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RETHINKING THE PRINCIPLE OF COMMON BUT DIFFERENTIATED RESPONSIBILITIES IN CLIMATE CHANGE LAW AND POLICY

by

ENAM KORKOR ANTONIO

A thesis submitted in fulfilment of the requirements for the degree of

DOCTOR OF PHILOSOPHY (PhD)

in the School of Law at the University of the Witwatersrand

Supervisor

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DECLARATION

I, **ENAM KORKOR ANTONIO**, declare that this thesis is my own unaided work. It is submitted in fulfilment of the requirements of the degree of Doctor of Philosophy (PhD) in the Faculty of Commerce, Law, and Management at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

SIGNATURE ……

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The citation conventions of the South African Journal on Human Rights (SAJHR) were used.

Abstract

Climate change has come to define human existence in the 21st century and beyond. The common but differentiated responsibilities (CBDR) principle is one of the normative pillars of international environmental law and the legal regime on climate change. However, the CBDR principle's purpose and function in the climate change regime have come under scrutiny. In contention is the ethical basis of historical contribution and responsibility, one of the two-fold markers of differentiation. Literature on the CBDR principle's relevance has been primarily shaped by realist theory. This approach neglects the historical antecedents of differentiation and the relevance of historical responsibility in framing the CBDR principle. It also obscures third world countries' concerns regarding climate justice instead of elevating them.

This thesis explores the contours of historical responsibility in the climate change regime using third world approaches to international law (TWAIL) as the main framing lens. I adopt an integrative literature review approach to analyse scholarly work on the CBDR principle and historical responsibility. The study seeks to answer the research question: to what extent does the historical responsibility concept influence the CBDR principle's relevance to climate justice and climate change mitigation? The thesis finds that the CBDR principle is part of an attempt to reverse the difference dynamic which characterizes the colonial and post-colonial era in the development of international law. Nevertheless, the contestations surrounding historical responsibility in the climate change regime reveal the interest-driven positions among developed and developing countries, notably the United States of America and the BASIC group of industrializing third world countries. The thesis further finds that despite these interest driven positions, the CBDR principle's metamorphosis damages the justice pillar of the climate change regime's normative framework. Although the Paris Agreement regime has almost erased historical responsibility from its framing of the CBDR principle, its continued

relevance is not diminished. In addition to the emerging discourse on post-growth theories, notably the concept of degrowth in developed countries, non-state actors are using litigation to highlight climate justice issues and propel mitigation action. The thesis contributes to the growing field of TWAIL scholarship in climate change law. It also informs a better understanding of the CBDR principle's relevance by focusing on a hitherto underdeveloped third-world historical perspective.

The study recommends that research on the third world position on climate change and mitigation should duly account for the pre-colonial and colonial influence on the development of international environmental law. A third-world sensitive analysis should go beyond merely linking differential treatment to calls for a new international economic order. It is also recommended that policymakers and state representatives involved in the negotiation process should consider the destructive effects of using constructive ambiguity, especially as a substitute for confronting difficult issues such as historical responsibility. Finally, the study recommends that sustained academic and civic engagement on the International Court of Justice's role in shaping international law regarding climate change will help to prepare the court for adjudicating on climate change.

Keywords: *climate change, emissions, historical responsibility, third world, developing countries, developed countries, North, South, climate justice*

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Writing this thesis has been one of the most challenging tasks I have ever had to do. Now that I have arrived at the end of the journey, it is humbling to realize what I have gained through the experience. Many people deserve more than just my thanks for the part they played. I will look for appropriate ways to express my gratitude. But for now, I hope these words will suffice to let some of them know how much I appreciate them.

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Dedication

To Nuna Ekua Benneh,
A precious gift to me

Abbreviations and Acronyms

AAUs	Assigned Amount Units
ACP	African Caribbean and Pacific Group
AOSIS	Alliance of Small Island States
Art	Article
Arts	Articles
BASIC	Brazil, South Africa, India, China
CBDR	Common but Differentiated Responsibilities
CBDR-RC	Common but Differentiated Responsibilities and Respective Capabilities
CBDR-RC/NC	Common but Differentiated Responsibilities and Respective Capabilities in light of different National Circumstances
CDM	Clean Development Mechanism
CERs	Certified Emission Reductions
CERDS	Charter of Economic Rights and Duties of States
CFCs	Chlorofluorocarbons
COP	Conference of the Parties
ERUs	Emission Reduction Units
ESTs	Environmentally Sound Technologies
EU	European Union
EUE	Ecologically Unequal Exchange
G-77	Group of 77
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GHGs	Green House Gases
GNP	Gross National Product
HFCs	Hydrofluorocarbons
ICJ	International Court of Justice
IEA	International Environmental Law
IEL	International Environmental Law
IMF	International Monetary Fund
INC	Intergovernmental Negotiating Committee
INDC	Intended Nationally Determined Contribution
IPCC	Intergovernmental Panel on Climate Change
LDCs	Least Developed Countries
LMDC	Like-Minded Developing Countries
MEAs	Multilateral Environmental Agreements
NAMAs	Nationally Appropriate Mitigation Actions
NDC	Nationally Determined Contribution
NEMA	National Environmental Management Act
NGO	Non-Governmental Organisation
NIEO	New International Economic Order
PSNR	Permanent Sovereignty over National Resources
RMUs	Removal Units
S	Section

SDGs	Sustainable Development Goals
SS	Sections
TWAIL	Third World Approaches to International Law
UCLA	University of California, Los Angeles
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNTS	UN Treaty Series
US	United States of America
VCLT	Vienna Convention on the Law of Treaties
WMO	World Meteorological Organization
WST	World Systems Theory
WTO	World Trade Organization

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Chapter 1

Towards Rethinking the Principle of Common but Differentiated Responsibilities in Climate Change

1.1 Background to the Study

Human activities are threatening to alter the global climate system irreparably.[1] In the context of this study climate change is described through the lens of the greenhouse effect.[2] The temperature on earth is kept within habitable levels because of nature's own heating design.[3] Greenhouse gases (GHGs)[4] control energy flows in the atmosphere by absorbing infra-red radiation by keeping the earth's surface some 20 degrees Celsius warmer than it would be if the atmosphere contained only oxygen and nitrogen.[5] GHG levels are determined by a balance between sources and sinks. Sources are processes that generate GHGs; sinks are processes that destroy or remove them.[6] Apart from industrial chemicals like carbon dioxide, methane, chlorofluorocarbons (CFCs) and hydrofluorocarbons (HFCs), GHGs have been present naturally in the atmosphere for millions of years.[7] While their warming effect is good for the earth and humankind, an over-concentration of GHGs means that the earth temperature increases over time.[8] It is the unprecedented rate of warming that has led the international community to establish a legal regime to address climate change.

By 1988, the World Meteorological Organization (WMO) and the United Nations Environmental Programme (UNEP), with the backing of the United Nations General Assembly

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[1] This situation has produced the term Anthropocene, to signal that 'the world has entered a new human-dominated geological epoch, resulting from the dramatic changes that the planet has gone through since the industrial revolution and the great population expansion …': See R Clémençon 'Welcome to the Anthropocene: Rio+20 and the Meaning of Sustainable Development' (2012) 21 *Journal of Environment & Development* 311, 312.
[2] Several other factors also affect the earth's climate system. See M Maslin *Climate Change: A Very Short Introduction* (2014) 3.
[3] Ibid 2.
[4] GHGs are gases in the atmosphere that can absorb or reflect the sun's radiation from the earth's surface: See R Thomas et al 'What is meant by "balancing sources and sinks of greenhouse gases" to limit global temperature rise?' Grantham Institute Briefing Note No. 3 (2016) 2.
[5] R Henson *The Thinking Person's Guide to Climate Change* (2014) 27-28.
[6] Thomas et al (note 4 above) 2 (explaining sources and sinks and how they can be balanced).
[7] Maslin (note 2 above) 2.
[8] Ibid.

established the Inter-Governmental Panel on Climate Change (IPCC)[9] to 'provide internationally coordinated scientific assessments of the magnitude, timing and potential environmental and socio-economic impact of climate change and realistic response strategies'.[10] In 1992, the United Nations Framework Convention on Climate Change (UNFCCC) opened for signature.[11] In 2007 the IPCC opined that global atmospheric concentrations of carbon dioxide (CO_2), methane and nitrous oxide had increased markedly as a result of human activities since 1750 and had far exceeded pre-industrial values determined from examining ice cores spanning many thousands of years.[12] The report attributed the global increases in carbon dioxide concentration primarily to fossil fuel use and land use change, while those of methane and nitrous oxide were primarily due to agriculture.[13] The IPCC released another report in 2014 in which it confirmed that evidence of the human influence on the climate system was overwhelming.[14] The Report noted that atmospheric concentrations of GHGs are at unprecedented levels in at least 800,000 years.[15]

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[9] The IPCC itself does not conduct research, but reviews research papers from scientists across the world. It does its work within 3 working groups. Working Group I (WG I) examines the physical scientific basis of climate change; Working Group II (WG II) looks at the vulnerability of socio-economic and natural systems to climate change. It also examines the positive and negative impacts of climate change and options for adaptation; Working Group III (WG III) assesses the mitigation options for limiting climate change through reducing or preventing GHGs and enhancing activities that remove the GHGs from the atmosphere. The IPCC also has a Task Force on National Greenhouse Gas Inventories that oversees the IPCC National Greenhouse Gas Inventory Programme. See Intergovernmental Panel on Climate Change < https://www.ipcc.ch/ >.

[10] UNGA Res 43/53 (6 December 1988) UN Doc A/RES/43/53, para 5.

[11] United Nations Framework Convention on Climate Change (adopted 14 June 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC).

[12] IPCC 'Summary for Policymakers' in SD Solomon et al (eds.) *Climate Change: The Physical Science Basis: Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (2007) (IPCC, 2007 SPM) < https://www.ipcc.ch/report/ar4/wg1/ > 131.

[13] Ibid 135.

[14] IPCC '*Climate Change: Synthesis Report*. *Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2014) (IPCC: 2014 Synthesis Report) < https://www.ipcc.ch/pdf/assessment-report/ar5/syr/AR5_SYR_FINAL_All_Topics.pdf > 40. More recent IPCC publications confirm the scientific basis of climate change. See IPCC 'Summary for Policymakers' in V Mason-Delmotte et al (eds) *Climate Change: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* < https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf > 3 noting that '[i]t is unequivocal that human influence has warmed the atmosphere, ocean and land.'

[15] IPCC: 2014 Synthesis Report 44.

The economic growth which took place during the industrial era brings into focus the differentiated contributions and capacities of developed and developing countries. Countries that led the industrialization and economic development processes have contributed more to the over-concentration of GHGs in the atmosphere. They are also better equipped (financially and technically) to deal with the impacts of climate change. This differential in economic growth and contribution to GHG emissions gave rise to the common but differentiated responsibilities (CBDR) principle in climate change.[16]

1.1.1 North-South tensions, Differentiation and Climate Change

Climate change epitomizes the long-standing tension between developed and developing countries. The tensions between the global North and South manifest in the politico-legal discourse on climate change. With GHG emissions and their associated impacts running at cross-purposes with the desire to achieve socio-economic development, the injustice inherent in the climate change crisis is apparent when one considers that the adverse impacts are disproportionately distributed to poorer developing countries that have contributed minutely to GHG emissions.[17] In addition, vulnerable developing countries of the South have little or no capacity to adapt to climate change, whereas the head start that developed countries gained to develop economically gave them the technological and financial resources necessary to mitigate and adapt to the impacts of climate change.[18]

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[16] UNFCCC, preamble. The third paragraph provides that 'the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs'.

[17] PK Shukla 'Justice, equity and efficiency in climate change: A developing country perspective' in Fair Weather? (1999) 145, 146.

[18] J Ikeme 'Equity, environmental justice and sustainability: Incomplete approaches in climate change politics' (2013) 13 *Global Environmental Change* 195, 200.

In the meantime, while developed country emissions are expected to decline in the coming years, emissions from the developing world are rising because most of the energy resource endowments of the South are fossil-based.[19] Developing countries are set to remain big users of coal, the most carbon-laden fossil fuel.[20] That the North appears reluctant to provide the financial and technical resources that are necessary to enable a just transition to green energy further deepens the mistrust.[21] Ultimately, if the status quo persists the North and South will both continue to strive to achieve economic growth and prosperity but without properly dealing with the environmental costs (and climate change) thereof. [22] The regime on climate change seeks to build consensus on addressing climate change around key international environmental law principles. These principles provide a context within which to study the principle of CBDR.

1.1.2 The Climate Regime's Guiding Principles

The climate regime's guiding principles serve as its foundational and normative blocks. Consensus building around these principles itself gives an early indication of disagreements arising from competing national interests. The guiding principles of the climate change regime are provided for in Article 3 of the UNFCCC. They are the precautionary principle, the

[19] Shukla (note 17 above) 2.
[20] PS Chasek, DL Downie & JW Brown *Global Environmental Politics* 6 ed (2014) 7.
[21] RS Dimitrov 'The paris agreement on climate change: Behind closed doors' (2016) 16 *Global Environmental Politics* 1. The idea of a just 7. to a sustainable, climate-friendly world springs from two seemingly opposing positions. On one hand, low emitting (and often vulnerable) countries who advocate a shift from fossil-fuel reliant economies. On the other hand, high-emitting countries who are reluctant to fully commit to reducing their emissions for fear that such a move would affect their labour force and economic growth. Just transition is used here to connote the view that 'justice and equity must form an integral part of the transition towards a low-carbon world.' See United Nations Research for Social Development (UNRISD) 'Just transition research collaborative: Mapping just transition(s) to a low-carbon world' (December, 2018) < https://cdn.unrisd.org/assets/library/books/pdf-files/report-jtrc-2018.pdf > 3, 4.
[22] A Brown & G Kütting 'The environment' in MF Imber & TC Salmon (eds), *Issues in International Relations* 2 ed (2008) 153,165.

principle of sustainable development, and the common but differentiated responsibilities principle.

The precautionary principle calls on states to take cost-effective precautionary measures to protect the environment even in the face of scientific uncertainty about an environmental problem.[23] The UNFCCC therefore provides that where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost.[24]

The practical operation of the precautionary principle has been the subject of scholarly criticism.[25] In the context of climate change, the precautionary principle is not without controversy. Although the science of climate change has come to be widely accepted, there are still pockets of skepticism which continue to influence the operation of the precautionary principle in climate change. The US, for example, adopts a 'no regrets' variant of the precautionary principle which aims at minimizing regrets from regulatory mitigation action because of the uncertain consequences inherent in taking such precautionary actions.[26]

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[23] Rio Declaration on Environment and Development UN Doc. A/CONF.15/15Rev.1 (adopted 13 June 1992) (Rio Declaration) Principle 15.
[24] UNFCCC, Article 3.3.
[25] See for example C Sunstein 'The precautionary principle as a basis for decision making' (2005) 2 *Economists' Voice* 5,7 (arguing that the precautionary principle is 'frequently paralyzing' and 'can stand as obstacle to regulation and non-regulation and to everything in between'). See also PM Dupuy & JE Viñuales *International Environmental Law* (2015) 61 (noting that the legal implications of precaution are not easy to circumscribe precisely).
[26] J Cameron & J Abouchar 'The precautionary principle: A fundamental principle of law and policy for the protection of the global environment' (1999) 14 *Boston College International & Comparative Law Review* 1, 12 (citing an address by Secretary of State James Baker, National Governors Association, in Washington, D.C. in which the Secretary of State defends the 'no regrets' policy stating that the 'no regrets' policy provides support for 'actions which make economic and environmental sense regardless of the outcome of scientific disputes over cause and effects.' The US generally regards the precautionary principle as an approach rather than a normative principle).

In an ideal situation where states take adequate precaution to safeguard the environment, the expectation is that the environment is utilized for the benefit of present and future generations despite the presence of uncertainties. Thus, the precautious use of the environment is a significant aspect of the international consensus to promote sustainable development.

The principle of sustainable development is described as 'development that meets the needs and aspirations of the present generation without destroying the resources needed for future generations to meet their needs'.[27] In the context of climate change, sustainable development is crucial because a dual relationship exists between sustainable development and climate change. Climate change impacts key natural and human living conditions which in turn provide the basis for socio-economic development. On the other hand, the priorities and interests of states on sustainable development dictate the pace of GHG emissions.[28] The United Nations Sustainable Development Goals for all nations therefore includes a call to 'take urgent action to combat climate change and its impacts'.[29] The principle of sustainable development encompasses intergenerational equity and requires both developed and developing states to pursue their developmental goals in a manner that does not sacrifice the future generation's ability to meet their needs.[30] Sustainable development also requires intra-generational equity, so that development is not lop-sided and concentrated only in the North.[31]

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[27] The World Commission on Environment and Development *Our Common Future* (1987) 41.

[28] K Halsnæs et al 'Framing Issues' in B Metz et al (eds) Climate Change 2007: Mitigation. Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change < https://www.ipcc.ch/site/assets/uploads/2018/02/ar4-wg3-chapter2-1.pdf > para 121.

[29] United Nations Sustainable Development Goal (SDG) Number 13 <https://www.un.org/sustainabledevelopment/climate-change-2/> SDG 13 affirms the link between climate change and development and emphasizes the need for support to help developing countries move toward low-carbon economies.

[30] EB Weiss 'Our rights and obligations to future generations for the environment' (1990) 84 *American Journal of International Law* 198, 200.

[31] Intragenerational equity focuses on considerations of justice and equity among people of the same generation. In the context of this study, it would particularly relate to fairness and equity among a generation of people across

The call for sustainable development brings into focus the different levels of developmental needs at play among developed countries, rapidly developing countries and least developed countries (LDCs) and juxtaposes these different needs with the global effort to reduce GHG emissions. There is an inescapable nexus between economic development and GHG emissions.[32] Economic development – past, present and future – and its ramifications for global political and economic dominance have been and still are at the centre of the discourse about states' obligations towards mitigation.[33] A state's sovereign right to develop the natural resources within its territory is well-known, particularly within the North-South discourse on development.[34] Effective measures to mitigate GHG emissions threaten this time-tested principle of state sovereignty over natural resources. Given that developed countries have had the free hand to pursue economic development (albeit in unsustainable ways) developing countries consider that their development should not come with inappropriate restrictions which work to stifle their efforts to provide better lives for their people.[35] These conflicts in

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the global North and South regarding the use of the remainder of the 'carbon space' in the wake of climate change and sustainable development goals. Intra-generational equity also feeds into the discussion as to whether it is important to differentiate between the emissions from the North which are termed 'luxury emissions' – because such emissions are associated with the production of luxury goods – and emissions from the South which are termed 'survival emissions' – because those emissions are necessary for the survival of people living in the South. See H Shue 'Subsistence emissions and luxury emissions' (1991) 15 *Law and Policy* 39. See also J Ntambirweki 'The developing countries in the evolution of an international environmental law' (1991) 14 *Hastings International & Comparative Law Review* 905, 924 (noting that it is important to address intra-generational equity because '[w]ithout righting the wrongs of today and extinguishing present inequalities, there will remain nothing to bequeath to the future'). The lop-sidedness alluded to here is a theme that characterizes later analysis of the concept of sustainable development. The call for sustainable development has focused on providing the third world with development 'targets' that ostensibly propel economic growth and safeguard the environment. This approach turns a blind eye to the North's unsustainable development, shaped by over-production and over consumption. See Chapter 2 below.

[32] Halsnæs et al (note 28 above) 50.

[33] Chasek, Downie & Brown (note 20 above) 152.

[34] S Kartha, T Athanasiou & P Baer 'The north-south divide, equity and development – The need for trust-building for emergency mobilisation' (2012) 3 *Climate, Development & Equity* 47, 49.

[35] Stockholm Declaration on the Human Environment, UN Doc. A/CONF. 48/14 (June, 1972) 11 ILM 1416 (Stockholm Declaration), Principle 23. See also D Ciplet, JT Roberts & MR Khan *Power in a Warming World: The New Global Politics of Climate Change and the Remaking of Environmental Inequality* (2015) 56 (noting that the right from the UN Conference on the Human Environment in 1972 at Stockholm, developing countries had always held the suspicion that developed countries were championing environmental protection as a way to keep developing countries from achieving high economic growth.) The very nature of the problem of climate

interests and priorities make the CBDR principle a necessary framing principle for mitigating climate change.

The origins of CBDR are traceable to two broad concepts in international law, namely the concept of common concern of humankind and the concept of differential treatment.[36] The concept of common concern of mankind restricts states in their exploitation of shared environmental resources to protect the shared resource. The concept of common concern thus addresses issues of singular importance, whose resolution exceeds the reach of individual states.[37] The concept of common concern resonates with the first leg of the CBDR principle in the sense that the atmosphere is a shared resource and its conservation is humankind's shared responsibility.[38] The responsibility for limiting GHG emissions is common because GHG emissions are generally completely mixed in the atmosphere within weeks, regardless of the location of the emission.[39] Furthermore, given their global reach, the adverse impacts of climate change can be considered as a common concern of humankind whose effective response demands collective action.[40]

Differential treatment in international law is defined as instances where the principle of sovereign equality is downplayed to make way for extraneous factors such as differences in contribution to a problem, levels of economic development or unequal capacities to tackle a

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change adds some credibility to the south's suspicions and present a formidable bargaining point for the BASIC group of countries. Climate change is a problem brought on mainly by industrialization from which the North has benefitted. It will affect countries in the South more, although they have benefitted less from industrialization. Furthermore, developed countries are calling on developing countries who are now seeking to accelerate economic development, to curb their emissions.

