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AMBITIOUSLY COLLECTIVE TO COLLECTIVELY AMBITIOUS: AN EVOLUTIONARY INTERPRETATION OF PARTIES' MITIGATION OBLIGATIONS UNDER THE PARIS AGREEMENT

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Abstract

Whether collective obligations exist, or should exist, in public international law has been tiptoed around by international legal scholars, court judges, and instrument drafters for decades. However, the unprecedented challenges arising out of the climate crisis, including the necessity for swift action and cooperation between states, present fresh ground for legal innovation and the recognition of the collective obligation in international law. This paper argues that the Paris Agreement on climate change creates binding collective obligations of conduct for its Parties, with particular reference to Articles 2 and 3 of the Agreement. To translate these legal obligations into positive action—and to clarify the legal relationship between the temperature goal (Article 2) and mitigation (Article 4)—an evolutionary interpretation of the Paris Agreement will be advanced.

Key words: *"Collective obligations"; "Paris Agreement on climate change"; "Ambition"; "Ambitious"; "Evolutionary interpretation of treaties"; "Obligations of conduct"*

I Introduction

The Paris Agreement under the United Nations Framework Convention on Climate Change 2015 ("Paris Agreement") (see Annex) changed the course of international climate law, potentially indefinitely, by shifting focus away from individual mitigation targets, in favour of long-term collective goals.[1] Under the Paris Agreement, Parties are not required to commit to substantive result-based obligations, making joining the Agreement easier.[2] The issue is whether mere participation is enough, not only to combat climate change but also to uphold Parties' mitigation obligations. There is little consensus between international legal scholars on the legal construction or future effectiveness of the Paris Agreement. This paper attempts to provide a fresh interpretation of the Paris Agreement based on the growing literature of collective obligations in international law, and the resulting expectations for Parties. An evolutionary interpretation of the Agreement, based on the intentions of the signatory parties, will be advanced.[3] Such an interpretation helps to provide the necessary legal connection between collective obligations and individual efforts, previously neglected by international scholars.[4] The goal is to contribute to the literature on collective obligations in public international law and, more particularly, to propose that an evolutionary interpretation is appropriate to the context and purposes of the Paris Agreement.

To begin, some background to the Paris Agreement will be provided, including the political motivations for drafting decisions. Next, the presence of existing collective obligations in international law, as well as in the Agreement itself, will be considered. It will be determined that while Parties did not intend to create substantive collective obligations of result, they did intend to create binding collective obligations of conduct. This derives particularly from Articles 2 and 3 and also from the political and scientific context within which the Agreement was written. The question arises as to how such obligations,

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[1] Paris Agreement Under the United Nations Framework Convention on Climate Change (Paris Agreement) 3156 UNTS (opened for signature 16 February 2016, entered into force 4 November 2016); Alexander Zahar "Collective Obligation and Individual Ambition in the Paris Agreement" (2020) 9 TEL 165 at 169.

[2] Ralph Bodle, Lena Donat and Matthias Duwe "The Paris Agreement: Analysis, Assessment and Outlook" (2016) 10 CCLR 5 at 17.

[3] Eirik Bjorge *The Evolutionary Interpretation of Treaties* (Oxford University Press, Oxford, 2014).

[4] Zahar, above n 1, at 166.

particularly the obligation to be ambitious, can be interpreted to increase the likelihood of the Paris Agreement's goals being achieved. This paper argues that an evolutionary interpretation of the Agreement not only reflects Parties' intentions but also informs our understanding of the legal relationship between the collective obligations in Article 3 and the individual obligations contained in Article 4. Article 3 acts as a bridge, connecting the temperature goal to the rest of the Agreement. Finally, some high-level suggestions for how individual Parties can ambitiously, fairly and genuinely contribute to the temperature goal will be provided.

II Preliminary Matters

A Types of International Obligations

Initially, it will be helpful to outline the different kinds of obligations, and non-obligations, observed by legal scholars in international law. Firstly, the legal form of an international instrument can be distinguished from the nature of its provisions. The issue of legal form generally refers to the legal status of the overall instrument, the key question being whether the instrument is a legally binding treaty.[5] Due to the United States' constitutional and political sensitivities, the Paris Agreement does not carry the title of "Treaty" or "Protocol", rather adopting the softer language of "Agreement".[6] Despite this, it is generally accepted by scholars and political leaders that the Agreement is an outcome with legal force.[7] It entered into force as a binding international agreement in accordance with the Vienna Convention on the Law of Treaties ("Vienna Convention") in November 2016.[8] On the

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[5] Sebastian Oberthür and Ralph Bodle "Legal Form and Nature of the Paris Outcome" (2016) 6 Climate Law 40 at 42–43.

[6] Jacob Werksman "Remarks on the International Legal Character of the Paris Agreement Symposium: Transnational Perspectives on US Withdrawal from the Paris Climate Agreement: Articles and Essays" (2019) 34 Md J Int'l L 343 at 354.

[7] At 354; Oberthür and Bodle, above n 5, at 46; Lavanya Rajamani and Jacob Werksman "The legal character and operational relevance of the Paris Agreement's temperature goal" (2018) 376 Phil Trans R Soc A 1 at 3; Sebastian Oberthür and Lisanne Groen "Hardening and softening of multilateral climate governance towards the Paris Agreement" (2020) 22 Journal of Environmental Policy and Planning 801 at 805; Lavanya Rajamani "The 2015 Paris Agreement: Interplay between Hard, Soft and Non-Obligations Analysis" (2016) 28 JEL 337 at 340; Bodle, Donat and Duwe, above n 2, at 6.

[8] Vienna Convention on the Law of Treaties (Vienna Convention) 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980) at art 2, 24; Lavanya Rajamani and Jutta Brunnée "The Legality of Downgrading Nationally Determined Contributions under the Paris Agreement: Lessons from the US Disengagement" (2017) 29 JEL 537 at 539.

other hand, the nature, or character, of an agreement's provisions relates to the stringency of the wording of individual provisions.[9] Targets and actions, while contained in the agreement and thus forming part of international law, may be flexible or discretionary, depending on their framing.[10] Even if they hold the status of law in a legally binding treaty, they may not impose strict legal obligations on parties.

Secondly, if a provision imposes a legally binding obligation, this may be either an obligation of result or of conduct.[11] An obligation of result is a commitment to achieve a specific outcome.[12] This can either be substantive or procedural. For example, the commitment to achieve a specified emission reduction target is a substantive obligation of result,[13] whereas the commitment to follow reporting requirements, or provide access to information, are procedural obligations of result. An obligation of conduct is the commitment to particular actions, behaviour or conduct which endeavour towards a goal or outcome.[14] These are called due diligence obligations.[15] They may also be either substantive or procedural. For example, under general international law, the no-harm rule creates a substantive obligation of conduct for states.[16] An example of a procedural obligation of conduct is provided by Article 4.2 of the Paris Agreement, which requires Parties to "pursue domestic mitigation measures, *with the aim of achieving* the objectives of such contributions".[17] It is generally acknowledged, and the outcome of purposeful drafting, that while the Paris Agreement contains obligations of conduct,[18] and procedural obligations of result, it is less clear whether it contains any substantive obligations of result.[19] Benoit Mayer argues that obligations of conduct can be at least as demanding as

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[9] Rajamani and Werksman, above n 7, at 3.
[10] Oberthür and Bodle, above n 5, at 47.
[11] At 51.
[12] Benoit Mayer "Obligations of conduct in the international law on climate change: A defence" (2018) 27 RECIEL 130 at 130.
[13] Zahar, above n 1, at 179; Oberthür and Bodle, above n 5, at 51.
[14] Zahar, above n 1, at 168; Daniel Bodansky "The Legal Character of the Paris Agreement" (2016) 25 RECIEL 142 at 146; Oberthür and Bodle, above n 5, at 51; Mayer, above n 12, at 130.
[15] Alice Ollino *Due diligence obligations in international law* (Cambridge University Press, Cambridge, 2022).
[16] Mayer, above n 12, at 131.
[17] Paris Agreement, above n 1, at art 4.2, emphasis added; Mayer, above n 12, at 130.
[18] The Paris Agreement contains both substantive and procedural obligations of conduct.
[19] Bodansky, above n 14, at 146; Rajamani and Werksman, above n 7, at 5; Zahar, above n 1, at 179; Rajamani, above n 7, at 342.

substantive obligations of result, and hold great promise if objectives are clearly defined and compliance effectively and transparently monitored.[20]

Thirdly, provisions may be directed at parties individually or collectively. International legal scholars have attempted to identify some rules or trends contained in the wording of treaties, which indicate whether a provision is directed at parties individually or collectively.[21] For example, a provision directed to "each party" clearly creates individual obligations, whereas a provision applying to "all parties" may apply individually or collectively, depending on the wording of the provision.[22] Suggested rules are not always reliable indicators of the subject, and words used should be interpreted within the context of the provision and the purpose of the treaty as a whole.[23]

B The Paris Agreement: Political Negotiations and Background

For the purpose of simplification, the debate over the legal character of the Paris Agreement can be narrowed down to three main political perspectives, all of which contributed to its final drafting.[24] The consensus was reached, whether genuinely held or a political sales pitch, that by not requiring legally binding mitigation targets, more countries would be willing to sign up to the Agreement, increasing the likelihood of widespread participation. This approach has been largely successful, with almost all Parties to the United Nations Framework Convention on Climate Change submitting an intended nationally determined contribution prior to the Paris summit.[25]

Firstly, developing and middle-income countries wanted to avoid signing up to binding commitments which would compromise their sovereignty and development priorities.[26] India in particular prioritised economic growth and the eradication of poverty, with roughly

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[20] Mayer, above n 12, at 131.

[21] Rajamani, above n 7, at 343; Bodansky, above n 14, at 145; Zahar, above n 1, at 171; Lavanya Rajamani "Ambition and differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics" (2016) 65 Int Comp Law Q 493 at 501.

[22] Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani *International Climate Change Law* (Oxford University Press, Oxford, 2017) at 218; Bodansky, above n 14, at 145.

[23] Vienna Convention, above n 8, at art 31.

[24] Werksman, above n 6, at 351.

[25] Bodle, Donat and Duwe, above n 2, at 17.

[26] Werksman, above n 6, at 351–352.

a fifth of its population still not having access to electricity.[27] India maintained that rich countries must repay their historic debt drawn from the Earth's carbon budget and lead the way in mitigation efforts.[28] This clashed with the U.S. refusal to accept historic responsibility for carbon emissions.[29] China also favoured non-binding mitigation actions but, unlike India, China had a decreasing interest in differentiating between countries based on per capita and historic emissions because of its massive and still growing emissions.[30] Some developing countries, like Brazil, advocated for the requirement that Parties should take more ambitious actions over time, in an effort to prevent "backsliding" by developed countries.[31] This resulted in the "progression" principle being included in Articles 3 and 4.

