighted by McLachlan) for whom international law is better understood as a normative system and a process, rather than as rules.²³ I would add 'frozen' rules. Higgins reminded us that 'context is always important'.²⁴ 'Law as a process encourages interpretation and choice that is more compatible with values we seek to promote and objectives we seek to achieve', she wrote.²⁵ McLachlan, for his part, aptly emphasises: 'the content of international law changes and develops continuously – it provides a constantly shifting canvas against which individual acts, including treaties, fall to be judged. Any approach to interpretation has to find a means of dealing with this dynamism'.²⁶

See also *Obligations of States in Respect of Climate Change* (Request for an Advisory Opinion: Order of 15 December 2023) [2023] General List No 187 <<https://www.icj-cij.org/case/187/orders>> accessed 12 February 2024.

21. Pierre-Marie Dupuy, 'L'unité de l'ordre Juridique International' (2002) 297 *Recueil des Cours de l'Académie de Droit International* 9. A note of caution to the reader is that the written version of the general course is not a word-by-word version of the course delivered. In my opinion, the general course in its oral version had a depth and originality not captured in the published version.

22. Pierre-Marie Dupuy, '2000–2020: Twenty Years Later, Where are We in Terms of the Unity of International Law?' (2020) 9(1) *Cambridge International Law Journal* 6, 6.

23. Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (OUP, Oxford 1994) 8.

24. *Ibid* 8.

25. *Ibid* 10.

26. McLachlan (n 11) 282.

An instructive example of how the different elements Higgins and McLachlan note above played out in an actual case can be seen in the *Shrimp/Turtle* case.²⁷ This was a case Dupuy referred to in his course. The first memory I have of this course is a voice, in the tone almost as if narrating a story: Dupuy's voice (I did not sit in the main room, as it was full on the first day), explaining (in French) the issues in the *Shrimp/Turtle* case. The sea turtles, an endangered species under United States (US) law (Endangered Species Act 1973), were caught as by-catch with shrimp. The US had passed a law requiring States catching wild shrimp and exporting them to the US to be certified as having adopted specific conservation measures, namely shrimp trawls to be equipped with turtle-excluder devices. The position adopted by the US was challenged at the World Trade Organization (WTO) by India, Malaysia, Pakistan and Thailand, who argued that the law contravened WTO obligations because it amounted to an illegal restriction on their shrimp exports. For its part, the US justified such measures under Article XX of the General Agreement on Tariffs and Trade (GATT) 1994, which exempted WTO members from their trade obligations in order to protect human, animal and plant life (Article XX(b)) or conserve natural resources (Article XX(g)).²⁸

In its examination of the case, the WTO Appellate Body took into account international environmental law in order to interpret international trade law, namely to construe the scope of measures permitted under Article XX of the GATT.²⁹ The Appellate Body concluded that 'the United States measure, while qualifying for provisional justification under Article XX(g), fail[ed] to meet the requirement of the chapeau of Article XX, and therefore, [was] not justified under Article XX of the GATT 1994'.³⁰ Its reasoning, however, reflected the acceptance that 'other law' (eg environmental law) was relevant to interpret GATT.³¹ The Appellate Panel observed that, while 'the words of Article XX (g), 'exhaustible natural resources', were actually crafted more than 50 years ago, they must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment'.³² In their words, 'from the perspective embodied in the preamble of the WTO Agreement, ... the generic term "natural resources" in Article XX(g) is not "static" in its content or reference, but is rather "by definition, evolutionary"'.³³ This pronouncement (as those on which this decision

27. WTO, *United States-Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body* (12 October 1998) AB -1998-4 and WT/DS58/AB/R.

28. *Ibid.*

29. *Ibid* [168]–[171]. The Appellate Body mentioned the following examples: the Convention on Biological Diversity art 5, the Convention on the Conservation of Migratory Species of Wild Animals, and the Inter-American Convention for the Protection and Conservation of Sea Turtles, which, at the time of the dispute, had not yet entered into force.

30. *Ibid* [187].

31. *Ibid* [185]. The Appellate Body pointed out: '[W]e wish to underscore what we have *not* decided in this appeal. We have *not* decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have *not* decided that sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have *not* decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment' (emphases original).

32. *Ibid* [129].

33. *Ibid* [130], replying regarding *Namibia (Legal Consequences) Advisory Opinion* [1971] ICJ Rep 31. The ICJ stated that, where concepts embodied in a treaty are 'by definition, evolutionary', their 'interpretation cannot remain unaffected by the subsequent development of law Moreover, an international instrument has to be interpreted and applied within the framework

was based, emanating from the ICJ) would strongly influence me to opine in a formal piece of advice in 2019 (as discussed below) that it was possible to interpret the UNCLOS, which does not include the term ‘climate change’ anywhere in its text, as prohibiting pollution by way of significant greenhouse gas emissions. A living instrument like UNCLOS, in my view, is not static.

With some shame, I admit, I was not familiar with the work of McLachlan on systemic integration (I became acquainted with it only in 2022).³⁴ My training as an international lawyer, however, was deeply grounded in Higgins’s understanding of international law, having done my LLM at the London School of Economics, where Higgins had been Principal Professor before going to the Bench at the ICJ.

My technique in treaty interpretation was also influenced by my work as counsel before the Inter-American System from 1997 to 2013, where the application of the principle of systemic integration is well established. I appeared before the Inter-American Court of Human Rights, in cases in which this principle was applied to the interpretation of human rights treaties in their interrelation with international humanitarian law. It was self-evident to me that both international humanitarian law and human rights law protect in essence the same principle: human dignity. My experience living in the middle of internal armed conflict, back in my country of origin, influenced this view. The enforceability of international humanitarian law via the interpretation of international human rights treaties in internal conflicts was resisted and criticised back then by mainstream international lawyers,³⁵ but today it has become generally accepted.³⁶

The Inter-American Court of Human Rights has applied the principle of systemic integration for decades in its work, something that has remained mostly under-studied and unacknowledged by mainstream Western writing in international law.³⁷ The Inter-American Court of Human Rights has applied this principle not only in interpreting regional human rights treaties taking into account international humanitarian law³⁸

of the entire legal system prevailing at the time of the interpretation’. See also *Aegean Sea Continental Shelf Case* [1978] ICJ Rep 3; Robert Jennings and Arthur Watts (eds), *Oppenheim’s International Law*, vol 1 (9th edn, Longman, London 1992) 1282; Eduardo Jimenez de Arechaga, ‘International Law in the Part Third of a Century’ (1978) 159(1) *Recueil des Cours de l’Académie de Droit International* 49.

