

# Notes

## Introduction

1. Z. Kunuk (Ottawa Citizen), "Inuit Experience Tells Us Adaptation Is Key to the Future – Climate Change Seen as Opportunity to Learn Sustainable Ways to Live in Natural World", (11 November 2010), *Edmonton Journal*.
2. Film, *Qapirangajuq: Inuit Knowledge and Climate Change*, world premiere 23 October 2010 at the imagineNATIVE Film + Media Arts Festival, Toronto.
3. R. Kuokkanen, "Self-Determination and Indigenous Women's Rights at the Intersection of International Human Rights", (2012), 34(1), *Human Rights Quarterly* 225–50. T. Koivurova, "Sovereign States and Self-Determining Peoples: Carving Out a Place for Transnational Indigenous Peoples in a World of Sovereign States", (2010), 12(2), *International Community Law Review* 191–212.
4. World Meteorological Organization, *The Global Climate 2001–2010: A Decade of Climate Extremes – Summary Report*; Foreword, M. Jarraud, Secretary-General WMO; [http://library.wmo.int/pmb\\_ged/wmo\\_1119\\_en.pdf](http://library.wmo.int/pmb_ged/wmo_1119_en.pdf) (accessed 30 January 2014).
5. *Ibid.*, 7.
6. *Ibid.*, 12.
7. *Ibid.*, 9.
8. *Ibid.*, 8.
9. *Ibid.*, 13.
10. The IPCC was set up jointly by the World Meteorological Organization (WMO) and the United Nations Environment Programme (UNEP) in 1988 to provide authoritative assessments, based on the best available scientific literature, on climate change causes, impacts and possible response strategies. IPCC, *Special Report 2012*, C. B. Field and others (eds), *Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation* (Cambridge University Press 2012) 80.
11. *Ibid.*, 240.
12. *Ibid.*, 241.
13. *Ibid.*, 244. See specifically Y. Hirabayashi and S. Kanae, "First Estimate of the Future Global Population at Risk of Flooding" (2009) 3, *Hydrological Research Letters* 6–9 at p. 8. See also T. Kleinen and G. Petschel-Held "Integrated Assessment of Changes in Flooding Probabilities Due to Climate Change", (2007), 3–4, *Climatic Change* 283–312.
14. IPCC, *Climate Change 2007, The Fourth Assessment Report* (AR4) (IPCC 2007).
15. The final draft report, dated 7 June 2013, of Working Group I's contribution to the IPCC 5th Assessment Report "Climate Change 2013: The Physical Science Basis" was accepted but not approved in detail by the 12th session of Working Group I and the 36th session of the IPCC on 26 September 2013 in Stockholm, Sweden. The final draft report comprises Working Group I's full scientific and technical assessment. The report is to be read in conjunction with the document entitled "Climate Change 2013: The Physical Science Basis. Working Group I Contribution to the IPCC 5th Assessment Report – Changes to

- the Underlying Scientific-Technical Assessment” to ensure consistency with the approved Summary for Policymakers (IPCC – XXVI/Doc. 4).
16. IPCC press release: “Human Influence on Climate Clear, IPCC Report Says”, Stockholm, 27 September 2013, 2013/20/PR.
  17. UNEP, *The Emissions Gap Report; Are the Copenhagen Accord Pledges Sufficient to Limit Global Warming to 2° C or 1.5° C?; A Preliminary Assessment*; November 2010; Foreword; Achim Steiner, UN Under-Secretary-General, UNEP Executive Director; p. 3.
  18. United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC).
  19. *Ibid.*, art. 2.
  20. UNFCCC, preamble, art. 1(3) definitions, art. 3 principles.
  21. “Climate Change Secretariat, Status of Ratification of the Convention”, [http://unfccc.int/essential\\_background/convention/status\\_of\\_ratification/items/2631.php](http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php) (accessed 30 January 2014).
  22. For status see UNGA A/RES/67/19 and UNGA A/RES/58/314.
  23. Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (1969) (VCLT 1969), art. 26 “*Pacta sunt servanda*”.
  24. UNFCCC, Annex I.
  25. UNFCCC, art. 4(5).
  26. UNFCCC, art. 4(6).
  27. UNFCCC, preamble, art. 4(1)(e), art. 4(8)(d).
  28. UNFCCC, art. 7.
  29. UNFCCC, Decision 2/CP.17, Outcome of the work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention, VII. Review: further definition of its scope and development of its modalities; Addendum, part two to the Report of the COP on its 17th session, held in Durban from 28 November to 11 December 2011: Action taken by the COP at its 17th session, FCCC/CP/2011/9/Add.1; dist. 15 March 2012. (See Decision 1/CP.17, Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, 2 at para. 2.)
  30. UNFCCC Report of the COP on its 19th session, held in Warsaw from 11 to 22 November 2013; Decision 1/CP.19, Further Advancing the Durban Platform, FCCC/CP/2013/10/Add.1 (dist. 31 January 2014 ), 3, preamble; 4, para 2.
  31. UNFCCC ADP, Report of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention on the second part of its 15th session, held in Doha from 27 November to 7 December 2012, FCCC/AWGLCA/2012/5, dist. 22 February 2013. UNFCCC ADP, Report of the Ad Hoc Working Group on the Durban Platform for Enhanced Action on the first part of its first session held in Bonn from 17 to 25 May 2012, FCCC/ADP/2012/2, dist. 6 July 2012.
  32. Say for instance by guiding negotiators to reach consensus on trade-offs or “amicable pairs”. Amicable pairs in this sense refer to two different norms so related that the sum of the proper divisors of each is equal to the other.
  33. UNFCCC, Note by the Secretariat, Administrative, financial and institutional matters, Decision-making in the UNFCCC process, Background information relating to the proposal to include a sub-item on the provisional agenda of the 19th session of the Conference of the Parties, Item 17(d) of the provisional agenda, Annex, Letter dated 14 October 2013 from the Head of the Federal Service for Hydrometeorology and Environmental Monitoring of the Russian Federation to the Executive Secretary, UNFCCC COP 19 Warsaw, 11–22 November 2013, FCCC/CP/2013/INF.3, dist. 28 October 2013.

34. Ibid., 3.
35. Ibid., 4.
36. Stephen Humphreys, "Climate Change and International Human Rights Law", in Rosemary Rayfuse and Shirley V. Scott (eds), *International Law in the Era of Climate Change* (Edward Elgar Publishing 2012) 29–57, asserts that existing human rights architecture is unable to manage the gap between human rights as universal rights of humanity, namely "rights-bearers" (a deontological approach), and human rights as treaty obligations, namely "duty-bearers" (a formal or positivist perspective). Stephen Humphreys (ed.), *Human Rights and Climate Change* (Cambridge University Press 2009) (identifies normative challenges concerning climate, the rights to water, food security and health).
37. Siobhan McInerney-Lankford, Mac Darrow, and Lavanya Rajamani, *Human Rights and Climate Change: A Review of the International Legal Dimensions* (World Bank Publications 2011).
38. Daniel Bodansky, "Introduction: Climate Change and Human Rights: Unpacking the Issues", (2010), 38(3), *Georgia Journal of International and Comparative Law* 511–24.
39. Alan E. Boyle and Michael R. Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Press 1998).
40. UNFCCC art. 1(2). At its 65th session, in 2013, the ILC decided to include the topic "Protection of the atmosphere" in its programme of work on the understanding that work on the topic will proceed in a manner so as not to interfere with relevant political negotiations, including on climate change, ozone depletion and long-range trans-boundary air pollution, published 21 August 2013, [http://untreaty.un.org/ilc/summaries/8\\_8.htm](http://untreaty.un.org/ilc/summaries/8_8.htm) (accessed 30 January 2014). UNGA Official Records, 66th session; Supplement no. 10 (A/66/10 and Add.1); Geneva, 26 April–3 June and 4 July–12 August 2011; ILC, Report on the work of its 63rd session, Annex B, Protection of the Atmosphere (Shinya Murase) 315–29.
41. Field and others, *Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation* (n. 10) 5. IPCC, *Climate Change 2007, The Fourth Assessment Report* (AR4) (IPCC 2007) Synthesis Report 30:
 

Climate change in IPCC usage refers to a change in the state of the climate that can be identified (e.g. using statistical tests) by changes in the mean and/or the variability of its properties, and that persists for an extended period, typically decades or longer. It refers to any change in climate over time, whether due to natural variability or as a result of human activity.
42. UNFCCC, preamble.
43. IPCC 2007, *Climate Change 2007, The Fourth Assessment Report* (AR4) Synthesis Report 27. IPCC, UNEP, WMO, *Guidance Notes for Lead Authors of the IPCC Fourth Assessment Report on Addressing Uncertainties*, July 2005.
44. World Bank (Stéphane Hallegatte and others), "Investment Decision Making under Deep Uncertainty – Application to Climate Change" (September 2012), The World Bank, Sustainable Development Network, Office of the Chief Economist Policy Research Working Paper 6193, 4. See also World Bank, Potsdam Institute for Climate Impact Research and Climate Analytics, *Turn Down the Heat, Why a 4°C Warmer World Must Be Avoided* (International Bank for Reconstruction and Development and The World Bank 2012 (November)).
45. Humphreys, *Human Rights and Climate Change* (n. 36).
46. Ibid.

47. Field and others, *Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation* (n. 10) 85. D. Kuwali, "From the West to the Rest: Climate Change as a Challenge to Human Security in Africa", (2008), 17(3), *African Security Review* 18–38. R. Mearns and A. Norton, *Social Dimensions of Climate Change: Equity and Vulnerability in a Warming World* (World Bank Publications 2010).
48. Manfred Nowak (Panel member and rapporteur), *Protecting Dignity: An Agenda for Human Rights* (2011, 22), Report of the Panel on Human Dignity: "There are threats to human security which are global in nature and which can only be combated by global action, such as the rising sea level caused by global warming and climate change."
49. Wolfgang Benedek, "Human Security and Human Rights Interaction", in Moufida Goucha and John Crowley (eds), *Rethinking Human Security* (Wiley 2009) 12: "Although human rights and the concept of human security are interrelated, interdependent and mutually reinforcing, they should not be used interchangeably." They are "essentially a manifestation of human dignity" (M. Nowak, *Introduction to the International Human Rights System* (Martinus Nijhoff 2003, 1). Human security and human rights are both derivatives of human dignity.
50. Humphreys, "Climate Change and International Human Rights Law" (n. 36).
51. Bodansky, "Introduction: Climate Change and Human Rights: Unpacking the Issues" (n. 38).
52. *Ibid.*, 516.
53. *Ibid.*
54. *Ibid.*
55. *Ibid.*, 518.
56. *Ibid.*, 524.
57. Peter Westmore, "Global Warming: Climate Alarmism Is Alive and Well", *News Weekly* (18 August 2012) ("There has been no overall warming of the earth since the el Niño year of 1998, despite the predictions of computer models and the [IPCC]. Nevertheless the global warming industry continues to pump out reports and statements warning of imminent environmental catastrophe").
58. David R. Baker, "Candidates Ignore Climate Change Debate", *San Francisco Chronicle* (California, 3 October 2012).
59. Haroon Siddique, "Ignoring Global Warming Is 'Reckless' of the Government, Warn Campaigners", *Guardian* (London, 1 October 2012).
60. Fiona Harvey, *Climate Change Is Already Damaging Global Economy*, written by more than 50 scientists, economists and policy experts and commissioned by 20 governments, a report facilitated by the DARA group and the Climate Vulnerable Forum, finds "climate change is already contributing to the deaths of nearly 400,000 people a year and costing the world more than \$1.2 trillion, wiping 1.6% annually from global GDP".
61. Al Gore, *Our Choice: A Plan to Solve the Climate Crisis* (Rodale Books 2009) ("we must stop using carbon based fossil fuels, like coal and oil...and switch to renewable energy sources").
62. Lawrence Hurley, "Climate: Skeptic Group Takes Aim at Journalists" *E&E Reporter Greenwire* (11 July 2012). Skeptical Science sets out a taxonomy of arguments at <http://www.skepticalscience.com/argument.php?f=taxonomy> (accessed 30 January 2014).
63. Richard Lindzen, "Global Warming: The Bogus Religion of Our Age" *Daily Mail* (8 March 2007).
64. Richard Lindzen, "Alarmists Keep Ringing the Bell" *Australian* (24 April 2010).