Secondly, the Obama administration, while strongly inclined to join the Paris Agreement, had to navigate significant political and constitutional restraints.[32] Todd Stern—the U.S. special envoy for climate change at the Paris Conference—argued that "there are many [developing] countries who would be inclined to put in a lower target than they're really capable of if they were worried about the legally binding nature of the targets themselves".[33] This sentiment failed to reflect the true reason for wanting non-binding mitigation actions, which was that the U.S. could not join the Paris Agreement if it required additional legislative action from the Republican-dominated Senate.[34] An agreement was needed which would fit within the boundaries of the President's Executive Authority.[35] This ruled out any substantively binding obligations of result, especially in the form of mitigation targets.[36]

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[27] Awasthi Vanita and Rohit Kumar Gupta "COP 21: The Paris Paradigm by Vanita Awasthi & Rohit Kumar Gupta Volume" (21 December 2016) International Journal of Legal and Social Studies <https://ijlss.wordpress.com> at [15].
[28] Raymond Clémençon "The Two Sides of the Paris Climate Agreement: Dismal Failure or Historic Breakthrough?" (2016) 25 JED 3 at 7.
[29] At 6.
[30] Oberthür and Bodle, above n 5, at 47; Clémençon, above n 28, at 7.
[31] Rajamani, above n 21, at 500–501.
[32] Werksman, above n 6, at 352.
[33] Emily Gosden "Paris climate deal 'must enforce transparency'" *The Telegraph* (online ed, United Kingdom, 28 November 2015) <www.telegraph.co.uk>; Clémençon, above n 28, at 6.
[34] Suzanne Goldenberg "How US negotiators ensured landmark Paris climate deal was Republican-proof" *The Guardian* (online ed, United States, 13 December 2015) <www.theguardian.com>; Werksman, above n 6, at 352; Oberthür and Bodle, above n 5, at 45.
[35] Werksman, above n 6, at 352.
[36] Oberthür and Bodle, above n 5, at 53; Clémençon, above n 28, at 6.

Thirdly, the European Union ("EU") and several progressive countries, including developing countries with high ambition, pushed for legal bindingness as a key aspect of ambition.[37] On behalf of the EU and its member states, Greece submitted that in order to achieve the temperature objective, the 2015 agreement should "contain mitigation commitments from all Parties that are legally binding and provide the framework in which Parties will fulfil those commitments".[38] The survival of small island states especially depends on the success of the Paris Agreement because of the dangers of sea level rise.[39] Ultimately, these countries had to resign themselves to the fact that an agreement lacking binding mitigation commitments is better than no agreement at all.[40] There was, at least, the acceptance by all political camps of a temperature goal with ambiguous legal character being written into the text in recognition of the effects of sea level rise on island states.[41]

C The Results of Political Wrangling: Overview of the Paris Agreement

The result of political negotiations, but primarily the gridlock of the US Congress, was that the Paris Agreement would be a legally binding international treaty, containing provisions of uniquely ambiguous legal character.[42] The following section provides an overview of the Paris Agreement's key provisions. Some provisions are demonstrably legally binding, while others are more ambiguous. An in-depth analysis of the legally binding character, or lack thereof, of certain potentially transformative provisions will be saved for later in this paper.

1 Purpose and goals

The Paris Agreement's most publicised goal is contained in Article 2.1(a).[43] The Agreement aims to hold the increase in the global average temperature to well below 2°C above pre-industrial levels and endeavouring to limit the increase to 1.5°C above pre-

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[37] Werksman, above n 6, at 352; Oberthür and Bodle, above n 5, at 47.
[38] "EU Submission on Mitigation in the 2015 Agreement, Submission by Greece and the European Commission on behalf of the European Union and Its Member States" (28 May 2014) <https://unfccc.int> at 3.
[39] Werksman, above n 6, at 352.
[40] Clémençon, above n 28, at 7.
[41] At 7.
[42] Rajamani and Werksman, above n 7, at 3.
[43] Paris Agreement, above n 1, at art 2.1(a).

industrial levels.[44] This is the "long-term temperature goal".[45] It is ambiguous where exactly between 2°C and 1.5°C the temperature goal sits.[46] Some interpret it to mean that genuine and concerted efforts must be made towards the objective of 1.5°C, unless this is already impossible, in which case around 1.7°C or 1.8°C becomes the limit.[47] Scientific evidence reveals that if low-lying island states have any hope of avoiding destruction, the 1.5°C limit cannot be exceeded.[48]

2 Mitigation

Articles 3 and 4 attempt to translate the temperature goal into individual long-term emissions reduction objectives through the use of nationally determined contributions ("NDC"s).[49] NDCs are targets, frameworks and goals volunteered by individual states based on their own capacities and climate ambitions, with a view to contributing to the collective goals outlined in Article 2.[50] Parties are legally obligated to prepare, communicate and maintain their NDCs and there is a good faith expectation that Parties intend to achieve the objectives of their NDCs.[51] All NDCs are subject to transparency procedures and regular stocktake.[52] NDCs must be communicated every five years and each Party's successive NDC must be a progression beyond their existing NDC.[53] Article 4 does not prescribe specific mitigation plans or what emission levels should be achieved.[54] There is no substantive legal requirement to actually achieve NDCs, as this would give NDCs the same legal status as the Kyoto Protocol's emission targets, which many countries

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[44] At art 2.1(a).
[45] At art 4.1.
[46] Navraj Singh Ghaleigh "Article 2: Aims, objectives and principles" in *The Paris Agreement on Climate Change: A Commentary* (Edward Elgar Publishing Limited, Cheltenham, 2021) at [2.17].
[47] Felix Ekardt, Jutta Wieding and Anika Zorn "Paris Agreement, Precautionary Principle and Human Rights—Zero Emissions in Two Decades?" (2018) 10 Sustainability 2812 at 2814.
[48] MJ Mace "Mitigation Commitments Under the Paris Agreement and the Way Forward" (2016) 6 Climate Law 21 at 22–23.
[49] Bodle, Donat and Duwe, above n 2, at 7; Paris Agreement, above n 1, at art 3 and 4.
[50] Anna Schoonees "Paris Agreement I: Collective obligation and individual ambition? What is the legal relationship between the temperature goal (art 2) and the nationally determined contributions (arts 3 and 4)?" (Te Kauhanganui Tātai Ture – Faculty of Law Te Herenga Waka – Victoria University of Wellington, 2022) at 4.
[51] Rajamani, above n 21, at 498.
[52] Bodle, Donat and Duwe, above n 2, at 17.
[53] Paris Agreement, above n 1, at art 4.3 and 4.9.
[54] Bodle, Donat and Duwe, above n 2, at 17.

have already rejected.[55] Hence, Article 4 imposes individual obligations on Parties, but these are largely of conduct and procedural result, rather than substantive result.[56]

It is suggested that the NDCs of developed countries "should" be in the form of economy-wide absolute emission reduction targets.[57] For example, New Zealand's NDC uses an emissions budget approach, similar to that of Australia and Switzerland.[58] New Zealand's first NDC in 2016 committed to reducing greenhouse gas emissions to 30% below 2005 levels by 2030. In November 2021, this target was updated to reduce net emissions to 50% below the gross 2005 level by 2030.[59] Less-developed countries are encouraged to move towards creating emission targets, but there is little guidance in the Agreement about alternative targets or actions which should be taken in the meantime.[60]

3 Other key aspects of the Paris Agreement

The Paris Agreement also contains provisions about adaptation, finance, technology and capacity-building support, transparency, implementation and compliance, and a global stocktake every five years.[61] To support adaptation, Parties to the Paris Agreement establish a global goal for enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change.[62] There is recognition of the need for international cooperation and the importance of taking into account developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change.[63]

Finance, technology and capacity-building support are also prioritised, with the Paris Agreement stating that developed country Parties shall transfer financial resources and

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[55] Bodansky, above n 14, at 146.
[56] Art 4(2).
[57] Bodle, Donat and Duwe, above n 1, at 7.
[58] Cabinet Paper "Agreement to update New Zealand's first Nationally Determined Contribution under the Paris Agreement (26 October 2021) CAB-21-MIN-0434 at [23].
[59] "Nationally Determined Contribution" (24 December 2021) Ministry for the Environment <https://environment.govt.nz>, 2,5; "Submission under the Paris Agreement New Zealand's first Nationally Determined Contribution—Updated 4 November 2021" (4 November 2021) United Nations Climate Change Nationally Determined Contributions Registry < https://unfccc.int/NDCREG> at 1.
[60] Bodle, Donat and Duwe, above n 2, at 8; Schoonees, above n 50, at 5.
[61] Paris Agreement, above n 1, at arts 7, 9, 10, 11, 13, 14, 15.
[62] At art 7.1.
[63] At art 7.6.

technology development to assist developing countries with respect to both mitigation and adaptation.[64] Developed country Parties also commit to communicating information on financial support biennially.[65] Capacity building involves the cooperation of all Parties in order to enhance the ability of developing country Parties, particularly those most vulnerable to the adverse effects of climate change, to take effective adaptation and mitigation actions.[66]

Finally, the Paris Agreement provides for transparency through information sharing and education, a non-punitive implementation and compliance mechanism, and a global stocktake.[67] A transparency framework is created to provide a clear understanding of the progress in climate change action "including good practices, priorities, needs and gaps, to inform the global stocktake".[68] The global stocktake will take place every five years from 2023 and its outcome shall inform Parties in updating and enhancing their actions and support, as well as enhancing international cooperation for climate action.[69]

III International Collective Obligations: Fabrication or Innovation?

The existence of collective obligations in international law has been discussed by scholars without consensus or authoritative confirmation.[70] This section will firstly consider the existence of the collective obligation at international law prior to the Paris Agreement, determining that no such obligation existed. Secondly, this section will consider whether the Paris Agreement contains collective obligations, making it the first innovative statement of collective obligations in international law. To achieve this, a framework containing some criteria of bindingness will be consulted. On a plain reading of the Agreement, and using the bindingness framework, Article 3 contains a collectively binding obligation of conduct. While Article 3 relies heavily on the goals contained in Article 2 to provide context,

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[64] At art 9,10.
[65] At art 9.5.
[66] At art 11.
[67] At arts 13, 14, 15.
[68] At art 13.5.
[69] At art 14.
[70] Joost Pauwelyn "A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?" (2003) 14 EJIL 907; Zahar, above n 1.

meaning, and direction for its collective obligation, Article 2 itself does not create any legally binding obligations on its own.