[36] Dupuy & Viñuales (note 25 above) 71-72.

[37] F Soltau 'Common concern of humankind' in KR Gray, R Tarasofsky & C Carlane (eds), *The Oxford Handbook of International Climate Change Law* (2016) 206.

[38] UNFCCC, preamble.

[39] See United States Environmental Protection Agency 'Overview of greenhouse gases' < https://www.epa.gov/ghgemissions/overview-greenhouse-gases >.

[40] Soltau (note 37 above) 209.

given international problem.[41] Differential treatment manifests itself in a variety of ways in international law. It may subject parties to different compliance timetables, permit special defenses; make noncompliance, if not forgiven, overlooked; or afford qualified nations financial and technical contributions, either to absorb the costs of compliance, or as a pre-condition for their participation.[42] Differential treatment is manifested in multilateral treaties such as in trade,[43] and the law of the sea.[44] The general consensus is that the rationale of differentiation is not to produce permanent exemptions but rather to create a temporary formal legal inequality to address a real substantive inequality among states.[45] The aim of differential treatment is thus to promote equity and fairness.[46]

Notwithstanding its genesis, the CBDR principle can also be considered as a novel principle which was first articulated in the ozone regime,[47] further developed at the 1992 Rio Conference on Environment and Development and more integrated and operationalized in

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[41] P Cullet 'Differential treatment in international law: Towards a new paradigm of inter-state relations' (1999) 10 *European Journal of International Law* 549, 551. See also L Rajamani *Differential Treatment in International Environmental Law* (2006) 131.

[42] C Stone 'Common but differentiated responsibilities in international law' (2004) 92 *American Journal of International Law* 276, 278.

[43] The World Trade Organization (WTO) agreements contain 'special and differential treatment (SDT) provisions' with respect to developing countries which operate to give longer time periods for implementing agreements and commitments (Article XVIII:B, General Agreement on Tariffs and Trade (GATT), require all WTO members to safeguard the trade interests of developing countries and provide measures to increase trading opportunities for developing countries, See also General Agreement on Tariffs and Trade (GATT) Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries L/4903 (28 November 1979) (providing an 'enabling clause' which has been read into subsequent multilateral trade agreements). See also PV den Bossche *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2008) 604 (generally discussing special and differential treatment for developing-country members in the WTO).

[44] See United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1883 UNTS 397 (UNCLOS) arts 69, 254 (providing for differential treatment for land-locked and geographically disadvantaged states).

[45] Cullet (note 41 above) 557.

[46] Rajamani (note 41 above) 151-152 (discussing the basis of differential treatment in international environmental law as equality, equity and fairness).

[47] See, for example, Vienna Convention for the Protection of the Ozone Layer (adopted 22 March 1985; entered into force 22 September 1988) 1513 UNTS 293 Preamble (acknowledging 'the circumstances and particular requirements of developing countries'). See also Montreal Protocol on Substances That Deplete the Ozone Layer (as amended, adopted 16 September 1987, entered into force 1 January 1989) 152 UNTS 3 (Montreal Protocol) Art 5 (providing extensively for developing countries whose annual calculated level of consumption of ozone depleting substances is less than 0.3 kilograms per capita, including a delay in implementing commitments for a period of 10 years).

environmental agreements such as the UNFCCC and Kyoto Protocol to the UNFCCC.[48] The CBDR principle's primary aim is to equitably distribute the burden of dealing with global environmental problems among states. It expresses elements of equity and places more responsibility on countries that are more responsible for specific global environmental problems and those that have the means to tackle environmental problems.[49] Thus, CBDR proceeds on two considerations: First, that states have a common responsibility towards environmental protection; and second, that there are differences in levels of contribution to causing environmental problems and capabilities towards addressing those problems.[50] In the context of climate change differentiation is necessary because developed countries have contributed more to GHG emissions and are also better placed, financially and technologically, to implement solutions.[51] The CBDR principle therefore provides an opportunity to incorporate considerations of equity and justice within the textual understanding of the sovereignty and equality of states and their corresponding responsibilities.[52]

There have been varied scholarly views on the legal status of CBDR. The views range from a total denial of CBDR as a legal principle in IEL[53] to a tacit or express acceptance of CBDR as an emerging principle of customary international law.[54] There are also those whose views fall somewhere in between denial and acceptance, where CBDR is more than a political principle or an aspirational goal. Yet, CBDR is far too inchoate and disputed to be considered

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[48] Dupuy & Viñuales (note 25 above) 74. The CBDR principle's operation in the Kyoto Protocol comes into focus in Chapter 3 below, as part of an analysis of climate change negotiations and how they have shaped the CBDR principle's journey through the climate change regime.
[49] C Wold, D Hunter & M Powers *Climate Change and the Law* 2 ed (2003) 177.
[50] Rajamani (note 41 above) 73.
[51] Ibid 131, 137-138 (generally discussing the markers for differentiation in international environmental law).
[52] P Cullet 'Differential treatment in environmental law: Addressing critiques and conceptualizing the next steps' (2016) 5 *Transnational Environmental Law* 305, 307.
[53] Stone (note 42 above) 299.
[54] See, for example, International Law Association (ILA) New Delhi Declaration of Principles of International Law relating to Sustainable Development (2002) UN Doc A/57/329, para 3. The CBDR principle is listed as one of the seven leading principles of international sustainable development law.

a settled legal principle: thus, 'more than soft law but not yet custom'.[55] It is of sufficient ethical weight to form the philosophical basis for the interpretation of existing obligations and the elaboration of future international legal obligations.[56] Whatever its designation in the hierarchy of norms CBDR's importance is evident because it has significantly influenced the legal architecture of the international climate change regime.[57]

Since its inclusion in the normative fabric of the climate change regime, the CBDR principle has been at the heart of the political and legal wrangling among major GHG emitters. The CBDR principle directly impacts on economic development and its rippling effect on political and economic dominance in international relations.[58] It is the CBDR's connection with power and economic interests that has contributed to the growing influence of BASIC countries at climate negotiations and further contributed to the uncertainties in operationalizing differentiation in the climate regime.[59] Thus, developed countries seek to use the CBDR principle to set normative standards for participation from developing countries towards solving climate change and also to put some limits on the development process. On the other hand, developing countries rely on the principle to draw attention to their developmental needs, their reduced capacity to assist in managing environmental problems and their lower contribution to their creation [60]

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[55] Rajamani (note 41 above) 161. See also L Paradell-Trius 'Principles of international environmental law: An overview' (2000) 9 *Review of European Community & International Environmental Law* 93, 95 (noting generally the uncertainty surrounding the legal status of principles of international law environmental law).
[56] L Rajamani 'The principle of common but differentiated responsibility and the balance of commitments under the climate regime' (2000) 9 *Review of European Community & International Environmental Law* 120, 124.
[57] Dupuy &Viñuales (note 25 above) 75 (noting that despite its controversial status in international law CBDR is instrumental in performing two functions, namely to influence the content of certain agreements and also to assist in the interpretation of their provisions).
[58] S Atapattu 'The significance of international environmental law principles in reinforcing or dismantling the north-south divide' in S Alam et al (eds), *Environmental Law and the Global South* (2015) 74, 94-95.
[59] X Qi 'The rise of BASIC in UN climate change negotiations' (2011) 18 *South African Journal of International Affairs* 295 (generally discussing how BASIC's rise and prominence at climate negotiations and their role in framing the issues concerning differentiation).
[60] Dupuy & Viñuales (note 25 above) 73.

The CBDR principle's reach extends both to climate adaptation and climate mitigation. Climate adaptation calls for state parties to anticipate and prepare for the negative climate change impacts. Adaptation requires that states take necessary action to reduce the damage that negative climate change impacts can cause.[61] Although international cooperation is required for adaptation, this does not translate into tangible commitments and obligations. Rather, international cooperation for adaptation exists to provide assistance for adaptative action and to enable information sharing.[62] In the context of the CBDR principle, climate adaptation echoes the two-fold markers of differentiation. Firstly, the countries who have contributed more to GHG emissions should assist those who have contributed less, but will bear the biggest negative impacts of climate change.[63] Secondly, many of the countries who must prepare for negative climate impacts are those with limited financial and technological resources to do so. Thus, the countries who have more advanced financial and technological capabilities should assist to build the needed capacity.[64]

Climate mitigation involves measures to limit the increase of GHG emissions and measures to conserve and strengthen carbon sinks.[65] Mitigation actions to limit GHG emissions include actions that promote energy efficiency, renewable energy, carbon taxing, emissions trading and technology research and development.[66] Mitigation actions to enhance carbon sinks involve measures such as land use, land-use change and forestry and measures encourage afforestation and measures to reduce emissions from deforestation and forest degradation.[67] This study's focus is on utility of the CBDR principle in the context of climate mitigation. The CBDR principle's role in driving mitigation action has been controversial. Its function, as a

[61] D Bodansky, J Brunnée & L Rajamani *International Climate Change Law* (2017) 14.
[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] Ibid 12.
[66] Ibid.
[67] Ibid.

normative tool for allocating commitments towards mitigation remains a problematic for the climate change regime.[68] International climate change agreements and instruments have attempted to operationalize the CBDR principle. However, the disagreements surrounding its scope and meaning have eclipsed the efforts to use the CBDR principle to drive mitigation action.[69] Consequently, non-state actors have sought to engage national courts to provide compel local authorities to implement the CBDR principle when carrying out their commitments towards mitigation.[70]

1.2 Problem Statement

There has been a shift in the philosophical basis on which the CBDR was founded, from considerations of justice to pragmatism and effectiveness.[71] In a bid to avoid a standoff and further delays, the climate regime has downplayed the role of historical responsibility and its impact on the equity and justice pillars of the climate superstructure.[72] The climate change regime has not made room for working an ethical responsibility for past emissions into determining appropriate mitigation obligations for states.[73] The problem is that academic

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[68] See D Bodansky & L Rajamani 'The issues that never die' (2018) 12 *Carbon & Climate Law Review* 184.
[69] Ibid.
[70] See PG Ferreira '"Common But Differentiated Responsibilities" in national courts: Lessons from Urgenda v. The Netherlands' (2016) 5 *Transnational Environmental Law* 329.
[71] R Clémençon 'The two sides of the Paris climate agreement: Dismal failure or historic breakthrough?' (2016) *Journal of Environment & Development* 1, 10. See also S Klinsky & H Winkler 'Building equity in: strategies for integrating equity into modelling for a 1.5°C world' (2018) *Royal Society: Philosophical Transactions A* 1(noting that inequality will likely increase under the Paris climate goals and that more is required to include inequality arguments into models of assessment).
[72] The Paris Agreement does not expressly mention historical responsibility as the UNFCCC does: S Chin-Yee 'Briefing: Africa and the Paris climate agreement' (2016) *African Affairs* 1, 8 (observing that during the Paris negotiations the United States of America firmly rejected provisions that referred to historical emissions and ensured that the Agreement avoided possible pitfalls that would attract liability for American businesses).
[73] I Boran 'Principles of public reason in the unfccc: Rethinking the equity framework' (2017) 23 Science and Engineering Ethics 1253, 1254 (noting that since the Paris Agreement shifted from establishing binding targets for developed countries alone to a universal regime of participation there are questions as to how exactly the Paris Agreement will ensure equitable terms). This study proceeds further on this tangent and argues that although the Kyoto Protocol's type of differentiation did not produce the desired results, the Paris Agreement's 'self-differentiation' model does not provide any clear markers for ensuring fairness in sharing the burden of mitigating climate change and rather appears to be moving away from equity and embracing pragmatism. See also UNGA Res 66/288 (11 September 2012) UN Doc A/Res/66/288. Para 191 notes 'with concern the gap between the aggregate effect of mitigation pledges by parties to the UNFCCC by 2020 on one hand and the aggregate emission

literature on the CBDR principle's relevance has been largely shaped by realist theory.[74] This approach has skewed the utility of differentiated responsibilities for mitigation along the line of pragmatism, and less towards justice. This approach neglects the historical antecedents of differentiation and the relevance of historical responsibility in framing the CBDR principle. It also obscures third world countries' concerns regarding climate justice, instead of elevating them.

1.3 Purpose Statement

The purpose of this study is to assess the relevance of the CBDR principle for climate change mitigation from the perspective of third world approaches to international law (TWAIL). Specifically, this study focuses on the utility of the historical responsibility concept as a driver for justice, regarding mitigation through emissions reduction.

1.4 Aims and Objectives

The aim and objectives of the study are:

1. To analyse the relevance of historical responsibility in applying the CBDR principle to climate change mitigation.
2. To examine the connections between the colonial antecedents of modern international law and the CBDR principle's emergence in international environmental law as exemplified by climate change regime.
3. To analyse how key negotiating positions on mitigation have impacted the CBDR principle's interpretation and normative value.

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pathways consistent with having a good chance of keeping lobal temperature increase below 2ºC or 1.5ºC above pre-industrial levels. This gap is an early indication of the challenges that are likely to arise in ascertaining what 'ambition' truly means for countries under the Paris Agreement'.

[74] For a brief theoretical overview of realism, see section 1.7.5 below.

4. To determine how the absence of historical responsibility obscures considerations of justice in the climate change regime.
5. To determine how historical responsibility may be manifested in the climate regime under the Paris Agreement.
6. To analyse what role climate change litigation could play to influence a CDBR principle that includes historical responsibility.

1.5 Hypothesis and Research Questions

1.5.1 Hypothesis

This study proceeds on the hypothesis that the pre-colonial and colonial antecedents of public international law provide a useful lens for examining the scope and application of the CBDR principle in relation to climate change mitigation. In this regard, the study's central hypothesis is that the CBDR principle (as it applies to the climate change regime and mitigation) has broken down and changed since its initial intendment. The CBDR principle's metamorphosis has happened because the overarching purpose of differentiation has moved farther away from considerations of justice and historical responsibility. Consequently, the CBDR principle's normative underpinnings should drive the legal implementation of CBDR for mitigating climate change.

1.5.2 Research Question and Focal Questions

The research question that this study investigates is: to what extent does the historical responsibility concept influence the CBDR principle's relevance to climate justice and climate change mitigation?

The overarching research question is further broken down into the following focal questions:

1. How did the pre-colonial and colonial antecedents of modern international law impact the CBDR principle's emergence in international environmental law as exemplified by the climate change regime?
2. How have developed and developing countries used the CBDR principle to further their interests and how have key negotiating positions on the CBDR principle affected the CBDR's normative value, in relation to the climate change regime?
3. What aspects of the climate change regime's negotiating process obscure climate justice and to what extent does historical responsibility enhance climate justice?
4. How can historical responsibility be practicalized for mitigating climate change?
5. How does climate change related litigation help to reintroduce historical responsibility into current notions of the CBDR principle in the climate change regime?

1.6 Scope and Limitations of the Study

1.6.1 Scope

The scope of the study covers the CBDR principle in the climate change regime. Specifically, the study centres on the historical contribution and responsibility component of the CBDR principle. Given the breadth of this study, the thesis does not seek to analyse the CBDR principle as it applies to other international environmental law regimes.

1.6.2 Limitations of the Study

1.6.2.1 Generalizations

Some parts of the study adopt a fair amount of generalization. Chapter 2 takes a more generalized outlook on the pre-colonial and colonial antecedents of modern international law how they have influenced the third world's position on differentiation for climate mitigation. This generalization is justified on the basis that European imperialism practically set the

inequitable international economic structure in motion. Together with the United States of America (US) and their allies, Europe continues to control international economic fortunes.[75] The potentially nebulous terms such as West/Third World, North/South and developed/developing countries are used in this study to delineate the negotiating positions on the CBDR principle. Furthermore, although there is a focus on the West/North versus South/Third World divide, there is a strong emphasis on some countries more than others. For instance, in Chapter 3 the focus is on the key negotiating blocs in the climate change regime who influence the CBDR principle's meaning and application. The focus further narrows to the US on one side and Brazil, South Africa, India and China (negotiating as the BASIC group[76]) on the other side and their influence on the CBDR principle's historical contribution and responsibility marker.

1.6.2.2 Economic Development as an Influencing Factor on Historical Contribution

While this study highlights the importance of economic development within the discussion of power as it relates to the neo-realist theory,[77] the focus of the study is not to examine economic development. This study is limited to an examination of states and their quest for economic development as a political tool which influences their negotiating positions on CBDR. The focus on economic development's reach on interpreting the CBDR principle thus limits the study's analysis to mitigation through emissions reduction.

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[75] P Phillips *Giants: The Global Power Elite* (2018) chapter 4.
[76] See UNFCCC 'Party Groupings' < https://unfccc.int/process-and-meetings/parties-non-party-stakeholders/parties/party-groupings >.
[77] See section 1.8.5 below.

1.6.2.3 Compliance in the Climate Change Regime

Similarly, this study is not intended to undertake a complete analysis of compliance with the climate change legal regime but is limited to discussing implementation of mitigation obligations as an aspect of compliance, in the context of CBDR.

1.6.2.4 Financial and Technological Capability

Although this study references financial and technological capability in the analysis of the historical responsibility inherent in the CBDR principle, this study does not fully examine financial and technology transfers in relation to capabilities, as a marker of differentiation. Although financial and technology transfer are incidental to differential treatment the historical antecedents of GHG emissions are linked to the developed world's financial and technological advancement. Thus the basis for technological and financial transfer from the North to the South traces back to the historical events that culminated in the build-up of GHG emissions.

1.6.2.5 Treaty Text Formulation as an Aspect of the Negotiation Process in the Climate Change Regime

Several stages and process inform the final production of a treaty's text and provisions. Some of these processes are formal, in accordance with the provisions of the Vienna Convention on the Law of Treaties.[78] These processes go to validate the treaty making process and clothe the text with legal authority. This study is limited to an analysis of constructive ambiguity as a diplomatic tool for negotiation. The study is further limited to its use in the context of framing the CBDR principle, as it relates to mitigation through emissions reduction.

[78] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered in force 27 January 1980) 1155 UNTS 331.

1.6.2.6 Climate Change Litigation

Although there is a growing number of climate-related cases in national courts, Chapter 5 does not undertake a comprehensive study of all these cases.[79] The focus is on two decided cases. The selected cases are justified based on their direct relation to the relevance of historical contribution towards mitigation action in the climate change regime. Furthermore, the selected cases map onto the North/South dichotomy which informs the study's focal research questions.

1.6.2.7 Climate Justice

Justice is an abstract ideal.[80] Contextually, justice translates differently to different interest groups affected by climate change.[81] This study takes a state-centric approach to justice, that is, a focus on justice as it pertains to inter-state outcomes regarding climate change mitigation.

1.6.2.8 Documents on Climate Change

The study's analyses have been limited to the three major instruments: the UNFCCC, the Kyoto Protocol and the Paris Agreement. Although some other closely related instruments such the Copenhagen Accord,[82] the Cancun Agreement[83] as well as the Durban Platform for Enhanced Action[84] are analysed, the study is not an in-depth study of all documents emanating

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[79] For a comprehensive discussion of national climate litigation see J Peel & J Lin 'Transnational climate litigation: The contribution of the global south' (2019) 113 *American Journal of International Law* 679. See also *Climate Change Litigation: Global Perspectives* in I Alogna, C Bakker & JP Gauci (eds) 2021 and J Peel & HM Osofsky 'Climate change litigation' (2020) 16 *Annual Review of Law & Social Sciences* 21.
[80] MDA Freeman *Lloyd's Introduction to Jurisprudence* 9 ed (2014) 481.
[81] For example, groups such as children, young adults, women and indigenous people bring different perspectives to justice and climate change. See D Schlosberg & LB Collins 'From environmental to climate justice: Climate change and the discourse of environmental justice' (2014) 5 *Wiley Interdisciplinary Reviews: Climate Change 359*, 367.
[82] Decision 2/CP.15 Copenhagen Accord FCCC/CP/2009/11/Add.1 (18 December 2009) (Copenhagen Accord)
[83] UNFCCC Decision 1/CP.16 on The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention FCCC/CP/2010/7/Add.1 (Cancun Agreement).
[84] FCCC/CP/2011/9/Add.1 'Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action' Decision 1/CP.17 (2011) (Durban Platform).

from the Conference of the Parties of the UNFCCC. Consequently, the study critically analyses the Katowice Texts but only in so far as they feed into the overall assessment of historical responsibility and its relevance to climate justice.

1.6.2.9 Secondary Information

Some aspects of this study rely on secondary information which may not be easily verifiable. For example, in Chapter 3, the evaluation of constructive ambiguity relies partly on the reported or published accounts of events that took place during climate change negotiations. While some of the accounts originated from negotiators who partook in the negotiation process, other accounts are taken from reporters and non-state actor groups who may have been at climate conferences, but may not have been direct partakers of the negotiations.