34. McLachlan (n 14).

35. Particularly based on the argument that international humanitarian law was *lex specialis* and, where it applies, international human rights law does not apply.

36. The principle that human rights treaties do not cease to apply during armed conflict has been recognised by the ICJ in its Advisory Opinion on the *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory* and *Democratic Republic of Congo v Uganda: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 [106]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) [2005] ICJ Rep 168 [216].

37. With some exceptions albeit treating the Court’s approach as one of ‘expansionism’: Lucas Lixinski, ‘Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law’ (2010) 21 *European Journal of International Law* 585.

38. Inter-American Court of Human Rights, *Las Palmeras v Colombia* (Judgment on Preliminary Objections, 4 February 2000) Series C No 67 [32]–[33]; Inter-American Court of Human Rights, *Miguel Castro-Castro Prison v Peru* (Judgment on Merits, Reparations and Costs, 25 November 2006) [197(1)], [201], [203]–[204], [223]–[224], [271], [313] and [403]–[404]; Inter-American Court of Human Rights, *Mapiripán Massacre v Colombia* (Judgment on Merits, Reparations and Costs, 15 September 2005) Series C No 134 [106] and [114]–[115].

and the UN Convention on the Rights of the Child,³⁹ but also by reference to the Vienna Convention on Consular Relations,⁴⁰ international indigenous law⁴¹ and, more recently, international environmental law.⁴² To go back to the words of McLachlan asserting that ‘any approach to interpretation has to find a means of dealing with this dynamism’, this regional court has been applying a dynamic interpretation technique to provide *coherence* in the applicability of international law in the Americas.

In 2015, I finally became engaged with the principle of systemic integration in the work on ‘Fragmentation of International Law’ by the ILC Study Group⁴³ when preparing an article I entitled ‘Like Oil and Water? Human Rights in Investment Arbitration in the Wake of *Philip Morris v Uruguay*’.⁴⁴ It was an article that looked into the fundamental relationship between human rights and investment law in the wake of the cases *Philip Morris v Uruguay*⁴⁵ and *Urbaser v Argentina*.⁴⁶ In doing so, it aimed to address the question, ‘are human rights arbitrable within an investment claim?’. Based on my understanding of the work of the ILC Study Group, this scholarship enabled me to consider later the question of ‘how can pre-existing legal norms (to the Paris Agreement) be used to address questions about climate change?’.

3 THE ‘MASTER KEY’ TO INTERNATIONAL LAW (OR THE PRINCIPLE OF SYSTEMIC INTEGRATION)

The question of whether pre-existing legal norms could be used to address issues of climate change begged the question of whether there is a presumption of coherence within existent international law. In my view there is such a presumption. Article 31(3)(c) of the VCLT⁴⁷ enshrines this presumption of coherence within existent international law,

39. Eg see Inter-American Court of Human Rights, *Case of the ‘Street Children’ (Villagrán-Morales et al)* (Judgment, 19 November 1999) Series C No 63 [192]–[194]; Inter-American Court of Human Rights, *Case of the Gómez-Paquiyaury Brothers v Peru* (Judgment on Merits, Reparations and Costs, 8 July 2004) Series C No 110 [164]–[168].

40. Inter-American Court of Human Rights, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (Advisory Opinion Requested by the United Mexican States, 1 October 1999) OC-16/99.

41. See eg Inter-American Court of Human Rights, *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Judgment, 31 August 2001) Series C No 79 [2] and [4]; Inter-American Court of Human Rights, *Kichwa Indigenous People of Sarayaku v Ecuador* (Judgment, 27 June 2012) Series C No 245 [215], [217].

42. Inter-American Court of Human Rights, *The Environment and Human Rights* (Advisory Opinion, 15 November 2017) Series A No 23.

43. ILC (n 10).

44. Monica Feria-Tinta, ‘Like Oil and Water? Human Rights in Investment Arbitration in the Wake of *Philip Morris v. Uruguay*’ (2017) 34 *Journal of International Arbitration* 601.

45. *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay* (Award) ICSID Case No ARB/10/7 (8 July 2016).

46. *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic* (Award) ICSID Case No ARB/07/26 (8 December 2016).

47. Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31: ‘1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise in addition to the text, including its preamble and annexes: ...

a principle held in the *Oil Platforms* case⁴⁸ by the ICJ. The ILC Study Group noted, in that sense, that ‘[i]n International Law, there is a strong presumption against normative conflict’.⁴⁹

The work of the ILC Study Group on fragmentation of international law,⁵⁰ which termed Article 31(3)(c) of the VCLT to be ‘the master key to international law’,⁵¹ or the solver of ‘a systemic problem – an inconsistency, a conflict’⁵² between different rules, was central to my developing a way to argue a case on climate change under a human rights treaty. My answer to the question above was that existing legal norms could be used in issues of climate change via an interpretative gate.

There are three fundamental propositions which relate to the notion of ‘the master key to international law’ from the work of the ILC on fragmentation of international law which I particularly noticed and which can be distilled as follows. They are: (a) international law is understood as a system; (b) all international law exists in a systemic relationship with other law (therefore, in interpreting a rule, one ought to look into the normative environment of a treaty); and (c) a limited jurisdiction does not imply a limitation of the scope of the law applicable in the interpretation and application of the treaty. I shall look at each one in turn.