A Collective Obligations in International Law

Before considering whether the Paris Agreement contains collective obligations, the existence of collective obligations at international law should first be considered. Examples where collective obligations seem to arise include the reservation, modification, suspension or breach of a treaty.[71] In other words, when something has gone wrong. This section will cover the earliest instances of the collective obligation being implicitly recognised in international case law through to more contemporary evidence as found in international norms like the Responsibility to Protect.

1 International case law

One of the earliest signs of the development of the collective obligation in international law, as opposed to the individual obligation, is contained in the advisory opinion of the International Court of Justice ("ICJ") in the *Reservations to the Genocide Convention* case in 1951.[72] The court noted:[73]

> In such a convention the contracting States *do not have any interests of their own; they merely have, one and all, a common interest,* namely, the accomplishment of those high purposes which are the *raison d'etre* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.

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[71] Refer to the cases, commentary and international instruments discussed below.
[72] *Reservations To The Convention On The Prevention And Punishment Of The Crime Of Genocide (Advisory Opinion)* [1951] ICJ No 12.
[73] At 23, emphasis added.

The court found that if a reservation is not compatible with the object and purpose of the treaty, including the "common interest" of the parties,[74] then that reservation will be prohibited. This is because the intentional creation of collective rights and obligations is an essential part of the object and purpose of a treaty, and therefore cannot be the subject of reservation without frustrating the treaty's purpose. This was subsequently reflected in Article 19(c) of the Vienna Convention, which prohibits reservations to a treaty incompatible with the object and purpose of that treaty.[75]

In *Customs Régime Between Germany and Austria*, when deciding whether a modification should be permitted, Judge Anzilotti said in his individual advisory opinion that the provisions were not adopted in the "interests of any given state, but in the higher interest of the European political system and with a view to the maintenance of peace".[76] The *Oscar Chinn* case also arose out of a proposed modification.[77] In that case, Judge Van Eysinga said the General Act of Berlin "does not create number of contractual relations between a number of States".[78] Rather, it:[79]

> …forms an *indivisible whole* [and] may be modified, [but] the agreement of all contracting Powers is required. An inextricable legal tangle would result if, for instance, it were held that [modification at issue] might be in force for some contracting Powers while it had ceased to operate for certain others.

The Judge implicitly recognises that the purpose of having a collective obligation, held by all parties, would be defeated by individual parties opting out of, or modifying, the obligation. It does not make sense to allow parties to unilaterally, or bilaterally, modify their commitment to a multilateral treaty, because the effect is not just to rid one reciprocating state of their rights under the agreement, but to rid all parties to the agreement

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[74] At 23.

[75] Vienna Convention, above n 8, at art 19(c); Pauwelyn, above n 70, at 910. Admittedly, the obligation placed on Parties by the Vienna Convention is an individual one. However, what this paper hopes to demonstrate through the analysis is that the individual obligation to not modify a treaty functions in protection of the broader collective obligations which states owe to one another under the treaty, and which would be rendered useless if one Party was to modify their own obligations.

[76] *Customs Régime between Germany and Austria* (individual opinion by M Anzilotti) [1931] PCIJ No 41 at 64.

[77] *Oscar Chinn* (separate opinion of Jonkheer van Eysinga) [1934] PCIJ No 63.

[78] At 133–134.

[79] At 134, emphasis added.

of their multilateral rights.[80] When parties contract collectively in the "interests of peace" this means that peace for all parties is guaranteed,[81] but also that all parties must guarantee their commitment to peace for the benefit of the collective.

2 The International Law Commission Reports on the Law of Treaties by Sir Gerald Fitzmaurice

From 1956 to 1960, Special Rapporteur Sir Gerald Fitzmaurice presented five separate reports for the International Law Commission on the law of treaties, covering: (1) the framing, conclusion and entry into force of treaties; (2) the termination of treaties; (3) the essential and substantial validity of treaties; (4) the effects of treaties as between the parties; and (5) treaties and third States.[82] In his Third Report on the Law of Treaties, Fitzmaurice identified three types of international treaty obligations: reciprocal, interdependent and integral obligations.[83] Reciprocal obligations are those contained in either bilateral treaties or multilateral treaties of the reciprocating type.[84] Agreements of a reciprocating type were defined by Fitzmaurice as those which "involve a mutual exchange of benefits between the parties, or a reciprocal course of conduct by each towards each, of such a kind that a default by one party would be a default in that party's relations with some other party".[85] If there was a fundamental breach of reciprocal obligations by a party, then the treaty could be suspended or terminated.[86] This is because if a party modifies, suspends or breaches their reciprocal obligations with another consenting party, this does not affect any other party to the agreement besides the reciprocating party with whom the modification, suspension or breach was agreed.

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[80] This becomes more complex when one introduces other factors present in contemporary international environmental law, such as when a state might be a party to a framework convention like the UNFCCC but decide not to become a party to a subsequent agreement under it, like the Paris Agreement. However, this subject could be the discussion of an entirely different paper.

[81] *Oscar Chinn*, above n 77, at 133.

[82] *Law of Treaties—First report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur* [1962] vol 2 YILC 27 at 159.

[83] *Law of Treaties—Third report by G G Fitzmaurice, Special Rapporteur* [1958] vol 2 YILC 20 at 27–28.

[84] At 41.

[85] At 44.

[86] At 27–28.

Interdependent and integral obligations are present only in multilateral treaties and can be classified as particular subsets of the collective obligation.[87] Integral obligations are those where "the force of the obligation is self-existent, absolute and inherent for each party, and not dependent on a corresponding performance by the others".[88] Interdependent obligations occur "where a fundamental breach of one of the obligations of the treaty by one party will justify a corresponding non-performance generally by the other parties, and not merely a non-performance in their relations with the defaulting party".[89] If a subsequently conflicting agreement results in modification, suspension or breach of an integral or interdependent obligation, that subsequently conflicting treaty will "to the extent of the conflict, be null and void".[90] This is because if some parties decide to modify, suspend or breach their obligations between themselves, this will not only affect the parties directly involved, but also the rights and obligations of all the other parties to the multilateral treaty.[91] Hence, changes to the treaty which are not consented to by all parties, are impermissible.

In a normative sense, if one were to apply Fitzmaurice's categorisation to the Paris Agreement, integral obligations would be the preferred interpretation, because it does not rely on reciprocal performance. If the Paris Agreement was considered to contain interdependent or reciprocal obligations, then failure by any Party to perform their obligations could result in all Parties defaulting on their obligations, which would be devasting to the climate. The Paris Agreement is an attempt by world leaders to move away from a transactional, or reciprocal, perspective towards a mindset of ambition and cooperation. Furthermore, Special Rapporteur James Crawford—who initially introduced collective obligations into the Draft Articles on State Responsibility, discussed below—pointed out that integral collective obligations should not be limited to humanitarian and human rights obligations, but may also include obligations for environmental protection.[92]

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[87] Pauwelyn, above n 70, at 913.
[88] *Law of Treaties—Third report by G G Fitzmaurice, Special Rapporteur*, above n 83, at 28.
[89] Fitzmaurice, above n 83, at 27–28.
[90] At 27–28.
[91] Pauwelyn, above n 70, at 914.
[92] At 917.

3 The Vienna Convention on the Law of Treaties

Fitzmaurice's categorisation was not explicitly maintained in the Vienna Convention but did have its influence in at least six different provisions.[93] Arguably the most important provision is Article 41.[94] Article 41 prohibits modifications to a multilateral treaty between two or more of the parties that:[95]

(1) are prohibited in the treaty itself; or
(2) "affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations"; or
(3) "relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as whole".

The first ground is straightforward. If a treaty, expressly or impliedly, prohibits modification of its terms then modification by two or more of the parties is contrary to the intention of all parties. The second ground of prohibiting modification by two or more parties is if it would affect the rights and obligations of other parties.[96] As explained, if certain parties decide to modify their obligations under a multilateral treaty containing integral or interdependent obligations, this affects not only the rights and obligations of the parties involved but also those of other parties to the treaty. The rights and obligations are considered to belong to parties collectively and any modification to the rights and obligations of one party is a modification to the whole. For example, a nuclear-free zone treaty based on interdependent obligations would be useless if one party was permitted to keep nuclear weapons in the nuclear-free zone. Or, if a human rights treaty based on integral obligations, containing inherent rights deriving from a higher moral code, was modified to allow certain states to commit human rights breaches against certain other parties, this would be offensive to the morality of all parties.

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[93] At 912.
[94] At 914.
[95] Vienna Convention, above n 8, at art 41.1(b). It should be noted that Article 58 provides essentially the same prohibition but in terms of suspension rather than modification.
[96] At art 41.1(b)(i).

The third ground of prohibiting modification by two or more parties is if it would be incompatible with the object and purpose of the treaty as a whole.[97] Joost Pauwelyn, in his article "A Typology of Multilateral Treaty Obligations", suggests that cases which do not fall within the first or second ground, but that still relate to a provision for which a derogation is against the object or purpose of a treaty, can be explained only by the existence of collective obligations.[98] If parties intended to use the treaty to create collective obligations, then any agreement between certain parties that modifies those collective obligations is going to be contrary to the object and purpose of the treaty. This was seen in the *Reservations to the Genocide Convention* case,[99] where the creation of collective obligations was considered to be part of the object and purpose of the treaty, and hence a reservation relating to those obligations was prohibited.[100]

4 The International Law Commission ("ILC") Draft Articles on State Responsibility

Legal scholars have pointed to the ILC Draft Articles as containing references to collective obligations.[101] The Draft Articles on the Responsibility of States for Intentionally Wrongful Acts was adopted by the ILC in 2001. Article 42 concerns the invocation of responsibility following the breach of an obligation.[102] It states that an injured state may invoke the responsibility of another state if the obligation breached is owed to "a group of States including that State, or the international community as a whole".[103] This is the first express suggestion in international law that obligations can be owed to states collectively.[104] The commentary refers to "obligations established in the collective interest".[105] It also explains that Article 42 deals with injury arising from "violations of collective obligations" and

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[97] At art 41.1(b)(ii).
[98] Pauwelyn, above n 70, at 915.
[99] *Reservations To The Genocide Convention* case, above n 72.
[100] It should be noted that the Convention did not go so far as to automatically invalidate incompatible modifications as Fitzmaurice recommended, but only to prohibit them.
[101] Pauwelyn, above n 70, at 916; Zahar, above n 1, at 176.
[102] *Report of the International Law Commission on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001)* [2001] vol 2, pt 2 YILC 1 at 117. Article 42 also allows an injured state to invoke responsibility for a breach of obligation which would "radically…change the position of all other States to which the obligation is owed". This is reminiscent of Article 41 of the Vienna Convention and Fitzmaurice's proposal that inconsistent treaty modifications be "null and void". Articles 48 and 50.1 are also relevant, but there is insufficient scope in this paper to cover them in detail.
[103] At 117.
[104] Pauwelyn, above n 70, at 916.
[105] *Report of the International Law Commission on the work of its fifty-third session*, above n 102, at 102.

defines collective obligations as those "that apply between more than two States and whose performance in the given case is not owed to one State individually, but to a group of States or even the international community as a whole".[106] It is important to note, however, that because Article 42 is concerned with invoking responsibility, rather than facilitating ambition, the collective obligations referred to are framed in the negative, rather than the positive. They are less about collective action, and more about individual breach and the resulting reparation. Article 42 does not exclude the existence of positive collective obligations but also does not confirm it. The Paris Agreement provides a more complex challenge because punitive measures such as invoking responsibility have been expressly prohibited by Article 15.[107] The scope of collectively held obligations for positive action is yet to be defined. However, the commentary does consider that "group of states" refers to states that have "combined to achieve some collective purpose".[108] This is more indicative of the collective action issues arising out of the Paris Agreement, and suggests that positive collective obligations operate in the background of individual state responsibility.