1.6.2.10 Time Constraints

The time frame for carrying out the research for this study limits an extensive evaluation of certain aspects of the climate change regime. As mentioned above, the study does not delve into an extensive evaluation of all the documents emanating from meetings and conferences of the parties because of the sheer volume of documents released. Since the climate change scene is unfolding rapidly, some parts of this study (which itself has had to evolve to deal with changes in law and policy) could become redundant at some point. For example, state parties may decide to revisit historical responsibility in the next major COP to be held in Glasgow.[85] Thus, this study should be seen as part of the body of knowledge on climate change mitigation and emissions reductions, which other studies may update in the future.

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[85] See UNFCCC 'COP 26' < https://unfccc.int/conference/glasgow-climate-change-conference-october-november-2021 >.See also UN Climate Change Conference UK 2021 < https://ukcop26.org/ > This study does not cover negotiations during COP 26 or the outcomes of those negotiations.

1.7 Theoretical Framework

The theoretical framework for the study is derived from theories of distributive justice derived from Rawls[86] and Sen[87] in relation to climate justice. This study is also shaped, partly, by structural realism and world systems theories,[88] in the field of international relations. Some parts of the study draw from frame theory and discourse studies. The overarching theoretical approach in which the study is grounded is third world approaches to international law.

1.7.1 Third World Approaches to International Law

Third World Approaches to International Law (TWAIL) is a term which some scholars at Harvard Law School coined to advance a reexamination of international law from a third world perspective.[89] The initial aim was 'to develop new ways of thinking about the relationship between international public law and international economic law, and issues of global wealth and poverty.'[90] 'For TWAIL scholars, international law is not simply a set of formal rules that guarantees sovereign equality, but rather also a system that entrenches formal inequality that produces international economic and political hierarchy and domination, of the rich industrialized economies over poorer ones.'[91]

[86] J Rawls *A Theory of Justice* (1999).
[87] A Sen The Idea of Justice (2009).
[88] See section 1.7.4 below.
[89] OC Okafor 'Newness, imperialism, and international legal reform in our time: A TWAIL perspective' (2005) 43 *Osgoode Hall Law Journal* 171. See also JT Gathii 'TWAIL: A brief history of its origins, its decentralized network, and a tentative bibliography' (2011) 3 *Trade Law & Development* 26, 28-32.
[90] Gathii (note 89 above) 29.
[91] See JT Gathii 'The agenda of third world approaches to international law (TWAIL) Forthcoming in J Dunoff & M Pollack (eds) *International Legal Theory: Foundations and Frontiers* (2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3304767> 12.

Some 'TWAILers'[92] have attempted to conceptualize TWAIL. For instance Gathii calls TWAIL 'a historically aware methodology'.[93] Okafor argues that TWAIL offers both theories of and methodologies of analyzing international law and institutions.[94] Another view is that TWAIL is 'an attempt to promote and inject an ethical dimension into international law that will ensure a fair playing field for all actors.'[95] Indeed, the vision statement of the TWAIL movement admits the divergence of views as how to conceptualize TWAIL.[96] Despite the divergent views most TWAILers consider TWAIL to provide an alternative perspective with which to understand international law as it applies to third world countries. They share a common goal of looking at the history, structure and process of international law and institutions from the standpoint of the peoples of the third world, particularly those who are poor and marginalized.[97] TWAIL proceeds on the premise that international law has derived much of its legitimacy and power from imperialist and colonialist ideals. Thus, Mutua posits that international law is illegitimate and predatory because it 'reproduces and sustains the plunder and subordination of the Third World by the West'.[98] In Anghie's view, modern international law 'follows the familiar pattern of the colonial encounter, the division between

[92] I use the term 'TWAILers' to refer to the founding members and disciples of TWAIL. There is no definitive means of identifying a TWAILer; no particular features to look out for. Except for the founding scholars of TWAIL, latter-day scholars who subscribe to TWAIL hardly announce themselves as TWAILers and one can hardly tell from their names. One is left to glean their association with TWAIL from the subtext, arguments and conclusions of their scholarly writings. See Gathii (note 89 above) 47. See also JT Gathii 'Promise of international law: A third world view (Including a TWAIL bibliography 1996–2019 as an appendix)' (2020) *114 Proceedings of the ASIL Annual Meeting* 165, Appendix.

[93] Gathii (note 89 above) 34.

[94] OC Okafor 'Critical third world approaches to international law (TWAIL): Theory, methodology, or both?' (2008) 10 *International Community Law Review* 371, 378.

[95] K Appiagyei-Atua 'Ethical dimensions of Third-World Approaches to International Law (TWAIL): A critical review' (2015) 8 *African Journal of Legal Studies* 209, abstract.

[96] A 1997 TWAIL vision statement acknowledges that 'members may not agree on the content, direction and strategies of third world approaches to international law': K Mickelson 'Taking stock of TWAIL histories' (2008) 10 *International Community Law Review* 355, 357.

[97] BS Chimni 'A just world under law : A view from the south' (2007) 22 *American University International Law Review* 199, 200.

[98] M Mutua 'What is TWAIL?' (2000) 94 *Proceedings of the ASIL Annual Meeting* 31, 31.

civilized and uncivilized, the developed and the developing, a division that international law seeks to define and maintain using extraordinarily flexible and continuously new techniques.'[99]

Additionally, TWAIL insists that issues of material distribution and imbalances of power affect the way in which international legal concepts, categories, norms and doctrines are produced and understood.[100] A case in point is the legal status of United Nations General Assembly (UNGA) Resolutions compared to United Nations Security Council Resolutions. Although developing countries make up the majority of membership in the United Nations General Assembly, UNGA Resolutions are largely thought to be soft law.[101] On the other hand, at the Security Council whose membership is less democratic, resolutions are binding. [102]

Latter day TWAILers now seek to fill some gaps that initial TWAILers did not capture. For example Appiagyei-Atua opines that an important gap that requires filling is the contention that TWAIL applies only to international economic law. In fact, TWAIL is applicable to the entire gamut of international law.[103] When the other areas of international law are examined, one gets a holistic picture of the extent of the 'monstrosity of the atrocities that international law has unleased on the Third World.'[104] In this regard, TWAIL has permeated the discourse on climate change and other global environmental problems. Ratner has also opined that 'while lawyers talk and write about aspects of distributive justice, for example, the place of economic rights within the pantheon of human rights, or the balance between the rights of the foreign

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[99] A Anghie *Imperialism, Sovereignty and the Making of International Law* (2005) 244.
[100] L Eslava & S Pahuja 'Between resistance and reform: TWAIL and the universality of international law' 3 *Trade Law and Development* (2011) 103, 104-105.
[101] MD Öberg 'The legal effects of resolutions of the UN Security Council and General Assembly in the jurisprudence of the ICJ' (2005) 16 *European Journal of International Law* 879, 883 (noting that generally, UNGA resolutions are considered non-binding).
[102] S Talmon 'The Security Council as world legislature' (2005) 99 *American Journal of International Law* 175, 177.
[103] Appiagyei-Atua (note 95 above) 222.
[104] Ibid.

investor and those of the host state international investment law, most shy away from scholarship or concrete proposals to alter radically the global distribution of wealth.'[105] Anand contends that in order to assess 'what should be done' to make international law more 'effective and acceptable', it is necessary to 'look at the problem historically.'[106]

Scholarly work on TWAIL and climate change is in its growth stage. Scholars such as Mickelson, Gordon and Atapattu have analysed aspects of international environmental law (IEL) and critiqued its utility concerning how third world countries and peoples are portrayed as the villains who sacrifice environmental protection for economic gains.[107] Dehm also provides a critique of climate change instruments, from a TWAIL perspective.[108] Scholars in the sociology field have drawn links between the theory of unequal ecological exchange (EUE), world systems theory (WST) and environmental degradation in the third world.[109] This inter-connection adds value to analysis of TWAIL.

1.7.2 World Systems Theory and Ecologically Unequal Exchange

The theory of EUE applies more directly to the extraction and production process inherent in international trade. Early proponents of the theory drew from political, economic

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[105] One of the reasons for the reluctance to approach international problems with an ethics perspective is that mainstream scholarship is still influenced by Northern governments and scholars who do not perceive global wealth inequities as more imperative than other global problems: S Ratner 'Ethics and international law: Integrating the global justice project' (2013) 5 *International Theory* 1, 11.
[106] Appiagyei-Atua (note 95 above) 3.
[107] K Mickelson 'Rhetoric and rage: Third world voices in international legal discourse' (1998) 16 *Wisconsin International Law Journal* 353., R Gordon 'Unsustainable Development' in S Alam et al (eds), *International Environmental Law and the Global South* (2015) 53. See also Atapattu (note 58 above).
[108] See J Dehm 'Carbon colonialism or climate justice? Interrogating the international climate regime from a TWAIL perspective' (2016) 33 *Windsor Yearbook of Access to Justice* 129.
[109] D Ciplet & JT Roberts 'Splintering south: Ecologically unequal exchange theory in a fragmented global climate' in RS Frey, PK Gellert & HF Dahms (eds), *Ecologically Unequal Exchange : Environmental Injustice in Comparative and Historical Perspective* (2019) 273; JT Roberts & BC Parks 'Fueling injustice: globalization, ecologically unequal exchange and climate change' (2007) 4 *Globalizations* 193; AK Jorgenson & B Clark 'Ecologically Unequal Exchange in Comparative Perspective: A Brief Introduction' (2009) 50 *International Journal of Comparative Sociology* 211.

sociology[110] and other research on the extractive industries.[111] The theory proceeds on the assertion that the international trade system has produced a system where developed countries are placed in a position of advantage that enables favourable trade terms.[112] Specifically, the advantage that developed countries capitalise on is two-fold: their access to the natural resources in the third world through the market forces of demand and supply; and the structure of the international trade system whereby raw or semi-refined natural resources have volatile and, sometimes, low prices.[113] EUE theorists posit that there is an unequal ecological exchange inherent in international trade between the developed world and the third world.[114] Through the global trade system, developed countries do not factor in the environmental (ecological) and social costs developing countries bear in extracting, processing and trading their natural resources.[115] EUE theorists argue that third world countries end up absorbing these environmental and social costs and, at the same time, receive far less from developed countries for their exchange of natural resources.[116]

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[110] AK Jorgenson, K Austin & C Dick 'Ecologically unequal exchange and the resource consumption/environmental degradation paradox a panel study of less-developed countries, 1970-2000' (2009) 50 *International Journal of Comparative Sociology* 263, 264.

[111] Ibid 265. The prevailing view is that ecologically unequal exchange theory's development benefitted from Stephen Bunker's research into extractive industries and under-development in the Amazon.

[112] BC Parks & JT Roberts 'Climate change, social theory and justice' (2010) 27 *Theory, Culture & Society* 134, 142.

[113] Jorgenson, Austin & Dick (note 110 above) 265.

[114] Ibid.

[115] PS Ciccantell 'Ecologically Unequal Exchange and Raw Materialism: The Material Foundations of the Capitalist World-Economy' in RS Frey, PK Gellert & HF Dahms (eds), *Ecologically Unequal Exchange : Environmental Injustice in Comparative and Historical Perspective* (2019) 49, 52.

[116] Researchers have tested EUE theory against international trade practices between developed countries and developing countries and have found that the structure and practices of international trade bear the EUE theory out. For example Giljum and Eisenmenger found in a study of EU trade relations that EU imports were about four times more than its exports. More interestingly, regarding its trade with third world countries in Africa and Latin America, the study found that for each ton of EU exports, the EU received a value ten times higher than a ton of imports from Africa and Latin America. See S Giljum & N Eisenmenger 'North-south trade and the distribution of environmental goods and burdens: A biophysical perspective' (2004) 13 *Journal of Environment & Development* 73.

EUE is closely linked to world-systems theory in the field of international relations. World-systems theory posits that the structure of the world-system is a power hierarchy between the core and the periphery where the powerful and rich core societies of the world dominate and prey on the weak and less powerful societies at the periphery.[117] According to world-systems theory, technology serves useful purpose in classifying a group in the core or the periphery.[118] The more advanced and developed countries are, the more they fit into the core; and the less advanced and developed countries are, the more they fit into the periphery.[119] Because the wealthy core controls the international economy, the periphery is somewhat doomed to a type of economic development that replicates their subservient status in the world system.[120]

World-system theorists view countries as players or elements in the system whereby the wealthy elite use the state machinery to pursue their interests in countries that form the core in the world system.[121] Imperialism is a tool with which the powerful core states dominate less powerful regions at the periphery of the world system. Furthermore, hegemony produces one core state, which temporarily towers over other core states. The hegemonic state fosters a balance of power and free trade, but only for its benefit.[122]

EUE and world-systems theory support the crux of TWAIL's critique of international law as a tool and propeller of neo-eco-colonialism in the third world. Imperialism and

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[117] C Chase-Dunn & P Grimes 'World-systems analysis' (1995) 21 *Annual Review of Sociology* 387, 389.
[118] Ibid 413.
[119] Ibid.
[120] S Hobden & RW Jones 'Marxist theories of international relations' in J Baylis, S Smith & P Owens (eds), *The Globalization of World Politics: An Introduction to International Relations* 7 ed (2017) 129, 133.
[121] Ibid.
[122] Ibid.

colonialism created the core/semi-periphery/periphery category.[123] Through further differentiating mechanisms such as the World Bank's categorisation of countries along self-defined lines, the world came to be divided along the fault line of developed/developing. As argued in Chapter 2, this difference dynamic birthed similar dichotomies, chief of them being the North-South dichotomy.[124] Arguably, North-South relations (and tensions) are at the heart of the conceptual and normative origins of IEL.[125] Mickelson has analysed the concept of ecological debt, the carbon space and environmental space as they relate to climate change action and fairness in the climate change regime.[126] Aside from analysing injustice in the climate change regime from a broad North-South perspective, TWAIL provides a viewing lens for examining the climate change regime's treaty-making process. In particular, chapter 4's focus rests, in part, on linguistic tools deployed to achieve constructive ambiguity during the law-making process, as well as the influence of issue framing on interpretations attached to the CBDR principle.

1.7.3 Frame Theory and Critical Discourse Analysis

Frame theory seeks to examine the way in which individuals organize experience.[127] Frames are core organizing ideas that suggest and define what an issue is about. Frames are tools used to contextualize and engage different interpretations, so as to unpack multifaceted issues.[128] Frame theory plays a role in understanding political ideological positions on a given subject. For example, state representatives acting as negotiators of multilateral agreements use

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[123] Ibid 132,133.
[124] See Chapter 2 below.
[125] K Mickelson 'South, north, international environmental law and international environmental lawyers' (2000) 11 *Yearbook of International Environmental Law* 52, 53.
[126] K Mickelson 'Leading towards a level playing field, repaying ecological debt or making environmental space: Three stories about international environmental cooperation' (2005) 43 *Osgoode Hall Law Journal* 139.
[127] E Goffman *Frame Analysis: An Essay on the Organization of Experience* (1974).
[128] M Hjerpe & K Buhr 'Frames of climate change in side events from Kyoto to Durban' (2014) 14 *Global Environmental Politics* 102, 104.

frames to communicate and spread their ideological positions. They do this by repeating their positions. When done continuously, their repeated language becomes 'normal' language and triggers their ideology in the minds of other state representatives.[129] Consequently, language – spoken and written – is vehicle for communicating and spreading frames.

Discourse analysis, in broad terms, focuses on language in action. It is the study of meanings given to language, whether written or spoken, and the actions that entities carry out when language is used in specific contexts.[130] Discourse analysis finds expression in several aspects of communication, including the field of diplomacy. In diplomacy, language plays a central role in both the framing of issues and the way negotiators deal with proposed treaty provisions that are contentious.[131] Negotiators often employ evasion strategies such as constructive ambiguity to avoid taking a clear stand on an issue, so that they satisfy several audiences.[132] Critical discourse analysis provides a way to describe and evaluate the way language is used to present an issue, against certain normative ideals.[133]

In the context of climate change and the disagreements that characterize discourse on the CBDR principle, constructive ambiguity has been used to present multiple interpretations of differentiation.[134] The framing of issues bordering on ethics and justice in the climate change regime work to elevate certain conceptions of responsibility over others. Thus, frame theory and critical discourse analysis allow for a critique of language use as a tool for framing the

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[129] G Lakoff 'Why it matters how we frame the environment' (2010) 4 *Environmental Communication* 70, 72.
[130] JP Gee & M Handford 'Introduction' in JP Gee & M Handford (eds), *Routledge Handbook of Discourse Analysis* (2012) 1, 1.
[131] S Biniaz 'Comma but differentiated responsibilities: Punctuation and 30 other ways negotiators have resolved issues in the international climate change regime' (2016) 6 *Michigan Journal of International Law* 37, 39.
[132] E Friedman 'Evasion strategies in international documents: When "constructive ambiguity" leads to oppositional interpretation' (2017) 14 *Critical Discourse Studies* 385, 386.
[133] N Fairlough 'Critical discourse analysis' in JP Gee & M Handford (eds), *Routledge Handbook of Discourse Analysis* (2012) 9, 9.
[134] Biniaz (note 131 above) 40.

issues central to third world interests, and for assessing the use of constructive ambiguity in relation to the CBDR principle. In particular, frame theory and critical discourse analysis have shaped the analysis in Chapter 4 below regarding climate justice. They provide the foundation for engaging two focal questions of the study, namely: what aspects of the climate change negotiation process obscure climate justice; and, to what extent does historical responsibility enhance climate justice?

1.7.4 Distributive Justice

Distributive justice, generally, is a concept of justice that provides principles as to how communal benefits and burdens may be distributed to achieve a fair outcome.[135] Principles of distributive justice therefore would provide moral guidance for the political processes and structures that affect the distribution of economic benefits and burdens in societies.[136]

1.7.4.1 John Rawls and Distributive Justice

John Rawls presented a concept of distributive justice based on fairness.[137] He argued that in order to formulate principles to achieve justice in the distribution of wealth and other public goods the persons in charge of the distribution should act from 'the original position'.[138] By assuming the original position, the persons envision themselves in the position of free and equal persons who jointly agree upon and commit themselves to principles of social and political justice.[139] To ensure that the persons at the original position would arrive at fair principles devoid of their personal inclinations, aspirations and conceptions of their self-

[135] AF McKee 'What Is "Distributive" Justice?' (1981) 39 *Review of Social Economy* 1, 5.
[136] J Lamont & C Favor 'Distributive Justice' in EN Zalta (ed.) *The Stanford Encyclopedia of Philosophy* (2017) < https://plato.stanford.edu/archives/win2017/entries/justice-distributive>.
[137] Rawls (note 86 above).
[138] Ibid 15,17.
[139] Ibid. Rawls calls this agreement a social contract.

interests, Rawls reasoned that the persons would make principles of justice while behind 'a veil of ignorance'.

Rawls reasoned that persons at the original position and who acted from behind the veil of ignorance would rationally choose two principles of justice. First that each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others. The second principle, the difference principle, provides that while the distribution of wealth and income need not be equal, it must inure to everyone's advantage, and at the same time, positions of authority and offices of command must be accessible to all. Injustice, Rawls argues, is therefore simply inequalities that are not to the benefit of all. [140]

1.7.4.2 Amartya Sen and the Idea of Justice

Amartya Sen presents a more a nuanced view of justice.[141] Sen is critical of the concepts of justice that present a set of perfectly just principles.[142] Sen argues that perfection is almost never relevant to the actual choices people face. In his view, it is more useful for political philosophers to provide guidance on how to make the world less unjust. Thus, knowing the nature of perfect justice is neither necessary nor particularly helpful.[143] Sen's approach to matters of justice focuses on providing ways of minimizing injustice and advancing justice rather than seeking the characterization of perfectly just societies.[144] In effect, the quest for

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[140] Ibid 52-56. Admittedly, Rawls did not reckon that the difference principle was applicable to international issues in the same way that it applied to national issues. In his later work Rawls developed a separate and different structure for applying his two principles of justice. However, other philosophers have argued that the Rawlsian principles are applicable to international matters too. See for example T Pogge *Realizing Rawls* (1989) and C Beitz *Political Theory and International Relations* (1979) who both argue that the global international order with its inequalities make room for Rawls' principles to be applied to global justice issues in the same way as the principles are to be applied nationally. This study draws on their arguments to the extent that they conclude that Rawlsian principles are useful for resolving global justice issues.

[141] Sen (note 87 above).

[142] Ibid ix, xii.

[143] Ibid 95-102.

[144] Ibid ix.

justice should involve a comparative framework which focuses on the practical reason behind what is to be chosen and which decisions should be taken rather than speculating on what a perfectly just society would look like.[145]

In contrast to Rawls's view of rationality and objectivity as he expressed by illustration through the original position and the veil of ignorance, Sen supports the use of positional objectivity. Positional objectivity is explained as a kind of objectivity that is person-invariant but position-relative.[146] In effect, 'what is observed can vary from position to position, but different people can conduct their respective observations from the same position and make much the same observations'.[147] Sen's nuanced views about justice provide useful insights on how to arrive at an end that is not necessarily perfectly just but rather less unjust. His views serve well to reinforce the theoretical framework for this study.

