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**FROM THE GLOBAL TO THE LOCAL: A TRANSITION IN
CLIMATE CHANGE STRATEGY**

Submitted for the LLB (Honours) Degree

Faculty of Law

Victoria University of Wellington

2020

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Abstract

Climate change is an inherently international problem- it cannot be attributed or contained to one nation state, and it affects the global common areas such as the atmosphere, the oceans and the Arctic and Antarctic. It follows that international law should be the port of call to remedy this global issue which is becoming ever present, and traditionally, it has been. This paper analyses the adequacy of current and previous climate change obligations for states under international law, with a particular focus on whether they propose binding duties which can be enforced. This paper looks to the effectiveness of these measures, and ultimately concludes there are significant gaps in the current international law instruments on climate change. In light of this analysis, the paper proposes alternative modes of demanding state climate change action and accountability, particularly through domestic legal measures.

I Introduction

"You can't negotiate with reality. You can't negotiate with science. Scientists are telling us that the next seven years are crucial to the fate of the Earth and to humanity."¹ On 22 September 2020, "the Climate Clock" was unveiled in New York City with a countdown to the predicted exhaustion of Earth's 'carbon budget',² in 2027.³ This clock illustrates the immediacy of the threat which climate change poses to the future of our planet and our humanity. Whilst alarming, the clock also shows the amount of time we have to change our actions to prevent this outcome, before it is too late.

Climate change is an inherently international problem- it cannot be attributed or contained to one nation state, and it affects the global common areas such as the atmosphere, the oceans and the Arctic and Antarctic.⁴ It seems fitting then, that international law would be an adequate remedy to such an issue. However, this paper will argue that the international community, and the role of international law is struggling to adapt to the particular challenges which climate change has created. As a consequence of this inadequacy, we cannot simply wait for international law to catch up, so action must, and can be taken at the domestic level to supplement the international framework and agreements on climate change. Thus the overarching premise of this paper is that international law on its own cannot resolve the challenges of climate change, but when coupled with an increased ambition within domestic law, states can be held accountable to their responsibilities to the climate and international community with regards to climate change adaptation and mitigation measures.

This paper is split into two parts. The first will address the threat which climate change causes, and how international law is equipped to deal with this problem. It will assess the adequacy and enforceability of current international instruments in mitigating state emissions and encouraging adaptive measures. The second part of this paper looks at practical methods of addressing climate change from a legal perspective. Instead of being limited to international law options, this paper looks to other ways in which practical climate action can be effectively taken and enforced at a domestic level, with a particular focus on domestic litigation and Non-state actor participation.

II The issue

The purpose of this section is to briefly explain what climate change is, and to outline the unique threat it poses to the international community, as well as the damage which climate change is already causing. In particular, this section aims to highlight the particular vulnerability of low-lying developing states, and accentuate the need for urgent and immediate climate change action by states.

¹ Andrew Boyd quoted in Jeff Berardeli "Colossal Climate Clock in New York City counts down to global deadline" (22 September 2020) CBS News <<https://cbsnews.com>>.

² The amount of CO₂ that can still be released into the atmosphere while limiting global warming to 1.5°C above pre-industrial levels, "Climate Clock", above n 1.

³ At the current rate of emissions, "Climate Clock", above n 1.

⁴ *Slow Onset Events: Technical Paper*, UNFCCC Doc TP/2012/7 (26 November 2012), at 9; O Pörtner and others (Eds.) *Summary for Policymakers. In: IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* (2019), at 6.

A Climate Change and the Greenhouse Gas Effect

Climate change is an extremely well-researched topic, in both the legal and scientific domain. The United Nations Framework Convention on Climate Change (UNFCCC) defines climate change as:⁵

a change of climate which is attributed directly or indirectly to human activity that alters a composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.

Human activities such as deforestation, industrial and agricultural processes, and through the burning of fossil fuels have released significant amounts of Greenhouse Gases⁶ into the atmosphere.⁷ These gases trap heat in the atmosphere, “making the planet warmer and thickening the Earth’s blanket.”⁸ In 2020, we are currently experiencing unprecedented levels of atmospheric concentration of greenhouse gases, as a result of past actions and continued emissions by both developed and [now] developing states.⁹ The concentration of carbon dioxide in our atmosphere, as of May 2020, is the highest it has been in human history- at 416 parts per million.¹⁰ It is this increase in atmospheric levels of greenhouse gases which are a cause of “global warming (an increase in global average temperatures) and associated changes in the earth’s climate patterns”, and which need to be significantly reduced to prevent “irreversible damages” as a result.¹¹

The effects of global warming are considered to be twofold: slow onset changes and sudden onset weather events.¹² Slow-onset effects according to the IPCC include “desertification, glacial retreat, land and forest degradation, loss of biodiversity, ocean acidification, increasing temperatures and sea level rise”.¹³ These events develop gradually, “from incremental changes occurring over many years or from an increased frequency or intensity of recurring events”, and are also interconnected.¹⁴ It is considered that by 2050, according to all possible Representative Concentration Pathways (scenario’s predicted by the IPCC)

⁵ *United Nations Framework Convention on Climate Change* 1771 UNTS 107 (opened for signature 14 June 1992, entry into force 20 January 1994), article 1.2.

⁶ Carbon Dioxide, Methane, Nitrous Oxide, Fluorinated Gases, see O Edenhofer and others (Eds.) *Climate Change 2014. Mitigation of Climate Change: Contribution of working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2014).

⁷ Above n 6, *Climate Change 2014. Mitigation of Climate Change*, at 24.

⁸ “Greenhouse Gas Emissions” (2018) United States Environmental Protection Agency <<https://epa.gov>>.

⁹ Valérie Masson-Delmotte and others (Eds.) *Summary for Policymakers. In: Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (2018), at 37.

¹⁰ “Earth’s CO2 Home Page” (2020) <<https://co2.earth>>.

¹¹ Chris Wold, David Hunter & Melissa Powers, “The Science of Climate Change” *Climate Change and the Law* (2nd ed, Lexis Nexis, 2013) (draft), at 2; *Only 11 Years Left to Prevent Irreversible Damage from Climate Change, Speakers Warn during General Assembly High-Level Meeting* UN Doc GA/12131 (28 March 2019).

¹² Above n 4, *Slow Onset Events: Technical Paper*, at 7.

¹³ “Slow Onset Events” (2020) UNFCCC <<https://unfccc.int>>.

¹⁴ Above n 4, *Slow Onset Events: Technical Paper*, at 7.

that the Arctic Ocean will, in summer, be “nearly ice free”.¹⁵ As a result of the identified accelerated decline of polar ice sheet mass... it has raised the possibility of a future sea level rise of 1 m or more by 2100, increasing the likelihood of salinization of soils, amplified cyclonic activity, and erosion of coastal systems, ports and infrastructure.¹⁶

Slow-onset effects are compounded by “sudden onset” weather events such as flooding, forest fires, cyclones, storm surges, king tides, flooding and intensified storms.¹⁷ Whilst climate change doesn’t necessarily *cause* these events, it acts as a catalyst and “threat multiplier” for the scale and regularity of these events.¹⁸ For example, the wildfires which occurred in Australia and the United States this year were part of the natural fire season which happens annually. However, scientists have identified that these fires now have drier conditions which intensify the climate needed to fuel these fires, making them last for longer, and be more severe.¹⁹ Since August 14, approximately 500,000 acres within a 100-mile radius of San Francisco have been burned, which is twice the land burned during the entire 2019 California fire season.²⁰ This “unprecedented” circumstance echoes the wildfires which Australia experienced at the end of 2019 and earlier this year. An estimated 40 million acres were burned between June 2019 and March 2020 as a result of “severe drought, which led into the hottest and driest year on record, combined with sustained high temperatures and windy conditions”.²¹ Furthermore, of the “125 attribution studies that have looked at extreme heat around the world, 93 percent found that climate change made the event or trend more likely or more severe” thus indicating the reality of climate change’s impacts have already started to be felt worldwide.²²

The fact climate change is occurring is now widely acknowledged and agreed upon by a majority of the world’s scientists, although despite this universal consensus, is not universally accepted by states and their leaders.²³ Despite what climate sceptics believe, there is now “unequivocal [scientific] evidence that the climate is changing across our

¹⁵ Above n 4, *Special Report on the Ocean and Cryosphere in a Changing Climate*, at 17; T F Stocker and others (Eds.) *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2013), at 12.

¹⁶ Above n 4, *Slow Onset Events: Technical Paper*, at 8.

¹⁷ Jane McAdam “Building International Approaches to Climate Change, Disasters, and Displacement” (2016) 33(2) WYAJ, at 3.

¹⁸ “Climate change recognized as ‘threat multiplier’, UN Security Council debates its impact on peace” (January 2019) United Nations News <<https://news.un.org>>; Above n 17, “Building International Approaches to Climate Change, Disasters, and Displacement”, at 3; “Briefing Statement: Damage from Cyclone Pam Was Exacerbated by Climate Change” (2015) Climate Council <<https://climatecouncilau.org>>, at 3.

¹⁹ Andrew Freedman and others, “California wildfires reach historic scale and are still growing” (August 22 2020) Washington Post <<https://washingtonpost.com>>.

²⁰ Above n 19.

²¹ L Granwal “Total Area Burned by Bushfires in Australia as of January 2020 by State” (May 4 2020) Statista <<https://statista.com>>; “2019-2020 Australian Bushfires” (May 2020) Centre for Disaster Philanthropy <<https://disasterphilanthropy.org>>.

²² Roz Pidcock, Rosamund Pearce, Robert McSweney “Mapped: How climate change affects extreme weather around the world” (April 2020) Carbon Brief Website <<https://carbonbrief.org>>.

²³ “Trump on climate change report: ‘I don’t believe it’” (26 November 2018) BBC News <<https://bbc.com>>.

planet, largely as a result of human activities”, and for the purposes of this paper, this will be an accepted premise.²⁴

B Small Island Developing States

The effects of climate change will be felt worldwide, however there will be, and have already been disproportionate impacts on Small Island Developing States (SIDS) and other developing countries. These states are based largely in the South Pacific and the Caribbean, and have long been acknowledged as likely to feel the first impacts of climate change.²⁵ This is predominantly due to the low-lying nature of these nations and their vulnerability to changes in their environment such as a rise in sea levels.²⁶ The impact this will have on SIDS is severe, with many states such as Tuvalu and the Marshall Islands lying just 2-3 meters above sea level at their highest point.²⁷ At least 11 islands across the northern Solomon Islands have “either totally disappeared over recent decades or are currently experiencing severe erosion”, and two of Tuvalu’s nine islands “are on the verge of going under.”²⁸ Tuvaluans have now reached the point of acknowledgment that it is a matter of if, not when that mass migration will have to occur as a result of the changing climate.²⁹

SIDS are not only vulnerable to the effects of climate change due to their low-lying nature, but also as a result of their “small size, remoteness, narrow resource and export base, exposure to external economic shocks, and potentially more frequent and intense natural disasters.”³⁰ Whilst the impacts of sea-level rise will likely have severe long-term impacts on inhabitants of SIDS, there will also be more short-term factors which put immense pressure on the viability of living in these states.³¹ SIDS rely heavily on their natural environment for their livelihoods, which will be significantly affected by the effects of climate change.³² There is evidence of this already occurring, wherein rising sea levels and

²⁴ S Solomon and others (eds.) *Summary for Policymakers: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (2007); Hannah Stallard “Turning up the Heat on Tuvalu: An Assessment of Potential Compensation for Climate Change Damage in Accordance with State Responsibility Under International Law” (2009) 15 CLR, at 165.