Interestingly, the commentary distinguishes between a group of states which make up a "community of states of a functional character" and a group of states which have a "separate legal personality".[109] According to the commentary, in relation to Article 42, only the former exists. Contrastingly, Alexander Zahar in his article "Collective Obligation and Individual Ambition in the Paris Agreement" seems to consider that an "international community [of states of a functional character]" can become a "legal person".[110] It is an intriguing idea because, as Zahar notes, if a group of states can coalesce into a single legal person, then there is nothing to prevent them from unilaterally binding themselves to legal obligations, as individual countries often elect to do.[111] If self-imposed obligations are not unusual at the state level, then there is nothing implausible about a group of states, in community or as a legal person, binding themselves to collective obligations at a global level.[112]

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[106] At 118.
[107] Paris Agreement, above n 1, at art 15(2).
[108] *Report of the International Law Commission on the work of its fifty-third session*, above n 102, at 102.
[109] At 118–119.
[110] Zahar, above n 1, at 177. Confusingly, Zahar cites the Draft Articles as relevant authority for this claim, despite the Articles stating that only a community of a functional character may exist.
[111] At 175.
[112] At 175.

5 *The responsibility to protect ("R2P")*

At the 2005 United Nations World Summit, the General Assembly adopted the World Summit Outcome which gave states the "responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity".[113] For our purposes, pillar three of R2P is relevant. It states that it is "the responsibility of Member States to respond collectively in a timely and decisive manner when a State is manifestly failing to provide…protection" to its populations.[114] R2P is an international norm, holding wide acceptance among states.[115] It is not included in a binding legal instrument. However, evidence of an accepted international norm, creating collective responsibility, suggests that it would not be inconceivable for the Paris Agreement to create legally binding collective obligations, especially if the Parties so intended. Arguably, long-term climate change is as serious a threat to human populations as genocide and war crimes, and even more reliant on collective action.

6 *Nollkaemper's shared responsibility*

Nollkaemper's "shared responsibility" in international law is the final part of this paper's canvassing of collective obligations in international law.[116] According to Nollkaemper, "shared responsibility" is the responsibility of multiple actors for a harmful outcome.[117] Responsibility is to be distributed between actors separately, rather than resting on them collectively.[118] This does not mean, however, that shared responsibility is the aggregation of two or more individual responsibilities held between states.[119] Shared responsibility falls on individual actors for their proportionate contribution to a particular collective harm.

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[113] *2005 World Summit Outcome* GA Res A/60/1 (2005) at 30.
[114] UN Secretary-General *Implementing the Responsibility to Protect—SecGen report* Un Doc A/63/677 (12 January 2009) at [11].
[115] "The Responsibility to Protect: A Background Briefing" (14 January 2021) Global Centre for the Responsibility to Protect <www.globalr2p.org> at [31].
[116] André Nollkaemper and Dov Jacobs "Shared Responsibility in International Law: A Conceptual Framework" (2012) 34 Mich J Int'l L 359; André Nollkaemper and Ilias Plakokefalos *The Practice of Shared Responsibility in International Law* (Cambridge University Press, Cambridge, 2017).
[117] Nollkaemper and Plakokefalos, above n 116, at 3.
[118] At 4.
[119] At 4.

Collective responsibility is different from shared responsibility because, instead of being shared among actors, it would be the "responsibility of the collective as such". [120]

The distribution of shared responsibility relies on the prior existence of collective obligations. Or, as Jacqueline Peel says in the "Climate Change" chapter of Nollkaemper's 2017 book, collective obligations "trigger" shared responsibility.[121] Without an obligation to prevent a harmful outcome, there can be no responsibility attributed if that outcome eventuates. According to the Paris Agreement, the harmful outcome Parties are attempting to prevent is the temperature goal being exceeded. Whether Parties are collectively obligated to prevent this harmful outcome is one of the main subjects of this paper. Therefore, whether shared responsibility exists under the Paris Agreement is a separate, but related, question to whether collective obligations exist under the Agreement.

7 Conclusion on collective obligations in international law

The presence of collective obligations in international law has been canvassed from cases before international law courts, to ILC Articles and commentaries, the Vienna Convention, R2P, and ending with notions of shared responsibility. The literature on collective obligations has undoubtably been steadily developing in international legal scholarship. Yet, claiming that collective obligations clearly existed prior to the Paris Agreement at international law would be too bold a claim. No international legal instrument or international court has explicitly created collective obligations, despite recognising their potential existence. If the Paris Agreement were to create collective obligations, it would be the first international instrument to do so. This would not be particularly outrageous; as we have seen, legal commentaries, instruments, and cases have referred to the existence of collective obligations and used the assumption of their existence in their reasoning for related issues. The climate crisis poses new challenges to the international community. Old rules are no longer going to be effective in safeguarding the planet and our societies; a new tack is needed, and perhaps collective obligations will provide it.

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[120] At 4.

[121] Jacqueline Peel "Climate Change" in André Nollkaemper and Ilias Plakokefalos (eds) *The Practice of Shared Responsibility in International Law* (1st ed, Cambridge University Press, 2017) 1009 at 1010.

B Collective Obligations in the Paris Agreement

The difference between a collective aim and a collective obligation lies in whether a provision is binding on parties to the agreement. While an agreement may in form be internationally binding, this does not necessarily mean that individual provisions will be of binding character. This section will use a bindingness framework[122] to evaluate whether certain provisions of the Paris Agreement are legally and collectively binding, or simply aspirational goals. Articles 2 and 3 will be the main focus, as these would be of the greatest interest if they were to create collective obligations. They are also the provisions most likely to create collective obligations. As we move through this section, it is important to remember that a treaty must be interpreted in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.[123]

1 Location in the text

It is important where the provision is located in the text. If it is located in the Preamble, it provides context,[124] and adds colour to the interpretation of the agreement, but will not create legal rights and obligations for parties.[125] If the provision is located in the main body, or operational part of the treaty, then it has the capacity to create legally binding rights and obligations.[126] Articles 2 and 3 are both contained in the main body of the Paris Agreement, rather than the preamble or any other annex or accompanying instrument. Hence, depending on their drafting, they have the potential to create legally binding collective obligations.

2 Normative content and language

A provision can create legal rights and obligations only if it creates norms, requirements or standards of behaviour for parties. The language used will aid in the interpretation of such standards of behaviour. Legal scholars generally accept that the word "shall" creates legally

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[122] Rajamani, above n 7, at 343; Daniel Klein and others *The Paris Agreement on Climate Change* (Oxford University Press, Oxford, 2017) at 133–134.
[123] Vienna Convention, above n 8, at art 31.1.
[124] At art 31.2.
[125] Rajamani, above n 7, at 343.
[126] At 343.

binding rights and obligations.[127] Words like "should", "encourage" and "may" are each weaker than the former, but all still provide normative language.[128] Words like "will", "acknowledge" and "recognise" are non-normative.[129] Article 2 is described within the Agreement as the purpose provision,[130] and contains the long-term temperature goal. Despite the argument by some scholars that Article 2 creates a substantive obligation of result to achieve the temperature goal,[131] the language used does not allow for Article 2 to carry such normative value. The use of "aims" is weak and non-normative, especially when coupled with the fact that the aim belongs to the Agreement, or the regime, rather than the Parties. This will be explored further in the "subjects" section.

Article 2 does state that the Paris Agreement "aims to strengthen the global response to the threat of climate change…*by…Holding* the increase in global temperatures to [the temperature goal]".[132] The use of "by holding" is arguably stronger and more certain than "aim". It implies that the temperature goal is something which will be achieved by the Paris Agreement. Despite this, Article 2 still does not provide an imperative or norm which Parties are obligated to follow. Rather, it provides a strong goal or aim which should be used to guide the interpretation and practical application of the Paris Agreement.[133]

Interestingly, there is division over the use of "are to", with some scholars claiming that it has normative value, equally as strong as "shall",[134] whereas others claim that it is non-normative and cannot create obligations.[135] This is of relevance to Article 3 which is set out below for the reader's convenience:[136]

> As nationally determined contributions to the global response to climate change, all Parties *are to* undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 *with the view to achieving* the purpose of this Agreement as

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[127] At 343; Bodansky, above n 14, at 145; Benoit Mayer "Temperature Targets and State Obligations on the Mitigation of Climate Change" (2021) 33 JEL 585 at 597; Oberthür and Groen, above n 7, at 803.
[128] Bodansky, above n 14, at 145.
[129] At 145.
[130] Paris Agreement, above n 1, at art 3.
[131] Zahar, above n 1, at 170.
[132] Paris Agreement, above n 1, at art 2.1, 2.1(a), emphasis added.
[133] Klein and others, above n 122, at 127–128.
[134] Zahar, above n 1, at 169.
[135] Bodansky, above n 14, at 145; Mayer, above n 127, at 596–597.
[136] Paris Agreement, above n 1, at art 3, emphasis added.

> set out in Article 2. The efforts of all Parties will represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of this Agreement.

Alexander Zahar argues that in the context of Article 3, "are to" is equivalent to "shall" and therefore it is mandatory for all Parties to undertake "ambitious efforts".[137] Conversely, Benoit Mayer distinguishes "are to" from "shall", arguing that only the latter carries with it the creation of obligations.[138] This paper suggests that, as consistent with the Vienna Convention's rules of interpretation, words should be interpreted in accordance with their ordinary meaning and in the context of the particular provision and the Agreement as a whole.[139] Therefore, "are to" should be read as an imperative obligation, rather than a passive prediction. This is consistent with the rest of the active sentence, which states that "Parties are to undertake…ambitious efforts…with the view to achieving" the objectives contained in Article 2 and attributes that obligation to "all Parties". It is also consistent with Articles 4, 7, 9, 10, 11 and 13, which create binding obligations of conduct and binding procedural obligations of result, rather than just passive predictions of future action.