3.1 International law understood as a system

Article 31 of the VCLT is a reflection of the principle of ‘systemic integration’ or ‘a guideline according to which treaties should be interpreted against the background of all the rules and principles of international law. In other words, international law should be understood as a system’.⁵³ The question of the relationship of different rights or obligations ‘could only be approached through a process of reasoning that makes them appear as parts of some coherent and meaningful whole’.⁵⁴

3.2 All international law exists in a systemic relationship with other law

The ILC Study Group noted that:

[i]t is sometimes suggested that international tribunals or law applying (treaty) bodies are not entitled to apply law that goes ‘beyond’ the four corners of the constituting instrument

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) *any relevant rules of international law applicable in the relations between the parties*’ (emphasis added).

48. *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (Merits) [2003] ICJ Rep [73]–[78]. See in particular [41] citing VCLT art 31(3)(c).

49. ILC (n 10) para 37.

50. Ibid.

51. Ibid para 420.

52. Ibid.

53. International Law Commission, ‘Report of the International Law Commission on the Work of its 57th Session’ (2 May–3 June and 11 July–5 August 2005) UN Doc A/60/10 para 467.

54. ILC (n 10) para 414.

or that, when arbitral bodies deliberate an award, they ought not to take into account rules or principles that are not incorporated in the treaty under dispute. ... But if ... *all international law exists in systemic relationship with other law*, no such application can take place without situating the relevant jurisdiction-endowing instrument in its normative environment.⁵⁵

In the words of the ILC Study Group, this means that ‘although a tribunal may only have jurisdiction in regard to a particular instrument, it must always interpret and apply that instrument in its relationship to its normative environment, that is to say “other” international law’.⁵⁶ The ILC Study Group emphasised that ‘[t]he way in which “other law” is “taken into account” is quite crucial to the parties and to the outcome of any single case’.⁵⁷ But, moreover, the principle of systemic integration would ‘look beyond the individual case’ and make sure that ‘the outcome is linked to the legal environment’.⁵⁸ In this analysis, the legal environment would be other obligations relevant to interpret the human rights in dispute, or the legal provisions from the UNCLOS. It could, for example, be obligations in relation to the climate. The dangers of ‘isolating’ legal institutions from one another was referred to by the ILC Study Group as follows:

To hold those institutions as fully isolated from each other and as only paying attention to their own objectives and preferences is to think of law only as an instrument for attaining regime-objectives. But law is also about protecting rights and enforcing obligations, above all rights and obligations that have a backing in something like a general, public interest. Without the principle of ‘systemic integration’ it would be impossible to give expression to and to keep alive, any sense of the common good of humankind, not reducible to the good of any particular institution or ‘regime’.⁵⁹

3.3 A limited jurisdiction does not imply a limitation of the scope of the law applicable in the interpretation and application of the treaty

Finally, from this perspective, whether a tribunal would be able to look into ‘other law’ is not a jurisdictional matter, but rather a matter of substantive law (ie the law applicable in the interpretation and application of the treaty). In that context, the ILC Study Group asserted that ‘the jurisdiction of most international tribunals is limited to particular types of dispute or disputes arising under particular treaties. *A limited jurisdiction does not, however, imply a limitation of the scope of the law applicable in the interpretation and application of those treaties*’.⁶⁰ Therefore, I submit that in the climate change context, the interpretation of a human rights treaty or of UNCLOS in light of the Paris Agreement is a matter of substantive law (namely the interpretation thereof) and not a jurisdictional matter.

55. Ibid para 423 (emphasis added).

56. Ibid.

57. Ibid para 480.

58. Ibid.

59. Ibid.

60. Ibid para 45 (emphasis added).

4 A CONFERENCE IN STOCKHOLM

Having developed an approach to the relevance of the Paris Agreement to the interpretation of other treaties, I attended a conference in Stockholm as a speaker.⁶¹ On 21 November 2016, the arbitral community, policy-makers, and representatives of governments, the private sector and academics met in Stockholm at a conference whose focus was considering what role (if any) international law and arbitration could have in the matter of climate change. This was an event jointly organised by the Stockholm Chamber of Commerce, the Permanent Court of Arbitration, the International Chamber of Commerce and the International Bar Association.⁶²

The conference in Stockholm could not have been more timely. Not only had the Paris Agreement entered into force on 4 November 2016, but a major follow-up conference (COP22), the main objective of which was to establish a regulatory framework to enable countries to reach goals agreed upon in Paris, had just taken place in Marrakech from 7 to 18 November 2016 with no tangible results in the wake of uncertainties arising from a change of administration in the US. With the Paris Agreement becoming binding for 113 jurisdictions, the Stockholm Conference brought to the fore its impact on international law. I was invited to address the topic ‘Can climate change be addressed using existing international legal mechanisms?’. My response was in the positive. It could be made justiciable, I argued, both in investment arbitration, as well as in international courts and quasi-judicial UN organs.

5 THE ROLE OF INTERNATIONAL COURTS OF LIMITED JURISDICTION

The idea that a treaty that did not contain the word ‘climate change’ could be interpreted so as to draw binding obligations for States in relation to climate degradation was novel back then. Moreover, in a public lecture at the UK Supreme Court premises held on 17 September 2015, entitled ‘Climate Change and the Rule of Law’, Philippe Sands posited that courts of ‘limited jurisdiction’⁶³ (as opposed to courts of general jurisdiction such as the ICJ) ‘might only ever have a limited role, unlikely to contribute in a material way to a broader response to climate change challenges’.⁶⁴ This was because ‘the treatment of the subject’ before such courts, in his view, ‘[would] invariably be limited to the application of a particular international convention’.⁶⁵ To my mind, Sands was wrong. He had obviated the possibilities given by rules of interpretation. As the ILC Study Group had pointed out, a limited jurisdiction does not imply a limitation of the scope of the law applicable in the interpretation and application of a treaty.

61. The conference was entitled ‘Bridging the Climate Change Policy Gap’: PCA, ‘Conference: “Bridging the Climate Change Policy Gap”’ (PCA, 21 November 2016) <<https://pca-cpa.org/en/news/conference-bridging-the-climate-change-policy-gap/>> accessed on 24 February 2024.