²⁵ See the Barbados Programme of Action (BPOA) adopted in 1994, the Mauritius Strategy of Implementation 2005, and “The Future We Want”, adopted at The United Nations Conference on Sustainable Development, Rio 2012; “Small Island Developing States” (2020) United Nations: Sustainable Development <<https://sdgs.un.org>>.

²⁶ In the Pacific, the sea level is rising at a rate of 12 millimetres per year, with projected sea levels set to have increased between 24-89 cm by 2090 from levels in 1996 (dependent on future greenhouse gas emissions), see P.D Nunn, A Kohler and R Kumar “Identifying and Assessing Evidence for Recent Shoreline Change Attributable To Uncommonly Rapid Sea-Level Rise in Pohnpei, Federated State of Micronesia, Northwest Pacific Ocean.” (2017) 21 *Journal of Coast Conservation* 719; John Podesta “The Climate Crisis, Migration, and Refugees” (July 25 2019) Brookings <<https://brookings.edu>>.

²⁷ Eleanor Ainge Roy “One day we’ll disappear: Tuvalu’s sinking islands” (May 2019) *The Guardian* <<https://theguardian.com>>.

²⁸ Simon Albert and others, “Interactions between sea-level rise and wave exposure on reef island dynamics in the Solomon Islands” (May 2016) 11(5) *Environmental Research Letters*, at 4; Above n 27, “One day we’ll disappear’: Tuvalu’s sinking islands”.

²⁹ Above n 27, “One day we’ll disappear’: Tuvalu’s sinking islands”.

³⁰ Above n 25, “Small Island Developing States”.

³¹ Above n 17, “Building International Approaches to Climate Change, Disasters, and Displacement” at 3.

³² Above n 17, “Building International Approaches to Climate Change, Disasters, and Displacement” at 7.

flooding has tarnished soil in Tuvalu, making it “salty, porous” and unable to sustain planting, pulaka crops and other fruit and vegetable yields.³³ This has resulted in “traditional Pacific Island staples such as taro and cassava now hav[ing] to be imported at great expense, along with most other food”, an unsustainable and expensive process for a developing nation.³⁴

Thus, the effects of climate change have already started to have a significant impact on those who have contributed to them the least. SIDS are directly threatened, and are already suffering damage as a result of harm caused by other states’ emissions, and are having to contemplate harsh realities such as migration, and lack of access to viable food and water supplies. The disproportionate nature of the causation, versus the severe effects of climate change is extremely unfair, and illustrates the need for international recourse, either in the way of reduced emissions, compensation or both for these states. But not only that, the measures need to promote resilience in these states, to prolong habitable existence in their own territories for as long as possible.

III The Current International Law Instruments on Climate Change

The purpose of this part is to firstly outline the current international law instruments which address the issue of climate change, and in particular, the way in which these instruments address and look to remedy the threats which SIDS are currently facing. This section looks to the applicability of international treaties, agreements, and customary law principles in addressing state action with regards to climate change. In order to be truly effective, the solutions and instruments created by international law must be looking to *mitigate* state contribution to climate change through international law, as well as adopting *adaptive* measures to remedy the effects climate change will undoubtedly cause. This section concludes that the current international law instruments are insufficient to adequately mitigate state greenhouse gas emissions, and that the difficulties of balancing state consensus with binding obligations has resulted in many soft law obligations on states, and has enabled states to do the bare minimum with regards to their climate change action. This section also finds that the applicability of customary international law to the specific challenges of climate change is difficult, and particularly limited by the requirements for causation.

A International Treaties

1 UNFCCC

The United Nations Framework Convention on Climate Change (UNFCCC) is an international treaty entered into force on 21 March 1994 which sets out a “shared vision of the common goals and interests of the international community”.³⁵ The UNFCCC has “near-universal membership” (197 state parties) and was one of the first global efforts to

³³ Above n 27, “One day we’ll disappear’: Tuvalu’s sinking islands”.

³⁴ Above n 27.

³⁵ Christina Voigt “State Responsibility for Climate Change Damages” (2008) 77 *Nordic Journal of International Law* 1, at 5.

address and rectify the pertinent issues associated with climate change.³⁶ The overall goal of the convention is:³⁷

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

Whilst the UNFCCC is a treaty, it does not impose hard law on its signatories with regards to climate change. Instead, in order to achieve its goal, the UNFCCC created a “framework” of different regimes and methods to encourage state participation and action. The most important of which are the annual Conferences of the Parties (COPs). COPs are the “supreme decision-making body of the convention” in which legal instruments and mechanisms can be adopted and reviewed in order to uphold the goals of the Convention.³⁸ COPs have also developed to facilitate discussions between not just states, but non-governmental organisations, scientific representatives and civil society members too, to provide the best information and advice to parties making climate change decisions.³⁹ The COPs are fundamental in acting as a catalyst for climate change action between states, and are a way to ensure that states are having to consistently come together to participate in climate change discussions and advancements.

The UNFCCC essentially strives to encourage engagement with climate change, and to put in place a number of measures which promote state action towards the goal of stabilizing greenhouse gas emissions, as well as enabling economic development to take place. The COPs are just one example of this, the UNFCCC has also created multiple bodies to assist with the practical realities of climate change such as the “Global Environment Facility” which directs grants and loans set up through the convention to support developing countries and provide them with aid, and the “Climate Hub 360” which is a new virtual event platform created in light of Covid-19. The Climate Hub 360 “showcases key events” and keeps states up to date with climate change information, with the idea of continuing to drive climate ambition despite the challenges posed by the pandemic.⁴⁰ Thus, the purpose of the UNFCCC is not to create hard law obligations on states, but to create an framework in which hard law obligations, treaties and protocols can be created by states, assistance can be given to developing states, and to ensure there is an annual accountability by states to their commitments under the UNFCCC.

2 *The Kyoto Protocol*

The Kyoto Protocol 1997 was one of the first international agreements under the UNFCCC on climate change. The Kyoto Protocol created a unilateral mitigation focused approach to

³⁶ “UNFCCC parties” (2020) UNFCCC <<https://unfccc.int>>.

³⁷ Above n 5, *United Nations Framework Convention on Climate Change*, article 2.

³⁸ “Conference of the Parties (COP)” (2020) UNFCCC <<https://unfccc.int>>.

³⁹ “Participation and registration” (2020) UNFCCC <<https://unfccc.int>>.

⁴⁰ “What is the United Nations Framework Convention on Climate Change?” (2020) UNFCCC <<https://unfccc.int>>; “UNFCCC Launches New Event Platform ‘Climate Hub 360’” (September 24 2020) UNFCCC <<https://unfccc.int>>.

climate governance, where states were given binding greenhouse gas (GHG) reduction targets based on their previous contribution to emissions.⁴¹ The protocol set hard law obligations for states, and was focused purely on ensuring developed states were set challenging targets to reign in emissions, with little to no obligation on developing states to do so. The Kyoto Protocol also had a compliance mechanism, whereby if a state was found to be in breach of their set emission target, they could be faced imposition of hefty fines as well as the obligation to meet their target the following year, with an additional 30 percent further reduction on emissions.⁴²

The Kyoto Protocol was an attempt at an equitable solution for mitigating climate change, giving funding to developing states, whilst requiring developed states to mitigate their previous contributions. Whilst equitable, the “obligation” based approach of the Kyoto Protocol was deemed by many to be too burdensome in practice, and in conflict with state sovereignty.⁴³ States were not willing to be bound to emission targets which they did not create, and were also opposed to the compliance mechanisms and punishments for failing to do so.⁴⁴ Many developed states also opposed the fact that developing states, such as China, were given no emissions targets under the agreement, despite still contributing to, and benefiting from emissions.⁴⁵ Thus, as a result of the voluntary nature of international law and the significant consequences the breaching the protocol, many large emitting states (such as Australia and the United States) simply didn’t ratify the agreement.⁴⁶ And as a result Canada pulled out altogether, announcing “the Kyoto protocol does not cover the world’s largest two emitters, the United States and China, and therefore cannot work”.⁴⁷ Essentially, the Kyoto Protocol failed. It was unable to get large-emitting states on board with climate change mitigation through its hard-law measures, and [industrialized] states rejected the differing approach between emissions regulations for developed and developing states, despite the obvious advantages which they have had as a result of their emissions, indicating a lack of responsibility which states are willing to have with regards to their own contribution to climate change.

3 *The Paris Agreement*

In response to the failure of the Kyoto Protocol⁴⁸, the Paris Agreement was created as an alternative under the UNFCCC framework, with the goal of universal state consensus and

⁴¹ Kyoto Protocol to the United Nations Framework Convention on Climate Change UNTS vol. no 2303 (opened for signature 11 December 1997, entered into force 16 February 2005). This is a simplified explanation of the Kyoto Protocol, see the UNFCCC website: https://unfccc.int/kyoto_protocol, for more information.

⁴² “Canada pulls out of Kyoto protocol” (December 13 2011) The Guardian <<https://theguardian.com>>.

⁴³ Christoph Böhringer “The Kyoto Protocol: a Review and Perspectives” (2003) 19(3) Oxford Review of Economic Policy 451, at 461.

⁴⁴ Above n 42 “Canada pulls out of Kyoto protocol”.

⁴⁵ Above n 42.

⁴⁶ Above n 42.

⁴⁷ Above n 42.

⁴⁸ And the Copenhagen Summit. For further reading on this, please see “Non-state actors in hybrid global climate governance: justice, legitimacy, and effectiveness in a post-Paris era” (2018) by Kyper, Linnér and Schroeder.

ratification of its climate change ambitions. The Paris Agreement was created with the central aim being to:⁴⁹

Strengthen the global response to the threat of climate change by keeping a global temperature rise this century to well below 2 degrees Celsius above pre-industrial levels, and to pursue efforts to limit this below 1.5 degrees.

In order to achieve this goal, the Paris Agreement adapted in several ways to the failures of the Kyoto Protocol. Firstly, the Paris Agreement shifted from binding obligations, to a mix of hard and soft law, in order to promote state agreement. This aim was essentially achieved, as 189 states ratified the Agreement including large emitters such as China, the United States, Russia and Australia.⁵⁰ Furthermore, the Paris Agreement shifted from a purely mitigation focus (as in Kyoto) to a hybrid of mitigation and adaptation measures, providing funding, technology, and capacity-building support to vulnerable states.⁵¹ This is a more holistic way of addressing climate change, and better at recognising the practical support which SIDS and other developing nations need to respond and act preventatively to the threat of climate change, not just the need for mitigation.