If Parties are obligated to undertake "ambitious efforts", this raises the question of what constitutes sufficiently ambitious efforts. There is no definition of ambition or "ambitious efforts" in the Paris Agreement, but Article 3 does say that "ambitious efforts" is to be defined in accordance with sections 4, 7, 9, 10, 11 and 13. Article 4 gives the reader a better idea of what is meant by ambition when it states that each Party's NDC will reflect its "highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances".[140] The concept of "highest possible ambition" reflects a standard of conduct to be exercised by the Parties.[141] While this does not provide a fixed definition of ambition, it does tell the reader that ambition should be at the higher end of what is "possible", and that a country's national circumstances are part of this assessment. As will be explained later in the paper, the failure

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[137] Zahar, above n 1, at 169.
[138] Mayer, above n 127, at 596–597.
[139] Vienna Convention, above n 8, at art 31.1.
[140] Paris Agreement, above n 1, at art 4.3.
[141] Christina Voigt "The Paris Agreement: What is the standard of conduct for parties?" (2016) 26 QILJ 17 at 24.

to define ambition was not an oversight, but rather an intentional act by Parties to allow for as much flexibility, evolution and progression as possible.

The statement "with the view to achieving" may also assist in defining ambition. A synonymous phrase is "with the hope of". If a person is acting with the hope of achieving a goal, then they must have some reasonable basis for believing, or hoping, that the goal can be achieved based on their actions. Otherwise, their actions are hopeless. If Parties are acting "with the view" to achieving the temperature goal, then those Parties must hold a genuine belief that their actions will achieve that goal. If Parties did not believe that it was possible to achieve the temperature goal, not only would the goal lose its political weight, the Paris Agreement itself would lose an essential element in the legal construction of its mitigation policy. As Lon Fuller wrote, the law cannot "order [someone] to do an act that is impossible".[142] Currently, achieving the temperature goal is still possible, but it is likely that the Paris Agreement would cease to hold any legal or political influence upon the goal becoming impossible to achieve. This paper argues that if states are to uphold their obligations under the Agreement, it is imperative that they prevent the temperature goal becoming obsolete.

A plain reading of Article 3 is that Parties have consented to an obligation to act with ambition,[143] and with the reasonable belief that their ambitious actions will result in the achievement of the temperature goal. Therefore, Parties' ambitions should be set at a level which allows them to hold the genuine belief that their efforts will be successful. Arguably, anything less than the highest possible ambition will not be sufficient to maintain this belief. This paper seeks to argue that Article 3 creates an obligation of conduct, relating to the Parties' states of mind. While there is no substantive obligation of result to achieve the temperature goal, there is an obligation to act in a way which supports a genuine belief that the goal might one day be achieved. This means that Parties need to undertake genuinely ambitious efforts which put them on a course of progress towards the goal.

A final note should be made on the second sentence of Article 3 which states that Parties' efforts "*will* represent a progression over time". Although "will" is usually more predictive

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[142] Lon L Fuller *The Morality of Law* (Yale University Press, New Haven, 1969) at 162.
[143] Klein and others, above n 122, at 139.

and passive,[144] the political and textual context of the Paris Agreement suggest that it creates a binding obligation of conduct for Parties to progress their efforts over time. In negotiations, it was important to many developing countries that NDCs would represent a compulsory progression over time to prevent "backsliding" by developed countries.[145] This is supported by Article 4 of the Agreement, which states that "Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution".[146] This places an obligation on individual Parties to ensure that their NDCs either increase in ambition, or at the very least, remain at the same level of ambition. Article 4 also provides for mandatory communication of NDCs every five years,[147] or if a Party is feeling particularly progressive, it may adjust its NDC at any time "with the view to *enhancing* its level of ambition".[148]

3 Subjects

The next consideration is whether the obligations of conduct described in the "normative content and language" section are individually or collectively binding or, in other words, to whom the provisions are addressed. As discussed, references to "each party", "parties" or "all parties" may determine whether an obligation is placed on an individual party, or parties collectively. An obligation may also be placed on a determined group of parties, such as "developed country parties". In that case it would create collective rights and obligations for that specified group, either to each other, or to all of the other parties to the agreement. If a provision is passive and fails to identify a subject, it may generate expectations of a regime or its institutions,[149] but does not create obligations on any party or group of parties.

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[144] At 139.
[145] Rajamani, above n 21, at 500–501; Klein and others, above n 122, at 137. The drive for "progression" to be included in Article 3 was spearheaded by the like-minded developing countries ("LMDCs"). While the Umbrella Group and the EU were reluctant to allow progression to be included in Article 3, they eventually had to give in when Brazil and the African group joined in support of the "progression" principle.
[146] Paris Agreement, above n 1, at art 4.3.
[147] At art 4.9.
[148] At art 4.11.
[149] Bodansky, above n 14, at 147; Rajamani and Werksman, above n 7, at 343. For example, Article 14 of the Paris Agreement is directed to the Conference of the Parties as an institution, and Article 4.5 is directed more generally at the Agreement itself as a regime when it says that "support shall be provided to developing country parties for the implementation of the Article".

The subject of Article 2 is “This Agreement”. On a plain reading of Article 2, the Paris Agreement binds itself to the substantive goal of holding the increase in global average temperatures to well below 2°C, but does not legally bind any Party to this substantive goal. This is why Article 2 is important for interpretation and provides a collective goal,[150] but does not create substantive rights or obligations on its own. Similarly, the Paris Agreement “recognises” the need to support developing country Parties, which places the obligation on the regime itself, rather than on any Party or group of Parties.[151]

Article 3 is where it becomes more complex. As can be seen, there are at least two different kinds of subjects contained in this provision. A reference to “all Parties” is provided in both the first and second sentence, and “recognizing the need to support developing country parties” is stated in the second sentence.[152] The context of each sentence is going to be important. The reference to “all Parties” in the first sentence may be interpreted as directed at Parties either individually or collectively. On one hand, individual Parties may act ambitiously, with a genuine belief that their individual contribution will help to achieve the purposes of the Agreement. This is reminiscent of the notions of shared responsibility, where states cause a collective outcome based on their individual contributions. This interpretation would also be consistent with the work of Mayer, who argues that collective obligations are incapable of being legal in nature and may only provide “collective aspiration” or moral obligation.[153] He argues that legal obligations can only be incurred by an individual legal person, not collectively by groups of states.[154]

On the other hand, there has been an increase in the literature about collective obligations and, as determined by the previous section, it would not be unthinkable for the Paris Agreement to be the first instrument to contain collective obligations. The first sentence of Article 3 could reasonably be read to mean that all Parties are to collectively undertake ambitious efforts with the view to achieving the purposes of the Paris Agreement.[155] This also makes more logical sense, because there is no way in which one Party could achieve

[150] Rajamani and Werksman, above n 7, at 11.
[151] Paris Agreement, above n 1, at art 3.
[152] At art 3.
[153] Benoit Mayer “International Law Obligations Arising in relation to Nationally Determined Contributions” (2018) 7 TEL 251 at 257 and 258.
[154] At 257 and 258; Mayer, above n 127, at 596.
[155] Klein and others, above n 122, at 139.

the temperature goal on their own, or reasonably believe that their individual contribution could guarantee the achievement of the goal. There has to be collective ambition and collective belief in achieving the goals of the Agreement. This is also supported by the second sentence of Article 3, which colours the meaning of the first sentence. The reference to "all Parties" in the second sentence can only be intended as being collectively binding because of the use of the singular collective "progression".[156] If it was meant to refer to Parties individually, it would have read in the plural: "The efforts of all Parties will represent progressions over time". Therefore, assuming that there is consistency within the Article, the use of "all Parties" in the collective sense in the second sentence informs the meaning of the first.[157]

4 *Precision and prescriptiveness*

In order for a provision to be legally binding, it needs to be sufficiently precise and prescriptive.[158] If there is room left for discretion, or if there is qualifying language, then parties will be able to legitimately take self-serving interpretations, undermining the obligation the provision seeks to impose.[159] International legal scholars have pointed out that Article 2 has the potential to create precise legal obligations because it could be quantified to describe a global carbon budget associated with limiting global average temperature increases to 2°C, and the requisite emission reductions pathways.[160] However, this ignores a number of considerations, including but not limited to: the massive uncertainties which would inevitably arise upon such calculations; the historic emissions of developed countries; the principle of common but differentiated responsibilities and respective capabilities; and finally the fact that few countries would sign up to such an agreement. In addition to the lack of normative language and clear subject, Article 2 is not sufficiently prescriptive or precise on its own to create legally binding obligations.

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[156] Paris Agreement, above n 1, at art 3.
[157] This is supported by Article 14 which refers to the "collective progress towards achieving the purpose of this Agreement". Furthermore, the draft agreements and decisions refer to "collective goals" in multiple versions, suggesting that it was always an intention to have some form of "collectiveness", whether binding or not.
[158] Rajamani, above n 7, at 343; Rajamani and Werksman, above n 7, at 4; Oberthür and Bodle, above n 5, at 42; Werksman, above n 6, at 355; Oberthür and Groen, above n 7, at 806.
[159] Rajamani, above n 7, at 343.
[160] Rajamani and Werksman, above n 7, at 4.

Some authors imply that in order for a provision to be sufficiently precise the subject of the provision must be an individual party.[161] However, this paper argues that this assumption is closed-minded and derives from the fact that collective obligations are unfamiliar territory for international scholars and political leaders. If collective obligations were an established legal concept, then there would be no doubt that a provision referring to "all Parties" in the collective sense would be sufficiently precise. The subject would be all the parties to the agreement and the only issue to be addressed would be the prescriptiveness of the provision. Therefore, an obligation being collective in nature is not a bar to the creation of legally binding rights and obligations, it just has not been seen before. In following this argument, as already explained according to language, normative value and subject, Article 3 is sufficiently precise.

5 Oversight and compliance

Finally, it matters what mechanisms are created by the treaty to ensure oversight and compliance.[162] A misconception exists that if an obligation is not enforceable through the use of force or sanctions, it is not legally binding.[163] The same is said of whether it is justiciable by courts or tribunals.[164] This is not the case. The legally binding character of a norm does not depend on whether there is a court or tribunal to apply it, or whether sanctions exist to ensure compliance.[165] So then, what does constitute legal bindingness? Daniel Bodansky answers this question, admitting that there is no other way to answer, than circularly: "legal bindingness reflects a state of mind".[166] The international community, enforcers of the law, politicians, country leaders and NGOs all have to believe that a rule constitutes a legal obligation and is mandatory rather than optional.[167] Treaties attempt to create norms which states will follow as binding but, ultimately, international law is built upon the concept of consent.[168] However disheartening and uncertain this may be, ultimately it is the nature of international law. This makes the work of legal scholarship,

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[161] Oberthür and Bodle, above n 5, at 49.
[162] Rajamani, above n 7, at 343.
[163] Bodansky, above n 14, at 143.
[164] At 143.
[165] At 143.
[166] At 143.
[167] At 143; Jean d'Apremont and Sahib Singh (eds) *Concepts for International Law* (Edward Elgar Publishing, Cheltenham, 2019) at 73.
[168] Vienna Convention, above n 8, at art 2(b),(c),(f),(g).

climate scientists, activists, and NGOs all the more important. This paper attempts to provide an interpretation of the Paris Agreement which contributes to that literature and highlights the importance of consensual collective ambition as part of the global action to prevent catastrophic climate change.