62. Ibid.

63. For a definition of courts of limited jurisdiction, see Ruth Mackenzie, Cesare Romano and Yuval Shany, *The Manual on International Courts and Tribunals* (2nd edn, OUP, Oxford 2010).

64. Philippe Sands, ‘Climate Change and the Rule of Law: Adjudicating the Future in International Law’ (UK Supreme Court, Public Lecture, 17 September 2015) <<https://www.supremecourt.uk/docs/professor-sands-lecture-on-climate-change-and-the-rule-of-law.pdf>> accessed 14 January 2024.

65. Ibid.

On 6 September 2018, I delivered a presentation at a Small States Conference, organised by the Institute of Small and Micro States in London. It was entitled ‘Melting Glaciers, Disappearing States, and Endangered Populations: International Dispute Resolution for Climate Change’.⁶⁶ This was to be a presentation with profound impact. In my presentation, I considered Sands’s position and dismissed it, arguing that, in my view, courts of limited jurisdiction were suitable to hear and likely to make a critical contribution to the justiciability of climate change cases. This included the UN Human Rights Committee. I was shortly afterwards instructed to represent the *Torres Strait Islanders* case.

6 THE TORRES STRAIT ISLANDERS CASE

The *Torres Strait Islanders* case was the first international case in which systemic questions were first considered in relation to climate change. Up to that point, the framing of climate change before bodies with specialised *ratione materiae* jurisdiction or limitations on applicable law had not happened. The case became therefore a crucible.

Brought by climate-vulnerable inhabitants of low-lying islands against a sovereign State – Australia – this was a case in which the application of the principle of systemic interpretation was tested for the first time in international adjudication. The claim construed State obligations in relation to climate change effects under a human rights treaty by reference to the Paris Agreement for the first time in international litigation. The claimants argued that they were experiencing:

5.2 ... severe impacts from climate change, including disruption to their homes and family life. In their combined statements, the authors describe experiencing the following problems: flooding and inundation of villages; flooding and inundation of ancestral burial lands; loss by erosion of their traditional lands, including plantations and gardens; destruction or withering of traditional gardens through salinification caused by flooding or seawater ingress; decline of nutritionally and culturally important marine species caused by climate change, and associated coral bleaching (reef death) and ocean acidification; and a reduced ability to practice their traditional culture and pass it on to the next generation. They also experience anxiety and distress owing to erosion that is approaching some homes in the community. For six of the authors, upkeeping ancestral graveyards and visiting and feeling communion with deceased relatives is at the heart of their cultures, and the most important ceremonies (such as coming-of-age and initiation ceremonies) are only culturally meaningful if performed on the native lands of the community whose ceremony it is.

5.3 The authors living on Boigu and Masig face a real prospect of displacement and loss of culture within the next 10 years unless urgent and significant action is taken to enable the islands to withstand expected sea level rise. The authors living on Warraber and Poruma

66. Monica Feria-Tinta, ‘Melting Glaciers, Disappearing States, and Endangered Populations: International Dispute Resolution for Climate Change’ (6 September 2018) <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.twentyessex.com%2Fwp-content%2Fuploads%2F2024%2F02%2FClimate_Change_International_Dispute_Resolution.pptx&wdOrigin=BROWSELINK> accessed on 16 February 2024. For the recorded proceedings of the presentation, see <https://www.youtube.com/watch?v=PJ4vzeuyKro&list=PL-M5JGQDtWUY9MBAvBm8_-D2tpgAZEbUw&index=4> accessed on 16 February 2024.

face such a prospect within their lifetimes unless urgent action is taken within 10–15 years. Such displacement can be prevented with reasonable adaptation and mitigation measures. If the State party's interpretation of imminence were followed, the authors would be forced to wait until their culture and land have been lost in order to submit a claim under the Covenant.

5.4 The authors have identified specific acts and omissions by the State party (relating to adaptation and mitigation) instead of relying on abstract arguments. Those acts and omissions have already and will continue to impair the authors' rights in ways that will worsen over time, because of the latent and/or irreversible nature of climate change.⁶⁷

Nowhere in the International Covenant on Civil and Political Rights (ICCPR) is the term 'climate change' mentioned, yet, by means of the application of the principle of 'systemic integration', obligations under the Paris Agreement were made justiciable. In her book titled *Problems and Process: International Law and How We Use It*, Higgins places attention on the role of 'the making of legal choices' by judges in the task of stating what the law is.⁶⁸ I would submit that it is not only the judges who make legal choices; in arguing a case and presenting arguments, counsel makes legal choices and advises a client accordingly. A claim under the ICCPR follows some precise rules. At the time, the UN Petitions and Enquiries Section limited claims to 50 pages. This required legal choices to be made as to what to include given the complexity of the case in the communication. As counsel, I made sure that submissions on the principle of systemic interpretation were made in the case.⁶⁹

In its submissions of 29 May 2020, Australia argued that the communication was inadmissible. In relation to the relevance of the Paris Agreement (and other human rights treaties which the complaint had raised as relevant to the dispute), Australia observed:⁷⁰

The alleged violations of international climate change treaties such as the Paris Agreement, and other international treaties such as the International Covenant on Economic, Social and Cultural Rights, are inadmissible *ratione materiae* because they are outside the scope of the present Covenant. Moreover, 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.⁷¹ The ordinary meaning of one treaty cannot be used to supplant the clear language of the Covenant.⁷²

Australia considered that there was no basis for the claimants to advance the position that international climate change treaties were relevant to interpreting rights under the ICCPR because Article 31(3)(c) was restricted to relevant rules of international law, as applicable 'between the parties'. It argued that, to the extent that State Parties vary

67. *Torres Strait Islanders case* (n 16) [5.2]–[5.4].

68. Higgins (n 23) 9.

69. *Torres Strait Islanders case* (n 16); Communication Under the Optional Protocol to the International Covenant on Civil and Political Rights (13 May 2019) [131]–[135] <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2019/20190513_CCPRC135D36242019_complaint.pdf> accessed 1 January 2024.