Thirdly, the Paris Agreement moved away from a unilateral top-down setting of emission reduction target, to the introduction of state determined Nationally Determined Contributions (NDCs) which are based on each countries' assessment of its capabilities and circumstances.⁵² The purpose of NDCs are to give states autonomy and responsibility to determine their own emission targets, instead of the targets being dictated to them. Where Paris differs from the Kyoto Protocol once more, is that the creation and achievement of NDCs are not only the responsibility of developed states, but developing states too, reinforcing the importance of universal climate change action.

As a consequence of the Paris Agreement's focus on consent, there are no enforcement mechanisms in the agreement to ensure state compliance to their NDC targets, nor are there consequences for failing to do so.⁵³ This has resulted in many states, such as Japan and the Netherlands taking a 'free rider' approach to emissions, setting low NDC targets (of 26 percent⁵⁴ and 17 percent respectively) and facing virtually no consequences from the Paris Agreement or the UNFCCC.⁵⁵ This is particularly problematic for SIDS who rely on the

⁴⁹ Paris Agreement 55 ILM 743 (adopted 12 December 2015, entered into force 4 November 2016), article 2(a).

⁵⁰ "Paris Agreement- Status of Ratification" (2020) UNFCCC <<https://unfccc.int>>.

⁵¹ Above n 49, article 9(1).

⁵² "Nationally Determined Contributions (NDCs)" (2020) UNFCCC <<https://unfccc.org>>.

⁵³ Melissa Denchak "Paris Climate Agreement: Everything You Need to Know" (December 2018) <<https://NRDC.org>>.

⁵⁴ Below 2013 levels by 2030, Climate Action Tracker is a research organisation conducting independent scientific analysis of countries' carbon emissions as compared to what is needed to reach the 1.5 degree or 2 degree targets from the Paris Agreement, "Climate Action Tracker" (2020) Climate Action Tracker <<https://climateactiontracker.org>>.

⁵⁵ "The Japanese government should raise the target of greenhouse gas emission reduction" (January 2020) <<https://climatenetwork.org>>; D Parthasarathy "Japanese NGOs urge Prime Minister Abe to substantially increase national climate targets following a public consultation" (February 2020) <<https://climatenetwork.org>>; Evert Stamhuis "A Case of Judicial Intervention in Climate Policy: the

mitigation measures imposed by as the Paris Agreement to reduce emissions by larger states, as they are not able to significantly reduce emissions themselves.⁵⁶ The Paris Agreement is one of the only comprehensive instruments which addresses climate change obligations between states, and thus offers SIDS few other routes to specifically demand mitigation efforts from states to protect their futures. Furthermore, SIDS rely on the financial support generated from forums such as the Paris Agreement for funding of preventative adaptation measures such as seawalls, and for recovery from the damage already caused by climate change.⁵⁷ This funding is also in place to act as a compensatory function for SIDS and other developing states, to reflect the fact that large-emitting industrialized states have benefited so significantly from emissions the cost of and risk to these vulnerable states. Yet, as the Paris Agreement doesn't enforce any of these obligations it relies on the voluntary contributions of states, which further exposes the vulnerability of SIDS to both the actions of large-emitting states and the effects of climate change, leaving them with few alternatives to demand state action.

Thus, there are clearly very few multilateral treaties within international law which directly address state action with regards to climate change. Of the few treaties we do have, there exists limited hard-law obligations on states which enforce state action. Instead, the combination of soft and hard law allows states to create their own obligations, of which have been extremely insufficient in creating ambitious state action with regards to climate change. The need to obtain consent by large-emitting states to adequately mitigate global emissions has exasperated this issue, and thus there are few ways of enforcing satisfactory implementation and observance of these treaties by states, and we are left with no enforceable obligations to hold states accountable.

B Customary international law

The ineffectiveness of international law in addressing state action with regards to climate change is further illustrated by the application of customary environmental law principles. Customary international law “can establish binding obligations for states and other members of the international community”⁵⁸ and is formed as a result of consistent and general state practice following from a sense of legal obligation (*opinio juris*).⁵⁹ There are a number of customary law principles which aim to frame state action with regards to the environment, but the difficulties of specifically *how* these principles to what states should do, and the need to find a causal link between damaged caused and state action, means that these are often rendered ineffective in both setting obligations for states, and holding states accountable for breaches of these customary law obligations.

Dutch Urgenda Ruling” (Speech to the Chief Justice and Justices of the NZ Supreme Court, Wellington, 21 March 2017).

⁵⁶ China, the US, Russia and India made up 55% percent of global emissions in 2018, see *UNEP Emissions Gap Report 2019: Executive summary* (2019) United Nations Environment Programme.

⁵⁷ “GCF Spotlight: Small Islands Developing States” (August 21 2020) Green Climate Fund <<https://greenclimate.fund>>, at 2.

⁵⁸ Except if there has been consistent rejection of the custom by a particular state, see Philippe Sands *Principles of International Environmental Law* (2nd ed, Cambridge University Press, United Kingdom, 2003) at 143-144.

⁵⁹ At 144.

1 *Precautionary Principle*

Climate change is an area in which science is continually developing, and is highly dependent on probabilities and likelihood, rather than complete certainty.⁶⁰ However, just because the effects of climate cannot be predicted *exactly*, does not mean that they should be disregarded or not acted upon. This is the premise of the precautionary principle, that where there are “threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”.⁶¹ Thus, states are under an obligation to act in a manner which takes climate change into full consideration when making decisions, and takes positive protection measures towards the environment, to reflect the science which indicates the threat climate change poses.⁶²

Despite this principle’s direct applicability, there is minimal evidence states have been applying it with regards to climate change. High emitting activities, such as new energy production from nonrenewable sources, and use of carbon technologies⁶³ are still both legal and supported in many states, despite there being clear scientific evidence to warrant the precautionary principle’s approach.

2 *Prevention Principle*

The prevention principle was recognised in the *Trail Smelter* arbitration, and explained as:⁶⁴

Under principles of international law... no State has the right to use or permit the use of territory in such a manner as to cause injury by fumes in or to the territory of another or the properties of person therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

Thus, a state is required to act with due diligence to prevent the harm caused by activities which they allow to take place within their territory, “via appropriate regulatory, administrative and other measures”.⁶⁵ This obligation can be through vicarious responsibility if the state does not act in setting regulations or preventative measures to regulate private companies’ actions, as illustrated by Canada’s liability for the Smelter’s emissions in the *Trail Smelter*.⁶⁶ This principle is reiterated in the UNFCCC at article 3(3) where states are under a duty to “prevent or minimise the causes of climate change and mitigate its adverse effects.”⁶⁷ However, as emissions are *allowed* under the Paris Agreement where states are only obligated to create NDCs not to reduce emissions entirely,

⁶⁰ Michael D. Mastrandrea and others, *Guidance Note for Lead Authors of the IPCC Fifth Assessment Report on Consistent Treatment of Uncertainties* (6-7 July 2010) Intergovernmental Panel on Climate Change <<https://ipcc.ch>>, at 3.

⁶¹ Rio Declaration on Environment and Development, Rio de Janeiro (14 June 1992) GA res A/CONF.151/26 (Vol. I), principle 15; above n 58, *Principles of International Environmental Law* at 268.

⁶² The precautionary principle also features in the UNFCCC article 3(3).

⁶³ Rowena Maguire *Incorporating International Environmental Legal Principles into Future Climate Change Instruments* Carbon & Climate Law Review (2012) 6(2) CCLR 101, at 108.

⁶⁴ *Trail Smelter Arbitration* (United States of America. v. Canada) (11 March 1941) UN Reports of International Arbitral Awards, Vol. III, 1905, at 1965.

⁶⁵ Above n 58, *Principles of International Environmental Law* at 246.

⁶⁶ Above n 64.

⁶⁷ Above n 5, *United Nations Framework Convention on Climate Change*, article 3.3.

it blurs the line as to what harm from emissions should have been prevented by states, and what they are allowed to emit freely.

3 *The No Harm Principle*

The no-harm principle is considered to be the “cornerstone of international environmental law”.⁶⁸ It establishes that “states may not conduct or permit activities within their territories, or in common spaces, without regard to other states or for the protection of the global environment.”⁶⁹ This principle is based on the concept of good neighbourliness between states, and the latin maxim “sic utere tuo ut alienum non laedas (to use your own property in such a way that you do not injure other people’s)”.⁷⁰ As such, the no-harm rule is a preventative principle, and has been reiterated and extended over time to cover more instances of state action. For example, principle 21 of the Stockholm Declaration addressed the notion of the no-harm rule, providing that:⁷¹

States have, in accordance with the Charter of the United Nations and the Principles of international law... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

This broadened the scope of the no-harm principle, as it takes away the border requirement previously required by the *Trail Smelter* case.⁷² Since 1972, principle 21 has been applied essentially verbatim in the subsequent 1992 Rio Declaration⁷³, and incorporated into many other international documents.⁷⁴ It was also affirmed by the ICJ in the *Corfu Channel*, where the principle was extended to include the concept of notification.⁷⁵ This reiteration affirms the principle’s relevance in international law and re-defines the scope as being to “harm caused in the territory of or in other places under the jurisdiction or control of a state other than the State of origin, whether or not the States concerned share a common border”.⁷⁶ Thus, the no-harm principle is well established customary international law which has been treated as such since the *Trail Smelter* and the Stockholm Declaration in 1972.

⁶⁸ Marte Jervan "The Prohibition of Transboundary Environmental Harm. An Analysis of the Contribution of the International Court of Justice to the Development of the No-harm Rule" (2014) PluriCourts Research Paper 14, at 14.

⁶⁹At 14.

⁷⁰ Above n 58, *Principles of International Environmental Law* at 242.

⁷¹ Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, principle 21.

⁷² Principle 21.

⁷³ Rio Declaration on Environment and Development, Rio de Janeiro, 14 June 1992, Principle 2.

⁷⁴ Such as the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries (2001) GA Res A/56/10, and the Convention on the Law of the Sea 1833 UNTS 397 (opened for agreement on December 10 1982, entered into force on November 1 1994).

⁷⁵ *Corfu Channel Case* (UK v Albania) (Merits) [1949] ICJ Reports 4, at 10.

⁷⁶ Above n 74, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, Art 2 (c); Above n 73, Rio Declaration.

4 *Polluter Pays Principle*

As established in the *Trail Smelter*, businesses, companies and states which have caused pollution, should be liable for the cost the pollution has caused.⁷⁷ This principle works on the basis that if polluting states are made to pay for the harm caused by their pollution, it would provide an incentive to minimize such pollution.⁷⁸ However the polluter pays principle, like most customary law principles, only applies when there is a sufficient link to the damaged caused and the harmful action.⁷⁹ This was evident in the *Trail Smelter* as the Sulfur Dioxide released from the Smelter company was able to be traced by scientists directly to the damaged caused to the land and property in the United States, thus the company, (and Canada vicariously) were liable for cost of repair.⁸⁰ However as the link between the harm and state action is more difficult to identify with regards to climate change, the polluter pays principle is difficult to apply, as discussed in part C (causation).