The Paris Agreement creates some mechanisms for oversight and compliance, which help to enforce the legally binding nature of its norms. Article 13 creates an "enhanced transparency framework", which operates in a flexible manner to provide a clear understanding of climate change action, including tracking the progress of NDCs and adaptation measures.[169] Transparency helps with holding governments accountable and putting both international and domestic pressure on state leaders. Article 14 provides for a "global stocktake" to take place every five years.[170] The stocktake is meant to contribute to transparency efforts and provide a forum to display findings from transparency measures and scientific findings. Some authors have also suggested that the stocktake is an opportunity for a high-level political event to raise awareness for influencing national policy agendas and to show renewed political commitment to the Paris Agreement and its goals.[171] Finally, Article 15 creates an implementation and compliance mechanism consisting of an expert-based committee, which reports annually to the Conference of the Parties.[172] This mechanism is facilitative, non-punitive and non-adversarial.[173] It does not use force and is fairly explicit that failure to perform obligations is non-justiciable. While some may complain that, for this reason, the Paris Agreement is soft, it is important to remember that states are free to leave international agreements at any time. The political and domestic pressure placed on state leaders by the transparency framework, global stocktake and annual compliance reports has the potential, if fully realised, to be equally as strong as any domestic law.

[169] Paris Agreement, above n 1, at art 13.1 and 13.5.
[170] At art 14.1.
[171] Lukas Hermwille and others "Catalyzing mitigation ambition under the Paris Agreement: elements for an effective Global Stocktake" (2019) 19 Climate Policy 988 at 997.
[172] Paris Agreement, above n 1, at art 15.2 and 15.3.
[173] At art 15(2).

6 Conclusion on collective legal bindingness

This section has focussed on Articles 2 and 3 to discover whether any collectively binding legal obligations have been created. This is because the articles from Article 4 onwards mostly create individual legal obligations, such as the creation and progression of NDCs, the provision of adaptation, finance and technology, and general obligations for the Agreement itself to create transparency and compliance mechanisms. It was found that while Article 2 is publicly famous for containing the temperature goal, this goal is purely aspirational, and the subject of any obligation created is the Paris Agreement itself. Furthermore, Article 2 provides important context for Article 3, and is the primary article to which Article 3 refers.

If collective obligations were created for the first time in the Paris Agreement, it would be in Article 3. The Article states that all Parties to the Agreement are to undertake ambitious efforts with the view to achieving the temperature goal contained in Article 2. This paper argues that this creates a collective obligation of conduct for Parties to behave in a way which justifies the reasonable belief that their collective action will succeed in achieving the temperature goal. Such behaviour is described elusively by the Agreement as "ambitious". Parties are also collectively obligated to progress their effort over time. There are purposefully no substantive collective obligations of result contained in the Paris Agreement, in Article 2 or 3.

IV Evolutionary Interpretation of Collective Obligations of Conduct

While it may be academically intriguing to consider the possibility that collective obligations of conduct exist in the Paris Agreement, this does not help practically if states do not know how to live up to such obligations. This section will attempt to consider how collective obligations of conduct might be linked to the individual obligations contained in other provisions, particularly Article 4. To achieve this, Eirick Bjorge's theory of the evolutionary interpretation of treaties will be used as inspiration for an interpretation of the Paris Agreement based on continual evolution and progression.[174]

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[174] Bjorge, above n 3.

A The Evolutionary Interpretation of Treaties

Bjorge's theory of the evolutionary interpretation of treaties is best explained with reference to the *Navigational Rights* case in the International Court of Justice in 2009.[175] In that case, the court said that where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meanings of those terms were likely to evolve over time, and the treaty has been entered into for a long period, the parties are presumed to have intended those terms to have an evolving meaning.[176] The issue was whether the phrase "for the purpose of commerce" included tourism.[177] The court decided that the phrase should be interpreted to cover all modern forms of commerce,[178] even if those forms had not yet existed at the time of signing the treaty in 1858, and hence could not have been anticipated by the parties.

The theory is predicated on three assumptions generally applied in the interpretation of international treaties: (1) treaties should be interpreted according to the objective intentions of the parties;[179] (2) good faith should be applied to discover what the parties actually wanted to say;[180] and (3) arguments which, on the ordinary meaning of the treaty text, are untenable cannot be justified by any theory of treaty interpretation.[181] Each of these will be briefly explained in relation to the evolutionary interpretation theory to demonstrate how the theory operates, before moving on to justify why the theory, or a version of it, is applicable to the Paris Agreement.

Firstly, Bjorge contends that the evolutionary theory of treaty interpretation is not an exceptional method of treaty interpretation but, rather, a proper application of the generic method of looking to the objective intentions of the parties.[182] When a party signs up to a treaty, this is a manifestation of their consent to be bound to the legal relations contained

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[175] *Dispute regarding navigational and related rights (Costa Rica v Nicaragua)* (Navigational Rights) (Judgment) [2009] ICJ Rep 2009.
[176] Bjorge, above n 3, at 1; *Navigational Rights*, above n 175, at [66].
[177] *Navigational Rights*, above n 175.
[178] Bjorge, above n 3, at 1.
[179] At 2.
[180] At 190.
[181] At 22.
[182] At 188.

in that treaty.[183] A state's ability to consent to legal obligations is an expression of state sovereignty and the foundation of the rules contained in the Vienna Convention.[184] The legal obligations a party intended to consent to must be determined by their objective intention. Although the main source of objective intention is the language of the treaty text itself, there can be other relevant factors to the discovery of intention,[185] such as contemporaneous factors like political and drafting negotiations. The balancing of all such factors will determine what the parties intended to consent to. However, objective intention is not limited to the meaning that parties intended at the time of signing the treaty, but also the meaning they intended the terms of the treaty to take on in future. It would often be contrary to the parties' intentions if treaties were interpreted as if they were fixed, non-evolving reflections of their specific time-period and context. Therefore, an additional factor is the temporal factor: whether the parties intended for terms to take on new, evolutionary meanings as social and political contexts changed. This is to be understood as the "evolution intended".[186]

Secondly, the intention of the parties must be interpreted in accordance with good faith[187] so as to ascertain what the parties actually wanted to say, as opposed to, from the wording, it may have seemed they had wanted to say.[188] Good faith acts as a reference point in weighing the importance of the interpretive factors.[189] This is because attempting to come up with a single formula for determining when the meaning of a term should evolve or not would present too many difficulties.[190] Rather, the ILC considered that "correct application of the temporal element would normally be indicated by interpretation of the term in good faith".[191] For example, if, within a modern context, it was necessary for a treaty term to take on new meaning to fulfil the object and purpose of the treaty, it would be entirely against good faith principles for an international court to hold parties to a strict textual

[183] At 56.
[184] At 56.
[185] *Navigational Rights,* above n 175, at [48].
[186] Bjorge, above n 3, at 188.
[187] Vienna Convention, above n 8, at art 31(1).
[188] Bjorge, above n 3, at 190.
[189] At 64.
[190] *Documents of the second part of the seventeenth session and of the eighteenth session including the reports of the Commission to the General Assembly* [1966] vol 2 YILC 169 at 222.
[191] At 222.

interpretation, based purely on the wording of the treaty. This would be holding parties to legal relations to which they did not consent.

Thirdly, the evolutionary interpretation theory cannot be used to read-in a meaning which the treaty text cannot reasonably bear. As stated in the Vienna Convention, the main source of interpretation must be the treaty text itself, and while contextual sources and interpretive methods may complement the meaning of a treaty, they cannot override it. The terms in a treaty can only evolve so far as the "ordinary meaning" allows. [192]

B Justification of Chosen Theory

The evolutionary interpretation of treaties theory is helpful in the context of climate change agreements, particularly the Paris Agreement, because it suits the object and purpose of progression and flexibility. There are a few reasons why the use of the theory can be critiqued, however, and these will be considered and rebutted below.

One issue that can be had with the evolutionary theory is that the foundations upon which it rests, namely interpretation based on the intentions of the parties, is not universally accepted. In the 1950s, there was disagreement among international legal scholars and advisers when attempting to codify the law of treaty interpretation in the Institut de Droit International. In his first draft of the resolution designed to be adopted by the institute, Special Rappporteur Sir Hersh Lauterpacht emphasised that the principal object of interpretation should be the search for the intentions of the parties.[193] He received strong backlash, including from Sir Eric Beckett, Legal Adviser in the British Foreign Office. Beckett considered that placing too much emphasis on ascertaining the intention of the parties tended to obscure the real task of interpreting the treaty itself.[194] This is especially the case where the parties never considered the future meaning at all, or where it was considered but parties deliberately refrained from deciding the issue for fear of divergent intentions.[195] As a result, in his text in 1953, Lauterpacht reduced intention to a lesser role,

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[192] Vienna Convention, above n 8, at art 31.1.
[193] KJ Keith *Interpreting Treaties, Statutes and Contracts* (Occasional Paper No 19, New Zealand Centre for Public Law, Wellington, 2009) at 21.
[194] At 21.
[195] At 21.

and the final text adopted by the institute in 1956 contained no reference to intention at all.[196]

When the ILC had its first session in 1949, it included the law of treaties as one of the areas of international law it wished to codify.[197] Finally, after many years of rapporteurs avoiding the subject entirely, including Fitzmaurice and Crawford, Waldock went on to consider methods of treaty interpretation. He noted that the process of interpretation has been controversial. Writers clashed on the application of principles and maxims of treaty interpretation, particularly on the weight to be given to the intention of the parties.[198] Waldock came to the conclusion that:[199]

> [Principles and maxims, such as parties' intentions] are, for the most part, principles of logic and good sense valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions which they employed in a document. Their suitability for use in any given case hinges on a variety of considerations which have first to be appreciated by the interpreter of the document: the particular arrangement of the words and sentences, their relation to each other and to other parts of the document, the general nature and subject-matter of the document, the circumstances in which it was drawn up, etc. Even when a possible occasion for their application may appear to exist, their application is not automatic but depends on the conviction of the interpreter that it is appropriate in the particular circumstances of the case. In other words, recourse to many of these principles is discretionary rather than obligatory, and *the interpretation of documents is to some extent an art, not an exact science.*

The ILC was placed in a difficult position. It could either omit the topic of interpretation of treaties altogether from the draft articles, or attempt to codify the few principles of interpretation which are strictly legal in nature.[200] Waldock suggested that the Commission

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[196] At 21–22.
[197] *Summary Records and Documents of the First Session including the report of the Commission to the General Assembly* [1949] vol 1 YILC 47 at 48.
[198] *Law of Treaties—Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur* [1964] vol 2 YILC 5 at 53.
[199] At 54, emphasis added.
[200] At 54.

attempt the delicate process of formulating some rules of interpretation.[201] He suggested this for a few practical reasons, including that it would be beneficial for the Commission to take a stance on the importance of the treaty text to prevent doctrinal differences and uncertainty.[202] He presented four draft articles for the Commission to review.