1.7.5 Structural realism

The structural realist theory is part of the larger realism movement in international relations. Structural realism explains state behaviour from the international system level of analysis.[148] Thus, it examines the states' behaviour in relation to the international system of which they are part.[149] The international system level of analysis suggests that nation-states behave the way they do because of certain fundamental characteristics of the international system of which they are all a part. To this end, the system compels states to behave and react

[145] Ibid 106.
[146] Ibid 157-158.
[147] Ibid 158.
[148] International relations scholars use levels of analysis to understand how foreign policy decisions are made at various levels: T Tamaki 'The Levels of Analysis of the International System' in E Kavalski (ed), *Encounters with World Affairs* (2016) 103, 104.
[149] KN Waltz *Man, the State and War* (1959) 159 (explaining the levels of analysis as three images).

in certain predictable ways.[150] Anarchy is a key feature of the international system. Anarchy is used to describe a situation in the international system where international politics takes place where there is no overarching central authority above individual sovereign states.[151]

Power is another essential feature in structural realism. Power is loosely defined as the ability of one state to influence state behaviour to achieve their interests.[152] Structural realists argue that power ultimately drives states in their relations with other states.[153] Power is viewed in relational terms. Thus states seek to use power to again advantage over other states to ensure their survival because states believe that no other state or international institution is capable of ensuring their survival.[154] Power is necessary also because states are constantly in a state of insecurity. Structural realists then argue that states use power to enhance capabilities in order to reduce their level of insecurity. An assessment of the 'capability' of a state is determined by five main criteria: its natural resource endowment, its demographic, economic, military and technological capacity.[155] States then use their capabilities to gain more power. Structural realists seek to determine the number of great powers in existence at a given time. The number of great powers would then determine the structure of the international system. States are

[150] T Dunne & BC Schmidt 'Realism' in J Baylis, S Smith & P Owens (eds), *The Globalization of World Politics: An Introduction to International Relations* 7 ed (2017) 101,109.
[151] Ibid 105.
[152] JP Kaufman *Introduction to International Relations: Theory and Practice* (2013) Kindle Edition, 775. Defining power is not straight-forward. Scholars like Kenneth Waltz consider it a matter of controversy. Other scholars of realism define power in terms of the role it plays in international politics while some other writers attempt to define power by describing its different elements. See for example KJ Holsti 'The concept of power in the study of international relations' (1964) 7 *Background* 179, 182-183 (breaking the concept of power down into three separate elements: an act or process of influencing other factors, the capabilities used to make wielding the influence successful and the responses to the act) See also JS Nye 'Soft power' (1990) 80 *Foreign Policy* 153, 153 (conceptualizing power in terms of hard (coercive) power and soft (co-optive) power).
[153] Dunne & Schmidt (note 150 above) 108.
[154] Ibid 110-111.
[155] KN Waltz 'The emerging structure of international politics' (1993) 18 *International Security* 44, 50 (stating further that it is difficult for states to maintain great power status without a certain economic capability).

therefore, constantly in search of ways to gain more power at the expense of other states to ensure their survival.[156]

One important aspect of international negotiations is the role of the veto power. For most global problems it is common to find one or more states whose cooperation is so vital to a successful agreement for coping with the problem that a stance which threatens to block consensus tends to weaken international action.[157] States are able to use power to influence the nature of obligations they will or will not accept during treaty negotiations. In the context of climate change the US is considered a veto state because it is able to block the climate change regime's success.[158] Subsequently, Brazil, South Africa, India and China, negotiating as the BASIC group, also formed a veto coalition and refused to accept any binding commitment to reduce GHG emissions, even if differentiated.[159] The veto situation is linked to the furtherance of economic interests over consideration of justice, even more so where, as with climate change, the US perceives that binding GHG emissions reduction commitments without a reciprocal obligation on emerging economies like China's shifts the dynamics of economic power in China's favour.[160] Structural realism frames the research because it affords an analysis of the climate negotiations not as matter of cooperation and consensus building but as a matter of economic interests locking horns with matters of justice in environmental governance.

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[156] Dunne & Schmidt (note 150 above) 108. The view that states maximize power to ensure survival is one that offensive realists advance, in contrast to neo-realists who contend that the ultimate concern of states is not for power but for security.
[157] Chasek, Downie & Brown (note 20 above) 17.
[158] Clémençon (note 61 above) 6.
[159] Chasek, Downie & Brown (note 20 above) 166.
[160] Rajamani (note 41 above) 228-229.

1.8 On Methodology

The research for this study was conducted using a desk research review. The research review design was built on the integrative literature review method which involves collecting, reviewing and synthesizing data.[161] The use of the integrative literature review approach allows for critical analysis and synthesis of data across a number of fields of study such as philosophy, sociology, international environmental law, ecological economics, international relations and international human rights. This approach is necessary because climate change is a multifaceted problem with tentacles stretching into physical science, energy, security and human rights, among others. I used the primary research question and the focal questions derived from it to guide the data collection process. Using advanced research tools, I collected secondary data mostly from online data sources. Secondary sources include textbooks, journal articles, internet and on-line library sources, newspaper and other online media reports. These secondary sources are justified, as they provide the latest information about developments surrounding the CBDR principle and climate change. Some primary sources such as treaties, international decisions and national cases were also reviewed and synthesized to present a holistic view of the relevance historical responsibility holds for applying the CBDR principle to meet the ends of justice.

Based on the choice of the integrated literature review as research method, I used frame theory and discourse analysis to guide my review of literature, especially regarding chapter 3 and chapter 4. Flowing from the use of integrated literature review, the relevant literature which undergirds the study has been integrated into the thesis. This enables an easy-flowing analysis

[161] Integrated literature review involves reviewing, critiquing and synthesizing literature on a topic in an integrated way so that new frameworks or perspectives on the subject matter are generated. See RJ Torraco 'Writing integrative literature reviews: Guidelines and examples' (2005) 4 *Human Resource Development Review* 356, 356.

and avoids repetition. Nonetheless, a short and preliminary literature review follows, to provide a suitable context in which to situate the gap in knowledge as well as the study's significant, original contribution to existing knowledge.

1.9 Preliminary Literature Review

1.9.1 Conceptual Framing of CBDR Principle

Cullet and Rajamani have (separately) conceptualized differential treatment in terms of three objectives of differential treatment which are based on notions of substantive equality, cooperation among states and incentive-based implementation of treaty obligations.[162] First, differential treatment satisfies the theory of substantive equality, as opposed to formal equality.[163] Formal equality proposes that all subjects should be given the same or similar treatment under the law. International law generally validates formal equality by enshrining the sovereignty and equality of states in the international legal system.[164] Differential treatment in international law allows the theory of substantive equality a place in the treatment of states, given the practical reality that inequalities exist among states.[165] Other views on equality similarly suggest that the CBDR envisages equal treatment for 'equal' states and unequal treatment for unequal states and also that CBDR can be traced to the notion of restorative equality.[166]

[162] Rajamani (note 41). See also Cullet (note 41).
[163] Cullet (note 41 above) 553.
[164] Ibid.
[165] Ibid 554, 558.
[166] Rajamani (note 41 above) 150, 151, 155 (referring to the works of Aristotle and Nietzche on justice and stating that "justice would demand that those who have benefited the most from the process that led to the creation of the problem bear an unequal burden for addressing the problem").

1.9.2 Negotiating Differentiation in the Climate Change Regime

The markers for differential treatment in modern international environmental law are contribution and capacity and these markers are articulated as the CBDR principle.[167] On the subject of contribution, it is mostly agreed that states bear responsibility for present (ongoing) emissions, given that there is now sufficient information on the effects of GHG emissions.[168] What remains shrouded in controversy is responsibility for past emissions and how past responsibility should shape present and future responsibilities.[169] The controversy arises because the North and the South seek to interpret the CBDR differently, in ways that advance their respective economic and political interests. The wrangling about what form differentiation should take in the climate change regime continues to be one of the defining features of climate change negotiations.[170]

The success of the climate change regime requires that all states cooperate to deal with climate change.[171] Although differentiation is required to ensure universal participation[172] it is possible for differentiation to impede participation when states deem it be as unfair. Because of the Kyoto Protocol's limited success,[173] it was all but certain that a post-2012 regime would be a bottom-up regime where states would voluntarily determine how and which aspects of the

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[167] Ibid 130.
[168] Ibid 146. See also Cullet (note 41 above) 561, 562.
[169] See generally M Friman & M Hjerpe 'Agreement, significance, and understandings of historical responsibility in climate change negotiations' (2015) 15 *Climate Policy* 302 (analyzing the results of a study of differences in understanding between negotiators from the developed countries and those from developed countries as to the place of historical responsibilities in climate negotiations leading up to the adoption of the Cancun Agreements).
[170] Bodansky & Rajamani (note 68 above) 190 (predicting that regardless of the final outcome concerning post-Paris Katowice rules 'the decisions adopted in Katowice decisions will not finally resolve the issues of bindingness, prescriptiveness, and differentiation.
[171] C Voigt & F Ferreira 'Dynamic differentiation: The principle of CBDR-RC, progression and highest possible ambition in the Paris Agreement' (2016) 5 *Transnational Environmental Law* 285, 291.
[172] Rajamani (note 41 above) 157.
[173] MJ Bortscheller 'Equitable but ineffective: How the principle of common but differentiated responsibilities hobbles the global fight against climate change' (2010) 10 *Sustainable Development Law & Policy* 49, 51 (arguing that although the CBDR may be sound its application in the Kyoto Protocol was politically ineffective).

new agreement would apply to their national circumstances.[174] More nuanced notions of differentiation articulated in the 2010 Cancun agreements and the 2011 Durban Platform gave early indications that states would adopt a more softened stance on burden sharing in a post-Kyoto regime.[175] Nevertheless, it was clear that no rule on burden sharing would be successful if it failed to address the vital interests of key parties or coalition of parties.[176]

An important point of consensus which emerged from the Durban Platform was that future climate action would require the contribution of all within the international community.[177] In their analysis of the Paris Agreement and its implications on differentiation, Voigt and Ferreira, note that Article 4.3 of the Paris Agreement envisages a standard of care for states to strive for their highest possible ambition in a manner that reflects their common responsibilities, respective capacities and national circumstances. Further, they opine that highest possible ambition is responsive to states differing responsibilities, capabilities and circumstances, while at the same time striving to match ambition with the overall aim of combining effectiveness and fairness.[178] However, the reality is that, politically, the Paris Agreement generally favoured developed countries of the North. It met key demands of the US such as the replacement of the binary differentiation between developed and developing countries with a flexible model of differentiation that is reflective of evolving national

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[174] D Bodansky 'The future of climate governance: Creating a more flexible architecture' in RB Stewart, B Kingsbury & B Rudyk (eds) *Climate Finance Regulatory and Funding Strategies for Climate Change and Global Development* (2009) 48, 50 (noting that in order to ensure greater participation, post-Kyoto, it would be essential to make the climate regime flexible to enable states mitigate climate change on their own terms.) See also Chin-Yee (note 62 above) 5 (noting that the key shift which broke the diplomatic deadlock in the lead-up to Paris COP-21 was the move from the top-down approach of the Kyoto Protocol to a bottom-up approach). See also J Brunnée & C Streck 'The UNFCCC as a negotiation forum: Towards common but more differentiated responsibilities' (2013) 13 *Climate Policy* 589, 591.
[175] Brunnée & Streck (note 174 above) 594.
[176] L Ringius, A Torvanger & A Underdal 'Burden sharing and fairness principles in international climate policy' (2002) 2 *International Environmental Agreements: Politics, Law and Economics* 1, 17.
[177] Boran (note 73 above) 1255.
[178] Voigt & Ferreira (note 171 above) 296.

circumstances. The Agreement is less fair to developing countries, particularly the Africa Group, because it does not address their special circumstances nor does it include possible avenues for any future claims for liability and compensation.[179]

Although the original intent of the CBDR in the Rio Declaration emphasized historical contributions to environmental degradation, developed countries have progressively worked towards shifting the focus of differentiated responsibilities from historical contributions to capacity to solve the problem. This enabled the breakdown of differentiation, from CBDR to common but differentiated responsibilities and respective capacities (CBDR-RC)[180] and, finally, to common but differentiated responsibilities and respective capabilities, in light of national circumstances (CBDR-RC/NC) in the Paris Agreement. [181]

1.9.3 TWAIL, Climate Change and Justice

It has been noted that from its inception the climate change regime did not fully capture the concerns of the South. [182] Although the UNFCCC was designed to be a foundation framework for climate law and policy, developing countries had wanted the UNFCCC to tackle issues of historical responsibility, immediate mitigation action and financial assistance for adaptation for vulnerable communities and countries. Instead, the focus of policy makers seemed to be on setting the stage for developed countries to take up binding emission reduction commitments.[183] Cullet notes that although there are many issues of common concern to states, the issues of greater concern to developed countries receive more attention and urgency.[184]

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[179] Clémençon (note 71 above) 6-7.
[180] Brunnée & Streck (note 174 above) 593.
[181] Bodansky, Brunnée & Rajamani (note 61 above) 220.
[182] A Najam, S Huq &Youba Sokona 'Climate negotiations beyond Kyoto: Developing countries concerns and interests' (2003) 3 *Climate Policy* 221, 223.
[183] Ibid.
[184] Cullet (note 41 above) 560.

Indeed, third world scholars have argued that the climate regime has moved away from issues of equity and responsibility which are paramount to the third world, and embraced issues of efficiency which the north favours.[185] In the standoff between past emissions on one hand and present and future emissions on the other, scholars have highlighted and urged a distinction between luxury emissions and survival emissions.[186] Najam and co-authors and other scholars point out the vast disparity between the per capita emissions of people living in developed countries and people living in developing countries.[187] In particular, there are opposing views as to the validity of historical responsibility for past (pre-UNFCCC) emissions, dating back to the industrial revolution. While some scholars defend the position that historical responsibility is possible to establish and advance (at least from a moral perspective),[188] there are others who hold on to skeptical views whether a basis even exists for advancing such a concept of responsibility.[189]

1.9.4 Litigating Climate Change

Litigation involving climate-change related issues has been on the rise in recent times.[190] National courts in both the global North and South have had their fair share of cases

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[185] W Scholtz 'Different countries, one environment: A critical southern discourse on the common but differentiated responsibilities principle' (2008) 31 *South African Yearbook of International Law* 113,126 (arguing, in response to Christopher Stone's dismissal of the CBDR, that Stone's view of the CBDR principle is problematic because it does not consider notions of equity which form the basis of the CBDR). See also J Gupta 'Climate change: A GAP analysis based on third world approaches to international law' (2010) 53 *German Yearbook of International Law* 341.; Dehm (note 108 above).
[186] Najam, Huq & Sokona (note 182 above) 225.
[187] Ibid. See also Shue (note 31 above).; J Hickel 'Quantifying national responsibility for climate breakdown: A equality-based attribution approach for carbon dioxide emissions in excess of the planetary boundary' (2020) 4 *Lancet Planet Health* e399.
[188] S Mason-Case & J Dehm 'Redressing historical responsibility for the unjust precarities of climate change in the present' in B Mayer & A Zahar (eds), *Debating Climate Law* (2021) 170.
[189] A Zahar 'Historical responsibility for climate change is propaganda' in B Mayer & A Zahar (eds), *Debating Climate Law* (2021) 190.
[190] Peel & Lin (note 79 above) 680.

involving climate change. Legal issues have been raised around varied areas of law including fundamental human rights,[191] duty of care,[192] and administrative law,[193] among others.

Although the International Court of Justice (ICJ) is yet to determine a matter involving change there have been calls for the court to intervene.[194] Despite these calls, there is cautious optimism concerning what positive impact an ICJ intervention could have on driving more action to address climate change.[195] Regarding possible issues for the ICJ's consideration, it has been argued that the CBDR principle is too sensitive and volatile an issue for the ICJ to wade into.[196] National courts, generally, have not explicitly considered the CBDR principle in their reasoning, albeit some courts have demonstrated an appreciation for some of the basic principles of international environmental law such as the precautionary principle and the sustainable development principle.[197]

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[191] The German Constitutional Court recently held that Germany's Federal Climate Protection Act was partly unconstitutional and violated the applicants' human rights because it fails to sufficiently set out provisions for Germany's emissions reduction beyond 2030: See *Neubauer et al v Germany* BVerfG 1 BvR 2656/18 -, Rn. 1-270 (Order of the First Senate of 24 March 2021) See also *Leghari v Pakistan* (2015) WP No. 25501/2015 (Punjab). The court held, among other things, that Pakistan's 'delay and lethargy' in implementing national climate change laws offended the fundamental rights of Pakistanis.

[192] A High Court in the Netherlands applied the duty of care rationale to hold that Netherlands government's national mitigation action was not ambitious enough to discharge that duty of care towards the Dutch people. The Dutch Appeals Court and Supreme Court have upheld this decision. See *Urgenda Foundation v The State of Netherlands (Ministry of Infrastructure & the Environment)* C/09/456689/HAZA13-1396 (2015) (English Translation), *The State of the Netherlands (Ministry of Infrastructure and the Environment) v Urgenda Foundation* 200.178.245/01 (2018) (English Translation) and *The State of the Netherlands v Urgenda Foundation* ECLI:NL:HR:2019:2006 (Supreme Court of the Netherlands) (20 December 2019).

[193] See Thomson v. Minister for Climate Change Issues CIV 2015-485-919 [2017] NZHC 733.

[194] See, for example, A Korman & G Barcia 'Rethinking climate change: Towards an International Court of Justice advisory opinion' (2012) 37 *Yale Journal of International Law Online* 35. See also M Wewerinke-Singh, J Aguon & J Hunter 'Bringing climate change before the International Court of Justice: Prospects for contentious cases and advisory opinions' in I Alogna, C Bakker & JP Gauci (eds), *Climate Change Litigation: Global Perspectives* (2021) 393.

[195] D Bodansky 'The role of the International Court of Justice in addressing climate change: Some preliminary reflections' (2017) 49 *Arizona State Law Journal* 689. See also P Sands 'Climate change and the rule of law: Adjudicating the future of international law' (2016) 28 *Journal of Environmental Law* 19.; and Wewerinke-Singh, Aguon & Hunter (note 194 above).

[196] Bodansky Ibid.

[197] An exception is the case between Urgenda Foundation and the Netherlands, where the court applied its understanding of the CBDR principle as part of reasons to hold that the Netherlands' mitigation commitments are not ambitious enough to meet the standard of care expected of the government: See Ferreira (note 70 above).

1.10 Gaps in Knowledge and Significance of the Study

1.10.1 The Gaps

Firstly, the existing literature on the doctrinal basis for the CBDR principle does not provide sufficient context for appreciating its underpinnings. Although Cullet and Rajamani have provided a robust conceptual foundation for the CBDR principle in the literature, both of them do not go beyond broadly linking the emergence of differential treatment to the call for a new international economic order.

Secondly, the existing literature does not fully engage with the inner workings of negotiations. Scholars have opined on negotiation outcomes and reported on the use of ambiguous terms and phrases to secure hard-won compromises. However, their focus has been on the result of these compromises.[198] Limited literature exists on the actual working of constructive ambiguity pertaining to formulating different meanings attached to the CBDR principle.[199]

Thirdly, existing literature captures the arguments for and against historical responsibility for climate change. Thus, the question one may ask is how can historical responsibility be put into practice to reflect ambition and also achieve justice. Although ecological economists are advancing post-growth concepts, post-growth considerations have not been mainstreamed into climate change law (as compared to literature on market-based mitigation options, for example).

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[198] For example, Bodansky and Rajamani opine that 'the Paris Agreement contains enough constructive ambiguity that it allows each side to 'live on to fight another day' but did not engage fully with the use of constructive ambiguity to achieve results at the Paris COP: Bodansky & Rajamani (note 68 above) 184.

[199] Bodansky, Brunnée & Rajamani (note 61 above) 92-93. See also R Moncel 'Unconstructive ambiguity in the Durban climate deal of COP 17 / CMP 7 ' (2012) 12 *Sustainable Development Law & Policy* 6.; and Biniaz (note 131 above).

Fourthly, there is growing literature on climate-related litigation in national and international courts. Scholars are debating the place of international and national judicial interventions in the law and politics of climate change, generally.[200] Peel and Lin have done a comprehensive overview of climate-related litigation in the third world.[201] The existing literature forms a good under-structure. It affords room to further investigate the connections which may exist between the legal reasons given for decisions made in the selected cases and judicial interpretations of the CBDR principle.

1.10.2 Significance of the Study

The study contributes to TWAIL scholarship on climate change mitigation and the CBDR principle. It provides researchers and policymakers with a TWAIL-centred perspective on historical responsibility as a key aspect of the CBDR principle. TWAIL scholarship in international environmental law and climate change is particularly crucial for climate change law and policy because developing countries have contributed the least to the build of GHGs in the atmosphere, but they are most vulnerable to climate change impacts. Furthermore, since GHG emissions are projected to increase before they peak in the third world, mitigating climate change inevitably involves an engagement with third world concerns about climate justice. This study offers an assessment of the CBDR principle's relevance to increasing ambition in the climate change regime by engaging the historical contribution and responsibility aspect of differentiation. References to historical emissions and responsibility are almost erased from the

[200] See, for example, I Alogna, C Bakker & JP Gauci 'Climate Change Litigation: Global Perspectives - An Introduction' in I Alogna, C Bakker & JP Gauci (eds), *Climate Change Litigation: Global Perspectives* (2021) 1. For a critical perspective see G Dwyer 'Climate litigation: A red herring among climate mitigation tools' in B Mayer & A Zahar (eds), *Debating Climate Law* (2021)128. See also K Bouwer 'The unsexy future of climate change litigation' (2018) 30 *Journal of Environmental Law* 483.
[201] See J Peel & J Lin (note 79 above).