5 *Common but Differentiated Responsibility*

The principle of common but differentiated responsibility establishes that whilst all states are responsible for protecting the environment, there is a need to take into account “each state’s contribution to the creation of a particular problem, and its ability to prevent, reduce and control the threat”.⁸¹ This is in recognition of the different contributions to emissions which states have had over time, and reflects that as industrialized states have benefitted so significantly from their excessive emissions (for example), that they have more onerous responsibility under international law to fix the problem which they have largely caused. This principle was specifically emphasized in the Kyoto Protocol, where states were set different emissions targets (or no emissions targets) strictly based on how much they had committed to previous emissions.⁸² The Paris Agreement instead builds common but differentiated responsibility into its framework, ensuring funding is provided to developing nations by industrialized and developed nations as compensation for previous emissions, as well as (softly) outlining that developed states “should continue taking the lead by undertaking economywide absolute emission reduction targets.”⁸³ The common but differentiated responsibility principle is one which invokes equity and has moral underpinnings, it is based on fairness towards states and builds ethical standards into the customary law framework.

Whilst these principles are all well-established customary principles of international environmental law, when trying to apply them to the issue of climate change, it highlights some of the key challenges to state accountability under the current law.

⁷⁷ Above n 64, *Trail Smelter Arbitration*; above n 58, *Principles of International Environmental Law* at 279.

⁷⁸ Above n 63, *Incorporating International Environmental Legal Principles into Future Climate Change Instruments*, at 110-111.

⁷⁹ Above n 64, *Trail Smelter Arbitration*, at 1920.

⁸⁰ Above n 64, “*Trail Smelter Arbitration*” at 1920.

⁸¹ Above n 58, *Principles of International Environmental Law* at 286.

⁸² UNFCCC “What is the Kyoto Protocol” 2020 <<https://unfccc.int>>.

⁸³ Above n 49, Paris Agreement, article 4.4.

C Causation

In order to hold a state accountable for breach of a customary international law principle, a causal link between the harmful action of the ‘state of origin’ and the damage caused to the aggrieved state needs to be established.⁸⁴ The question of causation highlights the dichotomy between “scientific probabilistic standards of proof [and the] law’s demand for certainty”, and is one of the biggest challenges with regards to climate change accountability.⁸⁵ Where scientists tend to work with *probabilities* and *likelihoods*, the law requires more in order for state accountability, for if a country is only *likely* to have caused emissions which have resulted in the salination of soil in a SIDS, they, or an adjoining body, are unlikely to accept causal responsibility for the damage caused. Thus, has been considered “‘virtually impossible’ to directly establish a direct causal relationship between the actions of one state and a particular climate change effect”.⁸⁶ This is not only due to the differing standards of proof, but a range of factors such as:⁸⁷

- (i) identifying an anthropogenic cause for a particular climate event; (ii) establishing a concrete extraterritorial obligation; (iii) calculating the relative contribution of each state to overall greenhouse gas emissions; (iv) distinguishing current (or at least recent) from past greenhouse gas emissions; and... (v) disaggregating collective responsibility – over both space and time – to identify a single causal relationship between right-holder and duty-bearer.

Additionally, as climate change is also known to exasperate climate phenomenon’s which already occur naturally it is even more difficult to attribute specific causation.⁸⁸ Differentiating between the severity of the event with and without the effects of climate change cannot be done to the level of legal certainty which is required for a direct causal link, and thus provides indicates yet another challenge which climate change presents to international law and accountability for states under it.⁸⁹

Thus, until science advances to be able to pinpoint a causal link between damage and state action, it is unlikely that breaches of customary law obligations will be able to be established or enforced under international law with regards to climate change.

IV Practical Factors

It is not just the ineffectiveness of international law which is inhibiting climate change progress, there are a number of moral, legal and political factors which affect state action and prevent substantial changes from being made. This illustrates the practical difficulties

⁸⁴ *Third Report on State Responsibility, by Mr James Crawford, Special Rapporteur* UN Doc A/CN.4/507 (4 August 2000), at 16.

⁸⁵ Nataša Nedeski, Tom Sparks & Gleider Hernández, “Judging climate change obligations: Can the World Court raise the occasion? Part I: Primary obligations to combat climate change”, *Völkerrechtsblog*, 30 April 2020, <<https://voelkerrechtsblog.org>>.

⁸⁶ Susannah Willcox “A Rising Tide” (2012) 9(1) *Essex Human Rights Review*, at 10.

⁸⁷ At 10

⁸⁸ Above n 26, “The Climate Crisis, Migration, and Refugees”; Above n 17, “Building International Approaches to Climate Change, Disasters, and Displacement”, at 3.

⁸⁹ Above n 11, “The Science of Climate Change”, at 22.

behind why instruments in international law such as the Paris Agreement, are not always able to work in the way they are intended. The purpose of this section is to show the conflict which states face with regards to taking action on climate change, yet proposes that these reasons are still superseded by an overwhelming moral obligation to rectify the problem to which states have contributed, and mitigate climate change effects for the vulnerable states who will suffer.

A Moral and Legal Dilemmas

Every state has contributed to climate change over time, however the extent to which states have contributed varies significantly. The consequences of climate change have been predicted to be “indiscriminate” and “far-reaching”, however, in the short-medium term, it is likely that those who have contributed the least to climate change such as SIDS (who have also felt the least benefits), will be, and already are, the first to feel the severity of its impacts.⁹⁰ This is an extremely unfair and disproportionate predicament for these states to be in, and leads to a moral and legal dilemma which states face with regards to climate action or inaction.

Firstly, climate change poses a severe threat to human rights around the world. The right to life, self-determination, health, adequate food and water, housing and to not be discriminated against (age), are all likely to be affected by climate change. These rights are protected in international treaties and agreements⁹¹, and are considered to be the “foundation of freedom, justice and peace in the world.”⁹² For some SIDS such as Tuvalu and the Marshall Islands, the future of their state being uninhabitable is virtually unavoidable⁹³ and will result in the loss of culture, territory, and potentially statehood.⁹⁴ This is a huge and unacceptable violation of their fundamental human rights, and is one which has been predicted to occur at the current rate of emissions.⁹⁵ As there is no one state which is responsible, it falls to collective responsibility to address this loss of rights. The difficulties associated with this, academics refer to as the tragedy of the commons—where “although collectively all countries would prefer to limit global emissions so as to reduce the risk of severe or catastrophic impacts, when acting individually, each still prefers to continue emitting unimpeded”.⁹⁶

⁹⁰ Stephen M. Gardiner and Lauren Hartzell-Nichols “Ethics and Global Climate Change” (2012) 3(10) *Nature Education Knowledge 5; Unprecedented Impacts of Climate Change Disproportionately Burdening Developing Countries, Delegate Stresses, as Second Committee Concludes General Debate* UN Doc GA/EF/3516 (October 2019).

⁹¹ For example, the International Covenant on Economic, Social and Cultural Rights GA Res 2200A (1966); International Covenant on Civil and Political Rights GA Res 2200A (1966).

⁹² Above n 91, International Covenant on Economic, Social and Cultural Rights, preamble.

⁹³ Above n 27, “One day we’ll disappear’: Tuvalu’s sinking islands”.

⁹⁴ Territory is a key aspect of statehood, believed that the future of these nations would be in question if they no longer had access to a territory, see above n 17, “Building International Approaches to Climate Change, Disasters, and Displacement”, at 8; Above n 86 “A Rising Tide”, at 2.

⁹⁵ “The IPCC’s Fifth Assessment Report: What’s in it for Small Island Developing States?” (2014) Climate & Development Network <<https://cdkn.org>>.

⁹⁶ Above n 90 “Ethics and Global Climate Change” (2012); see S Soroos, *The Endangered Atmosphere: Preserving a Global Commons*, (Columbia,1997) University of South Carolina Press; D Helm, *Climate-change policy: Why has so little been achieved?* (2008) 24 Oxford Review of Economic Policy 211.

It is imperative for vulnerable states that action occurs to mitigate climate change, yet as they are not often large emitters themselves, SIDS have to rely on other states' help. However, for states who are not faced with the immediate consequences of climate change, and whose economies continue to benefit from emissions, there are few motivating factors for changing actions in the short term if they can excuse their way out of it. This has a flow on effect for actors who also directly benefit from emissions, for without state regulation or laws, they are unlikely to put themselves at a risk of loss if they are not obligated to do so. This attitude of course, comes at the cost of other people and entire states' human rights, and is a thus big inhibitor of climate change action.

Climate change also poses an intergenerational problem. The effects of climate change are slow onset in nature, meaning the worst effects of climate change are yet to come.⁹⁷ Therefore, the time to act preventatively is now, but the most dire consequences will not be for an estimated 30-50 years in the future.⁹⁸ For states, individuals and companies which are benefiting from emitting greenhouses gases, especially oil, farming and agriculture, it would be costly, and somewhat burdensome to expect these actors to mitigate their harm on the environment for future generations if they will only see minimal benefits from doing so, and potentially be out of business. This is however, in complete contradiction to the livelihoods of future generations, animal species and the planet, who are unable to act now, but will feel the worst effects. Under both the common but differentiated responsibility and the polluter pays principle, there lies a moral expectation on industrialized states under customary international law to compensate for the advantage they have received through their previously unbridled emissions, and the harm which this is now causing, and will cause to future generations in other states. Thus, morally one may argue, there is an obligation for industrialized states to reduce the “disproportionate...burden on developing countries” who did not [substantially] contribute, nor feel the benefits of greenhouse gas emissions but yet will be first to suffer”, because it is the right thing to do.⁹⁹

B Political

The Covid-19 pandemic has had a significant impact on states' economies, with the reduction of travel, tourism, imports, exports and accessibility to local businesses.¹⁰⁰ In recovering from covid-19, States will not want to be investing huge amounts into climate change mitigation and adaptive measures, as the focus will be on recovering the economy as fast and efficiently as possible to return to ‘everyday life’:¹⁰¹

what we're seeing more of is governments using the pandemic recovery to roll back climate legislation and bail out the fossil fuel industry, especially in the US, but also in Brazil, Mexico, Australia, South Africa, Indonesia, Russia and Saudi Arabia.

⁹⁷ Above n 4, *Slow Onset Events: Technical Paper*, at 8.

⁹⁸ At 9.

⁹⁹ Above n 90, *Unprecedented Impacts of Climate Change*.

¹⁰⁰ The baseline forecast envisions a 5.2 percent contraction in global GDP in 2020, using market exchange rate weights—the deepest global recession in decades, according to “The Global Economic Outlook During the COVID-19 Pandemic: A Changed World” (June 2020) World Bank <<https://worldbank.org>>.

¹⁰¹ “Global Update: Pandemic Recovery with just a Hint of Green” (September 2020) Climate Action Tracker <<https://climateactiontracker>>.