65. IPCC, *Climate Change 2007, The Fourth Assessment Report*, Frequently asked question 1.3, "What is the greenhouse effect?", [http://www.ipcc.ch/publications\\_and\\_data/ar4/wg1/en/faq-1-3.html](http://www.ipcc.ch/publications_and_data/ar4/wg1/en/faq-1-3.html) (accessed 30 January 2014).
66. UNFCCC, Ad Hoc Working Group on Long-Term Cooperative Action under the Convention, Seventh session, Bangkok, 28 September to 9 October 2009, and Barcelona, 2–6 November 2009, FCCC/AWGLCA/2009/INF.2, Annex 1, A Shared Vision for Long-Term Cooperative Action, Option 3, p. 18; para. 38: "The government will be ruled by the COP."
67. *Ibid.*, 7, para. 3 (The first and overriding priority of all developing countries is to reduce/eradicate poverty and promote poverty alleviation.)
68. "Lord Monckton Breaks Down Rio + 20", <http://www.youtube.com/watch?v=i-NOjX914kk> (accessed 30 January 2014).
69. Ian Goldin and Tiffany Vogel, "Global Governance and Systemic Risk in the 21st Century: Lessons from the Financial Crisis", (January 2010), 1(1), *Global Policy* 4–15 at 6.
70. Francis Schüssler Fiorenza and John P. Galvin, *Systematic Theology: Roman Catholic Perspectives*, vol. 2 (Fortress Press 1991) 79.
71. OECD, *Glossary of Environment Statistics, Studies in Methods*, Series F, No. 67 (United Nations, New York 1997), "Global commons" (*patrimoine commun* in French).
72. T. Bodnar and M. Salathé, "Governing the Global Commons with Local Institutions", (2012), 7(4), *PLoS ONE* 1–7 (discusses the importance of sanctioning institutions with long reach: a small change in reach can profoundly influence the governance of the global commons).
73. G. Hardin, "The Tragedy of the Commons", (1968), 162(3859), *Science* 1243–8. G. Hardin, "The Tragedy of the Unmanaged Commons", (1994), 9(5), *Trends in Ecology and Evolution* 1.
74. Hardin, "The Tragedy of the Unmanaged Commons" (n. 73).
75. William Forster Lloyd, *Lectures on Population, Value, Poor Laws and Rent, Delivered in the University of Oxford, during the Years 1832, 1833, 1834, 1835, and 1836* (Roake & Varty 1837) (available on request from the British Library). William Forster Lloyd, *Four Lectures on Poor-Laws, Delivered before the University of Oxford, in Michaelmas Term, 1834* (Roake and Varty 1835). William Forster Lloyd, *Two Lectures on the Justice of Poor-Laws and One Lecture on Rent, Delivered in the University of Oxford, in Michaelmas Term, 1836* (Roake & Varty 1837). William Forster Lloyd, *Lectures on Population, Value, Poor-Law and Rent* (series reprint Kelley 1968). William Forster Lloyd, *A Lecture on the Notion of Value: As Distinguishable Not Only from Utility, But Also from Value in Exchange, Delivered before the University of Oxford, in Michaelmas Term, 1833* (historical reprint Lightning Source 2011).
76. John M. Broder, "At Meeting on Climate Change, Urgent Issues But Low Expectations", *New York Times* (27 November 2011).
77. John Rawls, *The Law of Peoples: With "The Idea of Public Reason Revisited"* (Harvard University Press 2001) 37.
78. E. de Vattel, *Le Droit des Gens ou Principes de la Loi Naturelle, Appliqués à la Conduite et aux Affaires des Nations et des Souverains*, vol. 2 (Leyde 1758).
79. Jean Pictet, *Le Droit Humanitaire et la Protection des Victimes de la Guerre* (Brill 1973) 30.
80. E. Jouve, *Le Droit des Peuples* (2nd edn, PUF 1992, Series: Que sais-je?, no. 2315).
81. World Bank (Hallegatte and others), "Investment Decision Making under Deep Uncertainty – Application to Climate Change" (n. 44).

82. Richard M. Emerson, "Power-Dependence Relations", (1962), 27(1), *American Sociological Review* 31–41 at 31: "mutual dependence binds actors together in a social system". Compare Karen S. Cook and others, "The Distribution of Power in Exchange Networks: Theory and Experimental Results", (1983), 89(2), *American Journal of Sociology* 275–305 at 298: "power-dependence theory is ill-suited to the analysis of complex network structures". Cook's paper identifies multiple foci of power operating at central hubs.
83. Alvin Toffler and Heidi Toffler, *Revolutionary Wealth: How It Will Be Created and How It Will Change Our Lives* (Crown Publishing Group 2007) 68, writing on dissolving borders and emerging region states.
84. Kenichi Ohmae, *The Next Global Stage: Challenges and Opportunities in Our Borderless World* (Wharton School Publishing 2005). See also Kenichi Ohmae, *The End of the Nation State: The Rise of Regional Economies* (HarperCollins 2008).
85. James F. Hoge and Samuel P. Huntington, *The Clash of Civilizations? The Debate* (2nd edn, Foreign Affairs 2010) (includes Huntington's seminal essay published in *Foreign Affairs* in the summer of 1993). Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (Simon and Schuster 1998).
86. Jonathan Wolff, *An Introduction to Political Philosophy* (Oxford University Press 2006) (a historical outline: power as enforcement, sanctions, compensation, liberty and so on).
87. In a similar fashion, Pambou-Tchivounda argues "that the legal framework for international migration exists but it lacks conceptual homogeneity and therefore requires the harmonization of norms and international coordination structures would guarantee its effective implementation". "Migration is a social phenomenon and therefore falls within the operational scope of the law but the fragmentation of the issue of international migration calls for an overhaul of the applicable regime from a unified, global perspective." See Guillaume Pambou-Tchivounda, "The Law Concerning International Migrations", in ILC, *Outlines Prepared by Members of the Commission on Selected Topics of International Law*, Topic: Programme of work, extract from UN Doc. A/CN.4/454, ILC Ybk (1993) 225.
88. ILC, *Report of the International Law Commission on the Work of Its 43rd Session* (29 April–19 July 1991) UN Doc. A/46/10; see "International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law" (117–18). "The Special Rapporteur felt that the Commission should not make a decision whether or not to deal with the problems of the 'global commons' within the context of the present topic until the matter could be considered further" (118, para. 259).
89. Christian Tomuschat, "The Global Commons", in ILC, *Outlines Prepared by Members of the Commission on Selected Topics of International Law* (n. 87) 245–7.
90. *Ibid.*
91. Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium (II): General Course on Public International Law*, Collected Courses of the Hague Academy of International Law (Martinus Nijhoff 2005) vol. 317.
92. Martti Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge University Press 2002) 47. Refers to "legal conscience" in the 1873 statute of the Institut de Droit International. A. A. Cançado Trindade, "Humanization of International Law", *International Law for Humankind: Towards a New Jus Gentium (II): General Course on Public International Law* (n. 91).

## 1 Scope of the Work

93. According to Kades and Jackson, profound changes in globalisation exacerbate legal complexity. Eric Kades, "The Laws of Complexity and the Complexity of Laws: The Implications of Computational Complexity Theory for the Law", (Winter 1997), 49(2), *Rutgers Law Review* 403–84. John H. Jackson, "International Economic Law: Complexity and Puzzles", (March 2007), 10(1), *Journal of International Economic Law* 3–12.
94. UNFCCC, COP 17, CMP 7: "work within the existing UNFCCC framework and its decisions and based on its principles and objectives", "Indaba: The Big Picture; Durban, South Africa", Media release of 2 December 2011, [http://unfccc.int/files/meetings/durban\\_nov\\_2011/application/pdf/cop17\\_cmp7\\_indaba\\_bullets.pdf](http://unfccc.int/files/meetings/durban_nov_2011/application/pdf/cop17_cmp7_indaba_bullets.pdf) (accessed 30 January 2014).
95. UNFCCC Decision 1/CP.19, Further Advancing the Durban Platform (n. 30), the COP reiterat[ed] that the work of the Ad Hoc Working Group on the Durban Platform for Enhanced Action shall be guided by the principles of the Convention; p. 3, preamble.
96. UNFCCC, Decision 2/CP.17, Outcome of the work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention, VII. Review: further definition of its scope and development of its modalities; Addendum, part two to the Report of the COP on its 17th session, held in Durban from 28 November to 11 December 2011: Action taken by the COP at its 17th Session, FCCC/CP/2011/9/Add.1; dist. 15 March 2012, p. 28; para. 160.
97. Frederick James Tomkins, *The Institutes of the Roman Law*, part 1 (Butterworths 1867) (available at Google eBooks). ("The laws of the Twelve Tables constitute the principal source of all Roman law. Livy calls this body of legislation the fons principalis of the public and private law of Rome", 36.) To discern the types of normative interactions that may govern the global commons, there is a need, at least at some stage in the analysis, to reflect on the governance of a veritable shared commons pre-State.
98. W. Neil Adger and others, *Fairness in Adaptation to Climate Change* (MIT Press 2006) (contested ideas of justice, "Adaptation to climate change will be governed by a multilevel solution based on the UNFCCC", 9).
99. Sven Ove Hansson, "A Panorama of the Philosophy of Risk", in Rafaela Hillerbrand, Sabine Roeser, Per Sandin, Martin Peterson (eds), *Handbook of Risk Theory: Epistemology, Decision Theory, Ethics, and Social Implications of Risk* (Springer 2011) 46.

The debate following John Rawls's Theory of Justice has shown, there is no single decision rule for risk and uncertainty that all participants in a hypothetical initial situation can be supposed to adhere to. It remains to show that a viable consensus on risk impositions can be reached among participants who apply different decision rules in situations of risk and uncertainty.

100. Robert O. Keohane and David G. Victor, "The Regime Complex for Climate Change", (2010) Harvard Kennedy School, The Harvard Project on International Climate Agreements, Discussion Paper 10–33. ("There is no integrated, comprehensive regime governing efforts to limit the extent of climate change." Instead, there is a "regime complex": a "loosely coupled set of specific regimes" explained by "institutional arrangements".) Hardin also looks through the institutional rather than constitutional lens; see G. Hardin, "Who Cares for Posterity?", in

- Ernest Partridge (ed.), *Responsibilities to Future Generations* (Prometheus Books 1981).
101. Kristian Skagen Ekeli, "The Principle of Liberty and Legal Representation of Posterity", (2006), 12(4), *Res Publica* 385–409 (coherent discussion on guardians of future generations).
  102. A. A. Cançado Trindade, *The Access of Individuals to International Justice* (Oxford University Press 2011).
  103. Frans Viljoen and Lirette Louw, "State Compliance with the Recommendations of the African Commission on Human and People's Rights, 1993–2004", (2009), 7(2), *International Journal of Civil Society Law* 22–59.
  104. Manfred Nowak, "On the Creation of World Court of Human Rights", (2012), 7(1), *National Taiwan University Law Review* 257–92.
  105. David Miller, *Principles of Social Justice* (Harvard University Press 1999).
  106. Brian Barry, *Why Social Justice Matters* (Polity Press 2005). Brian Barry, *Justice as Impartiality* (Oxford University Press 1996).
  107. B. C. Parks and J. T. Roberts, "Climate Change, Social Theory and Justice", (2010), 27(2), *Theory, Culture and Society* 134–66.
  108. Cançado Trindade, *The Access of Individuals to International Justice* (n. 102) 176.
  109. Viljoen and Louw, "State Compliance with the Recommendations of the African Commission on Human and People's Rights, 1993–2004" (n. 103).
  110. Nowak, "On the Creation of World Court of Human Rights" (n. 104).
  111. Barry, *Why Social Justice Matters* (n. 106).
  112. Parks and Roberts, "Climate Change, Social Theory and Justice" (n. 107).
  113. The fiduciary is the one owing the obligation or duty of care. To reinforce the previous commentary, States and non-State actors have a type of fiduciary duty to protect humankind.
  114. Will McGoldrick, Donald Feaver and Andrew Maver, "Fiduciary Duty and Climate Governance: Challenges for International Diplomacy and Law", in Charles Sampford, Ken Coghill and Tim Smith (eds), *Fiduciary Duty and the Atmospheric Trust* (Ashgate Publishing 2012) 20–1.
  115. Japan Branch Committee on Climate Change, "The Legal Principles Relating to Climate Change, Preliminary Issues on the Methodology and Scope of the Work" (International Law Association, July 2009). Committee on the Legal Principles relating to Climate Change, "Legal Principles Relating To Climate Change" (International Law Association Conference, Sofia, 2012) (Second Report).
  116. OED Online (Oxford University Press, accessed 30 January 2014).
  117. J. Gupta, "Negotiating Challenges and Climate Change", (2012), 12(5), *Climate Policy* (Special Issue: "Negotiating Climate Change") 631.
  118. B. C. Parks and J. T. Roberts, "Climate Change, Social Theory and Justice", (n. 107) 147: reference the work of Goldstein and Keohane in defining principled beliefs as "normative ideas that specify criteria for distinguishing right from wrong and just from unjust" in J. Goldstein and R. Keohane (eds), *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change* (Cornell University Press 1993) 9. J. T. Roberts, "Multipolarity and the New World (Dis)order: US Hegemonic Decline and the Fragmentation of the Global Climate Regime", (2011), 21(3), *Global Environmental Change* 776–84.
  119. A. Green, "Norms, Institutions, and the Environment", (2007), 57(1), *University of Toronto Law Journal* 105–28 (assesses the potential for government to influence environmental values and norms).