70. *Torres Strait Islanders case* (n 16) [4.1].

71. VCLT art 31(3)(c).

72. *Ibid.*

widely with respect to the climate change treaties themselves and also with respect to State Parties to the ICCPR, the basis for the claimants' assertion was 'unclear'. Noting that while there were 189 States Parties to the Paris Agreement compared with 173 States Parties to the ICCPR, this meant that 16 States that had signed the Paris Agreement had not elected to be bound by the terms of the ICCPR. Accordingly, Australia argued that to apply the terms of the Paris Agreement when interpreting the rights under the ICCPR would be completely inappropriate and contrary to the fundamental principle of State consent under international law. There was, however, a major flaw in Australia's case. Australia was a party to both treaties. It was bound by the Paris Agreement, as well as by the ICCPR and there was therefore no issue of State consent.

In the rejoinder, I argued on behalf of the claimants that Article 31(3)(c) of the VCLT (which reflects customary international law) requires the interpreter of a treaty to take into account any other relevant rules of international law binding on the State concerned. This is because human rights treaties are not synallagmatic treaties whose primary beneficiaries are other States. The primary beneficiaries of the obligations under a human rights treaty are individuals under the jurisdiction of the State in question.⁷³ The UN Human Rights Committee was invited to apply Article 31(3)(c) of the VCLT, which reflects the principle of systemic integration, namely that a treaty should be interpreted in the context of its normative environment.⁷⁴ The Paris Agreement (which was also binding on Australia) was the normative environment in which the ICCPR ought to be interpreted in the case.

The International Law Commission had pointed out, in its study on 'Fragmentation of International Law', that 'the systemic nature of international law has received its clearest formal expression in [Article 31(3)(c) of the VCLT]'.⁷⁵ This in effect meant, it was submitted, that human rights treaties cannot be interpreted in a vacuum. There was a normative environment (binding rules on a Respondent State), which was relevant to the interpretation of Australia's obligations under the human rights treaty in question. As the ILC Special Rapporteur Martti Koskeniemi (on Fragmentation of International Law) observed:

It is sometimes suggested that international tribunals or law-applying (treaty) bodies are not entitled to apply law that goes 'beyond' the four corners of the constituting instrument *But if, as discussed ... above, all international law exists in a systemic relationship with other law, no such application can take place without situating the relevant jurisdiction-endowing instrument in its normative environment.* This means that, although a tribunal may only have jurisdiction in regard to a particular instrument, it must always *interpret and apply* that instrument in the context of its relationship to its normative environment – that is to say 'other' international law.⁷⁶

This, it was highlighted, reflected principles that the ICJ had established in its jurisprudence. In the *Namibia Advisory Opinion*,⁷⁷ the ICJ applied this approach and held

73. ILC, 'Third Report of the Special Rapporteur on State Responsibility' (15 March, 15 June, 10 and 18 July and 4 August 2000) UN Doc A/CN.4/507 and Add 1–4, para 17.

74. ILC (n 10) para 430.

75. *Ibid* para 420.

76. *Ibid* para 423 (emphasis added).

77. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (Advisory Opinion) [1971] ICJ Rep 16.

that ‘an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation’.⁷⁸ Not only was the principle of systemic interpretation upheld, but the ICJ also stated that ‘interpretation cannot remain unaffected by the subsequent development of law’.⁷⁹ It was further argued that such an approach to treaty interpretation had also been reflected in the works of human rights organs and courts. The Human Rights Committee, for example, has held that the ICCPR should be interpreted as a ‘living instrument’.⁸⁰

It is pertinent to note that apart from the Inter-American System, which has embraced this technique of treaty interpretation (as reviewed above), the first explicit reference to the European Convention on Human Rights (ECHR) as a living instrument appeared in the European Court of Human Rights’ (ECtHR) case law in the judgment of *Tyrer v United Kingdom* more than 40 years ago.⁸¹ The ECtHR stated therein that the ECHR ‘must be interpreted in light of present-day conditions’.⁸² Likewise, the Human Rights Committee held in its General Comment 36 that:

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.⁸³

The Human Rights Committee adopted this approach in *Portillo Cáceres v Paraguay*,⁸⁴ where the Committee considered it relevant to the content of Paraguay’s obligations that Paraguay was bound by the Stockholm Convention on Persistent Organic Pollutants (the pollutants concerned included one on which the Review Committee of the Stockholm Convention had requested a global ban in 2008).⁸⁵ Thus, relevant international climate change law (ie the Paris Agreement) and the State’s climate change policies adopted thereunder were considered to be relevant to the interpretation of the State’s duties under the human rights treaty in question in the context of climate change, when said State is a party to the Paris Agreement.

The Human Rights Committee has taken this approach to inform the obligations of such a State under the ICCPR, for instance, in its Concluding Observations on the

78. Ibid 19.

79. Ibid.

80. *Judge v Canada*, Communication No 829/1998 (13 August 2003) UN Doc CCPR/C/78/D/829/1998; *4 Yoon and Choi v Republic of Korea*, Communications Nos 1321/2004 and 1322/2004 (3 November 2006) UN Doc CCPR/C/88/D/1321-1322/2004; *Atasoy and Sarkut v Turkey*, Communications Nos 1853/2008 and 1854/2008 (12–30 March 2012) UN Doc CCPR/C/104/D/1853-1854/2008.

81. *Tyrer v United Kingdom* App No 5856/72 (ECtHR, 25 April 1978).

82. Ibid [31]. For an illuminating reading on the ECHR as a ‘living instrument’, see ECtHR, ‘The Convention as a Living Instrument at 70’ (ECtHR, Background Document, Judicial Seminar 2020) <https://www.echr.coe.int/Documents/Seminar_background_paper_2020_ENG.pdf> accessed 29 December 2023.

83. Human Rights Committee, ‘General Comment 36 on art 6 of the International Covenant on Civil and Political Rights, on the Right to Life’ (2018) UN Doc CCPR/C/GC/36.