Some states (such as the UK) have been urged to adopt climate mitigation policies when ‘fixing’ their economies,¹⁰² but it is likely that most states will, and already have, reverted to traditional methods to mitigate the cost of Covid-19, at expense of environment and climate change action.¹⁰³ In Mexico for example, the Mexican Ministry of Energy has fast tracked a bill which “would effectively halt private renewable energy investment in the country, prioritising the government’s own ageing, fossil fuel-fired power plants” claiming the pandemic has caused a big drop in demand for renewable energy.¹⁰⁴

Further evidence of this prioritization can be seen by the postponement of COP 2020. The 26th meeting of the Conference of the Parties (COP) was supposed to take place in Glasgow from November 9-19th this year.¹⁰⁵ It was meant to be the pivotal year for reassessing NDCs, and ‘ratcheting them up’ in accordance with the Paris agreements’ ambitions, which was postponed due to the Covid-19 pandemic to ensure “all parties can focus on the issues to be discussed at this vital conference, and allow more time for the necessary preparations to take place”.¹⁰⁶ The increase of NDC targets is one of the only binding parts of the Paris Agreement of which the states are obliged to do, and has been postponed and enabled states to potentially neglect their climate obligations for another year, indicating yet another flaw within the international system.

To conclude, the first half of this paper aimed to show that there are extremely limited legally binding instruments which aim to regulate and enforce state climate change mitigation. As a result of this, the motivation for states to do so falls to acting equitably and in accordance to a moral compass. However, few states have been willing to prioritise long-term benefits to the planet and vulnerable states, over short-term financial and economic benefits to their own states, an illustration of the tragedy of the commons.¹⁰⁷ Thus, to prevent the significant loss of human rights, and to protect the futures of generations to come, we must look to other options which may be available to take mitigative and adaptive measures, to prevent the worst effects of climate change from occurring.

V What can be done internationally?

The latter half of this paper will address what can be done at an international and domestic level to address climate change, in light of the difficulties which have been presented in the former. It is first necessary to look within the international framework which we have already in the international sphere to find solutions to climate change inaction by states, as it is inherently an international problem which in an ideal, world could be remedied as one.

¹⁰² Fiona Harvey “UK’s coronavirus recovery should have green focus, Johnson urged” (2020) The Guardian <<https://theguardian.com>>;

¹⁰³ Climate Action Tracker “Mexico” (September 2020) <<https://climateactiontracker.org>>; Climate Action Tracker “Brazil” (September 2020) <<https://climateactiontracker.org>>.

¹⁰⁴ Above n 103, Climate Action Tracker “Mexico”.

¹⁰⁵ “COP26 Postponed” (2020) UNFCCC <<https://unfccc.int>>.

¹⁰⁶ Above n 105.

¹⁰⁷ “World military expenditure grows to \$1.8 trillion in 2018” (2019) Stockholm International Peace Research Institute <<https://sipri.org>>; Above n 55 “Japanese NGOs urge Prime Minister Abe to substantially increase national climate targets following a public consultation”.

A United Nations

1 Security Council

The issue of climate change has been gaining traction within United Nations bodies (not just the UNFCCC) as members of vulnerable states and scientific researchers have been putting pressure on developed states to take action at the international level. The General Assembly (UNGA) has even encouraged relevant UN organs to “intensify their efforts in addressing climate change...explicitly including its possible security implications.”¹⁰⁸ This could be taken as an indication that the Security Council (UNSC) should take action, as when there is “any threat to the peace, breach of the peace, or act of aggression which threatens international peace and security”, the UNSC has the ability to pass binding resolutions for all members of the United Nations.¹⁰⁹ As awareness of climate change has evolved and developed, the UNSC has become increasingly aware of the threat that it poses to states and people around the world. At various UNSC meetings there has been acknowledgement by scientists, political representatives and member (and non-member) states that “climate change acts as a threat multiplier”¹¹⁰ and as such, “the climate emergency is a danger to peace”.¹¹¹ The increase in climate change discussions by the UNSC, UNGA and UNFCCC and the demands from civil society, young people, scientists, political representatives and non-member states all indicate that action is wanted- and needed by the UNSC. Especially after the Paris Agreement and its inadequacies, a binding resolution would be a significant step forward and bypass the need for universal state consent, as they would be bound under the UN charter to the consequences of such resolution.

Political challenges are of course a practical barrier to significant climate change action being taken by the UNSC. With two permanent members of the council- the United States and China, the two largest greenhouse gas emitters,¹¹² it is unlikely that either will be taking a strong stance on fossil fuel regulation or a binding resolution- especially considering the US’ rejection of the Paris Agreement.¹¹³ This is particularly concerning as they also have the ability to veto any resolution the UNSC tries to make. Furthermore, China and Russia have “consistently expressed concern that the council’s engagement on [climate change] encroaches on the work of other UN entities”¹¹⁴ and have thus been opposed to UNSC action on climate change. This is despite support by said entities (the UNGA, and the UNFCCC) to expand and encourage climate change action.¹¹⁵ The lack of

¹⁰⁸ *Climate change and its possible security implications* GA Res A/63/281 (June 2019).

¹⁰⁹ *Charter of the United Nations* (1945) 1 UNTS XVI, article 39.

¹¹⁰ Above n 18, “Climate change recognized as ‘threat multiplier’, UN Security Council debates its impact on peace”.

¹¹¹ Miroslav Jenča “Climate emergency ‘a danger to peace’, UN Security Council hears” (July 2020) UN News <<https://news.un.org>>.

¹¹² Above n 54, “Climate Action Tracker”.

¹¹³ Roger Harrabin “Paris Agreement: Trump confirms US will leave climate accord” (October 2019) <<https://BCC News>>.

¹¹⁴ Melissa Turley Toufanian “Climate Change at the UN Security Council: Seeking Peace in a Warming World” (June 2020) United Nations Foundation <<https://unfoundation.org>>.

¹¹⁵ Above n 114 “Climate Change at the UN Security Council: Seeking Peace in a Warming World”; UNFCCC, “Fact sheet: The need for strong global action on climate change” (Press Release, November 2010).

political will and incentive for the member states to take decisive and bold climate change action is disheartening and doesn't indicate that immediate change will be able to be taken by the UNSC if the member states don't support it. However, future non-permanent members of the council such as Norway, Kenya and Canada have indicated that climate change will be "high on their list of priorities" when it comes to voting and their presidencies. This indicates a growing shift in momentum within, and outside of the UNSC that the threat of climate change cannot be ignored for much longer. If there is a significant amount of pressure from within the UNSC, the UNGA, and evidence as to the threat which climate change does and will continue to pose to the peace and security of persons across the world then over time there may be an opportunity for the UNSC to show leadership and take action against the threat climate change which poses.

2 *General Assembly resolution*

The UNGA is the only plenary body at the UN and has the purpose of facilitating "multilateral negotiations" between parties.¹¹⁶ The UNGA, like the UNSC can create resolutions, based on a majority state consensus. Although UNGA resolutions are not [generally] binding, they can illustrate an intent by the majority of UN members to address the serious issues which climate change pose, and to put pressure on nations which are still refusing to act. The UNGA forum also gives SIDS and other developing states an opportunity to participate, as they are often underrepresented in the UNSC, or may have their voices outweighed by permanent member states with different agendas. A UNGA resolution may expose the states which are continually acting against climate change goals, and put pressure to conform to a (potentially) overwhelming majority in such a public forum.

3 *A new UNFCCC protocol*

In an ideal world, there would be a more onerous treaty, or a Protocol to the Paris Agreement established by the UNFCCC which would gain universal consent, have a perfect balance of common but differentiated responsibilities for reducing emissions between states, and have punishments for failing to do so. However, this is simply not realistic with the current state of international law and participating states. Any ratcheting up of binding ambition is unlikely to be agreed upon, and even more unlikely to be universally ratified, making the likelihood of any new and more onerous treaties or amendments unlikely.

B *Advisory opinion*

The International Court of Justice was established in 1945 by the Charter of the United Nations and plays an important role in deliberating and settling legal disputes between nations.¹¹⁷ The ICJ also has the ability to give 'advisory opinions on "any legal matter" referred to it by authorized United Nations organs and specialized agencies,' such as the UNGA and the UNSC.¹¹⁸ Although not legally binding, advisory opinions have become a core element of ICJ jurisdiction and "carry great legal weight and moral authority".¹¹⁹

¹¹⁶ "Functions and powers of the General Assembly" (2020) UNFCCC <<https://unfccc.org>>.

¹¹⁷ Above n 109, *Charter of the United Nations*, article 7.

¹¹⁸ "International Court of Justice" (2020) ICJ Website <<https://icj-cij.org>>.

¹¹⁹ "Advisory Jurisdiction" International Court of Justice <<https://icj-cij.org>>.

In 2011, the President of Palau, Jonson Toribiong, announced that Palau and the Marshall Islands would call on the General Assembly to seek an urgent advisory opinion from the ICJ.¹²⁰ This advisory opinion was on “whether countries have a legal responsibility to ensure that any activities on their territory that emit greenhouse gases do not harm other states- essentially, the no-harm principle”.¹²¹ Palau and the Marshall Islands are two states which are facing immediate threats from the consequences of climate change. With most of the Marshall Islands sitting “less than two meters above sea level”, rising sea levels due to global warming leaves the Islands extremely susceptible to being lost entirely.¹²² It is this danger which formed the basis for the request to the UN, with these States needing to incite immediate preventative action and have more significant obligations on developed and less-at risk states.

The request of the Palauan President was unsuccessful, as the UNGA did not reach majority consensus on seeking an advisory opinion from the court.¹²³ This was likely due to the political and world views on climate change at the time, and the incoming negotiations on the Paris Agreement.¹²⁴ However, there has been an increase in calls recently for the UN and the ICJ to reassess their stance on an advisory opinion on the whether states actually do have a responsibility under international law to prevent greenhouse gas emissions from causing harm to other territories.¹²⁵ This is on the basis that there has been a change in public opinion, further scientific evidence, a shift in ICJ practice and a global shift towards climate action since 2011, which might result in a beneficial advisory opinion for states such as Palau.¹²⁶

Evidence of this “global shift” towards climate action and awareness, can be seen in a 2018 advisory opinion given by the Inter-American Court on Human Rights.¹²⁷ In this case, the Republic of Columbia “asked the Court to clarify the scope of state responsibility for environmental harm under the American Convention on Human Rights” and within the bounds of international customary law.¹²⁸ Whilst this opinion was predominantly focused on harm which may be caused by proposed offshore drilling activity, the court made

¹²⁰ Johnson Toribiong *President of the Republic of Palau to the 66th Regular Session of the United Nations General Assembly* (Speech to the United Nations General Assembly, 22 September 2011).

¹²¹ “Palau Seeks UN World Court Opinion on Damage Caused by Greenhouse Gases” (September 2011) UN News <<https://news.un.org>>.

¹²² Nina Larson “Marshall Islanders ‘sitting ducks’ as sea level rises, says president” (2019) Phys.Org Website <<https://phys.org>>.

¹²³ “Palau, Marshall Islands to Seek Advice from World Court on GHG Impacts” (26 September 2011) SDG Knowledge Hub <<https://sdg.iisd.org>>; Jaspreet Kindra “Island nation takes on the world’s polluters” (2014) <<https://thenewhumanitarian.org>>.