Paris Agreement. However, this study shows a web of interconnectedness involving the colonial antecedents of international law, historical responsibility and the justice pillar in the climate change regime's normative framework. These linkages continue to make historical responsibility crucial to achieving the climate change regime's overall goal. Researchers, policymakers and activists can build on the analysis, findings and recommendations provided in this study to reframe the discourse on differentiation and mitigation. In this way ongoing scholarship and policy dialogues on the CBDR principle and mitigation are imbued with considerations of justice that are reflective of the third world's concerns.

A historically sensitive approach is taken in Chapter 2 to explore the ways in which the CBDR principle is connected to the differences set up in the pre-colonial and colonial era to subordinate the third world. Islam and Attapatu (separately) have brought the search for deeper connections between international environmental law principles and the pre-colonial and colonial history of international law in sharper focus.[202] This study furthers the broad goal to 'examine the ways in which the North-South divide has compromised the effectiveness of international environmental law'.[203] Differentiation on the basis of one-sided criteria such as civilization, poverty and to an extent sustainability produced layers of discrimination which the CBDR principle attempts to reverse, especially regarding climate change mitigation.

The study zooms in on constructive ambiguity and examines the linguistic tools negotiators deployed to ambiguate the CBDR principle. This is done through the lens of frame theory as well as critical discourse analysis. In addition the study evaluates what impact the

[202] See MR Islam 'History of the north-south divide in international law' in S. Alam et al (eds), *International Environmental Law and the Global South* (2015). See also Atapattu (note 58 above).
[203] S Attapatu & CG Gonzalez 'The north-south divide in international environmental law: Framing the issues' in S Alam et al (eds), *International Environmental Law and the Global South* (2015) 1, 2.

ambiguation has had on climate justice by extending Gupta's analytic TWAIL approach. Gupta's third world 'GAP' approach' requires examining if the goals of developing countries in the regime are addressed; if there is a bias in arguments concerning the interpretation of the text of treaties in the regime; and if there is a pattern of inequity in the climate change regime.[204] A modified version of Gupta's GAP analysis is used to determine whether ambiguation has been useful for shaping the CBDR principle. In her article, Gupta focuses on bias emanating from scholarly arguments about interpreting climate change legal instruments.[205] However, she does not reference or point to a substantial body of literature to signal the bias she claims.[206] Although it is possible to conduct extensive literature review to assess her claim of scholarly bias against third world interests, this study does not cover such a wide scope. A more modest approach is taken whereby the 'arguments' component of Gupta's GAP analytic tool is replaced with another analytic marker – potential for change. The potential for change marker adds value to existing knowledge on assessing the climate change regime's potential for change, to advance third world concerns and address climate justice.

The study adds value to academic discourse on historical responsibility by synthesizing and merging arguments showing historical responsibility's relevance to climate justice and emerging post-growth concepts. In particular, the study considers what potential emerging theories on degrowth may have for putting historical responsibility into practice in the developed world.

[204] Gupta (note 185 above) 348-351. GAP' therefore stands for 'goals', 'arguments' and 'patterns of inequity'.
[205] Ibid 349. Gupta notes that assessing whether the arguments show a bias requires a thorough understanding of the arguments of scholars.
[206] Ibid 366-368.

The study contributes to existing knowledge on growing analyses on national and international litigation on climate-related issues. It contributes by placing the CBDR principle's initial intendment within the legal reasoning behind the selected decisions discussed in Chapter 5. The study also critiques and complements literature concerning the possibility that an ICJ opinion could be beneficial, particularly regarding the scope and application of the CBDR principle for mitigation.

1.11 Chapter Synopses

This study is divided into six chapters. This first chapter serves as the introductory chapter. As already mentioned, the study adopts an integrated literature review approach. Thus, the literature undergirding the study is mainstreamed into chapters 2 to 5. Chapter 2 explores the deeper connections between international environmental law principles and the third world's emergence in the pre-colonial and colonial history of modern international law. An argument is made that the CBDR principle is part of an attempt to reverse what Anghie calls the dynamic of difference, which characterizes the third world's emergence. With the CBDR principle set in a TWAIL-sensitive historical context, chapter 3 analyses the CBDR principle's journey through climate change negotiations. It is argued that contestations surrounding historical responsibility reveal the interest-driven positions among developed and developing countries, notably the United States of America on one side, and the BASIC group of industrializing third world countries on the other.

Chapter 4 focuses on climate justice and evaluates the impact that opposing interpretations of the CBDR principle has had on the climate change regime's justice framework. The critical analysis of the CBDR principle's metamorphosis is done by examining more directly the use of constructive ambiguity during negotiations. Chapter 4 also reviews

and synthesizes the arguments against and in support of historical responsibility and then draws connections between the calls for historical responsibility and post-growth theories. Chapter 5 takes the search for climate justice to the field of litigation. Using analysis of two selected cases, the focus is directed to the legal reasoning behind the decisions made and I assess whether the CBDR's initial intendment was a discernible factor in the outcome of the selected cases. Chapters 4 advances the argument that despite the interest driven positions, the CBDR principle's metamorphosis damages the justice pillar of the climate change regime's normative framework. It is argued that although the Paris Agreement-led regime has almost erased historical responsibility from its framing of the CBDR principle, its continued relevance is not diminished. In addition to emerging discourse on post-growth theories, notably, the concept of degrowth in developed countries, non-state actors have reignited the goal of seeking and applying justice to propel mitigation action among countries. Individuals, non-governmental organisations (NGOs) and national courts are shaping the course of climate-change litigation.

Chapter 6 concludes with a summary of the study's key findings, recommendations on how the CBDR principle can be better placed to advance the concerns of justice in the climate change regime. Chapter 6 also offers suggestions for possible future research projects.

Chapter 2

Unpacking Common but Differentiated Responsibilities: A Historical Premise

2.1 Introduction

Although all states are equal in law, they are not equal in the geo-political sense. Differentiation is a departure from formal equality among states. The pre-colonial and colonial history of international law and its connection to the establishment of the League of Nations and the United Nations draw out how differences have always existed among states. When one thinks of the concept of differentiation in international law, one can easily conclude that the socio-economic, cultural and geo-political inequalities between the industrialised countries and the less industrialised countries justify differentiation.

Scholars have adopted other approaches to unpacking the CBDR principle. For example, Stone adopts a realist view of 'common but differentiated responsibilities' and attempts to conceptualise 'differentiation' by examining three versions of differentiation.[1] Other scholars adopt a philosophical approach to uncover the underpinnings of the principle.[2] This chapter focuses on unpacking the common but differentiated responsibilities principle from a historical perspective. The aim is to examine the connections between the third world colonial antecedents of international law and the common but differentiated responsibility (CBDR) principle's emergence in international environmental law and the climate change regime.

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[1] C Stone 'Common but differentiated responsibilities in international law' (2004) 92 *American Journal of International Law* 276, 300. Stone concludes that the common but differentiated responsibilities principle is only meaningful if it is proven to be efficient. For a critique of Stone's views see W Scholtz 'Different countries, one environment: A critical southern discourse on the common but differentiated responsibilities principle' (2008) *South African Yearbook of International Law* 113.

[2] P Cullet 'Differential treatment in international law: Towards a new paradigm of inter-state relations' (1999) 10 *European Journal of International Law* 549 (discussing differentiation as an offshoot of substantive equality). See also L Rajamani *Differential Treatment in International Environmental Law* (2006), Chapter 5 (discussing the doctrinal basis for differential treatment in international environmental law).

The chapter draws on Anghie's 'dynamic of difference' framework, as used in presenting an alternative history of the centrality of the pre-colonial and colonial antecedents of modern international law.[3] The dynamic of difference framework offers a framing lens for unpacking the common but differentiated responsibilities principle that situates the concept of 'differentiation' within the historical antecedents of international law.[4] I draw from Third World Approaches to International Law (TWAIL) scholarship for its analysis of the civilisation mission through which European powers carried out colonisation. The colonisation mission directly engages the role of Eurocentrism in creating the so-called universal international law, from which international environmental law has developed.[5] I then conclude by situating the CBDR principle in the context of the layers of dividing factors that international law has placed between the colonisers and the colonised.

2.2 Origin of Differences in International Law: Deploying the Difference Dynamic

The general idea of differentiation has been at the centre of the world events which helped to establish the body of legal rules now known as international law. The idea that Europeans and their culture were different from and superior to other people and their way of life drove the European powers to undertake the civilisation mission.[6] This section presents the concept of civilisation as the foundation and justification for the colonisation of non-Europeans states and peoples. It presents positivist jurisprudence as the propeller of civilisation and

[3] A Anghie *Imperialism, Sovereignty and the Making of International Law* (2005), Chapter 1. Anghie argues that by differentiating between the cultural systems of European and non European societies, the European powers created a dynamic of difference. The dynamic of difference then enabled the civilization mission and eventually, colonisation.
[4] By way of distinguishing Anghie's dynamic of difference from my extension of the concept, I use the term difference dynamic.
[5] A Anghie 'Finding the peripheries: Sovereignty and colonialism in nineteenth-century international law' (1999) 40 *Harvard International Law Journal* 1, 2.
[6] Ibid 5.

colonialism. The aim is to examine how difference dynamic permeated the post-colonial concept of development.

2.2.1 The Civilisation of the 'Uncivilised' and the Emergence of Modern International Law

International law has developed in many phases.[7] Initially, international law developed from the inter-relations of communities, tribes, peoples and societies.[8] However, the end of the Napoleonic wars ushered in a new international order based on the balance of power in Europe.[9] By this time, ancient European philosophers had established the natural law theory.[10] Natural law philosophers argue that natural law cannot be restricted to any nation or group but is relevant worldwide because the ideas and precepts of the 'law of nature' are rooted in human intelligence.[11] In the eighteenth and nineteenth centuries, the European jurists' natural law philosophy gave way to positivism and the origins of what jurists call 'modern international law'.[12] Positivists viewed international law as a voluntary law based on the will and consent of sovereign states expressed through the practice of states, treaties and the relations between European states.[13] The positivist idea of international law aided a Eurocentric view of international law which treated treaties between European states as representing international law, but excluded non-European norm-making processes.[14] In this way, European states

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[7] MN Shaw *International Law* 6 ed (2008) 13-42. Shaw provides a commentary of the development of international law from its early origins, through the middle ages and the Renaissance, to the development of modern international law as it prevails in current times.
[8] Ibid 14.
[9] Ibid 27. The Napoleonic wars are a series of wars which occurred between 1803 and 1815 between the French empire and other European powers, when Napoleon Bonaparte was the French Emperor. For a general historical account, see G Bruum *Europe and the French Imperium* (1938) <https://ia601601.us.archive.org/0/items/in.ernet.dli.2015.183653/2015.183653.Europe-And-The-French-Imperium-1799-1814_text.pdf >.
[10] Anghie (note 5 above) 11, 12.
[11] See MDA Freeman *Lloyd's Introduction to Jurisprudence* (2014) 75-76. Freeman notes that the natural law theory lends itself to several meanings. However, a common theme that runs through different conceptions of natural is that there are certain objective moral principles which one can discover through reasoning.
[12] J Crawford *Brownlie's Principles of International Law* 8 ed (2012) 9-10.
[13] AA Yusuf *Pan-Africanism and International Law* (2014) 57.
[14] Ibid 57.

became the self-appointed determinants of entities they welcomed into the 'family of nations'.[15]

The concept of civilisation was the primary gambit that the European powers employed to exclude non-Europeans from the 'family of nations'.[16] European societies perceived that their legal, cultural and social values were superior to non-European ways of living.[17] In their estimation different legal and cultural systems and the people that used them were 'uncivilised'.[18] Thus, civilisation became the yardstick by which the European powers categorised the peoples of the world into civilised and barbaric or savage peoples.[19] It paved the way for European powers to justify conquests, genocide and slavery on the basis that non-European peoples were 'uncivilised' and in need of 'the good work of civilisation'.[20] More importantly, the civilisation mission opened the door for European powers to establish political

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[15] JL Dunoff, SR Ratner & D Wippman *International Law Norms, Actors, Process: A Problem-Oriented Approach* 3 ed (2010) 8 (citing excerpts from L Oppenheim *Internaitonal Law (1905).*

[16] B Bowden 'The colonial origins of international law : European expansion and the classical standard of civilisation' (2005) 7 *Journal of the History of International Law* 1 (discussing the emergence of international law from European law and the perceived superiority of European values).

[17] See LO Tarazona 'The Civilized and the uncivilized' in B Fassbender & A Peters (eds), *The Oxford Handbook of the History of International Law* (2012). See also J Sloan 'Civilized Nations' *Max-Planck Encyclopeadia of Public International Law* (2011). Sloan notes a difficulty of finding a definition for civilization. However, he provides two distinguishing features which writers have used to differentiate between civilized and uncivilized people: '1) civilized nations adhere to basic legal norms (national and international) and have governmental institutions to ensure this; and 2) civilized nations are populated by individuals who have advanced to the point where they are educated and self-aware enough to look beyond their immediate, base needs and desires.'

[18] See A Anghie 'The evolution of international law: Colonial and postcolonial realities' (2006) 27 *Third World Quarterly* 739, 742. Contrary to these perceptions, there is ample documentary evidence that non-European societies engaged in sophisticated trading and had effective political and legal systems, prior to the arrival of European explorers. See, for example RP Anand 'Role of the "new"Asian-African countries in the present international legal order' (1962) 56 *American Journal of International Law* 383, 386 (noting that when the Western powers arrived in India 'they did not find themselves in an area of lawlessness': they encountered well established systems of public and private law). See also K Nkrumah *Africa Must Unite* (1963) 4. Nkrumah recounts in the words of Basil Davidson the kind of people and cities the Europeans found when they discovered Africa: 'They anchored in havens that were thick with ocean shipping… and they saw that they had stumbled on a world of commerce even larger, and perhaps wealthier, than anything that Europe knew.'

[19] A Heraclides & A Dialla 'Eurocentrism, "Civilization" and the "Barbarians"' in *Humanitarian Intervention in the Long Nineteenth Century: Setting the Precedent* (2015) 35 (discussing the writings of many publicists and international law jurists of the nineteenth century which show the dichotomy they put between civilized European people and others who were either 'barbarians' or 'savages').

[20] MA Martinez 'Special Rapporteur's First Progress Report on Study on Treaties, Agreements and Other Constrictive Arrangements between States and Indigenous Populations (1992) E/CN.4/Sub.2/1992/32' para 123, <https://digitallibrary.un.org/record/226004?ln=en>.

and economic structures which would ultimately benefit them. Thus, did imperialism spread through Africa and Asia and the Americas.[21] Colonialism was the vehicle for establishing imperialism. [22]

Colonialism and the imperialist structure it established were also necessary tools for industrialisation. The cotton and iron industries which served as the flagship of the industrial revolution in Britain, required cheap and reliable energy sources. Coal was at the heart of this wave of industrialisation.[23] The second wave of industrialisation resulted in advances in chemicals, pharmaceuticals, and electronics, expanding coal production and introducing oil and gas into the energy sector.[24] Industrialisation propelled the expansion of global trade.[25] But, while industrialisation thrived and the colonial powers advanced their economies, they stifled industrialisation and trade involving their colonies by imposing high tariffs on raw materials emanating from their colonies and forcibly importing goods into their colonies.[26]

With time, the colonial powers established and controlled the global market. They set up an international market that under-priced raw materials, the mainstay of colonies'

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[21] Wright defines imperialism as 'the deliberate act or advocacy of extending or maintaining, for the primary purpose of aggrandizement, a state's direct or indirect political control over any other inhabited territory which involves treating the inhabitants inequitably in comparison with the norm for its own citizens.' See HM Wright ' "Imperialism": The word and its meaning' (1967) 34 *Social Research* 660, 670.

[22] See JT Gathii 'Imperialism, colonialism, and international law' (2007) 54 *Buffalo Law Review* 1013, 1014. I adopt Gathii's definition of colonialism as 'the territorial annexation and occupation of non-European territories by European states'.

[23] G Lawson 'The Rise of Modern International Order' in J Baylis et al (eds), *The Globalization of World Politics: An Introduction to International Relations* 7 ed (2017) 37, 43.

[24] Ibid.

[25] Ibid.

[26] Ibid. Industrialization is directly linked to the over-concentration of GHG in the atmosphere because the major source of carbon dioxide (a major GHG) is the burning of fossil fuels – coal, oil and gas. Four fifths of global carbon emissions result from energy production, industrial processes and transport: See M Maslin *Climate Change: A Very Short Introduction* (2014) 7. Because industrialization was one-sided, only the colonial powers (and later their allies) got the economic benefits of industrialization in the form of economic growth, technological advancement and social well-being. Industrialization has come to define positions on the relevance of the CBDR principle for climate change mitigation. See Chapter 3 and Chapter 4 below.

economies.[27] Then, they placed high prices on the products from their industries and, riding on the 'civilisation mission', they foisted their products on their colonies.[28] This scheme created a situation where the colonies exhausted their limited financial resources to purchase goods from their colonial masters' industries. This compelled the colonies to deplete and mortgage their raw materials to support the colonial economic model.[29] Colonies could not refine their raw natural resources due to a lack of technology. The colonial powers protected their infant industries and deliberately withheld the outflow of superior technologies.[30] In this way, the colonial powers created and benefitted from an inequitable and unbalanced global market and gave themselves an early start to economic development.[31]

European powers established and applied several Eurocentric legal principles at the height of colonisation and passed them off as having a universal effect.[32] Indeed, inter-state relations existed outside of Europe. Long before colonisation, there were international legal principles that governed these inter-relations among non-European states.[33] However, because of the power that the European nations wielded in military and economic terms, they succeeded in creating the dominance which the European public law required to appear 'universal'.[34] By

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[27] MR Islam 'History of the north-south divide in international law' in S Alam et al (eds), *International Environmental Law and the Global South* (2015) 23, 30.
[28] Ibid.
[29] Ibid.
[30] '… [A]lmost all NDCs [now-developed countries] had adopted some form of infant industry promotion strategy' when they were in the early stages of development: HJ Chang *Kicking Away at the Ladder: Development Strategy in Historical Perpective* (2002) 59. See also Lawson (note 43 above) 43.; S Ocheni & BC Nwankwo 'Analysis of colonialism and its impact in Africa' (2012) 8 *Cross-Cultural Comminication* 46, 50 (explaning the schemes the European powers used to subdue the African people and create an inferior status for their natural resources).
[31] HK Mohajan 'The first industrial revolution: Creation of a new global human era' (2019) 5 *Journal of* S*ocial Sciences and Humanities* 377, 390.
[32] Anghie (note 18 above) 744-746. See also FN Lone 'Cross-fertilization of westphalian approaches to international law: Third world studies and a new era of international law scholarship' (2020) 34 *Emory International Law Review* 955, 983.
[33] Yusuf (note 13 above) 58-59 (discussing examples of other legal structures in China and the Islamic world)
[34] M Koskenniemi 'Histories of international law: Dealing with eurocentrism' (2011) 19 *Rechtsgeschichte: Zeitschrift des Max-Planck-Instituts für europäische Rechtsgeschichte; Debatte, Recherche, Kritik* 152, 155.

the nineteenth century, modern international law was recognised as a distinct discipline but reserved only for 'civilised states' – a direct result of the proliferation of positivist jurisprudence.[35] European states perceived themselves to be civilised and their public law to apply to their relations with non-European states. Non-European states could only deal with the European states if they consented to terms which the European powers laid down unilaterally.[36]

In particular, Eurocentric concepts largely influenced the requirements for statehood, requirements that international law continues to recognise. The concept of sovereignty – the authority of a state to govern itself, have control over its territory and act on the international level– largely derives from Eurocentric notions of governance which the European powers used to dominate non-Europeans.[37] According to the writings of early European jurists, two features determined sovereignty. Firstly, there had to be a government that enjoyed obedience from a majority of the people. Secondly, for a group of people with a government to qualify as a subject of international law, it had to have an amount of civilisation and possess a fixed territory.[38] If a group of people, defined by government and territory, were not civilised, their territory was considered no man's land, and the people were objects of international law, not subjects.[39] This notion of sovereignty bred several doctrines which justified conquest,

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[35] Heraclides & Dialla (note 19 above) 33-38.
[36] Shaw (note 7) 27. See also L Oppenheim *International Law* (1905) 30-31, Heraclides & Dialla (note 19 above) (recounting military attacks by European powers on China, Japan and the Ottoman Empire. These entities had resisted colonization, but succumbed to invasion and later, traded with the European powers, often based on unequal treaties).
[37] See Crawford (note 12) 448. Crawford notes the difficulty of defining sovereignty and discusses the common features of sovereignty.
[38] Yusuf (note 13 above) 54 (quoting views of nineteenth century European jurists on sovereignty).
[39] Ibid. See also Anghie (note 3 above). In chapter 3 of his book, Anghie argues that the European powers created a 'dynamic of difference' which enabled them to justify, first civilization, then the theory of constitutive recognition of states and finally, colonization. He argues that the dynamic of difference created two different notions of sovereignty – one which applied to the European states and one which applied to non-European states and which carried seeds of subordination and economic dependence. I draw from his concept of the dynamic of difference to establish the historical premise of the common but differentiated responsibilities principle towards the end of this chapter.

dispossession and discrimination.[40] The concept of 'unoccupied land', 'undiscovered' 'no-man's land' formed the basis for acquiring territory, a prerequisite for statehood.[41]

Although international law emerged as a wholly distinct discipline, clothed with seeming universality, the reality is that the European powers infused Eurocentrism into international law from the start.[42] The doctrines of discovery, conquest and the use of onerous treaties were mainstays in nineteenth-century international law.[43] They enabled European states to forcibly acquire territories in present-day Africa, Asia, and Latin America.[44] As self-appointed determinants of membership of the family of nations, European states used the constitutive theory of recognition to determine which states qualified for statehood.[45] If there were states they did not recognise as possessing statehood criteria those states were considered outsiders.[46] The rest of the world became spectators, as the European powers entrenched the public law of Europe and established legal principles that would serve their interests long after the civilisation mission and colonisation ended. [47]

[40] Anghie (note 5 above) 50, 51.
[41] Territory is considered the most basic feature of statehood: Shaw (note 7 above) 487.
[42] Anghie (note 18 above) 739, 740.
[43] Ibid 740.
[44] A Anghie 'Colonialism and the birth of international institutions: Sovereignty, economy and the mandate system of the League of Nations' (2002) 34 *NYU Journal of International Law & Politics* 513, 565-566.
[45] Dunoff, Ratner & Wippman (note 15 above) 138.The constitutive theory of recognition posits that a claimant to statehood is not a state until other states have recognized it, notwithstanding that it has met the objective criteria for statehood.
[46] Yusuf (note 13 above) 58, 62, 63 (quoting the writings of TE Holland and noting the role of the religion in determining the members of the international community. Although states such as China, Japan and Turkey existed in the pre-colonial era, European states considered these states as outsiders and did not admit them into the 'exclusive club' because on their non-Christian civilization).
[47] Anghie (note 18 above) 740.