Finally, in 1969, the Vienna Convention was finalised. It included mentions of parties' intentions in relation to entering and leaving treaties, but Article 31, the interpretation article, notably fails to mention "intention" at all. It does, however, satisfy Waldock's recommendation that the Commission take a stance as to the weight attributed to the treaty text. The article gives primacy to the "ordinary meaning to be given to the terms of the treaty", leaving the weighing of parties' intentions to the discretion of the interpreter, as Waldock suggested.[203]

From the brief history provided above, it can be ascertained that the evolutionary theory's assumption that the intention of the parties is fundamental to treaty interpretation is by no means a universal one. The very foundation of the theory can be disputed. As Waldock says, treaty interpretation is "an art, not an exact science", and Bjorge's attempt to bolster his theory using the "intentions of the parties" method does not make it incontestable. This paper argues that, despite the disputable foundations of the evolutionary theory, it is still the best method of interpretation for the Paris Agreement. It may not apply as a matter of course, but it may be "appropriate in the circumstances of the case", as Waldock said back in 1964.[204] Furthermore, Bjorge does recognise that, if we are to use the parties' intentions when attributing evolutionary meanings, these intentions should be discovered objectively from the treaty text itself. Hence, he also subscribes to the international consensus that the treaty text is the primary source for interpretation.

The subsequent question is whether the evolutionary theory is appropriate for application to the Paris Agreement. As Bjorge notes at the end of his book, "It may even be that more often than not we are better off not talking about evolution or evolutionary interpretation at

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[201] At 54.
[202] At 54.
[203] Vienna Convention, above n 8, at art 31.1.
[204] *Law of Treaties—Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur,* above n 198, at 54.

all. That only exoticizes something that may already follow clearly from the wording of the treaty".[205] Let us return to our general definition of the evolutionary theory given in *Navigational Rights*: an evolutionary theory can be applied where, firstly, the parties have used generic terms, secondly, the parties were aware that the meanings of those terms were likely to evolve over time and, thirdly, the treaty has been entered into for a long period or is of "continuing duration".[206] Where all of these criteria have been met, it will be presumed that the parties intended those terms to have an evolving meaning and hence the evolutionary theory may apply.

A number of generic terms and phrases have been used in the Paris Agreement and purposefully left undefined. Concepts like "ambitious efforts" and ambition will be the focus of evolutionary definition. As generic terms and phrases, they have the potential of taking on evolutionary meanings. The dispute may arise that ideas such as "ambition" are almost too generic for the evolutionary theory to deal with. Unlike in *Navigational Rights*, where "commerce" forms a generic and evolving, but closed, list of activities, "ambition" has potentially endless variations in meaning and degree. This should not be seen as a bar to the application of the evolutionary theory to such terms. The theory can still be applied, with an acknowledgment of its limitations in adducing meaning, and with humility in recognising that this paper simply seeks to contribute as far as possible to global understanding of the Paris Agreement.

This paper seeks to argue that the parties were aware that the meanings of those terms were likely to evolve over time. *Navigational Rights* does not provide much guidance on what it means for parties to have been aware that terms were likely to evolve over time. It is unclear whether such awareness is presumed based on the "perpetuity" of the legal regime or whether actual awareness or intention is necessary.[207] Regardless of which threshold must be met, Parties to the Paris Agreement were evidently aware that certain terms should evolve over time. Contextual sources, such as negotiations and draft decisions, support the notion that Parties were aware that terms might evolve, based on the desire for swift action, flexibility, and the progression principle to be applied to mitigation efforts.[208]

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[205] Bjorge, above n 3, at 193.
[206] *Navigational Rights,* above n 175, at [66].
[207] At [67].
[208] Klein and others, above n 122, at 85.

However, the primary focus should be on the treaty text itself, from which one can discover the objective intentions of the Parties. As already noted, neither "ambitious efforts" nor "highest possible ambition" is expressly defined in the Agreement. Article 3 directs readers to interpret "ambitious efforts as defined" in Article 4. In Article 4, ambition is to be the "highest possible", with reference to "common but differentiated responsibilities".[209] The notion of "highest possible ambition" did not receive much attention or negotiation time but Parties generally supported it.[210] It can be found in at least eight drafting documents in the year that preceded COP-21 in Paris.[211] This suggests that Parties were aware of the term and purposefully left it undefined.

At one end of the scale, "highest possible" may mean what is possible without disruption to the status quo, economic growth, carbon prices or everyday life. At the opposite end of the scale, "highest possible" may mean action which is at the limits of what is physically, logistically, or constitutionally (or even unconstitutionally) possible, regardless of the economic, social and political consequences. The middle ground includes the "highest possible" ambition within political, legal, socio-economic, financial and institutional capacities and limits, which is not economically disproportionately burdensome.[212] The Agreement does not provide any indication as to the parameters of the scale of possibility, or where on the scale ambition falls. This is where the temperature goal becomes important. The argument was advanced earlier that "ambitious efforts" is defined as those efforts which allow the Parties to hold the genuine belief that their efforts will be successful in achieving the temperature goal. Article 3 also states that such "ambitious efforts" are to be undertaken "as defined" in Article 4, with the view to achieving the temperature goal. Therefore, if Parties were collectively to undertake the highest possible ambitious effort, the temperature goal should, in theory, be achievable. The "highest possible ambition" can be defined as the ambitious efforts which are capable of achieving the temperature goal.

Ambitious efforts which are capable of achieving the temperature goal are not going to be fixed, but are necessarily going to evolve based on their respective capabilities. The Parties

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[209] Paris Agreement, above n 1, at art 4.3.
[210] Voigt, above n 141, at 22.
[211] At 22–23.
[212] At 22.

were clearly aware of this as seen through the collective obligation placed on Parties that their effort will represent a "progression" over time.[213] As Parties engage in capacity building, climate finance initiatives, restructuring and development of infrastructure, and the development of sustainable energy, their ability to contribute to ambitious efforts is going to increase. The obligation on Parties to contribute more ambitiously is also going to change based on their common but differentiated responsibilities and capacities. It can also be hoped that Parties are going to be more willing to update their contributions in response to other states' behaviour, creating a "positive cycle of ambition".[214] Therefore, the meaning of what is "ambitious" in relation to Articles 3, 4, 7, 9, 10, 11, and 13 is going to evolve constantly over the next decades.

A counterargument is provided by Sir Eric Beckett's criticism that the parties' intentions should not be used to give insupportable meanings to words which the parties intentionally refrained from defining in a bid to limit the obligations placed on them. This may be true of some treaties, but not the Paris Agreement. Beckett represents a cynical view of treaty formation, for why would parties spend years negotiating treaty obligations which none of them intend to fulfil? The more optimistic, and hopefully more supportable, view is that the Parties purposefully did not define ambition. They were aware that allowing treaty terms to evolve provides Parties with flexibility to adjust to the new expectations required of them. Journalist David G. Victor argues that "flexibility offers a way to get started and build confidence that, in time, will beget more confidence and a willingness to do more".[215] Flexibility also allows Parties to adjust their "highest possible ambition" to be capable of achieving the temperature goal based on up-to-date scientific information.

Finally, the Paris Agreement was entered into for a long period and potentially an indefinite duration. Article 4.1 recognises that, in order to achieve the temperature goal, the Parties' actions need "to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century".[216] Therefore, it is anticipated that the Agreement looks to stand for at least 30 years, if not longer. The

[213] Paris Agreement, above n 1, at arts 3, 4.3.
[214] Håkon Sælen "Under What Conditions Will the Paris Process Produce a Cycle of Increasing Ambition Sufficient to Reach the 2°C Goal?" (2020) 20 Global Environmental Politics 83 at 89.
[215] David G Victor "Why Paris Worked: A Different Approach to Climate Diplomacy" (15 December 2015) YaleEnvironment360 <https://e360.yale.edu> at [6].
[216] Paris Agreement, above n 1, at art 4.1.

nature of the temperature goal itself is that it aims to limit global temperatures to well below 2°C above pre-industrial levels indefinitely. This is because that is the temperature that scientists have advised would prevent the worst effects of climate change, and before which the effects of global warming become irreversible. The treaty text even describes the temperature goal as the "long-term temperature goal".[217] If there is dispute as to the period of time, specifically that the evolution of its terms may need to occur far sooner compared to other treaties like in *Navigational Rights*, these may be met with the reply that the need for swift evolution recommends the evolutionary theory to the Paris Agreement even more. This is especially the case because the Parties evidentially intended the terms to evolve with the constantly changing climate and scientific information.

The above analysis shows that it can be presumed that the Parties to the Paris Agreement intended the meaning of its terms to evolve over time. Therefore, the evolutionary theory may be applied to the Paris Agreement, particularly in relation to "ambition", and the changing scientific and environmental circumstances.

C Application of the Evolutionary Theory and Resulting Obligations

There are at least two evolutionary definitions of "ambition". The first evolution of the definition relates to the short-term efforts necessary to ensure that achievement of the temperature goal remains possible. The second evolution relates to the subsequent updating of mitigation efforts to represent a progression over time. For each of these definitions, the legal relationship between the collective obligation contained in Article 3 and the individual obligations contained in Article 4 will be considered. The main point is that Article 3 acts as a bridge connecting the temperature goal and the collective obligations Parties have in relation to that goal to the rest of the Agreement, including Article 4. This is where Nolkaemper's idea that action can be shared or distributed to individual states becomes relevant.