120. R. Cooter, "Normative Failure Theory of Law", (1996–1997), 82(5), *Cornell Law Review* 949 ("Just as regulations ideally correct failures in markets, laws ideally correct failures in social norms").
121. R. Bowen, "International Imposition and Transmission of Democracy and the Rule of Law: Lessons from Central America", in D. W. Jackson, M. C. Tolley and M. L. Volcansek (eds), *Globalizing Justice: Critical Perspectives on Transnational Law and the Cross-Border Migration of Legal Norms* (Suny Press 2010) 174 ("The rule of law must be embraced by nations as a set of norms before it can be implemented as part of an overall pattern of behaviour in accord with these norms").
122. J. S. Ela, "Law and Norms in Collective Action: Maximizing Social Influence to Minimize Carbon Emissions", (2009), 27(1), *UCLA Journal of Environmental Law and Policy* 93–144 (discusses social norms). K. F. Kuh, "Capturing Individual Harms", (2011), 35(1), *Harvard Environmental Law Review* 155–204 ("norms are obligations that guide behavior without relying on enforcement through formal legal rules and sanctions" (166)). B. Druzin, "Law, Selfishness, and Signals: An Expansion of Posner's Signaling Theory of Social Norms", (2011), 24(1), *Canadian Journal of Law and Jurisprudence* 5–54 (discusses internalisation as the underlying sense of universal obligation or duty to follow a norm). P. Stockburger, "The Responsibility to Protect Doctrine: Customary International Law, an Emerging Legal Norm, or Just Wishful Thinking", (2010), 5, *Intercultural Human Rights Law Review* 365–406 (reflection on norms as long-standing international commitments).
123. Cançado Trindade, *The Access of Individuals to International Justice* (n. 102) 81.
124. *Ibid.*, 175. For discussions on an alternative view and the alienation of the aesthetic conscious (social norms), see B. Krajewski (ed.), *Gadamer's Repercussions, Reconsidering Philosophical Hermeneutics* (University of California Press 2004). Stone writes earlier on "universal conscience": J. Stone, *Human Law and Human Justice* (Stanford University Press 1965) 202. Stone also discusses the origin of justice as a "kind of metaphysical cosmological principle regulating the operation of the forces of nature on the elements of the universe" (11).
125. D. Landau, "The Reality of Social Rights Enforcement", (2012), 53(1), *Harvard International Law Journal* 189–248, (discusses "holding a norm constitutional only under the condition that it be interpreted a certain way" (218)).
126. On the interdependence of constitutional interpretation and practice, see M. J. Perry, "Why Constitutional Theory Matters to Constitutional Practice and Vice Versa", (1989), 6(2), *Constitutional Commentary* 231–50.
127. M. M. Naser, "Climate Change, Environmental Degradation, and Migration: A Complex Nexus", (2012), 36(3), *William and Mary Environmental Law and Policy Review* 713–68.
128. C. Brölmann, "International Organizations and Treaties: Contractual Freedom and Institutional Constraint", in J. Klabbers and A. Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar Publishing 2011) 299.
129. C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge University Press 2005).
130. D. Sarooshi, "Some Preliminary Remarks on the Conferral by States of Powers on International Organizations", (2003), Jean Monnet Working Paper 4/03, 6.
131. *Certain Expenses of the United Nations* (Article 17, para. 2, of the Charter) (Advisory Opinion of 20 July 1962) [1962] ICJ Rep. 168.

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## 2 Optimising Dynamic Normative Systems

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such overriding principles of international law which may be regarded as constituting principles of international public policy (ordre international public). These principles need not necessarily have crystallized in a clearly accepted rule of law such as prohibition of piracy or of aggressive war. They may be expressive of rules of international morality so cogent that an international tribunal would consider them as forming part of those principles of law generally recognized by civilized nations which the International Court of Justice is bound to apply by virtue of Article 38 (3) of its Statute.

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381. "Liability Directive Ensures Polluters Pay", (Reference IP/07/581), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/581&format=HTML> (accessed 30 January 2014). See Case C-378/08 *ERG and Others* (Judgment, Grand Chamber) (2010) ECR I-01919 (*Raffinerie Mediterranée (ERG) SpA, Polimeri Europa SpA and Syndial SpA v Ministero dello Sviluppo economico and Others*). The liability mechanism does not remedy all environmental damage. There needs to be, *inter alia*, a causal link between an identifiable polluter and "concrete and quantifiable environmental damage" (para. 52 of the grounds). Where a directive does not define the criteria for a causal link, the definition falls within the competence of Member States (para. 55 of the grounds). See Edwin Woerdman and others, "European Emissions Trading and the Polluter Pays Principle: Assessing Grandfathering and Over-Allocation", in Michael Faure and Marjan Peeters (eds), *Climate Change and European Emissions Trading: Lessons for Theory and Practice* (Edward Elgar Publishing 2009). For an analysis, see Arne Bleeker, "Does the Polluter Pay – The Polluter-Pays Principle in the Case Law of the European Court of Justice", (2009), 18(6), *European Energy and Environmental Law Review* 289–306.
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398. Case 6/64 *Flaminio Costa v. E.N.E.L.* (Judgment) (1964) ECR 00585: "By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply." "[T]he Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves."
399. *Ibid.*
400. Case 26/62 *NV Algemene Transport en Expeditie Onderneming Van Gend & Loos v Nederlandse Administratie der Belastingen* (Judgment) (1963) ECR 00001.
401. Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr und Vorratsstelle für Getreide und Futtermittel* (Judgment) (1970) ECR 01125.
402. Case C-213/89 *Factortame and Others* (Judgment) (1990) ECR I-02433, para. 18 of the grounds: (*The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others*). The court found it "necessary" to point to Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* (1978) ECR 629,
- in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures... by their entry into force render automatically inapplicable any conflicting provision of... national law.
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405. Case C-309/96, *Annibaldi* (Judgment, First Chamber) (1997) ECR- I-07493, para. 12 of the grounds (*Daniele Annibaldi v. Sindaco del Comune di Guidonia and Presidente Regione Lazio*).
406. Davies, *European Union Environmental Law: An Introduction to Key Selected Issues* (n. 391) 20. Issues of triangulation, or incidental direct effect, came to a head in *Wells*; see Case C-201/02, *The Queen, on the Application of Delena Wells v. Secretary of State for Transport, Local Government and the Regions* (Judgment, Fifth Chamber) (2004) ECR I-00723. In *Wells*, the ECJ held that "mere adverse repercussions on the rights of third parties, even if the repercussions are certain, do not justify preventing an individual from invoking the provisions of a directive against the



Member State concerned". The claimant was allowed to rely on Directive 85/337 to force a Member State to carry out an environmental impact assessment. That the quarry owners suffered the halting of mining operations pending the outcome of the assessment did not prevent an individual from relying on Article 2(1) of that directive. See *Wells* para. 64 of the grounds, "It is clear from settled case-law that under the principle of cooperation in good faith laid down in Article 10 EC the Member States are required to nullify the unlawful consequences of a breach of Community law". See *Wells* para. 66, "The Member State is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment".

407. Hedemann-Robinson, *Enforcement of European Union Environmental Law: Legal Issues and Challenges* (n. 390) 21.
408. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 2 October 1997, 1997 OJ (C 340) (Treaty of Amsterdam).
409. Treaty of Amsterdam (n. 408), Protocol on the Application of the Principles of Subsidiarity and Proportionality, Preamble. Treaty of Amsterdam, art. 1(5), "The objectives of the Union shall be achieved as provided in this Treaty and in accordance with the conditions and the timetable set out therein while respecting the principle of subsidiarity as defined in Article 3b of the Treaty establishing the European Community".
410. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 30 March 2010, OJ (C 83/01).
411. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, adopted at Lisbon 13 December 2007, entered into force 1 December 2009, OJ (C 306) art. 1(2). For an overview, see Jan H. Jans and Hans H. B. Vedder, *European Environmental Law: After Lisbon* (4th edn, Europa Law Publishing 2012).
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413. Case C-180/96, *United Kingdom of Great Britain and Northern Ireland v. Commission of the European Communities* (Judgment) (1998) ECR I-02265, para. 96 of the grounds ("mad cow disease"). Case C-331/88, *Fedesa and Others* (Judgment, Fifth Chamber) (1990) ECR I-04023, para. 13 of the grounds (*The Queen v. Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others*):

The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.

Case C-133/93, *Crispoltoni* (Judgment, Fifth Chamber) (1994) ECR I-04863, para. 40–41 of the grounds (*Antonio Crispoltoni v. Fattoria Autonoma Tabacchi and Giuseppe Natale and Antonio Pontillo v. Donatab Srl.*).

414. Case C-293/97, *Standley* (Judgment, Fifth Chamber) (1999) ECR I-02603, paras 46–9 of the grounds (*The Queen v. Secretary of State for the Environment and Ministry*

of Agriculture, Fisheries and Food, *ex parte* H.A. Standley and Others and D.G.D. Metson and Others). The ECJ recognised the polluter-pays norm as a principle again in Case C-1/03, *Van de Walle and Others* (Judgment, Second Chamber) (2004) ECR I-07613, para. 58 of the questions referred (*Criminal Proceedings against Paul Van de Walle, Daniel Laurent, Thierry Mersch and Texaco Belgium SA.*). Case C-188/07, *Commune de Mesquer* (Judgment, Grand Chamber) (2008) ECR I-04501 (*Commune de Mesquer v. Total France SA and Total International Ltd*): an extended polluter-pays principle was linked to obligations of conduct (see para 82 of the grounds). Case C-254/08, *Futura Immobiliare and Others* (Judgment, Second Chamber) (2009) ECR I-06995: there is currently no community obligation as to a specific method for financing the cost of disposing of urban waste (see para. 48 of the grounds) (*Futura Immobiliare srl Hotel Futura and Others v. Comune di Casoria*). The court suggested criteria (see from para. 50 of the grounds).

[T]he “polluter pays” principle does not preclude the Member States from varying, on the basis of categories of users determined in accordance with users’ respective capacities to produce urban waste, the contribution of each of those categories to the overall cost necessary to finance the system for the management and disposal of urban waste.