2.2.2 Decolonisation and the Quest for Economic Independence: Permanent Sovereignty over Natural Resources and the New International Economic Order

Decolonisation was the means through which the colonial powers conferred sovereignty and statehood on their former colonies and gave them personality in international law.[48] Newly-formed states became subjects of international law, capable of partaking in international relations.[49] The United Nations Charter bestowed the features of statehood such as equality, political independence and territorial integrity on states.[50] Notwithstanding the United Nations Charter's safeguards, many aspects of colonisation remained with the decolonised people. Political independence did not undo colonisation.[51] So much of the history and identity of non-European communities had already been rewritten and recast in permanence.[52]

Meanwhile, the colonial powers and their allies had emerged from the second world war with more advanced economies than the newly formed states.[53] This chapter cannot fully

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[48] In the political context, decolonisation refers to the political process that led to the creation of self-governing states after the second world war. R Khan 'Decolonization' *Max-Planck Encyclopeadias of International Law* (2011), para 1.

[49] Dunoff, Ratner & Wipman (note 15 above) 112 (naming decolonisation as one of the processes in which states have emerged).

[50] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) (1945) 59 Stat. 1031 (UN Charter) art 1.

[51] MW Mutua 'Why redraw the map of africa: A moral and legal inquiry' (1995) 16 *Michigan Journal of International Law* 1113,1116. Mutua argues of African decolonisation that at independence, the West only decolonized the state, but not the African peoples, pointing to the fact that the colonizers left behind cultural, legal and social structures that were alien to the African peoples and which they struggled to make their own.

[52] Ibid 1126-1130. For example, during the 'Scramble for Africa' of 1835 Britain, France, Germany and the Ottoman Empire redrew the map of Africa, changed geographical boundaries and disrupted tribal and community ties for their ultimate benefit, and for good. Mutua also notes that African states and their borders become artificial and did not express the efforts the pre-colonial African communities made to foster harmony despite their heterogeneous nature of their lifestyles. The colonial powers' unilateral act of permanent border alteration via treaties gained legal acceptance as international custom. Consequently, international tribunals have applied the principle that borders, once established cannot be changed (except by mutual agreement of the states involved in the territorial dispute). See for example Case Concerning the Frontier Dispute (Burkina Faso/Mali) 1986 ICJ 554, para 20; the principle of the immutability of established borders is considered a general principle of international law.

[53] Lawson (note 43 above) 45,46.

capture even a summary of post-second world war economic expansion. However, it suffices to mention a few key points and events to advance my arguments. The period immediately after the second world war, described as 'the golden age of capitalism' because the economies in Western Europe, the Soviet Union, the United States and Japan experienced rapid industrialisation and economic prosperity.[54] After the fall of the Soviet Union, France, Germany, the United Kingdom (UK), Canada, Japan and the United States of America (US) emerged as the seven largest economies in the world, earning the name the 'Group of Seven' (G7).[55] Together, the G7 built the international economic system on three pillar institutions: the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (the World Bank) and the General Agreement on Tariffs and Trade (GATT).[56]

The prominence of the World Bank and IMF in the third world post-colonial era stands out. In 1948, the World Bank introduced poverty as a means of categorising states. The World Bank defined poverty in economic terms.[57] This categorisation tied in well with the prevailing notion, championed by then US president Truman, that many people in newly-formed countries

[54] United Nations Secretariat Department of Economic and Social Affairs (UNDESA) 'World Economic and Social Survey: Reflecting on seventy years of development policy' (2017) < https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/WESS_2017-FullReport.pdf > (UN 2017 WESS Report).

[55] T Evans & C Thomas 'Poverty, hunger and development' in J Baylis et al (eds), *The Globalization of World Politics: An Introduction to International Relations* 7 ed (2017) 464, 472.

[56] The three institutions each played a significant role in shaping the international and domestic economic fortunes of the newly formed states. The World Bank and the IMF were the financial wing of the economic structure, while the GATT (which later became the World Trade Organization – WTO) promoted the concept of liberalized trade among nations. Through the Marshall Plan the US financed most of the post-war reconstruction of Europe: UN (2017 WESS Report) 24, 471.

[57] Any country whose annual per capita income was less than US 100 dollars was poor. See A Escobar *Encountering Development: The Making and Unmaking of the Third World* (1995) 23-24. Presently, the World measures international poverty by using an international monetary poverty line. As of 2017 the poverty line is set to almost 2 US dollars per person: World Bank Commission on Global Poverty 'Monitoring Global Poverty' (2017) xv, 1-2 < http://documents.worldbank.org/curated/en/353781479304286720/pdf/110040-REVISED-PUBLIC.pdf>.

were hunger-stricken, had a primitive economic life and needed development.[58] As Hickel recounts:

> 'Truman's idea of development was fit for the times. 'The dust was settling after the Second World War, European imperialism was collapsing and the world was beginning to take shape as a collection of equal and independent nations. The only problem was that in reality they were not equal at all: there were vast differences between them in terms of power and wealth, with the countries of the global North enjoying a very high quality of life while the global South – the majority of the world's population – was mired in debilitating poverty… Point Four offered them a compelling narrative. The rich countries of Europe and North America were 'developed'. They were ahead on the Great Arrow of Progress. They were doing better because they were better – they were smarter, more innovative and harder working. They had better values, better institutions and better technology. By contrast, the countries of the global South were poor because they hadn't yet figured out the right values and policies yet. They were still behind, 'underdeveloped' and struggling to catch up… In other words, Point Four explained the existence of global inequality and offered a solution to it in one satisfying stroke. And for this reason it wasn't long before it was picked up by the governments of Western Europe as well.'[59]

Thus, the World Bank labelled most newly-formed countries as poor and championed the neoliberal economic ideals that touted the free capitalist market economy as the solution to third world poverty.[60] The point here is not to glorify poverty. The point is that the World Bank's idea of poverty or lack, construed so narrowly in terms of monetary gains, effectively disregarded all the other ways in which people's well-being could be measured and assessed.[61]

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[58] Ibid 3 (quoting portions of President Truman's inaugural speech, especially Point Four, regarding development).
[59] See J Hickel *The Divide: A Brief Guide to Global Inequality and Its Solutions* (Ebook Version) (2017) 21-23.
[60] T Evans & C Thomas (note 55 above) 472. See also Hickel (note 59) 48, 49.
[61] See RE Gordon & JH Sylvester 'Deconstructing development' (2004) 22 *Wisconsin International Law Journal* 1,15 note 50 (citing Shrestha's account of life in his home country, Nepal, where the villagers (including his family members) were considered poor by World Bank standards. Nevertheless, from Shrestha's account, the authors note that the Nepalese people had a strong sense of community and responsibility and did not see their lack of money as diminishing their self-sufficiency). See also S Zubiri 'The key to Bhutan's happiness' BBC Travel (21 September 2021) <https://www.bbc.com/travel/article/20210920-the-key-to-bhutans-happiness>. (reporting that the Kingdom of Bhutan measures national development in terms of 'Gross National Happiness' (GNH). GNH rejects the traditional economic quantifications. Rather, 'Bhutan assesses its country's overall

Arguably, it is the insatiable quest for more economic gains that has driven the world to over-exploitation of the earth's resources.[62] Climate change is one of the consequences of over-consumption and over-exploitation of the environment for economic power.[63]

The World Bank's labelling spawned various other labels, all co-joined by the idea that some countries were impoverished, needed development, and that the economic policies of wealthier, developed countries held the answer to the woes of less developed countries.[64] Thus, the developed countries of the First World represent the global North and the developing countries of the Third World represent the global South.[65] As third world scholars acknowledge, these terms do not always reflect the heterogeneity among the groupings they define. However, the common history of political and economic dominance continues to unite Asia, Africa and Latin America.[66] Admittedly, there are legitimate concerns that North/South, developed/developing country, Western/Third World labels tend to over-simplify complex issues.[67] Despite the risk of over-simplifying complex issues, these terms serve to distinguish between the states that shaped and controlled the colonisation mission and those that bore the economic and social weight of colonisation. To a large extent, these terms map onto the coloniser/colonised dichotomies that have featured prominently in shaping the contestations in during climate change negotiations.[68]

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wellbeing on the basis of sustainable and equitable socio-economic development; environmental conservation; preservation and promotion of culture; and good governance.').

[62] R Gordon 'Unsustainable development' in S Alam et al (eds), *International Environmental Law and the Global South* (2015) 50, 70-71.

[63] Ibid 70.

[64] Hickel (note 59) 40, 41.

[65] K Mickelson 'Rhetoric and rage:Third world voices in international legal discourse' (1998) 16 *Wisconsin International Law Jounal* 353, 356.

[66] S Attapatu & CG Gonzalez 'The north-south divide in international environmental law: Framing the issues' in S Alam et al (eds), *International Environmental Law and the Global South* (2015) 1, 2.

[67] See for example W Scholtz 'Equity as the basis for a future international climate change agreement: Between pragmatisc panacea and idealistic impediment. The optimisation of the CBDR principle via realism' (2009) 42 *Comparative & International Law Journal of Southern Africa* 168, 180 note 50.

[68] See chapter 3 below.

The World Bank's model of development relied on westernised development theories. Modernisation was a central theme for most development theories.[69] Traditional economic, social and political structures were deemed the markers for underdevelopment, and modernity (defined in terms of European-American ideals) in economic, social and political structures were the hallmarks of development.[70] Ultimately, the modernisation theory failed to produce the promised result.[71] Next, the 'law and development' theory proposed a solution to third world underdevelopment. The 'law and development' theory built on the modernisation theory and held that adopting "good policies" – such as trade liberalisation and investment policies and conservative macro-economic policy – would provide a pathway for development by establishing the basic structure for a free market system.[72] Eventually, the law and development theory, too, failed.[73] Modernism and the law and development theory left a lasting impression that third-world countries would forever fall behind as long as their economic structures did not match the Western economic structures.[74] Yet, contrary to mainstream economic history, developed countries used nearly none of the policies they urged on developing countries at the time of their early development.[75]

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[69] N Phillips 'Global political economy' in J Baylis et al (eds), in *The Globalization of World Politics: An Introduction to International Relations* 7 ed (2017) 258.

[70] Escobar (note 57 above) 38. See also KE Davis & MJ Trebilcock 'The relationship between law and development: Optimists versus skeptics' (2008) 56 *American Journal of Comparative Law* 895, 900.

[71] Gordon & Sylvester (note 61 above) 18. For a critique of the modernization theory see TM Dunn 'The Failings of Liberal Modernisation Theory' (2013) < https://www.e-ir.info/pdf/39716>.

[72] HJ Chang 'Kicking away the ladder: Infant industry promotion in historical perspective' (2003) 31 *Oxford Development Studies* 21, 21. See also Gordon & Sylvester (note 61above) 18-19.

[73] Gordon & Sylvester (note 61 above) 19. Subsequently, third world scholars espoused the dependency theory to rival development theories in the conceptualization of development. See, generally, FG Snyder 'Law and development in the light of the dependency theory' (1980) 14 *Law & Society Review* 723.

[74] Gordon & Sylvester (note 61 above) 77. This rhetoric around the concept of development is central to North-South tensions surrounding climate change mitigation through the reduction of emissions. See Chapter 3 below. The quest for economic power and all its trappings is the propeller of economic advancement in the South. Developing countries assert that their quest for economic advancement requires that they have equitable access to sustainable means of development, so that their GHG emissions can peak quickly, and then fall. See chapter 3 below.

[75] Chang (note 72 above) 21. '… contrary to popular belief, Britain's technological lead that enabled this shift to a free-trade regime had been "behind high and long-lasting tariff barriers" ….': HJ Chang, 'Kicking away the

Meanwhile, a massive debt crisis engulfed the third world.[76] Developing countries became heavily indebted, and the World Bank and the IMF structural adjustment programs (SAPs) became the preferred mode of economic intervention.[77] But SAPs were often conditioned on onerous political and economic terms[78] and curtailed third-world countries' ability to fund significant, yet crucial, social interventions for their people.[79] It has been argued that many of the factors that led to third world debt are attributable to internal circumstances – dictatorships, corruption and tribalism – devoid of western interference. [80] While one cannot discount these factors entirely, it is crucial to point out that Western countries ultimately

ladder: An unofficial history of capitalism, especially in Britain and the United States' (2002) 45 *Challenge* 63, 77 (quoting P Bairoch *Economics and World History - Myths and Paradoxes* (1993)). During the nineteenth century, the United States fiercely supported protectionism and encouraged the intellectual development on infant industry protection. The United States government heavily invested in and protected their technology, pharmaceutical and biotechnology industries. See Chang (note 75 above) 88.

[76] The debt crisis resulted from bad borrowing and lending practices on the part of third world countries and multinational corporations and banks respectively, as well as major shocks to the global economy. See R Dornbusch & S Fischer 'Third world debt' (1986) 234 *Science* 836. See also JI Levinson 'A perspective on the debt crisis' (1989) 4 *American University International Law Review* 489 (analysing the causes of the debt crisis generally).

[77] Structural adjustment programmes(hereinafter SAPs) are programmes the IMF designed to enforce austerity measures in third world countries, which were aimed to reduce their debt stock. Although they may differ in content, some features cut across: currency devaluation, the removal/reduction of the state from the workings of the economy, the elimination of subsidies in an attempt to reduce expenditures, and trade liberalization: Phillips (note 69 above) 259, JB Riddell 'Things fall apart again: Structural adjustment programmes in Sub-Saharan Africa' (1992) 30 *Journal of Modern African Studies* 53.

[78] Conditionalities were a primary feature of IMF/World Bank loan facilities. Conditionality refers to an arrangement attached to a loan, whereby the creditor ties disbursement of a loan to certain conditions regarding the economic policies which the debtor country intends to pursue. See MC Tsai 'Globalization and conditionality: Two sides of the sovereignty coin' (2000) 31 *Law & Policy in International Business* 1317, 1321 note 29 (quoting P Mosley 'A Theory of Conditionality in *Development Finance and Policy Reform (P Mosley ed) (1992)* 129, 129).

[79] A Anghie 'Time present and time past: Globalization, international financial institutions, and the third world' (2000) 32 *NYU Journal of International Law & Politics* 243, 255 - 258. The IMF and World Bank demanded contradictory results from third world countries which ultimately played to the economic interests of Western countries, the financiers of the IMF and the World Bank. On one hand, indebted third world countries were required to embrace political and economic reforms would enable conditions for free trade, globalization and foreign direct investments – conditions which would ultimately inure to the benefit of the capital and technology controlling countries. On the other hand, third countries were required to come up with sources of funding to finance social interventions such as affordable housing, education and subsidized health care which would improve their people's living conditions: Ibid 1326.

[80] For example, see P Englebert & J Ron 'Primary commodities and war: Congo-Brazzaville's ambivalent resource curse' (2004) 37 *Comparative Politics* 61 (opining that the 'natural resource curse' significantly accounted for the civil war which broke out in Congo-Braziville after its independence).

profited and continue to profit from these factors. In some situations, they even instigated the internal conditions to further their ideological interests.[81]

The circumstances analysed above occurred over decades and overlapped in their impact on third world countries.[82] However, the result was that developing countries realised that while their former colonial masters had used the benefits of industrialisation to enrich themselves, they had been reduced to mere producers of under-priced raw materials for factories in the industrialised countries.[83] Despite the political and economic diversity surrounding their identities, developing countries banded together under the aegis of the United Nations General Assembly to demand a New International Economic Order (NIEO) and a Programme of Action on the Establishment of a New International Economic Order.[84]

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[81] There is substantial literature which places former colonial masters, the US, and their associated multinational corporations at the centre of numerous civil wars, at the height of the cold war. In some cases, using third world political leaders as pawns in the cold war era, the colonial powers sponsored civil unrest as part of the broader goal of defeating communism. The collateral benefit was that they were able to exploit and monopolize the production and export of primary commodities with due compensation or other consequence. See P Orogun '"Blood diamonds" and Africa's armed conflicts in the post-cold war era' (2004) 166 *World Affairs* 151 (generally discussing the role of multinational corporations and the quest to feed European markets regarding civil wars in Africa and situating this in context of the larger Western anti-communism agenda).; CW Mullins & DL Rothe 'Gold, diamonds and blood: International state-corporate crime in the Democratic Republic of the Congo' (2008) 11 *Contemporary Justice Review* 81 (specifically examining the civil war in the Democratic Republic of Congo with reference to the role of multinational corporations in fuelling the conflict for their benefit.; E Quaidoo 'The United States and the overthrow of Kwame Nkrumah' (Masters Thesis, Fort Hays State University 2010) (analyzing the overthrow of Ghana's first Black President, Kwame Nkrumah, and concluding that the United States was instrumental in his overthrow). The cold war represents a struggle between the US and the Soviet Union regarding the domestic political regimes in third world countries. The US favoured capitalism and the Soviet Union, communism. See SD Krasner 'The hole in the whole: Sovereignty, shared sovereignty, and international law ' (2004) 25 *Michigan Journal of International Law* 1075, 1079-80. See also T Barkawi 'War and world politics' in J Baylis, S Smith & P Owens (eds), *The Globalization of World Politics: An Introduction to International RelationsGlobalization* 7 ed (2017) 233. See also Hickel (note 59 above) 411.

[82] Islam (note 27 above) 43-47.

[83] A Akinsanya & A Davies 'Third world quest for a new international economic order: An overview' (1984) 33 *International & Comparative Law Quarterly* 208, 209. Third world scholars propounded the dependency theory which reconceptualized third world underdevelopment as the direct result of international economic structure that kept third world dependent upon and dominated by developed countries: T Smith 'The underdevelopment of development literature: The case of dependency theory' (1979) 31 *World Politics* 247, 249. Smith writes:'According to the best-known exponents of this perspective, the sovereign states of the South have long been dependent for an evolving mixture of technology, financing, markets, and basic imports on the international economic system dominated by the Northern capitalist powers (including Japan). These less developed countries may be called "hooked": they cannot exist without their dependence, but they also cannot exist with it …'.

[84] E McWhinney 'The international law making process and the new international economic order'(1976) *Canadian Yearbook of International Law* 57, 61-62.