¹²⁴ Above n 123.

¹²⁵ For example, the science was less developed, there was a lessened sense of political pressure and global cohesiveness on climate change, was not perceived to be an immediate issue- Philippe Sands “Climate Change and the Rule of Law: Adjudicating the Future in International Law” (2016) 28(1) *Journal of Environmental Law* 19, at 20.

¹²⁶ At 20-21.

¹²⁷ “Inter-American Court of Human Rights’ Advisory Opinion on the Environment and Human Rights” (May 2018) 22(6) *American Society of International Law*.

¹²⁸ Above n 127, “Inter-American Court of Human Rights’ Advisory Opinion on the Environment and Human Rights”.

significant reference to the applicability of principles of international environmental law, and to the impacts and harm caused by climate change.¹²⁹ The court “expressly recognized the adverse impact of climate change to human rights”, and indicated that the extraterritoriality test¹³⁰ created by the court was “sufficiently broad” to extend to situations of climate change harm.¹³¹ This still raises causation and due diligence issues, but the opinion is useful in indicating a shift in international courts’ attitude to both comment on climate change, and slowly extend their jurisdiction to cover state action- or inaction with regards to climate change and greenhouse gas emissions. Coupled with an increase of political willpower within the UN and further evidence of climate change’s impact which is already occurring, states may now be more willing to vote in the General Assembly in favour of an advisory opinion by the ICJ on state obligations with regards to climate change.

C Duty of assistance and Pacific support

The purpose of this section is to briefly highlight a possible duty of assistance which could emerge in the Pacific, but word limitations prevent an extensive analysis of the ideas put forward.

For SIDS in the Pacific, they face the most immediate threat from climate change.¹³² As these threats materialize, the purpose of a duty of assistance would be for states such as New Zealand (NZ) and Australia to assist with the consequences which occur as a result of the effects of climate change. The basis of a duty to assist may emerge not as a result of one particular obligation or treaty, but rather from a bundle or “toolbox”¹³³ of obligations from binding and non-binding agreements and initiatives¹³⁴, consistent state action¹³⁵, and under customary law principles such as common but differentiated responsibility and the polluter pays principle.

The duty could involve a legal obligation to provide assistance, be it in the form of financial aid, technical support and adaptation or expertise funds provided by NZ and Australia to Pacific nations particularly affected by climate change. Currently, this duty is not legally binding, but there is evidence of consistent disaster relief such as providing “desalination plants, rehydration packs, technical support and water supplies”¹³⁶, the setting up of Trust Funds for financial support¹³⁷, and creation of preemptive adaptation measures¹³⁸ by NZ

¹²⁹ Above n 127.

¹³⁰ [the extraterritorial test] “jurisdiction” [for the court] can embrace activities within a state that cause cross-border effects, noting that states have a duty to prevent transboundary environmental damage that could impair the rights of persons outside their territory, see above n 127.

¹³¹ Above n 127.

¹³² Above n 25 “Small Island Developing States”.

¹³³ Above n 17 “Building International Approaches to Climate Change, Disasters, and Displacement” at 9.

¹³⁴ Such as the Nansen Initiative; see above n 17, at 9.

¹³⁵ See ICJ decision Asylum Case (*Columbia v Peru*) (1950) ICJ Reports 131 and above n 58 “*Principles of International Environmental Law*” at 149.

¹³⁶ Above n 17, “Building International Approaches to Climate Change, Disasters, and Displacement” at 7; “Australia, NZ in airlift to drought-hit Tuvalu” (7 October 2011) BBC News <<https://bbcnews.com>>.

¹³⁷ Neil Boister “New Zealand and the Pacific” in Alberto Costi (Ed) *Public International Law: A New Zealand Perspective* (LexisNexis, Wellington, 2020) 303, at 308.

¹³⁸ “Humanitarian action” (2020) NZ Foreign Affairs and Trade <<https://mfat.govt.nz>>.

and Australia for these Pacific nations. This indicates that there is already at least some form of moral obligation- if not legal, that action must be taken to help.

If this duty did develop with state practice, it could be a binding legal obligation under customary law, meaning action could be taken by states in the Pacific to enforce such rights of assistance as the effects of climate change worsen. Furthermore, this duty would enable Pacific states to prologue permanent migration, as there would be support mechanisms provided on a consistent basis enabling these states to afford to rebuild after climate change induced disasters, as well as ensuring access to clean water, food and housing.¹³⁹ However, this duty does not legally exist yet, and until it does, SIDS will have to rely on the continued voluntary support of developed states to assist with mitigating and adapting to the effects of climate change.

D International dispute settlement

There are currently difficulties in bringing cases to an International Court or Arbitral tribunal with regards to specific climate change causes of action.

Firstly, in order for a state to have standing in international environmental law to bring a case, they need to prove that a breach of obligation owed to that state has taken place by another state.¹⁴⁰ As discussed in the sections above, the current international treaty and customary law on climate change provide few binding obligations in law of which a state can be found to have breached. Thus, there are almost no grounds on which a state can be found to have neglected a direct international law climate change obligation.

In the case that a state *is* found to have breached an international law obligation or custom, both causation and jurisdiction need to be established in order for the case to succeed. As discussed above, a causal link between harm caused in one state is extremely difficult to attribute solely to one state's actions, and until science is able to directly link the two, it is unlikely that there will be sufficient causation between a state's particular emissions and harm caused elsewhere to justify state responsibility. Furthermore, as part of a state's sovereignty, they may not be summoned to the ICJ, but instead must consent to the jurisdiction of the court.¹⁴¹ Some states have declarations in which they have agreed to the compulsory jurisdiction of the ICJ, however large-emitting states such as the Argentina, China, Russia and United States have not, and would have to consent to the court's jurisdiction which is unlikely if a claim is being brought against them.¹⁴²

Thus it is extremely difficult to bring a case directly under climate change law to an International Court or Arbitral Tribunal, and enforcement of state climate change action is limited. There are however, ways in which climate change obligations may be indirectly

¹³⁹ Above n 17, "Building International Approaches to Climate Change, Disasters, and Displacement" at 10.

¹⁴⁰ Above n 58 *Principles of International Environmental Law*, at 182; ILC Articles on State Responsibility, Pt 2, *Report of the ILC to the United Nations General Assembly*, UN Doc. A/56/10 (2001), article 42.

¹⁴¹ *Statute of the International Court of Justice* (18 April 1946) 33 UNTS 993, article 28.

¹⁴² International Court of Justice "Declarations recognizing the jurisdiction of the Court as compulsory"; Above n 54, "Climate Action Tracker" (2020).

upheld through Human Rights bodies. There are multiple Human Rights treaties¹⁴³ which exist to protect fundamental rights such as the right to life, the right to a home and healthy living environment, and the right to be free from discrimination (on the basis of age). Arguably, the harm caused by climate change can in fact imply a violation of these rights, where the harm caused by climate change threatens the livelihoods of citizens, their housing or their right to a healthy environment. There has been evidence of Human Rights bodies handling disputes which involve “environmental elements”¹⁴⁴ however, for the purposes of this paper it is sufficient to know this option exists, but involves further difficulties. The jurisdiction of these Human Rights courts and tribunals occur when has been an exhaustion of local law remedies, and if a state has been found to be in breach of a human rights obligation as a result of their actions.¹⁴⁵ Thus, cases and forms of dispute resolution will have to be taken at a domestic level first before Human Rights tribunals under these treaties will be able to have legal standing.

With the time it takes for international customary and treaty law to develop and come into fruition, coupled with the current lack of international enforceability of state action with regards to climate change, we must look to other alternatives to find a solution. There are overwhelming moral and legal obligations do so before the carbon budget runs out, and the utterly preventable, yet irreversible consequences of climate change occur.

VI From the global to the local

“No nation state alone created climate change and none alone can stop it. International cooperation is essential for success.”¹⁴⁶ While this quote remains true, when international law is failing to adequately address the problems which climate change poses, we must not sit idle but look to other options in the meantime. This section will look at different solutions which can be implemented to bypass the current stagnation international law is facing with respect to climate change resolutions. It will look to some trailblazers in climate change action and see whether these methods can be implemented more commonly. Finally, it will look to what citizens, non-governmental organizations, and non-state actors in states such as NZ can do to facilitate real reduction of emissions and pressure on governments to do the same.

¹⁴³ Such as the American Convention on Human Rights *Treaty Series No. 36* (opened for agreement 22 January 1969, entry into force 18 July 1978), African Charter on Human and People’s Rights 21 I.L.M. 58 (10 June 1981), the European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5 (4 November 1950) and the International Covenant on Economic, Social and Cultural Rights GA Res 2200A (1966).

¹⁴⁴ See, for example, above n 127 “Inter-American Court of Human Rights’ Advisory Opinion on the Environment and Human Rights”, and David Hart “Portuguese climate change claim in Strasbourg” (September 2020) UK Human Rights Blog <<https://ukhumanrightsblog.com>>.

¹⁴⁵ For example, the American Convention on Human Rights 1969, article 46; European Convention for the Protection of Human Rights and Fundamental Freedoms, article 35(1).

¹⁴⁶ Geoffrey Palmer, *Can Judges Make a Difference: The Scope for Judicial Decisions on Climate Change in NZ Domestic Law* (2018) 49 VULR 191, at 192.

A Citizens

One of the most important ways citizens can facilitate climate action is through political pressure on their representatives to act and legislate in a way which supports climate change mitigation, adaptation and awareness.

1 Marches and protests

Protests have long been the way in which citizens of a state show their displeasure or discontent with the state's actions (or inaction) with particular social and legal issues.¹⁴⁷ The Climate Strike 2019, School Strikes for Climate and activism of individuals such as Greta Thunberg have highlighted the immense public pressure and awareness which can come from members of the public. When governments are not acting in the best interests of the climate or are failing to implement adequate climate change agendas, public pressure from citizens is key in holding states accountable and demanding for them to do better.

The School Strike for Climate marches were part of the #fridaysforfuture movement created in 2018 as a result of Greta Thunberg's extensive campaigning for change.¹⁴⁸ The key message being to demand states take climate action seriously, in order to protect the future of its people and the Earth.¹⁴⁹ In particular, marches were scheduled in relation to current or critical events such as the Australian Bushfires and COP 25, as a way of taking large-scale action and demanding states across the world to do the same. In NZ, the marches took place all across the country and were some of the biggest protests in history.¹⁵⁰ An estimated 170,000 people- mostly school children- showed up to participate and show their support towards an issue which will affect the youngest generation most significantly.¹⁵¹

The protests capitalized on political and social agitation at the time and snowballed into a global climate action movement. The immense public awareness gained from media outlets covering the protests, masses of students missing school and from the marches in general, put an immense amount of pressure on political actors to take note of what is happening. Although these marches did not result in tangible change such as a new Act or binding treaty, they were important in refocusing international conversations once again towards climate change, and indicating that young people, new voters, would be holding climate change high on their priority list.