(see para. 52 of the grounds)

415. Hedemann-Robinson, *Enforcement of European Union Environmental Law: Legal Issues and Challenges* (n. 390). See also Maria Lee, *EU Environmental Law: Challenges, Change and Decision-Making* (Hart Publishing 2005) chapter 5.
416. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447 (Aarhus Convention).
417. Svitlana Kravchenko, “Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements”, (2007), 18(1), *Colorado Journal of International Environmental Law and Policy* 1–50.
418. Cases T-172/98 and T-175/98 to T-177/98, *Salamander AG and Others v. European Parliament and Council of the European Union* (Judgment of the Court of First Instance, Third Chamber) (2000) ECR II-02487, see para. 78 of the grounds re effective remedy (*Salamander AG, Una Film “City Revue” GmbH, Alma Media Group Advertising SA & Co. Partnership, Panel Two and Four Advertising SA, Rythmos Outdoor Advertising SA, Media Center Advertising SA, Zino Davidoff SA and Davidoff & Cie SA v. European Parliament and Council of the European Union*).
419. Farhan Yamin and Joanna Depledge, *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures* (Cambridge University Press 2004) 17.
420. B. Chaytor and K. R. Gray, *International Environmental Law and Policy in Africa (Environment & Policy)* (Springer 2010). Jan Glazewski, *Environmental Law in South Africa* (LexisNexis/Butterworths 2005) (the book provides a comprehensive assessment of several African jurisdictions).
421. Carl Bruch, *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa* (2nd edn, UNEP 2007).
422. The Constitution of the Republic of Namibia (entered into force 21 March 1990).
423. Dinah Shelton, “Human Rights and the Environment: Substantive Rights”, in Malgosia Fitzmaurice, David Ong and Panos Merkouris (eds), *Research Handbook on International Environmental Law* (Edward Elgar Publishing 2010) 268.
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425. The Constitution of the Republic of South Africa 1996 (approved by the Constitutional Court on 4 December 1996 and took effect on 4 February 1997).
426. The Constitution of the United Republic of Tanzania (CAP 2) art. 14, "Every person has the right to live and to the protection of his life by the society in accordance with the law".
427. *Joseph D. Kessy and Others v. The City Council of Dar es Salaam*, Court of Appeal of Tanzania at Arusha, Civil Appeal No. 53 of 1998. See also *Festo Balegele and 749 Others v. Dar es Salaam City Council*, High Court Tanzania, Civil Cause No. 90/1991.
428. *Peter K Waweru v. Republic of Kenya*, High Court of Kenya at Nairobi, misc. civ. appli. 118 of 2004, 2 March 2006, Kenya Law Reports.
429. *Ibid.*
430. *Kemai and 9 Others v. Attorney General and 3 Others*, High Court of Kenya at Nairobi, civil case 238 of 1999, 23 March 2000, Kenya Law Reports. *Kemai and Others v. Attorney-General and Others* (2005) AHRLR 118 (KeHC 2000). See African Human Rights Case Law Database, <http://www.chr.up.ac.za/index.php/about-the-african-human-rights-case-law-database.html> (accessed 30 January 2014).
431. Wilmien Wicomb and Henk Smith, "Customary Communities as Peoples and Their Customary Tenure as Culture: What We Can Do with the Endorois Decision", (2011), 11(2), *African Human Rights Law Journal* 429.
432. Government of Kenya, "National Climate Change Response Strategy" (April 2010): "the responsibility of significantly reducing emissions lies with industrialised countries because they are responsible for the historical accumulation of anthropogenic GHG emissions through industrialization" (24).
433. Ted Gullison Mary Melnyk and Carmen Wong, "Logging Off, Mechanisms to Stop or Prevent Industrial Logging in Forests of High Conservation Value", (October 2001) Union of Concerned Scientists, Center For Tropical Forest Science, Smithsonian Institution. Kenya was fully aware of the problem at the time (p. 13).

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435. *Kemai and 9 Others v. Attorney General and 3 Others* (n. 430).
436. Bugalo Maripe, "Human Rights and the Environment in Botswana" (Linking Human Rights and the Environment: A Comparative Review (workshop), University of Ghent, Belgium, September 2010).
437. *Ibid.*

438. *Sesana and Others v. Attorney-General* (2006) AHRLR 183 (BwHC 2006): constitutional challenges on the uprooting of the Basarwa from their ancestral lands, termination of water and other services, stoppage of food rations, refusal of special gaming licence, environmental rights assumed under broader human rights, freedom of movement upheld but the government not obliged to uphold essential government services (food and water) in all circumstances.
439. *Matsipane Moselelhanyane and Gakenyatsiwe Matsipane v. Attorney General*, Botswana Court of Appeal judgment, CACLB-074-10, 27 January 2011 (*Moselelhanyane*).
440. *Moselelhanyane* (n. 439) 20.
441. C. Claasen and J. Roloff, "The Link between Responsibility and Legitimacy: The Case of De Beers in Namibia", (2012), 107(3), *Journal of Business Ethics* 379–98. J. Van Wyk, "Double Diamonds, Real Diamonds: Botswana's National Competitiveness", (2011), 10(1), *Academy of Strategic Management Journal* 45–64.
442. *Moselelhanyane* (n. 439) 17.
443. Bonolo Ramadi Dinokopila, "The Right to Water in Botswana: A Review of the Matsipane Moselelhanyane Case", (2011), 11(1), *African Human Rights Law Journal* 282–95.
444. *Moselelhanyane* (n. 439) 20.
445. Maripe, "Human Rights and the Environment in Botswana" (n. 436). See also Dinokopila, "The Right to Water in Botswana: A Review of the Matsipane Moselelhanyane Case" (n. 443).
446. Bruch, *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa* (n. 421).
447. African Convention on the Conservation of Nature and Natural Resources (Revised Version) (adopted 11 July 2003) art XVI (Procedural Rights).
448. Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) OAU Doc. CAB/LEG/23.15 (2001), Preamble and art. 1.
449. African Charter on Human and Peoples' Rights (n. 198) art. 21(4).
450. Constitutive Act of the African Union (n. 448) art. 13(1)(e).
451. *Ibid.*, art. 14(d).
452. UNFCCC, art. 3(4).
453. Committee on the Legal Principles Relating to Climate Change (n. 115) Second Report 14.
454. African Convention on the Conservation of Nature and Natural Resources (OAU) (adopted 15 September 1968) OAU Doc. No. CAB/LEG/24.1. See also African Convention on the Conservation of Nature and Natural Resources (Revised Version) (n. 447).
455. African Charter on Human and Peoples' Rights (n. 198).
456. *Ibid.*, art. 24.
457. *Ibid.*, art. 24.
458. Malcolm David Evans and Rachel Murray, *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2000* (Cambridge University Press 2008) 285.
459. Fatsah Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (Martinus Nijhoff 2003) 364–5.
460. *Ibid.*
461. African Charter on Human and Peoples' Rights (n. 198) arts 27, 28, 29.
462. *Ibid.*, art. 21(2).
463. *Ibid.*, art. 21(3).

464. *Ibid.*, art. 9(1).
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794. UNGA, "Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of the First Part of Its Fifth Session" (n. 777) 28, para. 5.
795. UNGA, "Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of Its Fourth Session" (n. 776) 29, para. 9.
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797. "Report of the World Commission on Environment and Development: *Our Common Future*", Transmitted to the UNGA as an Annex to Doc. A/42/427 – Development and International Co-operation, Environment, chapter 2, "Towards Sustainable Development", UNGA Res. A/RES/38/161 (4 August 1987).
798. A. Boyle and D. Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press 2001).
799. Nico Schrijver and Friedl Weiss, *International Law and Sustainable Development: Principles and Practice* (n. 183).

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801. UNGA, "Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of the First Part of Its Fifth Session" (n. 777) 28, para. 2.
802. According to Sands and others, "the obligation to co-operate is affirmed in virtually all international environmental agreements of bilateral and regional application and global instruments": Sands and others, *Principles of International Environmental Law* (n. 513) 204.
803. Pierre-Marie Dupuy, "La Contribution du Principe de Non-Discrimination à l'Elaboration du Droit International de l'Environnement", (1991–1992), 7(2), *Revue Québécoise de Droit International* 135.
804. Shinya Murase, "Trade and the Environment: With Particular Reference to Climate Change Issues", (2005), 2(2), *Manchester Journal of International Economic Law* 22.
805. Edith Brown Weiss, John Howard Jackson and Nathalie Bernasconi-Osterwalder (eds), *Reconciling Environment and Trade* (2nd edn, Martinus Nijhoff 2008) 32.
806. Pictet, *Development and Principles of International Humanitarian Law* (n. 189).
807. R. Hammer, *Entering Torah: Prefaces to the Weekly Torah Portion* (Gefen Publishing House Ltd 2009) 176.
808. A. A. Yusuf, *An English Translation of the Holy Quran* (Lushena Books 2001) (An-Nisa, 4.36).
809. M. H. Kamali, *Principles of Islamic Jurisprudence* (Ilmiah Publishers 1998) 247. N. J. Coulson, *A History of Islamic Law* (Edinburgh University Press 1994). D. Powers, *Studies in Quran and Hadith* (University of California Press 1986).
810. Pictet, *Development and Principles of International Humanitarian Law* (n. 189).
811. *Donoghue (or McAlister) v. Stevenson* (1932) AC 562.
812. *East Suffolk Rivers Catchment Board v. Kent* (1941) AC 74 (on difference between statutory duties and powers to repair sea walls). *Anns v. Merton London Borough Council* (1978) AC 728 (on establishing a duty of care: proximity or neighbourhood based on reasonable contemplation and reasons for refuting a duty of care). Per Lord Wilberforce,

That, quite apart from such consequences as might flow from an examination of the duties laid down by the particular statute, there might be room once outside the area of legitimate discretion or policy, for a duty of care at common law; that it was irrelevant to the existence of that duty of care whether what was created by the statute was a duty or a power: the duty of care might exist in either case.

*Murphy v. Brentwood District Council* (1991) 1 AC 398 (physical injury). The House of Lords overruled the *Anns*' test in *Caparo* and reverted to the incremental approach whereby an existing duty must be established under the prongs of reasonably foreseeable harm, proximity, fair, just and reasonable (*Caparo Industries plc v. Dickman* (1990) 2 AC 605). *Cooper v. Hobart* (Supreme Court Judgment, Canada) (2001) 3 SCR 537 (proximity test). Many common law cases point to the degree of proximity between a manufacturer and consumer, but the main point here concerns the derivation of the neighbour principle.

813. Consolidated Version of the Treaty on European Union (2008) OJ C115/13 art. 4(3): "Pursuant to the principle of sincere cooperation, the Union and

- the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.” Norwegian Refugee Council, The Nansen Conference Climate Change and Displacement in the 21st Century (Oslo, Norway, 5–7 June 2011), Principle 1: “Responses to climate and environmentally related displacement need to be informed by adequate knowledge and guided by the fundamental principles of humanity, human dignity, human rights and international cooperation.”
814. UK, “Duty to Cooperate Factsheet Pursuant to Provision [section] 110 of the Localism Act 2011 for the Benefit of Local Planning Authorities”, <http://www.directionsplanning.co.uk/images/Directions%20Duty%20to%20Cooperate%20Factsheet%20010312.pdf> (accessed 30 January 2014). For a US example, see the duty to cooperate concerning notices in insurance claims: *Berkley Regional Ins. Co. v. Philadelphia Indemnity Ins. Co.* (US Court of Appeals for the 5th Cir., 2 August 2012) Case No. 11–50595. See also Case C-2/90, *Commission v. Belgium* (Judgment) (1992) ECR I-04480, paras 34 and 35 (tipping of hazardous waste in Wallonia; principle of proximity provides that environmental damage should be remedied at source).
  815. “Trail Smelter Case” (*United States v. Canada*) (16 April 1938 and 11 March 1941) Reports of International Arbitral Awards, vol. III, LIX, 1905–1982 at 1965.
  816. ILC, “Draft Articles on the Responsibility of International Organizations 2011” (n. 135) art. 3 (Adopted by the International Law Commission at its 63rd Session, in 2011, and submitted to the General Assembly as a part of the commission’s report covering the work of that session) A/66/10, para. 87.
  817. UNFCCC, “Integrating Practices, Tools and Systems for Climate Risk Assessment and Management and Disaster Risk Reduction Strategies into National Policies and Programmes” FCCC/TP/2008/4 (21 November 2008). UNFCCC, “Mechanisms to Manage Financial Risks from Direct Impacts of Climate Change in Developing Countries” FCCC/TP/2008/9 (21 November 2008).
  818. UNGA Res. 66/199 UN Doc. A/RES/66/199 (adopted by the General Assembly at its 91st Plenary Meeting, 22 December 2011).
  819. See [http://unfccc.int/adaptation/cancun\\_adaptation\\_framework/loss\\_and\\_damage/items/6597txt.php](http://unfccc.int/adaptation/cancun_adaptation_framework/loss_and_damage/items/6597txt.php) (accessed 30 January 2014).
  820. UNFCCC Report of the COP on its 19th Session, held in Warsaw from 11 to 22 November 2013; Decision 2/CP.19, Warsaw international mechanism for loss and damage associated with climate change impacts, FCCC/CP/2013/10/Add.1 (dist. 31 January 2014) 6.
  821. UNFCCC COP 7, Decision 27/CP.7, “Guidance to an Entity Entrusted with the Operation of the Financial Mechanism of the Convention, for the Operation of the Least Developed Countries Fund”, FCCC/CP/2001/13/Add.4 (8th Plenary Meeting, 10 November 2001).
  822. UN News Centre, “Palau Seeks UN World Court Opinion on Damage Caused by Greenhouse Gases”, (22 September 2011), <http://www.un.org/apps/news/story.asp?NewsID=39710&Cr=pacific-island&Cr1> (accessed 30 January 2014).
  823. UNFCCC, art. 14.6, art. 4.9.
  824. UNFCCC, art. 11.
  825. Hans Kelsen, *Pure Theory of Law* (n. 536) 195.
  826. UNGA, “Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of Its Fourth Session” (n. 776) II Principles 28–9.