84. *Portillo Cáceres et al v Paraguay*, Communication No 2751/2016 (30 September 2013) UN Doc CCPR/C/126/D/2751/2016.

85. Ibid para 7.3 and fn 7 to para 2.11.

initial report (on its compliance with its obligations under the ICCPR) by Cabo Verde. The Committee referred to Cabo Verde's obligations under Article 6 of the ICCPR in the context of climate change.⁸⁶ The Committee did not only recognise the particular vulnerability of small island States to the effects of climate change, but it also made quite detailed recommendations on sustainable development and resilience to climate change.⁸⁷

After the submission of a rejoinder in the *Torres Strait Islanders* case, we were ready for a decision by the Committee. However, the Committee gave Australia the opportunity to submit further observations on 5 August 2021. In respect of the arguments advanced on behalf of the claimants in relation to Article 31(3)(c) of the VCLT and its applicability in the interpretation of the ICCPR, Australia's response stressed, back again, that the object and purpose of both treaties had to be alike for the Paris Agreement to be considered as containing 'relevant rules':

6.5 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.⁸⁸

Australia was wrong on that as well, in my view. Its arguments did not succeed. In its adopted views, the UN Human Rights Committee noted, in relation to this point:

7.5 The Committee takes note of the State party's argument that the authors' claims under other international treaties are inadmissible *ratione materiae* because they lie outside the scope of the Covenant. The Committee observes that it is not competent to determine compliance with other international treaties or agreements. However, to the extent that the authors are not seeking relief for violations of the other treaties before the Committee but rather refer to them in interpreting the State party's obligations under the Covenant, the Committee considers that the appropriateness of such interpretations relates to the merits of the authors' claims under the Covenant. Accordingly, the Committee considers that in this respect, article 3 of the Optional Protocol does not constitute an obstacle to the admissibility of the communication.⁸⁹

The Committee thus took the Paris Agreement as a relevant instrument in the task of interpreting obligations of the State Party under the ICCPR in the context of claims of human rights breaches because of lack of action in relation to climate degradation. In its views dated 21 July 2022 (notified to the Parties on 22 September 2022), the Committee called on to the State 'to make full reparation' to the claimants:

11. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, *inter alia*, to provide adequate compensation, to the authors for the harm that they have suffered; engage in meaningful consultations with the authors' communities in order to conduct needs assessments; continue its implementation of measures necessary to secure the

86. Human Rights Committee, 'Concluding Observations on the Initial Report of Cabo Verde' (3 December 2019) UN Doc CCPR/C/CPV/CO/1/Add.1.

87. *Ibid.*

88. *Torres Strait Islanders* case (n 16) para 6.5. Fn omitted.

89. *Ibid* para 7.5.

communities' continued safe existence on their respective islands; and monitor and review the effectiveness of the measures implemented and resolve any deficiencies as soon as practicable. The State party is also under an obligation to take steps to prevent similar violations in the future.⁹⁰

The approach taken to treaty interpretation in this case, which set several groundbreaking precedents for international law and climate justice,⁹¹ has now become a blueprint for treaty interpretation in international climate change cases.

7 THE IMPLICATIONS FOR TWO PENDING ADVISORY OPINIONS

7.1 Advisory opinion on climate change and international law before ITLOS

My presentation at the conference on Small and Microstates in 2018 had another development. I was invited to sustain preliminary meetings with some Small States to present a legal view on the viability of the topic of climate change before ITLOS under UNCLOS. I brought the late Alan Boyle in to advise on this matter and I found myself towards the end of 2018 in Katowice, at COP24, in a side meeting, presenting a legal view on the above prospects.

The framing of climate change in relation to a treaty as old as UNCLOS was novel back then. There were not only the substantive issues of interpretation to be clear about, but, in the case of an advisory opinion route, there were procedural issues that needed to be clarified. In 2019, I was instructed by a State to produce, unled, formal written advice on the advisory opinion route to be pursued before ITLOS to tackle the effects of climate change. The route I suggested is the route that in essence the Commission of Small Island States on Climate Change and International Law (COSIS) took. I was of the view that the meaning of 'international agreement' included bilateral agreements. It sufficed, in my view, that two States entered into a bilateral agreement to satisfy one of the requirements of Article 138 of the Rules of the Tribunal to refer a matter for an advisory opinion to ITLOS.⁹²

On 12 December 2022, COSIS filed a request for an advisory opinion on climate change and international law pursuant to Article 2(2) of the COSIS Agreement, Article 21 of the ITLOS Statute and Article 138 of the Rules of the Tribunal.⁹³

90. Ibid para 11.

91. For an analysis of the decision, see Monica Feria-Tinta, 'Torres Strait Islanders: United Nations Human Rights Committee Delivers Ground-Breaking Decision on Climate Change Impacts on Human Rights' (EJIL Talk!, 27 September 2022) <<https://www.ejiltalk.org/torres-strait-islanders-united-nations-human-rights-committee-delivers-ground-breaking-decision-on-climate-change-impacts-on-human-rights/>> accessed 24 February 2024.

92. For a discussion of this topic see Monica Feria-Tinta, 'On the Request for an Advisory Opinion on Climate Change Under UNCLOS Before the International Tribunal for the Law of the Sea' (2023) 14 *Journal of International Dispute Settlement* 391. I agreed with the views of Rüdiger Wolfrum in that respect.

93. ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (ITLOS, Case No 31) <<https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/>> accessed 24 February 2024.

The questions posed in the request by COSIS contained the underlying assumption that anthropogenic greenhouse gas emissions are a form of pollution of the marine environment as they cause deleterious effects.⁹⁴ A preliminary issue for ITLOS to consider is therefore whether CO₂ emissions, greenhouse gas emissions (with the correlative climate change effects), fall within the meaning of ‘pollution’ under Article 1(1) (4) of UNCLOS. This, I believe, is the first interpretative task now before the tribunal. In order to render an advisory opinion in the case, ITLOS in essence faces the task of interpreting UNCLOS in the context of climate change.