Through the NIEO, developing countries hoped to address the effects of neo-colonialism by proposing a set of policies and principles regarding foreign investment and nationalisation, fair trade, transfer of financial and technological resources to developing countries, and environmental protection, among others.[85] Developing countries also proposed the Charter of Economic Rights and Duties of States (CERDS).[86] The exploitation of natural resources in the third world continued after decolonization because of pre-colonial concessions granted to transnational corporations domiciled in the Western countries. The concessions were often based on onerous commercial arrangements which gave the concessions holders unrestricted access to natural resources under the concession.[87] By introducing the CERDS as a product of international law, developing countries sought to legitimise their call for economic equality beyond the political rhetoric that the Declaration of the NIEO provided.[88]

Developing countries recognised and agreed that permanent sovereignty over natural resources (PSNR) and the restructuring of the global trading system were essential to a new economic order.[89] Third world countries pushed for a declaration to recognise the right of permanent sovereignty over natural resources (PSNR) in international law, to assert their sovereignty over natural resources within their territory.[90] They asserted that the right to nationalise or expropriate foreign investments to extract their natural resources flows from the

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[85] Declaration on the Establishment of a New International Economic Order, UNGA Res 3201 (SC-VI) (1 May 1974) (NIEO Declaration). See also A Anghie 'Legal aspects of the new international economic order'(2015) 6 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 145,146-147.
[86] Charter of Economic Rights and Duties of States (CERDS) (adopted 12 December 1974 by UNGA Res 3281(XXVIII).
[87] Gordon & Sylvester (note 61 above) 55, note 251. See also Islam (note 27 above) 30.
[88] Akinsanya & Davies (note 83 above) 213.
[89] Concerning PSNR four issues concerned third world countries: the unbridled exploitation of raw natural resources of a state by companies or persons who are nationals of the Western countries, expropriation, nationalisation and other acts of taking over the foreign investments made into the natural resources; compensation for the acts of taking; and dispute settlement resulting from issues regarding compensation: KN Gess 'Permanent sovereignty over natural resources: An analytical review of the United Nations Declaration and its genesis' (1964) 13 *International & Comparative Law Quarterly* 398, 398.
[90] Ibid.

right of PSNR.[91] Consequently, on compensation for expropriation, third-world countries contended that national law was the appropriate forum for determining the quantum of compensation and resolving the disputes on compensation.[92] PSNR ties into later tensions over GHG emissions and economic development. Developing countries point to their sovereign right over natural resources and argue that they ought to have a free hand in deciding how to exploit their natural resources (including coal, oil, gas and forest reserves, which are directly tied to GHG emissions) for their economic development.[93]

Developed countries resisted the call for an NIEO and opposed establishing the CERDS in the body of international law. Much of the opposition from developed countries centred on Article 2 of the CERDS, which favoured the national treatment principle for compensation after the expropriation of foreign direct investment.[94] Developed countries counter-argued that expropriating states were obliged to follow internationally accepted standards for compensation. [95] By extension, they argued that international arbiters should determine any disputes arising. Developed countries were concerned that developing countries would not treat

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[91] Ibid.

[92] Developing countries asserted that compensation should be 'appropriate, economically contextual and historically sensitive and determinable by national law.' See M Salomon 'From NIEO to now and the unfinishable story of economic justice' (2013) 62 *International & Comparative Law Quarterly* 31, 39. This 'national treatment rule was known as the Calvo Doctrine, which developed from Latin America. The Latin American principle of the equality of nationals and aliens emerged as a reaction to the abusive exercise of the right of diplomatic protection based on the westernized idea of 'international minimum standard'. The Calvo doctrine favoured non-preferential treatment under which foreign nationals or companies could not claim any greater measure of protection than nationals. Article 2 of the NIEO Declaration reflects the national treatment standard. See FV Garcia-Amador 'The proposed new international economic order: A new approach to the law governing nationalization and compensation' (1980) 12 *University of Miami Inter-American Law Review* 1, 40-43.

[93] See M Jakob et al 'The future of coal in a carbon-constrained climate' (2020) 10 *Nature Climate Change* 704, 704 (noting that although coal mining will decline in the developed countries, the demand for coal is likely to rise in China, other Asian countries and possibly, Africa).

[94] CERDS art 2. Article 2 enshrines the right of permanent sovereignty over natural resources. Among other things, it gives nationalizing states the full authority over foreign investment within their jurisdiction, power to determine compensation for expropriated property in accordance with national laws.

[95] In the words of a former US Secretary of State '[u]nder every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment therefor': KV Raman 'Transnational corporations, international law, and the new international economic order' (1978) 6 *Syracuse Journal of International Law and Commerce* 17, 52.

their investment interests fairly in their national jurisdictions.[96] Although it seems reasonable for developed (capital exporting) countries to expect fair treatment regarding expropriation, a hint of double standards is palpable in the sense that developed countries expected fair treatment in an economic system which had been unfair to the third world.[97]

Ultimately, the establishment of the NIEO failed. In the face of opposition from developed countries over some of its provisions, the CERDS failed to pass the treaty-making process.[98] McWhinney argues that by insisting on a policy that favoured one big list of demands couched as principles instead of working towards smaller, targeted agreements on specific economic concerns, developing countries reduced their chances of securing the cooperation of developed countries.[99] Arguably, even if the NIEO and CERDS had been couched in perfect legal language and imbued with possibilities for compromise, the NIEO and the CERDS would likely have suffered the same fate. The reason is that international law had already become too far entrenched in furthering the interests of developed countries to facilitate the fundamental paradigm shift required to support the NIEO and CERDS.[100] The UN structure's failure to give meaning to the majority that third world countries carry, its enabling of the minority who hold the economic power, while holding itself out to be an inclusive system, served to widen the North-South divide.

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[96] GW Haight 'The new international economic order and the Charter of Economic Rights and Duties of States' (1975) 9 *International Lawyer* 591, 600-602. Haight notes that some developing countries strongly opposed international contracts with foreign nationals, which created the view among developed countries that foreign investments would be unsafe under the CERDS.

[97] Developed countries had several avenues for manipulating international law in their favour, an advantage they were aware would not exist in the national jurisdictions of developing countries: Anghie (note 85 above) 151-152.

[98] Islam (note 27 above) 36-37.

[99] McWhinney (note 84 above) 62-64. McWhinney compares the step-by-step approach used in diffusing East-West tensions at the height of the cold war to the third world's approach.

[100] Anghie (note 85 above) 152.

2.2.3 International Law: Furthering the North-South Divide

The issue of compensation for the nationalisation of foreign investment in developing countries brings out the double standards that attended the application of the concept of sovereignty. Developing countries asserted the principle of sovereignty to argue that determination of compensation for nationalisation could be properly made only in the national courts of the nationalising country.[101] Since the owners of the investment were corporations (private non-state actors) with no personality in international law, developing countries maintained that it was their sovereign right to determine the quantum of compensation the investors would receive.[102] Developed countries, fearing that national courts would favour the nationalising state, maintained that international standards were the appropriate yardstick for determining compensation for the nationalised property.[103] At this point, it is instructive to note that the third world countries attempted again to use judicial means to resolve this matter. In the *Anglo-Iranian Oil Case,* the International Court of Justice (ICJ) upheld the third world view on compensation.[104] Relying on basic principles of international law, the Court held that international law governed relations between sovereign states and that private actors could not claim these sovereign rights. Thus a private contract between a private actor and a state could be regulated only by the state's domestic law and not by international law.[105]

Despite the ICJ's ruling, disputes between nationalising states and investor-corporations ended up before arbitration panels, tailored towards the western principles that

[101] Garcia-Amador (note 92 above) 24.
[102] Article 2 of the CERDS reflects this position. During diplomatic negotiations, most developing countries were willing to adopt a fair compensation for expropriation. The prevailing sentiments among developing countries was that they did not intend to scare potential investors away: Haight (note 96 above) 603.
[103] Salomon (note 92 above) 41.
[104] Anglo-Iranian Oil Case *(United Kingdom v Iran)* [1952] ICJ Rep 93 (Anglo-Iranian Oil Case).
[105] The ICJ ruled that it lacked jurisdiction to hear a matter concerning a concessionary contract signed between Iran and an English company.

developed countries had asserted.[106] These international arbitral tribunals formulated a 'hybrid' strand of international law, transnational law, which they applied, instead of international law, to settle disputes.[107] In this way, the hybrid transnational law cherry-picked basic international principles that were favourable to the corporations and bestowed the rights accruing from these principles on the corporations, as though they were states.[108] Developing countries sought to use settled international principles while developed countries (acting through arbitral tribunals) side-stepped these principles and unilaterally set a new body of law to further their economic interests.[109] The internationalization of contracts between the host state and the foreign investor provided the leeway for multinational corporations to acquire legal personality in international law.[110] While developing countries had little power and resources to argue against establishing the new transnational law, developed countries actively blocked the establishment of the new international economic order.[111]

Furthermore, the unsettled legal status of United Nations General Assembly (UNGA) resolutions and declarations requires some unpacking. This is necessary to lay the conceptual and theoretical foundation to unpacking the principle of CBDR in later chapters, given that the CBDR principle's entry into the international environmental law happened through a declaration.[112] Since the inception of the United Nations, there have been opposing views on the status of the General Assembly's resolutions and declarations. The central issue is whether they are declaratory of international law, early indicators of possible state practice which could

[106] Anghie (note 85 above) 151.
[107] Ibid 152.
[108] M Sornarajah 'The climate of international arbitration' (1991) 8 *Journal of International Arbitration* 47, 52.
[109] Ibid 54.
[110] J Cantegreil 'The audacity of the Texaco/Calasiatic award: René-Jean Dupuy and the internationalization of foreign investment law' (2011) 22 *European Journal of International Law* 441, 442-443.
[111] Anghie (note 85 above) 152.
[112] See section 2.3 below.

crystallise into customary international law or non-binding and merely aspirational.[113] Some jurists consider UNGA resolutions and declarations as non-binding because the General Assembly lacks legislative powers since the United Nations does not have a legislative arm, strictly speaking.[114]

For instance, Schwebel analyses the General Assembly's workings and observes that UNGA resolutions do not always reflect a state's willingness or otherwise to be bound.[115] He suggests that 'states often do not meaningfully support what a resolution says and they hardly ever mean that the resolution is the law.'[116] Flowing from this observation, Schwebel considers whether UNGA resolutions could be evidence of customary international law and argues that UNGA resolutions may not reflect state practice because international law looks to conduct, rather than verbal communication.[117] On the other hand, Lissitzyn holds a less restrictive view of the status of UNGA resolutions.[118] If a resolution contains statements that emanate from a large number of states, and which appear to deal with a legal matter, the resolution could be regarded as indicating a general consensus amounting to a norm of international law.[119]

From the views above, the legal status of UNGA resolutions requires a case-by-case examination of its contents to determine if they suggest a large consensus that the resolution is binding. This suggests that jurists and adjudicating bodies would have to create a litmus test

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[113] See B Sloan 'General Assembly resolutions revisited (Forty years later)' (1988) 58 *British Yearbook of International Law* 39. For more detailed analysis see also OY Asamoah *The Legal Significance of the Declarations of the General Assembly of the United Nations* (1966) Part 1.
[114] Haight (note 96 above) 597. See also Shaw (note 7 above); E Suy 'Innovations in international law-making processes' in M Johnston & Morris (eds), *The Internatonal Law and Policy of Human Welfare* (1978) 187, 190.
[115] SM Schwebel 'The effect of resolutions of the U.N. General Assembly on customary international law' (1979) *Proceedings of the Annual Meeting (American Society of International Law)* 301, 302.
[116] Ibid.
[117] Ibid.
[118] Ibid.
[119] Ibid 303.

for determining which UNGA resolutions have legal character.[120] Dupuy provided such a litmus test in the arbitration between Texaco Overseas Petroleum Company, California Asiatic Oil Company and the Libyan Arab Republic.[121] While admitting that UNGA resolutions and declarations could be declaratory of international law, he propounded three qualifying conditions. Of the three, one condition stands out. In order to be declaratory, the resolution should be acceptable to at least a majority of member states representing all various groups or the relevant group of states which the resolution directly affects.[122] Thus, even if a resolution passes with a two-thirds majority, if that majority excludes, for example, market economy states on questions of interest to them, that resolution would not count as an expression of international law.[123]

The condition above seems reasonable enough. Those whose interests are likely to be affected by a resolution should oppose a resolution that does not further their interests. These views resonate with developed countries' concern that UNGA resolutions and declarations could become an avenue for third world countries to exercise an automatic majority while passing these resolutions off as law.[124] However, from a third world perspective, this litmus test is belated for developing countries because much of the fundamentals of international law emerged and crystallised without their consent or participation.[125] In the UN, where third world

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[120] For the purpose of providing a third world perspective my focus is on the litmus test that adjudicating bodies used in the aftermath of the call for a NIEO, regarding compensation upon expropriation of foreign direct investment.

[121] *Texaco Overseas Company v Government of the Libyan Arab Republic* (1978) 17 ILM para 83-85. In the period following decolonisation, many colonial powers had been exploiting oil reserves in the third world under the aegis of international investment. Libya's vast oil reserves made it home to some multinational corporations domiciled in the developed countries.

[122] Schwebel (note 115 above) 305.

[123] Texaco Case para 83-85.

[124] Mickelson (note 65 above) 372.

[125] On this point, the words of a Director-General of UNESCO are instructive: 'Certain expressions such as "automatic majority" lose all their meaning. During its history, the United Nations has seen several dominating groups; however, perhaps none of these pose to the community of nations questions so basically linked to the dignity of man, to justice and equity, as the group of the developing countries when it proclaimed the need to

countries have a majority and can impact economic law, developed countries oppose law-making. Yet in economic institutions outside the UN where they hold the lion's share of economic power, developed countries control the fortunes of the third world.[126]

Based on the points and arguments made above, a pattern of differentiation becomes more discernible. After colonial rule, development became the next tool for differentiation. The concept of development goes on to shape the human experience and perception of the natural environment. As the next section shows, the environment fell victim to the North's quest to remain advanced and the South's attempt to catch up with the developed North. The consequences are intractable global environmental problems, chief among which is climate change.

2.3 Protecting the Environment: Common Responsibilities and Differential Treatment in International Environmental Law

In this section, a brief overview of how international environmental law assumed relevance is presented. The aim is to set out the connections between international cooperation for environmental protection, sustainable development and differential treatment.

2.3.1 The Human Environment: Defying Artificial Boundaries

establish a new international economic order…' See M Bedjaoui *Towards a New International Economic Order* (1979) 146.

[126] Salomon (note 92 above) 46-47.

International law regards all states as equal and sovereign, regardless of their geographical size, economic or political power.[127] Territorial sovereignty – a state's exclusive power over its territory – is one of the cardinal features of the international legal system. Consequently, states have the authority to develop and implement policies and laws to regulate the use of natural resources in their territory. [128] By extension, a state's territory comprises its landmass, its internal waters (lakes, rivers and canals), the state's territorial sea and airspace up to the area regarded as outer space.[129] Generally, sovereignty gives states complete control over their natural resources and all aspects of the natural environment that fall within their territory.[130]

Notwithstanding the above, as economic activities increased and states became more interconnected, it became evident that the use of the environment and natural resources could be subject to extraterritorial jurisdiction. For the sake of providing a background and context for later discussion of international cooperation regarding transboundary environmental problems, this section discusses two early international disputes. These disputes show that the use of the human environment, ecosystems and natural resources have always been intertwined with economic activity, as far back as 1893 when an ecological crisis in fur seal numbers degenerated into a political and economic row, leading to an arbitration in Paris in respect of Canada's sealing activities.[131] Fur seal harvesting raised several transboundary issues. First, the fur seals were migratory species that travelled between the coasts of Asia and North

[127] See above section 2.1 and 2.2.
[128] J Peel 'International law and the protection of the global environment' in RS Axelrod & SD VanDeveer (eds), *The Global Environment: Institutions, Law and Policy* (2015) 57.
[129] Ibid.
[130] Ibid. This would include the plants and animals that fall within their territory.
[131] MIH Macallister 'Seals, empires and mass politics: The 1893 Fur Seal Arbitration' (2020) 42 *The International History Review* 1192, 1192. Macallister notes '[in]1893, almost every type of dead animal could be worn as a hat: skunk, Australian ,possum, Japanese fox, raccoon, grebes, geese and swans, even wallabies, were available in New York, Paris and London'.

America. This meant that they defied the usual effect of territorial sovereignty. Second, sealers travelled across borders to conduct their business and left shifty political and legal identities. Third, the cross-boundary activities of the sealers drew conflicts among governments. Fourth, politics impeded possible ways of resolving issues.[132]

The arbitral tribunal ruled that sealing should be restricted during the summer breeding months.[133] Subsequently, the North Pacific Sealing Convention came into force in 1911.[134] Japan, the United States and Canada agreed to further sealing restrictions, and Japan and the United States decided to give a percentage of their earnings from sealing to Canada.[135] The Pacific Fur Seal Arbitration and other bilateral fisheries treaties of the early twentieth century signified a period where states acted on the understanding that the use of natural resources in the process of industrial and economic expansion required limits on the exploitation of plants and animals.[136]

A second transboundary dispute relevant to this thesis is the case between the United States and Canada which involved transboundary air pollution from a zinc smelter in Canada.[137] The activities at the smelter had harmed United States agricultural and timber interests.[138] The *Trail Smelter* Arbitration is well-known for the tribunal's holding that 'no state has the right to use or permit the use of its territory in such a manner as to cause injury, by

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[132] Ibid 1193. The transboundary problems surrounding the Fur Seal Dispute bear interesting similarities with the challenges posed by transboundary nature of GHG emissions. Chapter 5 below presents some of the transboundary challenges that GHG emissions raise, as they relate to climate change mitigation and the CBDR principle.
[133] Award between the United States and the United Kingdom relating to the Rights of Jurisdiction of United States in the Bering's sea and the Preservation of Fur Seals (1893) <https://legal.un.org/riaa/cases/vol_XXVIII/263-276.pdf> 270 (1893 Fur Seal Arbitration) For background facts, see R Duane 'The decision of the Behring Sea Arbitrators' (1893) *The American Law Register & Review* 58, 58.
[134] RA Miller 'Trail Smelter Arbitration' *Max Planck Encyclopaedia of Public International Law* (2007).
[135] Duane (note 133 above) 58.
[136] Peel (note 128 above) 58.
[137] United States v Canada (1952) 3 UNRIAA 1905 (Trail Smelter Arbitration).
[138] Miller (note 134 above).

fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence'.[139]

The two cases above illustrate the challenges with transboundary environmental problems. In selecting the cases above as illustrative cases, the aim is not only to establish the context for analysing environmental issues that call for inter-state cooperation. The second aim is to highlight two points. As with the Fur Seals dispute, politics can stand in the way of finding solutions to geo-political problems such as climate change.[140] In such instances, as with the Fur Seal Arbitration, national adjudication could present an alternative means of finding solutions.[141] Furthermore, although the Trail Smelter Arbitration established the no-harm principle, its application to complicated transboundary problems, such as climate change and the corresponding responsibilities towards mitigation, is not straightforward.[142] Transboundary problems called for greater cooperation based on the community of interest concept.

2.3.2 Common Concern and Sustainable Development

As environmental problems increasingly took on a transboundary and global dimension, two concepts emerged to shape the idea of community interests in international

[139] Trail Smelter Arbitration, 1965. This passage became known as the no-harm rule and was a pre-cursor to Principle 21 of the Stockholm Declaration. Since then, the no-harm rule has shaped the development of international environmental law. See PM Dupuy & JE Viñuales *International Environmental Law* (2015) 56.
[140] The geopolitics surrounding energy sources and attending economic power are central to the positions states have taken on the scope and application of the CBDR principle. See chapter 3 below.
[141] Climate change litigation in national courts comes into focus in chapter 5 below, where the focus is on an analysis of the potential climate litigation may hold for the CBDR principle.
[142] B Mayer 'The relevance of the no-harm principle to climate change law and politics' (2016) 19 *Asia Pacific Journal of Environmental Law* 79, 81.

environmental law: common heritage of humankind and common concern of humanity. The concept of common heritage of humankind rests on the idea that some areas are outside the territorial control of any one state and as such should be preserved and utilised for the benefit of humankind as a whole.[143] On the contrary, the concept of common concern of humankind points to action to address certain common environmental problems rather than the regulation of common areas.[144]

Common concern flows from the idea that certain environmental issues, like climate change, transcend national borders and affect people worldwide. Thus, because no single state can resolve these problems, states must cooperate for humankind's benefit.[145] The legal implications for common concern of humanity also differ from the legal repercussions for common heritage of humankind. Whereas common heritage of humankind implies a common ownership of common areas and common sharing of the benefits of the ownership, common concern of humankind implies creating a legal regime that imposes obligations on all members of the international community towards addressing transboundary environmental problems.[146]

Although common concern fosters a sense of community of interest regarding transboundary environmental problems its application inflamed developing countries' position on differential treatment. They asserted that responsibilities emanating from the common concern concept had to reflect the economic differences between industrialised countries and

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[143] CC Joyner 'Legal implications of the conscept of common heritage of mankind' (1986) 35 *International & Comparative Law Quarterly* 190, 191-192 (explaining the legal nature of the concept of the common heritage of mankind).
[144] F Soltau 'Common concern of humankind' in KR Gray, R Tarasofsky & C Carlane (eds), *The Oxford Handbook of International Climate Change Law* (2016) 206.
[145] D Shelton 'Common concern of humanity' (2009) 39 *Environmental Policy & Law* 83, 83.
[146] Ibid 85. Shelton suggests that common concern of humanity raises *erga omnes* obligations – obligations that each state owes to the international community as a whole. The *erga omnes* concept is further explored in the context of international adjudication on climate change in chapter 5 below.

third world countries.[147] They challenged the legal equality of states and questioned its efficacy in situations where fairness and equity required differentiated responsibilities while dealing with a common environmental problem.[148] Differential treatment was central to the demands developing countries made in the proposed NIEO.[149] Although the NIEO failed, the seeds of differential treatment survived and entered the field of international environmental law when environmental protection crossed paths with economic development.[150]

By the mid-twentieth century, international concern about environmental degradation caused by increasing economic development grew, and the UNGA resolved to convene a conference on the human environment in Stockholm.[151] The Stockholm Conference produced the Stockholm Declaration.[152] Although the Stockholm Declaration focused on providing a common outlook and shared principles for safeguarding the human environment, it also set a foundation for developing countries to formulate and consolidate the concept of differentiation in international environmental law. Principle 23 of the Declaration provides that uniform international environmental standards would be unworkable where such standards would be inappropriate for developing countries.[153] This provision set the tone for developing countries' arguments for differentiated responsibilities, especially in the legal regime for climate change.[154]

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[147] A Najam 'Unraveling the Rio bargain' (2002) 21 *Politics and the Life Sciences* 46, 48.
[148] Ibid.
[149] See, for example, CERDS, art 25, 30. See also DB Magraw 'Legal treatment of developing countries: Differential, contextual, and absolute norms' (1990) 1 *Colorado Journal of International Environmental Law & Policy* 69, 77.
[150] D French 'Developing states and international environmental law: The importance of differentiated responsibilities' (2000) 49 *International & Comparative Law Quarterly* 35, 49.
[151] P Galizzi 'From Stockholm to New York, via Rio and Johannesburg: Has the environment lost its way on the global agenda?' (2005) 29 *Fordham International Law Journal* 952, 961.
[152] Declaration of the United Nations Conference on the Human Environment (adopted 16 June 1972) 11 ILM 1416 (Stockholm Declaration). The Declaration comprises 26 principles on the environment and development, an action plan containing 109 recommendations and a Resolution.
[153] Stockholm Declaration, Principle 23.
[154] Najam (note 147 above) 48.