827. UNGA, "Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of the First Part of Its Session" (n. 777) 28–9.
828. UNGA, "Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of Its Fourth Session" (n. 776) II Principles 29.
829. UNGA, "Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of the First Part of Its Fifth Session" (n. 777) 29.
830. UNGA, "Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of Its Fourth Session" (n. 776) II Principles 27–9.
831. Sir H. Waldock (Special Rapporteur), "Third Report on the Law of Treaties" (3 March, 9 June, 12 June and 7 July 1964) UN Doc. A/CN.4/167 and Add.1–3, II ILC Yearbook 58, para. 21. See also Gardiner, *Treaty Interpretation* (n. 274) 307.
832. "Nuclear Tests" (*New Zealand v. France*) (Judgment) (1974) ICJ Rep. 473, para. 49.

... Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.

833. Mohammed Bedjaoui, "Keynote Address, Conference on Good Faith, International Law, and Elimination of Nuclear Weapons: The Once and Future Contributions of the International Court of Justice" (Geneva 1 May 2008) 17–18, <http://www.Incp.org/disarmament/2008May01eventBedjaoui.pdf> (accessed 30 January 2014).
834. A. W. B. Simpson, "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature", (1981), 48(3), *University of Chicago Law Review* 642.
835. Ibid.
836. Ibid.
837. Ibid., 642–3.
838. Edward Coke, *The First Part of the Institutes of the Laws of England; or, a Commentary upon Littleton*, vol. 1 (16th edn, Francis Hargrave and Charles Butler, Lincoln's Inn 1809).
839. M. Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press 2011) 36.
840. "† tenent, n.". OED Online (Oxford University Press), accessed 30 January 2014. From the Latin etymology: "they hold". "A tenet ought to be the opinion of one, what *he* holds".
841. Statute of the ICJ (n. 724) art. 38(1)(c). League of Nations, Statute of the Permanent Court of International Justice 16 December 1920, amended by the Protocol of 14 September 1929, (PCIJ Statute) art. 38.
842. VCLT 1969, Preamble, art. 26 "Pacta sunt servanda", art. 31 General Rule of Interpretation.

843. Field and others, *Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation* (n. 10) 5. IPCC, *Climate Change 2007, The Fourth Assessment Report (AR4)* (IPCC 2007) Synthesis Report 30:

Climate change in IPCC usage refers to a change in the state of the climate that can be identified (e.g. using statistical tests) by changes in the mean and/or the variability of its properties, and that persists for an extended period, typically decades or longer. It refers to any change in climate over time, whether due to natural variability or as a result of human activity.

844. UNFCCC art. 1(2).

At its sixty-fifth session, in 2013, the ILC decided to include the topic “Protection of the atmosphere” in its programme of work. The Commission included the topic in its programme on the understanding that: Work on the topic will proceed in a manner so as not to interfere with relevant political negotiations, including on climate change, ozone depletion, and long-range transboundary air pollution.

Published 21 August 2013, [http://untreaty.un.org/ilc/summaries/8\\_8.htm](http://untreaty.un.org/ilc/summaries/8_8.htm) (accessed 30 January 2014). UNGA Official Records, 66th Session; Supplement No. 10 (A/66/10 and Add.1); Geneva, 26 April–3 June and 4 July–12 August 2011; ILC, Report on the work of its 63rd Session, Annex B, Protection of the Atmosphere (Shinya Murase) 315–29.

845. IPCC, R. K. Pachauri and A. Reisinger (eds), *Synthesis Report; Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (n. 41) 30.
846. *Ibid.*, 72.
847. “The MOX Plant Case” (*Ireland v. United Kingdom*) Case No. 10 (Request for Provisional Measures) (ITLOS Order of 3 December 2001), 41 ILM 405 (2002), para. 51.
848. Aristotle (W. A. Pickard-Cambridge tr.), *De Sophisticis Elenchis* (“On Sophistical Refutations”), from vol. 1 of *The Works of Aristotle* (translated into English, ed. W. D. Ross, Oxford University Press 1928).

## 6 Auxiliary Principles

849. Statute of the ICJ, art. 38(1) (n. 724).
850. UNFCCC, Report of the COP on Its 17th Session (n. 29), see Decision 2/CP.17, Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention, II. Enhanced action on mitigation, E. Various approaches, including opportunities for using markets, to enhance the cost-effectiveness of, and to promote, mitigation actions, bearing in mind different circumstances of developed and developing countries, 17.
851. “North Sea Continental Shelf” (*Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands*) (Judgment) (1969) ICJ Rep. 47, para. 85. See also “Fisheries Jurisdiction” (*Federal Republic of Germany v. Zeeland*) (Merits, Judgment) (1974) ICJ Rep. 202, para. 69, which reiterates this point.
852. “Equity.” OED Online (Oxford University Press) accessed 30 January 2014.
853. Thomas Aquinas, *The Summa Theologica of St. Thomas Aquinas* (2nd and revised edn, Fathers of the English Dominican Province trs, Burns Oates and Washbourne 1920). For a different translation that frequently combines epikeia

- and equity, see Thomas van Aquino and Josepho Pecci (eds), *Summa Theologica* (Parisii 1925) 3339.
854. "Solidarity." OED Online (Oxford University Press) accessed 20 January 2014.
855. *Ibid.*
856. France, "La Constitution – Préambule de la Constitution de 1946" (Line 12: "*La Nation proclame la solidarité et l'égalité de tous les Français devant les charges qui résultent des calamités nationales.*")
857. *Ibid.*, art. 87: "*La République participe au développement de la solidarité et de la coopération entre les États et les peuples ayant le français en partage.*"
858. Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 5; CETS No. 005; 213 UNTS 221 (European Convention on Human Rights, ECHR).
859. France, "La Constitution – Charte de l'environnement de 2004", Preamble: Que l'environnement est le patrimoine commun des êtres humains, art. 2: "*Toute personne a le devoir de prendre part à la préservation et à l'amélioration de l'environnement.*"
860. H. Shue, "Subsistence Emissions and Luxury Emissions", (1993), 15(1), *Law and Policy* 39–60.
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862. Framework Convention for the Protection of National Minorities (Council of Europe) (adopted 1 February 1995, entered into force 1 February 1998) ETS 157, 2151 UNTS 243.
863. "Anchorage Declaration of the Indigenous Peoples' Global Summit on Climate Change 2009", <http://www.indigenoussummit.com/servlet/content/declaration.html> (accessed 30 January 2014).
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866. *The Oxford English Reference Dictionary* (Oxford University Press 1996) 1205.
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869. "Reciprocal." OED Online (Oxford University Press) accessed 30 January 2014.
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871. UNFCCC, Report of the COP on Its 7th Session (Marrakesh, 29 October–10 November 2001). Addendum, Part Two: Action taken by the COP, vol. IV, Decision 26/CP.7. Amendment to the list in Annex II to the Convention FCCC/CP/2001/13/Add.4 (dist. 21 January 2002) 5.
872. UNFCCC, Report of the COP on Its 16th Session (Cancun, 29 November–10 December 2010); Addendum, Part Two: Action Taken by the COP at Its 16th Session. Decisions adopted by the COP Decision 1/CP.16. The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention FCCC/CP/2010/7/Add.1 (dist. 15 March 2011).
873. "Land and Maritime Boundary between Cameroon and Nigeria" (*Cameroon v. Nigeria: Equatorial Guinea Intervening*) (Judgment) (2002) ICJ Rep. 443, para. 294.

- "The Court is bound to stress in this connection that delimiting with a concern to achieving an equitable result, as required by current international law, is not the same as delimiting equity."
874. UNGA Res. 55/2 "Millennium Declaration" (adopted by the GA 8 September 2000) para. 6.
875. UNFCCC COP Decision 1/CP.16, The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (n. 498).
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883. "Gabčíkovo-Nagymaros Project" (*Hungary v. Slovakia*) (Judgment) (1997) ICJ Rep. 68, para. 113.
884. *Ibid.*, 68, para. 112, 77, para. 140.
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887. "Southern Bluefin Tuna Case" (*Australia and New Zealand v. Japan*) (Award on Jurisdiction and Admissibility) (ITLOS Award of 4 August 2000) 39 ILM 1359 (2000), para. 34.
888. "Southern Bluefin Tuna Cases" (*New Zealand v. Japan; Australia v. Japan*) Case Nos 3 and 4 (Request for Provisional Measures) (ITLOS Order of 27 August 1999) 38 ILM 1624 (1999). Separate Opinion of Judge Laing, para. 19.
889. *Ibid.*
890. "Southern Bluefin Tuna Cases" (*New Zealand v. Japan; Australia v. Japan*) Case Nos 3 and 4 (Request for Provisional Measures) (ITLOS Order of 27 August 1999) 38 ILM 1624 (1999). Separate Opinion of Judge Treves, para. 9.
891. *Ibid.*
892. Agreement on the Application of Sanitary and Phytosanitary Measures (adopted 15 April 1994, entered into force 1 January 1995) (Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Multilateral Agreements on Trade in Goods) 1867 UNTS 536 (WTO SPS Agreement).
893. *Ibid.*, art. 5.7.