Systemic interpretation has featured as an important legal issue throughout the proceedings so far. Acting for the World Wildlife Fund (WWF), I dealt with this point in the submissions I prepared on its behalf.⁹⁵ The submissions of COSIS also raised the principle of systemic interpretation.⁹⁶ This, in its place, triggered responses by different States in oral arguments to the arguments on systemic interpretation. Doubtless, therefore, the issue of whether a systemic approach to the interpretation of UNCLOS is correct is something that ITLOS would have to determine. I make two observations in this regard.

First, an inherent aspect of UNCLOS is to be noted. UNCLOS was negotiated during a period when concerns of climate change were not known.⁹⁷ UNCLOS, however, was never meant to be a ‘static or immutable legal regime’.⁹⁸ Paragraph 4 of the preamble of UNCLOS provides that the aim of UNCLOS is to establish ‘a legal order for the seas and oceans which will’, among others, ‘promote ... the conservation of their living resources, and the study, protection and preservation of the marine environment’. UNCLOS purports to provide *the* overarching framework for international law in relation to the protection of the marine environment.⁹⁹

UNCLOS is considered ‘a living instrument’ capable of evolving. It is perhaps on that single doctrine enunciated by Judge Lucky in his separate opinion in the request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Advisory Opinion of 2 April 2015)¹⁰⁰ that interpretation issues in the context of new

94. ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (ITLOS, Case No 31, Letter by COSIS) <https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf> accessed 28 February 2024.

95. Monica Feria-Tinta, ‘Amicus Brief Filed on Behalf of the World Wide Fund for Nature (WWF) International’ (16 June 2023) in ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (ITLOS, Case No 31) [35]–[54] <https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/4/C31-WS-4-7-WWF.pdf?> accessed 28 February 2024.

96. Written Statement of the Commission for Small Island States on Climate Change and International Law (16 June 2023) in ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (ITLOS, Case No 31) [351]–[353] <https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/2/C31-WS-2-4-COSIS.pdf> accessed 28 February 2024.

97. Alan Boyle, ‘Protecting the Marine Environment from Climate Change’ in Elise Johansen, Signe Busch and Ingvild Ulrikke Jakobsen (eds), *The Law of the Sea and Climate Change* (CUP, Cambridge 2021) 83.

98. *Ibid.*

99. Robin Churchill, Vaughan Lowe and Amy Sander, *The Law of the Sea* (4th edn, Manchester UP, Manchester 2022) 603.

100. Jill Barrett and Richard Barnes (eds), *Law of the Sea: UNCLOS as a Living Treaty* (British Institute of International and Comparative Law, London 2016) 4.

forms of pollution can be resolved. UNCLOS is a constitution for the oceans,¹⁰¹ which contains provisions wide enough to be interpreted in accordance with the times. This would necessarily entail addressing the effects of anthropogenic emissions on the sea and the obligations of States under UNCLOS. Along that line, publicists have acknowledged, in relation to '[t]he general obligations of States to take measures to prevent, reduce, and control transboundary pollution and pollution of the marine environment which was elaborated in the 2010 *Pulp Mills* case and in the ITLOS Advisory Opinion on the Seabed Activities of 2011', that 'there seems no reason not to apply it to greenhouse gas emissions ...'.¹⁰² Indeed, there is consensus that the UNCLOS regime is 'solid, yet flexible', as the former President of ITLOS, Judge Paik, has observed.¹⁰³ Leading commentary on UNCLOS states:

If UNCLOS had provided detailed provisions on all matters relating to the protection of the marine environment, many of them (especially those concerning the prevention of pollution) would have become rapidly out of date as the need for higher standards of protection became apparent and the desirability of measures to address newly perceived environmental issues became evident.¹⁰⁴

Second, Vaughan Lowe, acting for COSIS, made an important remark during the oral proceedings which may need to be weighed properly in assessing the relationship between UNCLOS and other relevant treaties, including the Paris Agreement. This remark shows the complexity of issues in treaty interpretation and identification of the law. He started by setting out a need for coherence in the interpretation of UNCLOS in relation to other instruments (which include the Paris Agreement):

All of these international agreed rules, standards, and procedures inform the interpretation and the application of the UNCLOS provisions that address marine pollution, and thus help to define the precise content of the UNCLOS obligations.

Well, there is nothing particularly remarkable in any of this, and it's clear from the written submissions in this case that these points are generally accepted. They are the straightforward consequences of the express provisions of UNCLOS and of the provisions on treaty interpretation reflected in the Vienna Convention on the Law of Treaties.

The written submissions also show wide support for the principle that the UNCLOS obligations on the one hand, and the internationally agreed rules, standards and procedures on the other, should, as far as possible, be interpreted and applied so as to give rise to a coherent set of compatible obligations.¹⁰⁵

101. Michael W Lodge, Myron H Nordquist, Shabtai Rosenne et al (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol 1 (Martinus Nijhoff Publishers, Leiden 1985) 34.

102. American Society of International Law, 'The Role of International Courts and Tribunals in the Development of Environmental Law', vol 109 (Proceedings of the One Hundred Ninth Annual Meeting of the American Society of International Law), Remarks by Alan Boyle, 200.

103. Jin-Hyun Paik, 'How Healthy is the Ocean's Constitution?' (UNCLOS, 17 October 2019) <https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/paik/UNCLOS_25_171019_en.pdf> accessed 28 February 2024; remarks of Judge Paik, then President of ITLOS, at the conference celebrating the anniversary of UNCLOS in 2019.