2 Judicial review

“The right to apply for judicial review through the High Court is a central part of the ‘rule of law’”.¹⁵² Judicial review gives citizens the ability to question governmental decisions which are made at all levels and ask the courts to review the decision-making process. The court then assesses “whether they [the governmental official] acted within the scope of

¹⁴⁷ Maciej Kowalewski “Dissatisfied and Critical Citizens: the Political Effect of Complaining” (2019) 56 Soc 453, at 455.

¹⁴⁸ Fridays for Future “Strike Statistics” <<https://fridaysforfuture.org>>.

¹⁴⁹ Above n 148.

¹⁵⁰ Brittney Deguara “Crunching the numbers behind the national climate change strike turnout” (2019) Stuff.com <<https://stuff.co.nz>>.

¹⁵¹ Jason Walls “Climate change march: Thousands of schoolkids' action inspired by Greta Thunberg” (September 2019) NZ Herald <<https://nzherald.co.nz>>.

¹⁵² “Going to Court” (2020) Ministry of Justice <<https://justice.govt.nz>>.

powers given to them by law”.¹⁵³ Although judicial review cannot assess whether the *decision* made by the public actor/institution was correct, the court can “look to the factors the minister took into account, or didn’t take into account when making the decision”.¹⁵⁴ Thus, if a minister was to make a decision which was directly in contradiction of the Climate Change Response (Zero Carbon) Amendment Act, Paris Agreement targets or failed to take climate change into account when setting policy or making legislation with regards to the environment or emissions, it could be judicially reviewed by a concerned citizen. Even if this process doesn’t necessarily result in a change of decision, it is an important function that can put pressure on ministers to continually take these matters into account, be more aware of their climate change obligations and understand its importance to the NZ public.

3 *Voting*

Of course, one of the most significant practical abilities which citizens have to encourage proactive climate change policies is to vote for representatives, government and local leaders which embrace the need for urgent and proactive climate change action. In 2020, this is increasingly relevant, as the elections for not just the NZ government but for governments worldwide- including for the United States, are taking place this year. As the US have recently negated their climate change obligations and rejected the Paris Agreement, it could be a pivotal moment for the climate and international action taken with respects to climate change. In NZ, it too will have significant impacts as to who the public votes in, with different political parties taking extremely varying stances on the Zero Carbon Act and obligations to reduce greenhouse gas emissions. As the state of the climate is so time-sensitive, having to wait another 3 or 4 years under a government which does not support climate change mitigation or adaptation (such as the Trump administration) could be extremely critical to the future of the environment and future climate change action. Thus, the importance and power of voting in the interests of the planet and for parties which support strong climate change mitigation and adaptation processes cannot be overstated.

B Non-state actors

Non State Actors (NSAs), for the purposes of this section, can be defined as organisations and individuals that are not affiliated with, directed by, or funded through the government¹⁵⁵ and include a range of actors such as NGOs,¹⁵⁶ businesses, city and regional governments, indigenous peoples, research groups and civil society members.¹⁵⁷

1 Advantages

Non-state actors are able to use their resources to partner with citizens and provide a platform, funding and support to further their cause. For example, in NZ, there has been a push from NSAs for governmental and private divestment from oil and coal industries.

¹⁵³ Above n 152, “Going to Court”.

¹⁵⁴ Above n 152.

¹⁵⁵ “Non-State Actors” (2020) ESCR Net <<https://escr-net.org>>.

¹⁵⁶ Non-governmental organisations.

¹⁵⁷ David Wei “Linking non-state action with the U.N framework convention on climate change” (October 2016) C2ES <<https://c2es.org>>, at 1.

Investment in fossil fuel industries is something which has been harming the environment as well as continuing the funding and support of these companies by large institutions. In 2014 Auckland University students and NGO Fossil Free UoA embarked on a 5 year campaign to get the University of Auckland (UoA) Foundation to pull out of their fossil fuel investments and to reinvest more sustainably.¹⁵⁸ The students staged protests, undertook extensive lobbying and sent an open letter which involved submissions from UoA staff and students demanding the University took action, and were ultimately successful.¹⁵⁹ Although this action only created policy change at sub-government level, it indicated a shift in attitude from large institutions away from essentially funding significant greenhouse gas emissions by these companies.

On the back of UoA and other NZ universities divesting from the fossil fuel industry, 350.org Aotearoa lobbied the NZ government to do the same with Kiwisaver investment funds. BINGOs.¹⁶⁰ such as the UoA and Victoria University have a “key role in influencing decisions and policy makers” (according to the International Negotiations Survey) and by showing clear intent to move away from fossil fuels provides motivation for the government to do so too.¹⁶¹ As part of the lobbying process 350.org Aotearoa wrote extensive policy review statements imploring the government to follow the lead of these businesses, and invest in NZ’s future responsibly.¹⁶² This was coupled with immense public support via 230 submissions during the Kiwisaver consultation process and over 1300 letters written to the responsible ministers.¹⁶³ On 29 February 2020, the NZ government announced that “fossil fuel production will be excluded from future [Kiwisaver] funds” and that “New Zealanders’ hard earned money [would no longer] be used to support the fossil fuels companies that are the leading cause of the climate crisis”.¹⁶⁴ This puts an obligation on Kiwisaver fund managers not to invest in fossil fuel companies, and means that over \$1.15 Billion of New Zealanders money will be shifting away from supporting some of the biggest contributors to climate change, all at the hands of NSA action and public pressure.¹⁶⁵

Non-state actors are often able to take more drastic climate change mitigation and adaptive measures as they do not [usually] have to answer to a voting public, and often don’t have to go through as many legislative hoops as making a change on a nation-wide scale. Sub-state actors in the United States in particular have been leaders in taking climate change action, regardless of the lack of ambition by the Federal government. In 2014, the state of California and Canadian province Québec agreed to create a “carbon market” to regulate

¹⁵⁸ “Press Release: Students Celebrate as University of Auckland Ditches Fossil Fuels” (August 2019) 350 Aotearoa <<https://350.org>>.

¹⁵⁹ Above n 158.

¹⁶⁰ Business and industry non-governmental organizations.

¹⁶¹ Research on NSAs ability to effect change. N Nasiritousi, M Hjerpe and B Linnér “The roles of non-state actors in climate change governance: understanding agency through governance profiles” (2016) 16 *International Environmental Agreements: Politics, Law and Economics* 109.

¹⁶² “Default KiwiSaver Review Submission” (September 2019) 350 Aotearoa <<https://350.org>>.

¹⁶³ “Win! All default Kiwisaver funds to divest from fossil fuels” (February 2020) <<https://350.org>>.

¹⁶⁴ Grant Robertson and Kris Faafoi “Default KiwiSaver changes support more responsible investment” (Press Release, March 1 2020).

¹⁶⁵ Above n 163.

greenhouse gas emissions between the areas. The carbon market essentially puts “a price on carbon in the economy so that everyone’s decisions take into account greenhouse gas (GHG) emissions and their impacts.”¹⁶⁶ The governments each require companies (who are responsible for over 80 percent of greenhouse gas emissions) to purchase an “emission allowance” for each tonne of greenhouse gas which they emit each year.¹⁶⁷ Each state has a capped number of allocations, which are reduced on a yearly basis.¹⁶⁸ This is to encourage annual reductions of greenhouse gases in a practical way, forcing businesses to slowly ‘wean off greenhouse gases’ but which creates immediate effects in yearly reductions of emissions.

This agreement works largely due to the proximity of the states, but also the willingness from both states to be progressive and proactive with their carbon regulation. A similar agreement between other cities and nations is possible, with the right ambition and public pressure to encourage action. California has one of the 10th largest economies in the world, so predictable arguments that implementing a similar market would be too impractical or unsustainable for the economy are less convincing in light of California’s ability to do so on such a large scale.

Another example of sub-state and non-state actor innovation is the “We Are Still In Alliance”. After the Trump administration pulled out of the Paris Agreement, it signalled a dangerous shift in priorities for one of the highest-emitting states in the world.¹⁶⁹ However, in response to this, a cohort of just under 4000 parties, comprising of various businesses, cities, states, religious organisations, universities and institutions (which represent over 150 million people), joined the Alliance and pledged to continue working towards the Paris Agreement goal of reducing emissions to remain within 1.5° C.¹⁷⁰ This is an unprecedented amalgamation of all facets of American society, spanning across all states, various cities and between both democrats and republicans, and according to estimates, they will be able to reduce the US’ emissions by 25 percent (from pre-industrial levels) which is just under the initial NDC target of 26-28 percent set in 2015.¹⁷¹ This demonstrates the force which NSAs can have in effecting real change, especially when given backing from citizens and sub-state actors that acting in accordance to climate change mitigation goals is a priority which they will support. It also gives hope that whilst the Trump administration is continuing to slow down action with regards to climate change, that sub-state actors have taken responsibility in recognising the impact this will have to the planet and vulnerable states, and have been effective in taking action to prevent this from occurring.

These actions show the effect that small but continuous lobbying efforts from NSAs can have in upholding the Paris Agreement principles of reducing carbon emissions, divesting

¹⁶⁶ “The Carbon Market, a Green Economy Growth Tool!” (2020) Government of Québec <<https://environnement.gouv.qc.ca>>.

¹⁶⁷ Above n 166.

¹⁶⁸ Above n 166.

¹⁶⁹ Denise Chow “In wake of Trump's withdrawal from Paris climate accord, small-town USA says 'we are still in'” (December 2019) <<https://nbcnews.com>>.

¹⁷⁰ “We Are Still In’ Declaration” (2020) We Are Still In <<https://wearestillin>>.

¹⁷¹ Above n 170.

from fossil fuel and in being a catalyst for substantial policy change. It also illustrates how non-state actors and sub-state actors can be freer to act ambitiously towards climate change targets as they are not experiencing the country-wide pressure of being in central government and voter and party pressures to support certain industries, or to ‘protect the economy’.

2 *Disadvantages*

One disadvantage of NSAs, is that they cannot create country-wide law. Whilst some sub-state actors such as state or city governments can make regional law, for many countries such as NZ, these actors do not have such ability, and thus climate change policies are left to central government. As mentioned previously, which government is in power can have significant impacts on climate change mitigation and adaptation strategies, if they are even considered at all, and thus can limit the scope of the influence NSAs can truly have.

Whilst NSAs can be great at facilitating public awareness and challenging governments, the opinions of NSAs can simply be ignored. An example of this was highlighted recently in Japan, where the Climate Action Network (CAN) recommended NGO’s demand the Japanese Government created more challenging targets for the state’s emissions.¹⁷² Japan is the seventh largest contributor of GHG, and responsible for 4 percent of global GHG emissions since 1971.¹⁷³ Since signing the Paris Agreement, the Japanese government has “allow[ed] new coal-burning power plants to be built across the country is in total contradiction to the Paris Agreement goals” and have set their NDC at a mere 26 percent of their 2013 levels.¹⁷⁴ This prompted severe opposition from CAN-Japan and associated NGOs. Part of this response was hosting press conferences, publishing articles and extensive policy statements imploring the government to set a more ambitious target in accordance to their undertaking in signing the Paris Agreement.¹⁷⁵ Unfortunately, despite the action taken by the NGOs, the Japanese Government did not change their NDCs for 2030.