894. *EC Measures Concerning Meat and Meat Products (Hormones)* (WTO Appellate Body Report) WT/DS26/AB/R and WT/DS48/AB/R (adopted 13 February 1998) DSR 1998:I, 135 (“EC – Hormones”) paras 124, 253.
895. *Japan Measures Affecting Agricultural Products* (WTO Appellate Body Report) WT/DS76/AB/R (adopted 19 March 1999) DSR 1999:I, 277 (“Japan – Agricultural Products II”) para. 80.
896. *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* (Appellate Body Report) WT/DS291/R, WT/DS292/R and WT/DS293/R, Add.1 to Add.9, and Corr.1 (adopted 21 November 2006) DSR 2006:III VIII, 847 (“EC – Approval and Marketing of Biotech Products”) 340, paras 7.88 and 7.89.
897. Linda Cameron, “Environmental Risk Management in New Zealand – Is There Scope to Apply a More Generic Framework?” (2006) New Zealand Treasury Policy Perspectives Paper 06/06.
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900. Advisory Opinion OC-17/2002, “Juridical Condition and Human Rights of the Child”, Inter-American Court of Human Rights (IACtHR), published 28 August 2002, para. 47.
901. *Paul Anthony Blundell v. Sentence Administration Board of the Australian Capital Territory, The Australian Capital Territory and the Chief Executive of the Department of Justice and Community Safety* (Judgment of 2 December 2010) ACTSC 151 No. SC 98 of 2010.
902. “Ahmadou Sadio Diallo” (*Republic of Guinea v. Democratic Republic of the Congo*) (Judgment on the Merits) (2010) ICJ Rep. 639, Separate Opinion of Judge Cançado Trindade 729.
903. UNFCCC, Decision 1/CP.13, Bali Action Plan, Report of the COP on its 13th Session, held in Bali 3-15 December 2007, FCCC/CP/2007/6/Add.1.\* dist. 14 March 2008, p. 3, para 1(b)(ii). \*reissued for technical reasons. Consideration of “Nationally appropriate mitigation actions by developing country Parties in the context of sustainable development, supported and enabled by technology, financing and capacity-building, in a measurable, reportable and verifiable manner”. See also document FCCC/SBI/2013/INF.12/Rev.2. for a compilation of the information on all nationally appropriate mitigation actions (NAMAs) communicated by developing country Parties published by the UNFCCC Secretariat on 14 January 2014.
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907. Sands and others, *Principles of International Environmental Law* (n. 513) 207. Actually referenced from Agenda 21, Chapter 8, Integrating Environment and Development in Decision-Making.
908. Process of preparation of the Environmental Perspective to the Year 2000 and Beyond, UNGA Res. A/RES/38/161 (adopted by the General Assembly at its 38th Session; 102nd Plenary Meeting, 19 December 1983). See Report of the World Commission on Environment and Development, UNGA Res. A/RES/42/187 (42nd Session, 96th Plenary Meeting, 11 December 1987).
909. Report of the World Commission on Environment and Development, “Our Common Future”, transmitted to the UNGA as an Annex to Doc. A/42/427 – “Development and International Co-Operation: Environment, Chapter 2, Towards Sustainable Development” UNGA Res. 38/161 UN Doc. A/RES/38/161 (4 August 1987).
910. UNGA Res. 42/187 (n. 908) para. 4.
911. “Gabčíkovo-Nagymaros Project” (*Hungary v. Slovakia*) (Judgment) (1997) ICJ Rep. 7.
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915. UNFCCC, Ad Hoc Working Group on Long-Term Cooperative Action under the Convention; Report on the Workshop on Equitable Access to Sustainable Development; Revised report by the Chair; FCCC/AWGLCA/2012/INF.3/Rev.1, dist. 15 August 2012.
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920. Mathieu-Antoine Bouchaud, *Commentaire sur la Loi des douze tables: dédié au premier consul*, vol. 2 (Imprimerie de la République (France) 1803) 567–8 (author's translation).
921. *Ibid.*
922. Charter of the United Nations and Statute of the International Court of Justice (signed 26 June 1945), UNTC, CTC, ch. I.1 (“Charter of the United Nations”).
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925. Convention on the Protection and Use of Transboundary Watercourses and International Lakes (adopted 17 March 1992, entered into force 6 October 1996) 1936 UNTS 269 (Helsinki Water Convention), art. 10. Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (adopted 17 June 1999, entered into force 4 August 2005) 2331 UNTS 202 (ECOSOC Doc. MP.WAT/AC.1/1999/1 of 24 March 1999), art. 5(c).
926. Vienna Convention for the Protection of the Ozone Layer (adopted 22 March 1985, entered into force 22 September 1988) 1513 UNTS 293, arts 1(1), 2(1).
927. Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, UNGA Res. 1962, UN Doc. A/5515 (1963).
928. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (adopted 27 January 1967, entered into force 10 October 1967) 610 UNTS 205 (Outer Space Treaty).
929. Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Space (adopted 22 April 1968, entered into force 3 December 1968) 672 UNTS 119 (1968).
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### Notes

1. The Convention on the Law of the Non-Navigational Uses of International Watercourses, New York, 21 May 1997, shall enter into force on the ninetieth day following the date of deposit of the thirty-fifth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations. UN Treaty Series Online Collection, status as of 3 May 2014: 16 Signatories, 34 Parties.
2. The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity Nagoya, 29 October shall enter into force on the ninetieth day after the date of deposit of the fiftieth instrument of ratification, acceptance, approval or accession by States or regional economic integration organisations that are Parties to the Convention. UN Treaty Series Online Collection, status as of 3 May 2014: 92 Signatories, 34 Parties.
3. The Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations, Vienna, 21 March 1986,

shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession by States or by Namibia, represented by the United Nations Council for Namibia. UN Treaty Series Online Collection, status as of 3 May 2014: 39 Signatories, 42 Parties. International organisations, which are party to the Convention, are not counted for entry into force purposes, pursuant to article 85 of the Convention.

# Index

- Aarhus Convention, 90, 95–6  
access to justice, 78  
adaptation, *see* auxiliary principles  
Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP), 6, 118  
Africa, human rights, 91  
African Charter on Human and Peoples' Rights (Banjul Charter), 97  
African Court on Human and Peoples' Rights, 97  
Agenda 21, 75, 237  
analytical construction, 155–7  
anchoring (legal principles), 328  
*applicable to all* - process, 153  
arbitrariness, 86, 192–3, 224, 310–12  
Asia-Pacific Economic Cooperation (APEC), 198  
attribution, 179, 249, 265, 270, 271, 301  
authentication, 8, 142, 142, 159, 172–3, 235, 239  
auxiliary principles  
adaptation, 303–4  
appropriateness, 309–10  
common but differentiated responsibilities, 291–5  
cooperation, 263–4  
derivative legal principles, 288  
derivative legal products, 288  
distinguished from ancillary, 286  
estimators, 286  
imputation, 287–90  
integration, 309–10  
meaning, 283, 287, 290, 296  
mitigation, 303–4  
no harm, 263  
proxy, 286  
reduce an unfair burden, 296–7  
respective capabilities, 291–5  
root element, 287  
v structural principles, 290–1  
supplement a deficit, 296–7  
Bali Action Plan, 311  
distinct from Bali Principles, 44  
bias (as an error), 281  
bilateral investment treaties (BITs), 192–3  
bottom-up approaches, 218, 220  
Brundtland Commission (World Commission on Environment and Development), 257, 313  
*see also* sustainable development  
Cancun Agreements, 101–2, 151, 256, 302–3, 311  
capability (respective capabilities), 25, 67, 68, 84, 99, 102, 120, 168, 170, 214, 247, 248, 249, 251, 253, 255, 268, 291–6, 302–3, 328, 330, 340  
Caring for Climate (C4C) program, 105  
causation  
v consequences, 132  
proximate cause, 119  
root cause, 119  
children, *see* future generations  
choice and preferences, 121  
circular logic v circularization, 113  
citizenship, *see* non-state actors  
climate change  
causes, 10–11  
human rights approach v, 9  
IPCC definition, 276  
legal principles, 65–71  
UNFCCC definition, 3, 7  
*see also* global warming; greenhouse effect  
climate justice, *see* justice  
climate justice movements, 38, 44, 52, 118, 119, 127, 129, 151, 228, 248, 250, 283, 286, 313, 328, 330, 343  
climate-related disasters, 1–2  
Climate Welfare Function, 122–4  
collaborative plurality, 128  
collective welfare and consent, 122–4

- Common but Differentiated Responsibilities and Respective Capabilities, CBDRRRC), 67  
*see also* auxiliary principles
- Common but Differentiated Responsibilities (CBDR), 67–8, 86  
*see also* auxiliary principles
- compensation principle, 123, 254
- Competent Authority, 12, 37, 171–2, 174, 198, 228–9, 236  
role and function, 28  
UNFCCC COP, 30, 34
- Comprehensive Africa Agriculture Development Programme (CAADP), 99
- Conduct v result, *see* obligations
- congruity v relativism, 43, 55, 102, 114
- conscience, collective, 28, 31, 52–3, 57–8, 151
- conscience, mobilising the will, 59
- consent principle, 123
- conspiracy theories, 10
- constitutional theory, 132–9
- constitutional unification, 29, 30, 34, 41, 47, 54, 60
- constitutionalism, 16–17  
design aims, 35–6, 88  
ICJ, 32–3  
meaning and rationale, 30
- contextualization, 125–7, 132–4
- controversies and special topics, 212–15
- co-operation, 75
- corporate citizenship, 104–5
- corporate social responsibility (CSR), 104
- cost-benefit analysis (CBA), 81–4, 118, 121, 281
  
- deforestation, 6, 10, 11, 92
- developed countries, capability to service debt, 103
- developed country parties, 4, 101, 247, 292
- developing countries, duties, 102
- developing v developed countries, 6
- differentiation, 27–8, 37, 77, 126
- disasters (natural and climate-related), 1–2
  
- discrimination  
arbitrary or unjustifiable  
discrimination, 259, 261, 268, 318, 321–2, 324  
non-discrimination, 40, 47, 64, 72, 78, 126, 254, 261–2, 315, 322  
price discrimination, 214
- distributive fairness, 254
- distribution theory, 27
  
- Economic Community of West African States (ECOWAS), 99
- econometrics, regression, 113
- effectiveness, 99
- elements (overview)  
general, 21, 155–228  
meaning of, 155  
regression analysis, 143  
relationship to legal philosophy, 227–8, 232  
relationship to legal science and analytical construction, 156–7  
relationship to normative interaction, 209–10, 335–9  
relationship to objective v subjective tests, 149–50  
relationship to obligations of conduct v obligations of result (*see* section on *obligations*)  
substantive v procedural norms (role revised), 196–7
- elements (*user guide to managing systematic risk*)  
cognitive interpretation v authentic interpretation, 157–64  
legal hermeneutics and interpretation  
entailment 157  
deduction of nth order legal norms, 169  
entailment and constitutional unification, 164–71  
set logic and Venn diagrams, 170–1  
use of notation, 170
- modelling dependent and independent variables, 168–9
- nomenclature  
authentication, 172–3  
constitutional framework, 172  
legal system, 171–2  
modal specificity, 177

- norm addressee, 179
- norms, 173
- omission of an “ought”, 176–7
- ought not to be”
- range specificity, 177
- spatial specificity, 178
- spatio-temporal specificity, 178
- specificity of legal norms, 173–4
- specificity personae, 179
- sphere of validity, 178
- substantive v procedural and
  - objective v subjective, 149–50
- temporal specificity, 178
- transposition of values into legal norms, 173
- values and ethics, 171
- error reduction techniques
  - nesting, 200
  - parsing, 200
  - prologue, 201
  - regression analysis, 199–200
  - root element, 199
  - schema, 199
  - specification statement, 200–1
- linguistic interpretation
  - meaning of, 171
  - relationship to binding legal norms, 181–98
- policy question doctrine 201–207
  - constitutional limits, 205
  - constitutional reserves, 201
  - differences between law and policy, 201
  - international climate law, 203
  - meaning of, 201–7
  - political questions, 202
- treaty interpretation, 157–64
  - interpretation common v civil law, 167
  - interpretation ex post and ex ante, 165
  - see also* main heading for Treaty Interpretation
- energy – energy security
  - energy incentives, 214
  - energy renewables, 48
  - energy efficient occupations, 76
  - see also* human security
- energy transition (to a low-carbon society), 81, 105, 311, 314
  - carbon finance, 214
  - price of carbon, 214
  - energy “green” savings, 214–15
  - energy renaissance, 48–9
- entailment, 287–8
- environmental law, 39, 68, 70, 72–5, 85, 87, 89, 91, 96, 107–9, 5, 125, 127, 129, 147, 189, 229, 254, 271–2, 279
- Environmental Liability Directive (ELD), 85
- environmental principles, 74
  - Agenda 21, 1992, 75
  - Rio +20, 2012, 74–9
  - Rio Declaration, 1992, 75
  - Stockholm Declaration, 1972, 75
  - World Charter for Nature, 1982, 75
- Environmental Stewardship Strategy, 105
- Epikeia*, *see* legal equity
- epistemic communities, 246
- Equitable Access to Sustainable Development (EASD), 314–15
- equitable principles/relevant circumstances method, 302
- equity, 68–9
  - intergenerational equity, 69
  - intra-generational equity, 69
  - present and future generations, 60
- equity UNFCCC Article 3(1)
  - a. textual, contextual and teleological interpretation, 246–9
  - b. supplementary means of interpretation, 249–53
  - c. “common but differentiated responsibilities” and “respective capabilities”, 291–5
  - d. distinguishing characteristics, 295–6
- errors and inaccuracies, 280–4
- ethics, 50–1, 171
- European Court of Human Rights (ECtHR), 190
- European Court of Justice, 87–9
- exclusive economic zone, 240
- extensible mark-up language
  - avoiding harmful layering, 129–30
  - encryption, 130
  - nesting, 129
  - XML, internet language, 328
- externalities, 84, 231, 304