104. Churchill et al (n 99) 605.

105. ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (ITLOS, Case No 31), Submissions by Professor Vaughan Lowe on behalf of COSIS (Public Sitting, 12 September 2023, 3 PM,

He observed, however, that it had been suggested by some written statements in the proceedings, that ‘compliance with the Paris Agreement *ipso facto* establishes compliance with UNCLOS’,¹⁰⁶ alluding to the incorrectness of such remarks. Indeed, the relationship between the Paris Agreement and UNCLOS is not one of perfect overlap. These are two different instruments. In this context, Lowe raised a very important point: that is, that the obligations of States under UNCLOS are broader than under the Paris Agreement. While the Paris Agreement ‘is framed primarily in terms of the aims and ambitions of the States parties and things they “should” (rather than “shall”) do’, containing language ‘on agreed policy’, he noted that ‘UNCLOS States expressly agreed to unequivocal legal obligations’.¹⁰⁷ In other words, even if UNCLOS had to be interpreted by reference to best available science alone, the protection regime of the marine environment would be clearer and wider in terms of obligations of States under UNCLOS than generally under the Paris Agreement.

7.2 Advisory opinion on climate emergency and human rights before the Inter-American Court of Human Rights

Systemic questions of interpretation are also at stake before the Inter-American Court of Human Rights. On 9 January 2023, Chile and Colombia, both States Parties to the American Convention on Human Rights,¹⁰⁸ jointly filed a request for an advisory opinion on the climate emergency and human rights before the Inter-American Court of Human Rights. The request is ‘to clarify the scope of State obligations, in their individual and collective dimension, in order to respond to the climate emergency within the framework of international human rights law, paying special attention to the differentiated impacts of this emergency on individuals from diverse regions and population groups, as well as on nature and on human survival on our planet’.¹⁰⁹ The request contains the longest set of questions so far pending before any international court in relation to climate change.

As seen above, however, systemic issues of interpretation are already well settled in the jurisprudence of the Inter-American Court of Human Rights. The American Convention on Human Rights contains, in addition, further rules aiding in its interpretation (Article 29). It is to be expected, therefore, that this advisory opinion will simply build upon earlier decisions concerning interpretation. It is clear from the wording of the above excerpt that the request is benefiting from the ground-breaking

ITLOS, Hamburg) 27, lines 12–25 <https://www.itlos.org/fileadmin/itlos/documents/cases/31/Oral_proceedings/verbatim_records_rev/ITLOS_PV23_C31_4_Rev.1_E.pdf> accessed 28 February 2024.

106. *Ibid* lines 34–37.

107. *Ibid* 28, lines 33–38.

108. American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123. It is ratified by 25 State Members of the Organization of American States. Neither the United States, nor Canada are parties to it.

109. See the request on the official web page of the Inter-American Court of Human Rights: ‘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’ (IACHR, 9 January 2023) <https://www.corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf> accessed 28 February 2024.

Advisory Opinion on the Environment and Human Rights¹¹⁰ issued by the Inter-American Court of Human Rights in 2017, one of the most significant rulings on environmental law and human rights issued by any international court to date.

The trajectory of travel of justiciability of climate change issues, globally, owes a great deal to the developments that have taken place in the Inter-American System and it is clear for that reason that the Inter-American Court of Human Rights' advisory opinion may prove to be influential in its findings beyond the Americas, especially in three key areas: (a) the understanding of transboundary harm in the climate emergency context; (b) the contours of the right to life in the context of climate change; and (c) legal consequences for State inaction.¹¹¹

8 CONCLUSION

'What do the recent challenges faced by international law mean for the understanding of its formal and substantive unity?' asked Dupuy in an article assessing his 2000 general course at the Hague Academy 15 years later.¹¹² The Paris Agreement may be regarded as a development in what McLachlan has called 'the relentless rise in the use of treaties as a means for ordering international civil society'.¹¹³ Since Dupuy's general course, the growing complexity of international law is self-evident. New regimes, like the climate law regime, have emerged and a process to find a place for it within the general framework and operation of existing international law is currently in play. There is a rearrangement of the normative system of international law. Never before, I would say, has there been a greater need for coherence. The issues before the courts are no longer those of mere interpretation. They are existential. If Hugh Thirlway doubted whether Article 31(3)(c) of the VCLT 'would be of any assistance in the task of treaty interpretation',¹¹⁴ this article has brought to light the opposite. In the process of integrating climate law, via an interpretative process, systemic integration plays a key role, as seen in the *Torres Strait Islanders* case. While some scholars consider climate issues 'a too highly polycentric problem' to possibly be adjudicated,¹¹⁵ the principle of systemic interpretation assists in ordering obligations of States in this regard. The process unfolding

110. Inter-American Court of Human Rights, *The Environment and Human Rights* (15 November 2017) Advisory Opinion, OC-23/17, Series A No 23.

111. For an analysis on the issues before the Inter-American Court of Human Rights, see Monica Feria-Tinta, 'An Advisory Opinion on Climate Emergency and Human Rights Before the Inter-American Court of Human Rights' (2023) 102 *Questions of International Law: Zoom-in* 45.

112. Pierre-Marie Dupuy, 'The Unity of the International Legal Order: Reflections After 15 years' (Lauterpacht Centre for International Law Lecture, 30 March 2016) <<https://www.ceenrg.landecon.cam.ac.uk/news/the-unity-of-the-international-legal-order-reflections-after-15-years-by-pierre-marie-dupuy>> accessed 24 February 2024.

113. McLachlan (n 11) 283, referring to Charlotte Ku, 'Global Governance and the Changing Face of International Law' (2001) *Texas A&M Law Scholarship* 1.

114. Hugh Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989: Part Three' (1991) 62 *British Yearbook of International Law* 1, 58.

115. Aref Shams, 'Tempering Great Expectations: The Legitimacy Constraints and the Conflict Function of International Courts in International Climate Litigation' (2023) *Review of European, Comparative and International Environmental Law* 193, 194.

before international courts in different jurisdictions at present is unprecedented and not free from risks. Yet, so far, it is Higgins's notion of law as a process (and not the ultra-classicist position of Fitzmaurice)¹¹⁶ which is currently winning the case for the climate. The course that the different relevant advisory opinions may take is of fundamental importance for international law and humanity.

116. Contained in its reasoning in the *South West Africa Cases* 1962, aptly referred to by Higgins in Higgins (n 23) 4.