Since the first submissions of NDCs, scientists and policy analysts have been creating models mapping the different emissions reductions pathways consistent with achieving

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[217] At art 4.1.

different temperature goals.[218] Håkon Sælen's 2020 article presents a computational model of what he calls the Paris Agreement's "ambition mechanism".[219] Sælen found that the starting level of ambition is highly important for cumulative future emissions staying within the 2°C budget.[220] This scientific context provides us with the first evolution of the definition of ambition: the short-term efforts necessary to ensure that the temperature goal remains achievable. If Parties are to fulfil their collective obligation of conducting themselves in a manner which permits the reasonable belief that the temperature goal will be achieved, they need to act with sufficient ambition in the next few years. This is because the cumulative effect of emissions means that, for every year of delay, with emissions continuing at a constant rate, the time available for the transition to net zero emissions to limit warming to any given level shortens by two years.[221] Sælen tells us that "Global emissions in 2030 should be at least 4 percent lower than the level estimated using the most optimistic interpretation of [the first round of] NDCs".[222] Decarbonisation is needed within just a few years.[223] Therefore, there is a limit to the flexibility which the Paris Agreement affords to Parties. If Parties do not increase their aggregate ambition from the beginning of implementation, no amount of progression will be sufficient to produce any scenario that achieves the temperature goal without carbon dioxide removal technologies.[224]

In order to fulfil the collective obligation of conduct contained in Article 3, Parties' individual mitigation intentions for the 2025 round of NDCs need to be sufficiently ambitious. Article 3 explicitly lists Article 4 as one of the articles which should be performed with the view to achieving the temperature goal. Individual Parties' "highest possible ambition" must be defined according to the aggregate emissions reductions necessary by 2030 to ensure that the temperature goal remains achievable. Whether such pathways are actually consistent with the temperature goal is not just a scientific question,

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[218] Sælen, above n 214; Niklas Höhne and others "The Paris Agreement: resolving the inconsistency between global goals and national contributions" (2017) 17 Climate Policy 16; Annika Günther, Johannes Gütschow and Mairi Louise Jeffery "NDCmitiQ v100: a tool to quantify and analyse greenhouse gas mitigation targets" (2021) 14 Geoscientific Model Development 5695.
[219] Sælen, above n 214, at 83.
[220] At 99.
[221] Dann Mitchell and others "The myriad challenges of the Paris Agreement" (2018) 376 Phil Trans R Soc A 1 at 2.
[222] Sælen, above n 214, at 99.
[223] Ekardt, Wieding and Zorn, above n 47, at 6.
[224] Sælen, above n 214, at 99.

but a political one,[225] due to the principle of common but differentiated responsibilities. However, while it remains within the discretion of each Party to determine their level of national ambition, this discretion is limited by their obligations under the Paris Agreement.[226] While Article 2 is legally neutral when read in isolation,[227] it becomes instrumental in the context of the legal relationship between Articles 3 and 4. As Rajamani and Werksman write, "the temperature goal is at the heart of the Paris Agreement's 'ambition cycle'".[228] Parties must consider the extent to which the emissions pathways implied by their NDC will be a credible contribution to the temperature goal if they are to collectively maintain the genuine belief that the temperature goal is achievable.[229] This means that sufficiently ambitious individual NDCs will reflect the "best available science"[230] and follow the advice resulting from the global stocktake. The stocktake is timed to be completed just before the Parties' NDCs are communicated. Therefore, it is a legitimate expectation that Parties should design NDCs that align with the evidence produced by the stocktake, including its assessment of progress towards the temperature goal.[231] This is reliant on a successful global stocktake, clear lines of communication between Parties about their intentions, and the availability of scientific information. The legal relationship between Articles 3 and 4 means that Parties not only have a collective obligation, but that, in order to fulfil this collective obligation, individual Parties' efforts also need to support the belief that the temperature goal will be achieved by contributing their proportional share of mitigation efforts.

As Sælen's research shows, the gravity of Parties' mitigation targets is going to be at its highest for the next few years, particularly at the next round of NDC submissions in 2025, if they are to achieve the temperature goal. However, he also demonstrated that if Parties produce sufficiently ambitious mitigation targets in the next few years, then progression becomes the next most important method for achieving the temperature goal.[232] This provides us with the second evolution of the definition of ambition: the long-term

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[225] Carl-Friedrich Schleussner and others "Science and policy characteristics of the Paris Agreement temperature goal" (2016) 6 Nature Clim Change 827 at 5.
[226] Rajamani and Werksman, above n 7, at 7.
[227] Zahar, above n 1, at 170.
[228] Rajamani and Werksman, above n 7, at 7.
[229] At 7.
[230] Paris Agreement, above n 1, at art 14.1.
[231] Rajamani and Werksman, above n 7, at 10.
[232] Sælen, above n 214, at 99.

progression from the starting point of sufficiently ambitious initial targets, which will result in the achievement of the temperature goal. Defining ambition according to long-term progression provides Parties with slightly more flexibility than the first evolutionary definition. Lower global emissions in the near term will extend the timeframe before net emissions must reach zero.[233] Therefore, if Parties act swiftly to progress their mitigation efforts early in the next few decades, then this may remove some pressure from the degree of progression required in later decades. However, higher global emissions in the near term will require higher global emissions reductions in the long term, including negative emissions, if the carbon budget is to be met.[234] Hence, if Parties progress their mitigation efforts slowly at the outset, then the cumulative impact of emissions will mean that the pressure on them to progress their efforts will become increasingly stronger.[235] The more time spent by Parties not progressing their mitigation efforts, the less reasonable it is for them to believe that the temperature goal will be achieved. Hence, the pressure on Parties to progress their efforts will rise in proportion to the growing disbelief that the temperature goal will actually be achieved.

In order to fulfil the collective obligation of conduct contained in Article 3, each Partys' progression of its individual mitigation efforts needs to be sufficiently ambitious. Article 3 states that Parties should undertake ambitious efforts in carrying out their obligations under Article 4. Individual Parties' "highest possible ambition" must be defined according to their respective capabilities in enhancing their initial targets as far as possible, which will be reliant on long-term capacity building, the development of infrastructure and the growth of sustainable energy. Frauke Röser and others argue that "the cyclical nature of the rachet mechanism provides an opportunity to further institutionalise climate-policy planning processes and continue building sustainable capacities over time".[236] The momentum gained after the 2025 round of NDCs has to be maintained in subsequent cycles as part of the long-term process of institutionalising climate-policy planning.[237] In order for Parties

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[233] Mace, above n 48, at 27.
[234] UNFCCC *Report on the structured expert dialogue on the 2013–2015 review* (fccc/sb/2015/inf1, June 2015) at 8.
[235] Mace, above n 48, at 39.
[236] Frauke Röser and others "Ambition in the making: analysing the preparation and implementation process of the Nationally Determined Contributions under the Paris Agreement" (2020) 20 Climate Policy 415 at 424.
[237] At 424.

to reasonably believe that their long-term efforts will collectively achieve the temperature goal, individual Parties must take it upon themselves to continually enhance their mitigation efforts. The longer it takes for this to happen, the greater the pressure will be on individual Parties to act, if there is to be any hope of achieving the temperature goal. Sælen also found that it was highly important for individual Parties to progressively increase their initial ambition in response to emissions promises by other Parties.[238] Individual Parties must respond to the updates made by other Parties, to create a "positive cycle of ambition".[239] Other authors have taken an optimistic view of such updates. Voigt and Ferreira suggest that the Paris Agreement has the potential to function as a "catalyst for the race to the top", as individual Parties compete to enhance their climate mitigation actions as far as equity, justice and fairness allow.[240]

As a final note, Sælen found that if Parties fail to submit and perform sufficiently ambitious targets by 2030, then progression will have a greater effect at reducing the amount by which the temperature goal is exceeded.[241] Additionally, overshoot of the goal may require the use of carbon dioxide removal technologies.[242] The issue arises as to whether the Paris Agreement will still have any force once the temperature goal has been exceeded. According to the analysis advanced in this paper, the temperature goal is an instrumental part of the obligations placed on Parties. Parties are collectively obligated to behave in a way which allows them to hold the reasonable belief that the goal will be achieved. If Parties can no longer sustain this belief—because the temperature goal has been exceeded, or looks as if it will likely be exceeded—then there can no longer be any legal obligation because the law cannot demand the impossible.[243] What would happen in this case is outside the scope of this paper. Potentially a new treaty would be required, or it is probable that if temperatures are getting close to overshooting the goal, then a new treaty will already be in existence in anticipation of that result. Despite this gloomy prospect, it is important

[238] Sælen, above n 214, at 99.
[239] At 89.
[240] Christina Voigt and Felipe Ferreira "Differentiation in the Paris Agreement" (2016) 6 Climate Law 58 at 74.
[241] Sælen, above n 214, at 99.
[242] UNFCCC, above n 234, at 8.
[243] It is also important to note that, although political sources were used to provide background and interpretive value, this paper provides a legal analysis of the Paris Agreement, not a political one. Political scientists may argue that this paper's interpretation of the Paris Agreement is unworkable and the legal obligations too restrictive. However, the goal of this paper is to provide one interpretation which Parties can utilise, if they are so ambitious.

to note that, in theory, the temperature goal remains viable, and the obligations on Parties remain binding, until such time as the goal is exceeded. No one can predict the future with complete certainty.

V Conclusion

This paper has advanced an analysis of the Paris Agreement based on the existence of collective obligations contained in Article 3 of the Agreement and an evolutionary interpretation of those obligations. The evolutionary meaning of "ambition" is important, not only in the long-term, but it is also vitally important for the next few years. As was said in *Navigational Rights*, terms capable of evolution "must be understood to have the meaning they bear on each occasion on which the Treaty is to be applied".[244] Due to the cyclical and progressive drafting of the Paris Agreement, the treaty is being interpreted almost constantly: at each round of NDCs, each global stocktake, each annual report of the compliance committee, and every time states look to developing and implementing domestic policies and agendas. Two evolutionary definitions of ambition were presented in this paper, but there will undoubtably be others, and within each definition there will be still more variation. What is clear is that according to the overwhelming evidence, Parties need to act swiftly, and in accordance with scientific information, if there is any hope of the temperature goal remaining achievable. After this, there is slightly more room for flexibility, keeping in mind that the pressure on Parties to enhance their mitigation efforts will increase as the 1.5–2°C limit draws nearer, and that there can be no backsliding, only progress.

[244] *Navigational Rights,* above n 175, at [70].

VI Annex: Paris Agreement [Articles 2, 3, 4 and 14]

Article 2

1. This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:

(a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;

…

Article 3

As nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of this Agreement as set out in Article 2. The efforts of all Parties will represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of this Agreement.

Article 4

1. In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.

2. Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.

3. Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.

…

Article 14

1. The Conference of the Parties serving as the meeting of the Parties to this Agreement shall periodically take stock of the implementation of this Agreement to assess the collective progress towards achieving the purpose of this Agreement and its long-term goals (referred to as the "global stocktake"). It shall do so in a comprehensive and facilitative manner, considering mitigation, adaptation and the means of implementation and support, and in the light of equity and the best available science.

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