- extra-territorial/extra-territoriality, 9,  
13–14, 20, 47, 220, 315, 317,  
321–2, 326
- Fair and Equitable Treatment, 312
- fairness
- compensatory, 283
  - distributive, 254, 283
  - equity, 81, 295
  - fulfilment, 283
  - future generations, 92
  - guarantee, 283
  - law of interdependence, 254
  - of trial, 190
  - solidarity, 250, 253, 254
  - substantive, 300
- first principles
- a priori* approach, 39–40
  - congruency, 46
  - legal norms, 101–2
  - systematic approach, 17–18
- food security, 34, 74, 99–101, 248
- fortitude (constancy), 135
- framework for various approaches  
(FVA), 240
- fraternity, 12, 17, 126, 155–6, 228, 254
- free-riders, 122
- fulfilment (equity), 74
- future generations, 3, 9, 17, 19, 26–7,  
38–9, 60, 215
- cost-benefits, 118
  - discounting, 118
  - duty to protect, 121
  - how much do we owe them?, 212–15
  - rate of return regulation, 212
- Global Climate Change Alliance  
(GCCA), 101
- global commons
- atmosphere, 339
  - corporate incentives, 103–4
  - characteristics, 335–8
  - entrusted duties, 29–30
  - fiduciary theory, 27–30
  - general, 14–16
  - human right laws and, 72–4
  - ILC (1991), 20
  - outer space, 318
  - rationale, 335
- universal environmental principles,  
74–9
- see also* oceans
- Global Compact, 104–5
- global governance, 15, 151, 204
- global warming, 10, 15, 256, 305
- good faith, 71, 79
- good-neighbourliness, UNFCCC  
Article 3(5)
- a. textual, contextual and teleological  
interpretation, 259–69
  - b. supplementary means of  
interpretation, 269–71
  - c. cooperation and “no harm”, 315–6
  - d. distinguishing characteristics,  
316–26
- governance
- absence of consensus, 14–16
  - complex systems, 13–14
  - failure, 11–12, 104, 120–1, 125
  - legitimate, 151, 174
  - systemic failure, 11–12
- Green Climate Fund, 36
- green energy savings, 214–15
- greenhouse effect, 10
- greenhouse gases (GHGs), 3, 10
- ISO standards, 108
- harmony with nature, 76
- hermeneutics, 132–3, 139, 146, 155–7,  
170, 233–4, 241, 246
- heterarchy (*norms*), Heterarchical  
Dialectic (*cp* hierarchy), 228–32
- heuristics (*as an error*), 281
- hierarchy (*norms*), (*cp* heterarchy),  
228–30
- holistic guarantees, 48, 240, 295
- human dignity, 7–8, 14, 15, 18–20, 39,  
54, 83, 95, 104, 113, 125–6, 150,  
226–7, 264, 328, 334–5, 339
- human rights law, 7–8, 72, 129, 272,  
274, 311
- indigenous peoples, 1
- Basarwa, 93–5
  - Inuit, 1
  - Ogiek, 92–3
  - Ogoni community, 98
- regional dimensions
- Africa, 91
  - European Convention, 190



- third generation (*collective rights of the global commons*), 143–4
- Universal Declaration of Human Rights, 65, 101, 105, 238, 243
- human security, 7–8, 15, 39, 83, 113, 126, 150, 188, 242, 328, 334, 335, 343
- imputation, 288–90
- indigenous peoples, 72, 300
  - see also* human rights law
- individual transitive and invertible relations, 121
- integration, 78
- interconnection
  - normative, 119
  - regime, 119
- Intergovernmental Negotiating Committee for a Framework Convention on Climate Change (INC-FCCC), 249–53
- Intergovernmental Panel on Climate Change (IPCC)
  - climate change, definition, 7
  - 4<sup>th</sup> Assessment Report (2007), 8
  - 5<sup>th</sup> Assessment Report (*pending* 2014), 2
  - general, 276
- International Court of Justice (ICJ), 32, 46, 73, 267
  - Statute, 234, 236
- International Covenant on Civil and Political Rights, 310
- International Covenant on Economic, Social and Cultural Rights, 95
- international law (municipal law as part of international law), 158, 218, 220, 221, 227, 229, 236
- International Law Association (ILA), 65
- International Law Commission (ILC), 33, 63, 158, 161, 164, 176, 267
  - general, 65
  - global commons (1991), 20
- interoperability, 31, 34, 134–5, 137–9, 156
- interpretation
  - authentic, 157–9
  - ex post v ex ante*, 165–6
  - judicial, 157, 166, 205, 207
  - qualified, 83, 133, 224, 245
  - treaty, 157–64
- investment law, 129, 138–9, 312
- Jus cogens*, 61–5, 69, 74, 87, 126, 137–8, 186–7, 193–6, 239, 262, 271, 274
- jusgentium* (law of peoples), 16, 21, 26–7, 49
  - jusgentium* principles, 40–52, 61
- justice
  - absence from current theories, 219–20
  - climate justice, 125–30
  - global justice, 18, 19–21, 39, 61, 69, 120, 156, 215, 271
  - legal justice, 52–3
  - socialjustice, 27–9, 52
  - theories of, 222
- kaleidoscopic normativity, 16–19
- knowledge
  - future, 9–11
  - normative existence, 229–30
- Kyoto Protocol, 5, 35, 48, 67–8, 110, 239, 241–2, 262, 266–7, 277–8
- law of humanity, 29, 54, 60, 337
- law of interdependence, 254
- Law of the Sea
  - ITLOS, 279, 306
  - UNCLOS, 176, 240, 241
- Law of Treaties 1969 (VCLT), 62–4, 110, 146, 158–60, 162, 241, 276, 313, 323
- leadership
  - principled leadership, 102–3
  - transformational leadership, 104
  - women (role of), 101
- least developed countries (LDC), 267
- legal equity, 28, 82, 130, 147, 204, 247, 295, 311
- legal justice (relationship to)
  - applies to all, 15
  - breaches, 31
  - collective consensus, 28, 335
  - constitutionalism, 273, 340
  - efficient frontier, 86, 112, 147, 228
  - entrusted duty, 29
  - global, 151, 343
  - inquiry analyses, 17, 216–17
  - quality legal system, 107

- legal equity – *continued*  
 naturalism, 222–3, 336  
 normative content, 22  
 objective consensus, 337  
 parameters, 124  
 self-regarding qualities, 226–7  
 social justice v, 52–3, 247, 341  
 systemic risk, 334  
 universal, 32  
 value transformation, 18  
 verticalisation, 263
- legal norms  
 auxiliary principles, 122  
 binding, 181–5  
 effectiveness, 114, 121  
 first principles, 101–2  
 general, 238, 281, 317  
 general principles of international law, 60–5  
 inventories (*see* International Law Association)  
*juscogens*, 63  
 open systems interconnection v  
 internet coding, 127–9  
*pactasuntservanda*, 245  
 principles, rules and standards  
 (meaning and differences), 110–14  
 rules, 112–14  
 “soft law”, 107  
 specificity, 173–6  
 standards, 107, 112–13  
 UN Declarations, 197–8  
 UNFCCC principles, 110  
 verification and validation, 109
- legal norms (interactions)  
 density, 118–19  
 depth, 118–19  
 interactions between different  
 norms, 127  
 optimising interactions, 127
- legal philosophers  
 Aquinas, Thomas, 51, 52, 54, 56, 60,  
 142, 223, 224, 226  
 Aristotle, 51, 52, 60, 218, 224, 280, 295  
 Augustine of Hippo, 223  
 Austin, John, 58  
 Barry, Brian, 27–8  
 Bassiouni, Mahmoud Cherif, 51, 52,  
 60, 195, 275  
 Bentham, Jeremy, 217, 311  
 Bonaventure, 56  
 Bourgeois, Léon, 254  
 Brown Weiss, Edith, 92, 262  
 CançadoTrindade, Antônio Augusto,  
 21, 27, 31, 51–2, 59, 60, 72–3,  
 204, 311  
 Cardozo, Benjamin, 225–6  
 Cicero, 51, 52, 60, 158  
 Confucius, 316  
 D’Amato, Anthony, 45, 64, 71, 88, 113  
 De Visscher, Charles, 60–1  
 De Visscher, Paul, 231–2  
 Dostoyevsky, Fyodor, 55  
 Dupuy, Pierre-Marie, 85, 108, 262, 326  
 Dupuy, René-Jean, 60, 143, 231, 232  
 Dworkin, Ronald, 58, 107, 218,  
 219–22, 328  
 Endicott, Timothy, 52–4, 60, 69  
 Euclid of Alexandria, 155, 338, 344  
 Finnis, John, 223  
 Fuller, Lon, 223  
 Gadamer, Hans-Georg, 146–7  
 Grotius, Hugo, 122, 157–8, 232, 326  
 Hart, H.L.A., 58, 217–22  
 Hegel, Georg Wilhelm Friedrich, 230  
 Hesse, Hermann, 55  
 Higgins, Rosalyn, 151, 171, 209, 232  
 Hobbes, Thomas, 222  
 Holmes, Oliver Wendell, 181, 223,  
 225, 227  
 Howse, Robert, 227  
 Jouve, Edmond, 243, 254  
 Kamali, Mohammad Hashim, 264  
 Kelsen, Hans, 46, 108, 113–14, 141–2,  
 144, 158, 174–5, 216, 219, 221–2,  
 226, 229–32, 235, 267, 279, 336  
 Krishnamurti, Jiddu, 50, 59  
 Marx, Karl, 230  
 Merryman, J.H., 45  
 Montesquieu, Charles-Louis de  
 Secondat, 140–2, 144, 206,  
 221, 336  
 Murphy, Lionel, 181  
 Niebuhr, Reinhold, 55  
 Pérez-Perdomo, 45  
 Pictet, Jean, 46–7, 58, 221, 262–4, 336  
 Posner, Richard, 84, 164  
 Rawls, John; Charter Law of Peoples,  
 14–15, 124, 219  
 Raz, Joseph, 179, 219

- Rorty, Richard, 223  
 Rumi, Mawlānā, 50, 52  
 Russell, Bertrand, 55  
 Sartre, Jean-Paul, 230  
 Schmitt, Carl, 227  
 Scotus, John Duns, 56  
 Sohm, Rudolph, 45  
 Strauss, Leo, 227  
 Tocqueville, Alexis de, 222  
 Tomuschat, Christian, 20, 33  
 Van der Eycken, Paul, 166  
 Vattel, Emer de, 15  
 Weeramantry, Christopher Gregory, 34, 314  
 Wittgenstein, Ludwig, 58–9
- legal philosophy  
 analytical, 40  
 conflating legal theories, 45
- legal philosophy, systematics  
 first principles approach, 17–18  
 general, 41  
 global commons, 116–18
- legal principles  
 v legal rules and standards, 81, 109, 209–11  
 relationship to international law, 106–9, 207–8  
 relationship to special regimes, *lexspecialis*, 167–8, 208–9
- legal products, derivatives, 211–12  
*see also legal principles*
- legal reasoning  
 deductive, 134–9  
 general, 226–30  
 inductive, 134–9
- legal rules (relationship to legal principles), 111
- legal science  
 general, 140  
 regression analysis, 140–3
- legal systems  
 on autonomy and independence, 109  
 autopoietic systems, 113–15  
 circulation of the legal norm, 114–15  
 contemporary perspectives, 107  
 dynamic systems, 114–15  
 emerging perspectives, 113–14  
 environmental norms, 107  
 heterarchical systems, 113–14  
 interdependent systems, 118  
 networked systems, 113, 114  
 open systems, 127–9  
 systemic v systematic failure, 120–1
- legal theory  
 general, 130–1  
 kaleidoscopic normativity, 128  
 natural law theory, 222–4  
 normative triune, 226, 228  
 positivism, 223–8  
 realism, 223–8  
 string theory, 82, 263, 342–3
- legitimate expectations, 206, 312
- lexspecialis* principles, *see* legal principles, special regimes
- liability and compensation, 77, 79, 254, 320
- methodological issues, 41, 45, 69, 241, 279
- migration, 19, 43, 113  
 displacement, 74, 119
- Millennium Development Goals (MDGs), 43, 99, 339
- mitigation, *see* auxiliary principles
- morality, 63, 64, 173, 217–18, 222–5
- multi-causality, 20
- multicollinearity (*as an error*), 283
- municipal (domestic law), 158, 218, 220
- National Adaptation Programmes of Action (NAPAs), 100
- national law, 87–8, 114, 129, 134–8, 141, 202, 218, 236–7, 264, 275, 335
- Nationally Appropriate Mitigation Actions (NAMAs), 100, 311
- needs, Necessity test, 300
- network optimisation, 112
- New Partnership for Africa's Development (NEPAD), 99
- no harm  
 general, 76  
 proximate harm, 20  
 “root cause” of harm, 20
- non-state actors  
 and civil society, 103–4  
 climate constituencies, 247–8  
 epistemic communities, 246
- non-state actors and corporates  
 CEO Water Mandate, 105  
 corporate citizenship, 104–5