This highlights one of the major downfalls with leaving the policing of NDCs to NSAs. NSAs do not have ability to actually enforce international law themselves, it requires the state at some point to listen and act accordingly. It also illustrates a flaw in the Paris Agreement itself, as Japan faces no actual consequences from the Agreement for their small target, and the Agreement has no mechanisms to ensure that Japan, as a developed country, is setting NDCs which reflect their significant contribution to emissions.

Finally, when there are breaches by government of domestic or international law obligations with regards to climate change, the cost of bringing an action, and subsequent appeals by the state can be extremely expensive. Whilst this is not a disadvantage of NSAs, it is an inhibiting factor for many concerned citizens who want to bring forward a case.

¹⁷² Above n 55, “Japanese NGOs urge Prime Minister Abe to substantially increase national climate targets following a public consultation”.

¹⁷³ Hannah Richie and Max Roser “CO₂ and Greenhouse Gas Emissions” (December 2019) <<https://OurWorldInData.org>>.

¹⁷⁴ Above n 55, “The Japanese government should raise the target of greenhouse gas emission reduction”.

¹⁷⁵ Above n 55, “Japanese NGOs urge Prime Minister Abe to substantially increase national climate targets following a public consultation”.

Thus, NSAs have picked up responsibility and play an immensely important role in providing counsel, organization and funding for court action at a domestic level. Evidence of this support by NSAs will be discussed in the following section.

C Domestic litigation

Whilst international litigation remains challenging in the climate change context for reasons mentioned earlier in this paper, there have been attempts at a domestic level to bring claims which challenge insufficient climate action and force change from governments. This is useful to challenge governmental decisions with regards to mitigation and adaptation policies in light of domestic and international law, to try and get a more climate-friendly result. And at the very least, the threat of judicial review and domestic litigation “emphasises to decision makers that they need to go about making such decisions [with regards to climate change policy] carefully and properly in order to avoid litigation.”¹⁷⁶

In 2015, a Waikato University student took the Minister for Climate Change Issues to court over the minister’s failure “in several respects regarding the setting of greenhouse gas emissions reduction targets required by NZ’s Climate Change Response Act of 2002”.¹⁷⁷ The purpose of the case was to judicially review the Minister’s decision making process when setting emission targets under the Kyoto Protocol, and subsequent targets under the newly established Paris Agreement. Whilst the court decided that in the particular circumstances there was nothing they would do to intervene with the minister’s decision in the case, the court indicated that “it may be appropriate for domestic courts to play a role in Government decision making about climate change policy” in the future.¹⁷⁸ Thus, whilst this case did not result in a literal victory for Thompson, it was important in that the court expressed the possibility of future climate change involvement by the courts.

Three years after *Thompson*, and after the signing of the Paris Agreement, a similar case was taken to The Hague in the Netherlands, and had a different outcome. In this case, the Urgenda Foundation (representing over 900 private individuals) took the State of the Netherlands to court over their climate change policies.¹⁷⁹ The claimants argued the state breached their obligations to set ambitious NCD targets in accordance to the Paris Agreement, and thus acted unlawfully towards Dutch citizens.¹⁸⁰ The Netherlands, ranked fourth highest in global emissions per capita,¹⁸¹ set their NDC target in line with achieving just a 17 percent reduction in emissions from their levels in 1990.¹⁸² This was below the European Union (EU) target of 20 percent and not in line with the Paris Agreement goal of

¹⁷⁶ Above n 146, *Can Judges Make a Difference: The Scope for Judicial Decisions on Climate Change in NZ Domestic Law*, at 200.

¹⁷⁷ *Thomson v. The Minister for Climate Change Issues* [2017] NZHC 733; “Thomson v. Minister for Climate Change Issues” (2020) Climate Change Litigation Databases <<https://climatecasechart.com>>.

¹⁷⁸ *Thomson v The Minister for Climate Change Issues* at [133].

¹⁷⁹ Above n 55 “A Case of Judicial Intervention in Climate Policy: the Dutch Urgenda Ruling”.

¹⁸⁰ Above n 179.

¹⁸¹ Tejvan Pettinger “Top CO2 polluters and highest per capita” (2019) Economics Help <<https://economicshelp.org>>.

¹⁸² Above n 179.

keeping the global mean temperature under 2 degrees Celsius.¹⁸³ The Court supported the view of the claimants, and held “the Dutch Government’s climate change policy was unlawful” and that “in failing to achieve the 2020 greenhouse gas emission target reduction [of 25 percent to 40 percent]” the State had acted negligently with regards to their duty of care.¹⁸⁴ As a result of the court’s ruling, the Netherlands were ordered to “reduce their greenhouse gas emissions by 25 percent by the end of 2020”.¹⁸⁵ Although the initial ruling was appealed by the state, the decision was ultimately upheld by the Dutch Supreme Court in 2019, and the result is now binding on the state.¹⁸⁶

This decision was hailed as an “outright victory for climate activists” and is significant for a number of reasons with regards to the future of climate change action.¹⁸⁷ The implications of which, are worthy to note for the purposes of this paper. Firstly, the court based its decision primarily on the UNFCCC Paris Agreement and the European Convention for the Protection of Human rights and Fundamental Freedoms (ECHR).¹⁸⁸ These are not domestic pieces of legislation, but instead international treaties which the Netherlands had ratified as law.¹⁸⁹ This indicates the usefulness of international treaties at the domestic level, as they can be enforced by citizens and NGOs, and don’t have to be used at the international level to make states adhere to their international obligations. Domestic litigation also tends to avoid the jurisdictional difficulties which are highlighted by international law, as the state has to consent to domestic litigation and judicial review, but can refuse to do so at the international level.¹⁹⁰

The *Urgenda* sets a framework for citizens and NSA’s of other nations (members of the EU in particular) to follow suit. There is now a blueprint case set for how to take a state to court over their negating their domestic and international climate change obligations, and a [non-binding] precedent for how the court may decide. This is especially persuasive for states within the Council of Europe, as the ECHR and the Paris Agreement (if ratified) apply equally to these states as it did in the Netherlands, and forms similar grounds for litigation to be started domestically under their obligations. Domestic litigation therefore, may be of particular use in future, as currently many signatories- including the European Union, are failing under their Paris Agreement obligations to reduce emissions in line keeping the global temp under 1.5-2 degrees Celsius.¹⁹¹ At the current rate of emissions NZ, Australia, Canada and the European Union are on track for a 2-3 degrees global mean temp by 2100.¹⁹², with China, Indonesia, Russia and the USA on track 4+ degrees by

¹⁸³ “Dutch State to reduce greenhouse gas emissions by 25% by the end of 2020” (December 20 2019) Hoge Raad Der Nederlanden (English Translation) <<https://hogeraad.nl>>.

¹⁸⁴ Above n 179; above n 183.

¹⁸⁵ Above n 183.

¹⁸⁶ Above n 183.

¹⁸⁷ Above n 183.

¹⁸⁸ Above n 183.

¹⁸⁹ “Chapter XXVII ENVIRONMENT” (2020) United Nations Treaty Collection <<https://treaties.un.org>>; “Chart of signatures and ratifications of Treaty 005: Convention for the Protection of Human Rights and Fundamental Freedoms” (2020) Council of Europe <<https://coie.int>>.

¹⁹⁰ Patricia Birnie and Alan Boyle *International Law and the Environment* (2nd ed, Oxford University Press, Oxford, 2002) at 199.

¹⁹¹ Above n 54 “Climate Action Tracker”.

¹⁹² Above n 54 “Climate Action Tracker”.

2100.¹⁹³ With the potential availability of domestic litigation, individuals and NGOs are given the ability to enforce the obligation that these states took on in signing the Paris Agreement, and enforce emission targets which are compliant with the Paris Agreement's goals.

Finally, the *Urgenda* case illustrates the role the courts have in acting as a check on parliamentary sovereignty, that whilst governments are able to enact whatever legislation they wish, their actions still have to be within the bounds of the law. Thus, despite the Dutch government arguing that emissions policies were the responsibility of elected ministers, the court's ruling in *Urgenda* suggests that where it can be found a state is in contradiction of their international obligations (and it is constitutional for the court to do so) the court may apply law from international sources and give them direct effect in the domestic court.¹⁹⁴ For states which have ratified the Paris Agreement and have similar duty of care or ECHR requirements, this may be a viable option for domestic courts to act as a check on governments' obligations to its people, and its obligations under both domestic and international law.

What these cases show, is that there is an increasing awareness by domestic courts in the role that they play in upholding compliance with both international and domestic climate change law. Whilst this progression may be slow "because the judges are concerned not to overstep what is considered in NZ as to be the appropriate judicial role", it is still progress, and the mere threat of litigation may be sufficient to encourage governmental accountability in creating effective climate change policies.¹⁹⁵ Without international law, the scope of domestic litigation would be limited, indicating the need for both international framework and domestic legal action to hold states accountable. Furthermore, jurisdiction is far easier to establish domestically, so governments cannot hide behind the guise of state sovereignty and having to jurisdiction as they are able to do in the international arena and may be forced to face the repercussions of their actions [or inaction].

VII Conclusion

Thus, the future of the planet rests entirely within our hands. How we act within the next 7 years in mitigating emissions and providing resources for adaptation, will decide the fate of many SIDS, developing nations and generations to come. Without action, climate change threatens the fundamental human rights of millions of people and viability of life on Earth, negating the very core elements of rights which we are afforded as people. To allow this to happen would be a cruel injustice, but it is a fate which we still have the ability to change.

Whilst international law does offer options for big change, largely in the form of resolutions by pivotal UN bodies- the Security Council and the General Assembly, these solutions require mass state consensus and ambition by states to take climate change action seriously.

¹⁹³ Above n 54.

¹⁹⁴ Above n 55 "A Case of Judicial Intervention in Climate Policy: the Dutch *Urgenda* Ruling".

¹⁹⁵ Above n 146, *Can Judges Make a Difference: The Scope for Judicial Decisions on Climate Change in NZ Domestic Law*, at 203.

This has undoubtedly been made harder as a result of the current Covid-19 pandemic, as state priorities have shifted to focus on the world health response and salvaging their respective economies. However, this cannot be used as an excuse to negate climate change responsibilities for much longer. As a result, until the ambition within international law catches up to the urgency which climate change requires, we must turn to domestic measures to fill in the gaps. Small scale action such as protests, lobbying of parliament and climate-conscious voting, compounded by an increase in domestic litigation are ways in which citizens and NGOs can keep states accountable for their responsibilities to the climate and obligations to their people. It is going to have to take many small efforts, because one large one is unlikely to occur within the current state of international law.

Hope is not lost, but urgent action is required. Citizens, NGOs and states across the world are going to have to come together to demand climate change action from those who have the ability to affect real changes, for "the climatic world is one world even if politically we are not." - Reid Bryson.¹⁹⁶

¹⁹⁶ Reid Bryson "A Perspective on Climate Change" (Speech to the United States Congress, United States, May 26 1976).

VIII Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 12,650 words.

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