- non-state actors and corporates –
  - continued*
  - corporate social responsibility (CSR), 104
  - Global Compact, 104–5
- non-discrimination (trade), 78
- normative contextualisation, 124–5
- normative interaction
  - Africa, 90–1
  - auxiliary legal principles, 212
  - collaborative plurality, 128
  - consequential norms, 114
  - derivative legal products, 150, 211
  - dynamic systems, 114
  - encryption, 130
  - Europe, 96
  - harmful layering, 129–30
  - harmful optimisation, 129–30
  - legal principles, legal rules and legal standards, 210–11
  - routing norms, 128
  - special regimes, 215
  - transcendent principles, 112
  - UNFCCC constituencies, 104
- normative legal principles and legal rules, 211
- standards, 210–11
- normative plurality, 13, 38
- normative specification, 190, 192–6
- norms
  - Grundnorm*, distinction from monism, 113
  - Grundnorm*, 113–14
  - sphere of validity, 127
  - see also* legal norms
- objective v subjective tests, specificity
  - materialize, 90, 174–6
- obligations
  - of best endeavour, 176, 309
  - of conduct, of means, 186–90
  - internationally wrongful acts, 189–90, 192
  - objective, 187
  - of performance, 195–6
  - of result, of effect, 186
- oceans
  - Equitable Principles/Relevant Circumstances method, 302–3
  - global commons, 13
  - International Tribunal for the Law of the Sea (ITLOS), 279, 306
  - Southern Bluefin Tuna cases, 306
  - stock depletion, 306
  - temperature, 277
  - see also* UN Convention on the Law of the Sea (UNCLOS)
- optimisation, 129–30
  - meaning, 112
  - of legal systems and norms, 112
- participation, 78
- particularity (necessary feature), 102
- people (law of peoples, *jus gentium*), 98
- peremptory norms, *see jus cogens*
- philology of the law, *see* elements and extensible mark-up language
- philosophy
  - judge-made law, judges have integrity, 216–17
  - of legal science, 140
  - naturalism (and natural law theory), 222–3
  - normative triune, 226, 228
  - positivism (and positive law), 217–19
  - realism (and legal realism), 222–4
- pluralism, collaborative, 58, 101–2
- policy question doctrine, 201–7
- political question doctrine, 202
- polluter-pays, 67, 70, 80–2, 84, 89–90, 92, 126, 250
- poverty, 11, 18, 20, 27–8, 77, 98, 100, 103, 118, 120, 126, 175, 222, 314–15, 339
- precaution, 70–1, 79–81
- precautionary principle, 80–2, 85, 92, 250, 256–7, 266, 279, 304–9
- Precaution, UNFCCC Article 3(3)
  - a. textual, contextual and teleological interpretation, 255–6
  - b. supplementary means of interpretation, 256–7
  - c. adaptation and mitigation, 303–4
  - d. distinguishing characteristics, 304–9
- prevention, 84
- preventive principle, 80
- principles
  - Africa, 90–1
  - auxiliary, 285–329

- basic principles, International Law Association, 65–74
- climate change, 65–74
- environmental, 74–86
- Europe, 87–90
- first order, different orders, 231–2
- first principles, 233–84
- international, 106, 138, 184
- joint responsibility, 111
- juscogens*, 63
- Statute of the ICJ, 234–5
- synderesis, 54–7
- transcendental, 37, 50, 65, 69, 96, 138, 142, 145, 153, 186–7, 233–4, 275, 335–8
- principle of proportionality, 89
- prioritisation, 117, 121
- procedural principles, 90, 218
- process *applicable to all*, 153
  - auxiliary principle, 285–329
  - elements, 155–232
  - first principles, 233–84
- proportionality, 88–90, 126, 253, 296, 299–301, 311
- proximate harm, 20, 334
- prudence (logic, rationale), 56–7, 134–5, 223
- questions
  - of effect, 17, 90, 111, 114, 244
  - of fact, 17, 90, 114, 244
- recommendations
  - for beneficiaries, 340
  - Cowen's, 37
  - for fiduciaries, 340
  - for future studies, 340–1
  - International Law commission Report (1983), 176
- regional environmental principles
  - Africa, 90–102
  - Europe, 87–90
- regional law, 114, 129, 335
- regulation of negative externalities, 231, 304
- relativism (v congruity), 43, 56, 69
- research instruments
  - comparative method, 131
  - empirical inquiry (case law method), 131
  - normative inquiry (case study method), 131
- resilience, 99, 126, 129, 266, 273, 288–9, 305, 315
- responsibility
  - v capability, 294
  - common responsibility to protect the environment, 76–7
  - v duty to protect, 247
  - to protect (duty to protect), 60, 76–7, 92
  - shared, 41, 88, 90, 105, 122, 198, 301
- risk
  - contagion, 15, 16
  - systemic risk, 11, 117–20, 334
  - (cp) systematic risk, 11, 12, 66, 117, 120, 232, 334
- risk portfolios, *see* optimisation
- see also* risk regulation
- risk regulation, 150, 178, 256, 303–5, 309
- right to information, 78
- right to participation, 95, 100, 180
- rights
  - collective (third), 143
  - inter-generational, 73, 252
  - intra-generational, 19, 69, 70, 76, 248, 251–2, 293
- Rio Declaration on Environment and Development, 75, 105, 306
- Rio+20, 11, 75, 79, 118
- risk regulation, 150, 178, 256, 303, 304, 305, 309
- root cause, 20, 119
- root element
  - Kyoto Protocol, 278
  - meaning, 199
  - UNFCCC, 239–41
- rule of adjudication, 220
- rule of change, 219–20
- rule of conduct, 226
- rule of recognition, 219
- Seattle Agreement, 14, 151
- set logic and Venn diagrams, 170–1
- shared responsibility, 41, 88, 90, 105, 198, 301
- shift principle, 80
- small island developing states, 178, 216, 299
- social choice theory, 122

- social justice, 15, 27–9, 31, 47–8, 82, 123, 151, 247, 303, 334–5
  - v legal justice, 52–3
- social principles, 52, 81, 264
- socio-legal issues, 27, 122
- solidarity, UNFCCC Article 3(2)
  - a. textual, contextual and teleological interpretation, 253–4
  - b. supplementary means of interpretation, 254–5
  - c. supplement a deficit and reduce an unfair burden, 296–7
  - d. distinguishing characteristics, 297–303
- see also* law of interdependence
- Southern African Development Community (SADC), 99–101
- sovereign debt crisis, 103
- sovereignty, 76, 77
- special and differentiated treatment, 296–7
- special circumstances
  - merit tests, 302
  - necessity, 299–300
- special circumstances, proportionality, 299–300
- special regimes, 215
- specification, 22, 139, 200–1
- spiral hermeneutics, 146, 233
- standards
  - GHG emissions, 109
  - International Organization for Standards (ISO), 109
  - private and quasi-private, 109
- state responsibility v non-state responsibility, 18, 102, 237, 318, 322
- Stockholm Declaration, 75, 126, 237, 318, 320, 324
- subjective obligation, 174–6
- subsidiarity, 78, 88–9
- substantive rules, 218
- supremacy principle (primacy), 87, 90
- sustainability – UNFCCC Article 3(4)
  - supplementary means of interpretation, 257–8
  - textual, contextual and teleological interpretation, 257–8
- sustainable development, 69, 77
- sustainable effectiveness (including the integration principle), 78, 312
- sustainable endeavour, 312, 325, 339
- syneidesis, 54
- synteresis, 54
- systematic failure, 11–12
  - indications of, 120–1
  - Osborne, 145–6
- systematic review, scope of, 145–6, 149
- systematics, use of, 144
- systemic failure, 12, 66, 117–18, 334
  - bilateral relations, 77
  - institutional solutions, 60
  - relational solutions, 121
  - structural adjustment, 118
- “Systemic 5” economies, 103
- systemic risk
  - limitations of, 118–20
  - v systematic, risk and failure, 11–12
- taxonomy, 233, 246, 273, 284, 291
- teleological reasoning, 164
- theory of justice, 124, 219, 222, 228
- theory of positivism, 221
- top-down approaches, 217, 220
- trade law, 20, 39, 47, 119–20, 129, 138–9, 205, 208, 229, 260, 268–9, 274, 279, 322, 325
- transboundary harm, 67
- treaty interpretation, 157–64
  - contextual, 160
  - dispute resolution, legal decision making, 163–4
  - preparatory work, 162–3
  - supplementary means, 162–3
  - teleological reasoning, 164
  - textual, 162
- UN Charter, 64, 65, 71, 76, 78, 125, 158, 204, 317, 323
- UN Convention on the Law of the Sea (UNCLOS)
  - constitution of the oceans, 240
  - drafting, 176
  - principles, 240–1
  - root element, 240
- UN Declarations, 197–8, 323
- UN Declaration of Human Rights, 101, 243
- UNEP Emissions Gap report, 2

- United Nations Framework Convention  
 on Climate Change (UNFCCC)  
 Art 1, Definitions, 3, 10, 304  
 Art 2, Objective, 3, 304  
 Art 3, Principles, 240  
 Art 3, Principles – footnote,  
 implications, 110  
 Art 3(1), Principles, 110  
 Art 3(2), Principles, 110  
 Art3(3), Principles, 110, 304  
 Art 3(4), Principles, 110  
 Art 3(5), Principles, 110  
 Art 4, Commitments, 301  
 Art 7, Conference of the Parties,  
 COP, 5  
 constitutional issues, 26–7  
 constitutional unification, 29–30, 34,  
 41, 47, 54, 107, 130, 132–5, 138,  
 143, 148, 155, 164–5, 199,  
 200, 287  
 COP 16 (Cancún, Mexico), 311, 314  
 COP 17 (Durban, South Africa), 2011,  
 5, 25, 35, 36, 100, 311; process  
 applicable to all, 155–232  
 COP 18 (Doha, Qatar), 2012, 36, 110,  
 240, 311; loss and damage, 6,  
 26, 266  
 COP 19 (Warsaw, Poland), 2013, 6, 25,  
 36, 110, 118, 240, 266, 311  
 decision-making process, 5–7  
 negotiating process, 35–8  
 object and purpose., 3–5  
 Preamble, 8, 10, 242–3  
 Structure, 4  
 United Nations Framework Convention  
 on Climate Change (UNFCCC)  
 treaty interpretation  
 contextual, 253–4  
 general, 42, 109  
 supplementary, 249–53  
 textual, 246–9  
 UN World Conference on Human  
 Rights, 72  
 universality, 15, 18, 33–5, 73, 127,  
 134–5, 137–8, 171, 195  
 user-pays, 127  
 utility maximisation  
 cardinal, 121–2  
 ordinal, 122  
 validity/validation, 108, 174–5, 200,  
 205, 209, 212, 217, 219, 222, 228–32  
 value chain, 20  
 values  
 ethical, 40  
 fundamental, 50, 125  
 governing, 109, 111, 150, 165, 288  
 legal, 45, 52, 112, 174, 207, 208,  
 210–11, 242, 245, 262, 285, 288,  
 291, 327  
 verification, 37, 100, 109, 166, 259,  
 290, 311  
 verticalisation, 57, 113, 263  
 virtues (*quality of the legal system*),  
 57, 226  
 Warsaw Climate Change Conference in  
 2013, 6, 25, 36, 100, 110, 240, 266,  
 311–12  
 water, 93–5, 97, 100, 101, 105, 107, 113,  
 120, 129, 139, 148, 156, 168, 212,  
 214–15, 230, 242, 248, 316–20  
 water law, 19, 31, 33, 100, 120, 129, 139,  
 168, 199, 215, 230, 267, 274  
 welfare economics, 122  
 women's rights (gender), 39, 49, 57, 78,  
 100, 101, 102, 129, 140, 248, 339  
 World Bank, 8, 12, 139  
 World Charter for Nature, 237  
 World Meteorological Organization, 1  
 World Trade Organisation (WTO), 20,  
 67, 104, 109, 120, 158, 162–3, 260,  
 262, 279, 298, 300, 307–8, 312,  
 321–5  
 Decision on Trade and  
 Environment, 322  
 Doha Round, 20, 104, 262, 298, 311  
 Sanitary and Phytosanitary Measures  
 (SPS Agreement), 307–8  
 Technical Barriers to Trade (TBT  
 Agreement), 109