Developing countries were concerned that the environmental movement would move the focus away from tackling their development needs.[155] As with the early formation of international law, a bigger concern was that environmental movement would introduce new international principles whose formulation would likely not involve them significantly.[156] On the other hand, developed countries were concerned about developing countries only to the extent that they feared that developing countries would not have strong national environmental policies, which would make their territories havens for industries seeking to escape strict environmental laws and undermine competitive global trade.[157]

In the years following the Stockholm Conference, environmentalism continued its rise in Europe and North America.[158] These environmental problems brought environmental issues deeper into the development discourse.[159] Thus, in 1983, the UNGA established the World Commission on Environment and Development, commonly known as the Brundtland

[155] Gordon (note 62 above) 50-51.
[156] AL Springer 'International environmental law after Rio: The continuing search for equity' (1993) 7 *Ethics & International Affairs* 115, 121.
[157] Ibid 120, 121. With regard to climate change mitigation, developed countries prioritize economic interests – as seen in the inclusion of market-based solutions for GHG emissions reduction in the KP and the Paris Agreement. On the other hand, developing countries perceive economic development as the sure path for rising to economic power. Development is still cast in the modernist mold of the post-colonial era, although the climate change crisis is proof that that model of development is no longer feasible: See chapter 4 below.
[158] Gordon (note 62 above) 56.
[159] By 1979, due to technological improvements, there was a growing scientific consensus that climate change was happening: D Bodansky 'The history of the global climate change regime' in U Luterbacher & DF Sprinz (eds), *International Relations and Global Climate Change* (2001) 23, 24.

Commission.[160] The Brundtland Commission produced a report which formally christened a new concept of development – sustainable development.[161]

2.3.3 Sustainable Development for the South, Unsustainable Development in the North

Undeniably, the concept of sustainable development serves a valuable purpose in the evolution of international environmental law, despite its nebulous legal character.[162] The Commission's definition of sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'[163] carries high normative value. The idea that the present generation holds the planet in trust for future generations is the ethos of international environmental law.[164] Inter-generational considerations feed into issues of equity and justice in climate change law.[165] The relevance to differentiated responsibilities in climate change mitigation is presently evident in the level of youth involvement in climate activism in recent times.[166]

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[160] UNGA Res 38/161 (19 December 1983) UN Doc A/RES/38/161. Before the UNGA resolution, the United Nations Environmental Programme (UNEP) held a special session in Nairobi where the UNEP Council examined progress made after the Stockholm Conference. The outcome document, the Nairobi Declaration, emphasized the need to intensify global, regional and national efforts to address environmental degradation. The UNGA endorsed the Declaration and subsequently established the Brundtland Commission. See P Galizzi & A Herklotz 'Environment and Development: Friends or Foes in the 21st Century?' in M Fitzmaurice, DM Ong & P Merkousis (eds), *Research Handbook on International Environmental Law* (2010) 69, 74.

[161] Report of the World Commission on Environment and Development: Our Common Future (1987) (Our Common Future).

[162] See V Lowe 'Sustainable development and unsustainable arguments' in A Boyle & D Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (2001) 19, 21, 31(arguing that although the concept of sustainable development has not acquired the status of a binding norm of international law, it could be described as a metaprinciple which acts on other legal rules and principles).

[163] Our Common Future Chapter 2, para 1.

[164] The concept of inter-generational equity envisions the planet and humankind in a three-way relationship involving their past, present and future interactions with nature.'Each generation is both a trustee or custodian of the planet for future generations and a beneficiary of previous generations' stewardship'. See EB Weiss 'In fairness to future generations' (1990) 32 *Environment: Science & Policy for Sustainable Development* 6, 8.

[165] EB Weiss 'Climate change, intergenerational equity, and international law' (2008) 9 *Vermont Journal of Environmental Law* 615, 627.

[166] The younger generation in the developed world tend to advance the core issues of injustice surrounding the North's near exhaustion of the carbon space at the expense of the third world and climate change's impact on inter-generational justice: See for example A Sabherwal et al 'The Greta Thunberg effect: Familiarity with Greta Thunberg predicts intentions to engage in climate activism in the United States' (2021) 51 *Journal of Applied Social Psychology* 321(assessing the impact that youth climate activist Greta Thunberg has had one mobilising other youngsters to push for inter-generational equity). One may argue that young people are gradually taking up the role of 'norm entrepreneurs'. See chapter 5 below.

In addition, the report does well to diagnose the problems that link the environment to development. At face value, the Commission's report appears even-handed in the way it attributes the environmental problems arising from development to developed and developing countries. On the one hand, the report presents poverty as an environmental pollutant. If people are impoverished, the report argues, they are more likely to destroy forests, overuse land and allow their livestock to overgraze grasslands.[167] On the other hand, the report also cites economic growth as a major contributor to environmental problems. The report identifies the use of raw materials in large proportions, energy, chemicals and the creation of pollution as the unintended consequences of economic growth.[168]

Notwithstanding the above, the concept of sustainable development is lop-sided in the way that it has facilitated global interventions towards sustainable development. In operationalising sustainable development, the report perpetuates the prevailing idea that economic development provides a win-win situation for the environment and the third world's impoverished people.[169] Yet, while offering solutions for poverty alleviation in developing countries, the Brundtland report fails to capture unsustainable development patterns in developed countries adequately.[170] Unsustainable development in the North feeds an already inequitable economic system that categorises the environment as an externality, whose protection comes second to economic growth.[171]

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[167] Our Common Future, para 8.
[168] Our Common Future, para 9.
[169] L Rajamani 'From Stockholm to Johannesburg: The anatomy of dissonance in the international environmental dialogue' (2003) 12 *Review of European, Comparative & International Environmental Law* 23, 27.
[170] Gordon (note 62 above) 63.
[171] Ibid.

Arguably, the Brundtland Commission missed the chance to provide a thorough dialogue of how developed countries have undertaken unrestrained and unsustainable development.[172] In the years that followed the Brundtland Commission's Report, developed countries further accelerated economic development, using cheap fossil fuels. In defiance of the concept of sustainable development, developed countries have devoured more than their fair share of the earth's ecological capacity.[173] Although the Commission clothed the idea of sustainability with seeming universality, its application to the North-South cases of environmental degradation confirms that sustainable development is, in reality, a Western solution to third world unsustainable development.[174] It disregards the unsustainable production modes and consumption patterns ingrained in the western model of development, which are the root causes of unsustainable development.[175] Coal, oil and gas have become so ingrained in the concept of economic development that one can hardly conceive of economic growth without them, as cheap sources of energy for industrial growth.[176] Developing countries who are industrializing their economies are also looking to fossil fuels to accelerate their industrialisation. Despite having substantial fossil fuel reserves, developing countries will be constrained in using them for economic development, if global efforts have a chance of limiting global temperatures to 1.5 degrees or even 2 degrees.[177] To the extent that sustainable development reinforces the notion that developing countries are still primitive in their quest for

[172] Ibid 65.
[173] Ibid 68. The unsustainable production and consumption patterns of developed countries are particularly relevant in chapter 4 regarding the luxury emissions of developed countries versus the survival emissions from developing countries in international climate change law.
[174] Ibid 62.
[175] See Najam (note 147) 48.
[176] T Princen, JP Manno & P Martin 'Keep them in the ground: Ending the fossil fuel era' in *State of the World* (2013) 161, 161.
[177] Y Strauch, T Dordi & A Carter 'Constraining fossil fuels based on 2 °C carbon budgets: The rapid adoption of a transformative concept in politics and finance' (2020) 160 *Climatic Change* 181. The consequences of keeping fossil fuels in the ground in the third world, when considered in light of climate justice are examined in chapter 4 below. Furthermore, in chapter 5 South Africa's use of coal comes into focus in the analysis of climate litigation's impact on current notions of the CBDR principle.

development and that they must migrate to a more environmentally friendly, sustainable means of economic development, the concept creates another layer of difference.[178]

The tensions between the global North and the global South took centre stage once again during negotiations at the United Nations Conference on Environment and Development (UNCED). The following section marks the beginning of the process of rethinking differentiated responsibilities, as the title of the thesis suggests. The posturing of developed countries and the renewed resolve of developing countries to assert their entitlement to the fruits of economic development are the precursors to later analysis of the CBDR principle and the relevance of the historical responsibility.

2.4 The Rio Declaration, Climate Change and the CBDR Principle: The Sum of all Differences

This final section introduces the differential treatment and climate change. It also introduces the CBDR principle as enunciated in the Rio Declaration on Environment and Development.[179] The connection between the difference dynamic and the CBDR principle is further developed. My chief argument is that the CBDR principle, as envisaged in the Rio Declaration, is the third world's attempt to reverse the inequalities that the difference dynamic has created since the European civilisation mission.

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[178] See JA Du Pisani 'Sustainable Development - Historical roots of the concept' (2006) 3 *Environmental Sciences* 83, 94. Du Pisani argues that historically, the concept of sustainable development was not ideologically neutral: it leans positively towards the growth and modernization viewpoints. Furthermore, he opines, the issue of sustainable development is, in some ways, an implicit acknowledgement that considerations of human development trump environmental concerns.

[179] Rio Declaration on Environment and Development (adopted 13 June, 1992) 31 ILM 874 (Rio Declaration).

2.4.1 The Rio Declaration: Principle 7 as the Foundational Basis for CBDR

Twenty years after the Stockholm Conference, the UNCED was held in Rio de Janeiro, Brazil.[180] As with the Stockholm Conference, the conflicting views of developed and developing countries on the development and environment agenda were on full display.[181] The UNCED produced the Rio Declaration on Environment and Development as well as three multilateral environmental agreements (MEAs).[182] The acrimony over the balancing of development needs and environmental concerns was so acute that both developed and developing countries found themselves forced to show allegiance to the anti-environment/pro-development movement and vice versa.[183] This section limits the discussion of the UNCED to the Rio Declaration on Environment and Development because of its direct bearing on the development of differential treatment in international environmental law.

The Rio Declaration on Environment and Development sets out 27 principles aimed at achieving the goal of 'establishing a new and equitable global partnership through the creation of new levels of cooperation among States.'[184] Principle 7 sets out the concept of differentiated responsibilities for addressing international environmental problems. Principle 7 provides, in part:

> 'In view of the *different contributions* to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the *international pursuit of sustainable development* in view of

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[180] UNGA Res. 228 (1990) U.N.Doc. A144149 (deciding to convene the United Nations Conference on the Environment and Development and directing that conference should promote and further development of international environmental law).
[181] DA Wirth 'The Rio Declaration on Environment and Development: Two steps forward and one Back, or vice versa?' (1994) 29 *Georgia Law Review* 599, 604.
[182] United Nations 'Conferences: Environment and Development'
< https://www.un.org/en/conferences/environment/rio1992 >.
[183] IM Porras 'The Rio Declaration: A New Basis for International Co-operation' (1992) 1 *Review of European, Comparative & International Environmental Law* 245, 247.
[184] Rio Declaration, Preamble.

> *the pressures their societies place on the global environment* and of *the technologies and financial resources they command*.'[185]

From the above, Principle 7 distributes responsibilities differently towards countries based on countries' level of contribution and their capabilities, measured in terms of technological and financial advancement.[186] In unpacking the concept of differentiation, the key aspects of Principle 7 require some examination. First, Principle 7 provides two markers of differentiation: contribution to a given environmental problem and technological and financial capabilities to address the problem.[187] Thus, it could be argued that Principle 7 suggests that the use of a conjunction (as opposed to disjunction) in framing the markers implies that both markers are necessary to invoke differentiation.[188]

Secondly, the two markers operate differently in relation to real time. The contribution marker serves to allot the major contributors to an environmental problem more responsibility than minor contributors. Thus, it could be inferred that the contribution marker's operation is limited to past/historical state actions that significantly caused the problem, to be determined as at the time of allocating the differentiated responsibilities.[189] On the other hand, by the wording of Principle 7, one can infer that capabilities are to be measured in the present tense when allocating the differentiated responsibilities.[190]

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[185] Rio Declaration, Principle 7 (emphasis added).
[186] Porras (note 183 above) 250.
[187] JE Viñuales *The Rio Declaration on Environment and Development: A Commentary* JE Viñuales ed, (2015) 2,7.
[188] Rajamani (note 2 above) 149. See also P Pauw et al 'Different perspectives on differentiated responsibilities: A State-of-the-Art Review of the Notion of Common but Differentiated Responsibilities in international negotiations' (2014) *German Development Institute / Deutsches Institut für Entwicklungspolitik (DIE)* Discussion Paper, No.6/2014 1, 7.
[189] French (note 150 above) 48.
[190] Ibid.

From the above, another challenge emerges. Principle 7 leaves room for questioning the basis of differentiation. Principle 7's use of a conjunction to signify that the markers of differentiation apply simultaneously testifies to the role of colonisation on post-colonial economic development. The direct link between the North's industrialisation and their advanced financial and technological capabilities is hardly contestable – one could not have happened without the other.[191] Thus, Principle 7's coupling of historical contribution with advanced capabilities captures the economic injustice of the colonial era and channels it as the basis of remedial responsibility. Developed countries built the global economy and amassed wealth through industrialisation, at the third world's expense.[192] Through industrialisation, developed countries reaped financial and technological benefits which makes them better equipped to reduce adverse impacts from environmental harm.[193] Thus, differentiation is necessary to elicit the cooperation of developing countries whose contribution to environmental problems is relatively minimal and whose technological and financial resources are inadequate to address environmental problems.[194]

However, Principle 7 is unclear as to how to treat ongoing contributions as well as projected contributions of countries.[195] One possible explanation could be proffered to clarify the limited application of the contribution marker. Principle 7 envisages a temporary use of CBDR to correct an injustice and once remedied, there would be little need to consider ongoing contributions as a reason for differentiated responsibilities. This explanation resonates with Rajamani's observation that:

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[191] The benefits and profits acquired through the exploitation of renewable and non-renewable resources, which have contributed to causing climate change, have been enjoyed in the North to a large extent: Ibid 47.
[192] As discussed in section 2.2 above.
[193] J Gupta 'International law and climate change: The challenges facing developing countries' (2006) 16 *Yearbook of International Law* 119, 121.
[194] Ibid.
[195] Rajamani (note 2 above) 138.

> 'Differential treatment exists where relevant differences exist. It follows logically that when the relevant differences vanish, differentiation should cease, or at least that the lack of differences should be taken into account in fashioning future obligations under the regime. Since differential treatment is a reflection of differences, if differential treatment persists after the differences have ceased to exist, differentiation perpetuates rather than addresses inequality. This suggests that differential treatment should be subject to review and therefore is time-bound.'[196]

In effect, after CBDR remedies the lop-sidedness, all countries would revert to common and more equal responsibilities for later contributions.[197]

Principle 7's limited approach to contribution (as a marker for differentiation) has come under critique. In Stone's critique of Principle 7, he argues that limiting Principle 7 to historical contributions is problematic and concludes that such a construction makes it unclear how present generations should be responsible for the harm their forebears created.[198] Stone infers that differentiation is only efficient if we construe contribution in the present tense: that is, if contribution targets the current contributors to a problem.[199] In answer to Stone's view, the claim that contribution to an environmental problem should be limited to present (not historical) contribution produces an absurd outcome, especially in situations where the root cause of the problem rests substantially on past conduct.[200] Therefore, to bypass historical contributions would be to bypass the main culprits of that environmental harm because without

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[196] Rajamani (note 2 above) 173. See also French (note 150 above) 50, arguing that '[i]t is therefore apparent that differentiation cannot simply impose additional obligations on developed States *ad infinitum*').

[197] Climate change and the politics engulfing it proved a more complicated problem which brought historical contribution into core disagreements between developed and developing countries. The historical responsibility arising from the North's substantial contribution to causing climate change is at the heart of this thesis. Chapter 4 revisits the temporary nature of differentiation in support of the argument that historical responsibility is necessary to advance fairness and propel ambition for mitigation.

[198] Stone (note 1 above) 291-292.

[199] Ibid.

[200] J Hickel 'Quantifying national responsibility for climate breakdown: A equality-based attribution approach for carbon dioxide emissions in excess of the planetary boundary' (2020) 4 *Lancet Planet Health* e399, e343.

their past conduct, the environmental damage would not have arisen in the first place.[201] Climate change is a prime example of such a problem.

2.4.2 *Climate Change: Perfect Storm and the 'Perfect' model for Differential Treatment in International Environmental Law?*

Climate change is one of the biggest challenges of the 21st century, for two broad reasons. Firstly, the third world is most vulnerable to climate change despite contributing far less to GHG emissions that cause climate change. Less developed countries (LDCs) cannot provide adequate social protection for their citizenry in the face of food shortages,[202] climate-related health emergencies,[203] water stress,[204] and, ultimately, sea level rise that could completely wipe out some countries' territories.[205] Climate change sets back the third world's development strides because it multiplies existing socio-economic challenges.[206] Secondly, the most capable countries (in terms of financial and technological advancement) are developed

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[201] F Soltau *Fairness in International Climate Law and Policy* (2009) 189.

[202] Climatic changes – causing drought, excessive rains and other extreme weather conditions - will reduce food productivity and production and add a layer of pressure on food systems that are already fragile. Agriculture-based livelihoods are also certain to face challenges as crops, livestock and fish resources and their ecosystems, agriculture, livestock and fishing infrastructure, assets such as irrigation systems and livestock shelters are destroyed: Food and Agriculture Organization of the United Nations 'FAOs work on Climate Change: United Nations Climate Change Conference 2015' 6 < http://www.fao.org/3/a-i5165e.pdf >.

[203] The World Health Organization projects that between the year 2030 and 2050 climate change is expected to cause about 250,000 additional deaths a year from malnutrition, diarrhoea and heat stress and billions of dollars in direct damage costs to health: World Health Organization 'Climate Change and Human Health' <http://www.who.int/globalchange/en/ >. Research suggests that high biodiversity reduces the rate at which pathogens are transmittable from animals to humans. Climate change has exacerbated bio-diversity loss, thus, raising the risk of the occurrence of diseases that are transmitted from animals to humans: RS Ostfeld 'Biodiversity loss and the ecology of infectious disease' (2017) 1 *The Lancet Planetary Health* e2, e3.

[204] Water stress and food shortages have been linked to armed conflicts: PH Gleick 'Water, Drought, Climate Change and the Conflict in Syria' (2014) *Weather, Climate, & Society* 331 (noting the link between water shortages and the conflict in Syria and broadly discussing future climate-related risks for water systems).

[205] Countries such as those in South, South East and East Asia would be threatened because of the presence of densely populated deltas. Egypt and Mozambique have also been described as hotspots for potential impacts. Low-lying islands such as the Maldives or Tuvalu could be submerged or completely abandoned in the 21st century: RJ Nicholls & A Cazenave 'Sea Level Rise and Its Impacts on Coastal Zones' (2010) 328 *Science*, 1517,1519.

[206] United Nations News 'Climate change recognized as 'threat multiplier', UN Security Council debates its impact on peace'(25 January 2019) < https://news.un.org/en/story/2019/01/1031322 >.

countries, but they are the main contributors to the problem.[207] However, developed countries have the least incentives to act because they are less likely to suffer from negative climate change impacts, in the short term.[208]

In addition to the above observations, the concept of development, heavily influenced by westernised ideals of capitalism, over-production and over-consumption to fuel the free market system, is one of the driving forces of climate change.[209] Climate change is, partly, the result of the one-sided industrial wave that characterised the pre-colonial and post-colonial imperial resource extraction. Developed countries have reached advanced stages of development on the back of colonisation, at the expense of a climate system that is now over-concentrated with GHGs.[210] The GHG-laden atmosphere leaves only a small portion of what environmental scholars have named the carbon/ecological space.[211] It is this limited space that developing countries in the South must use to propel their development and catch up with advanced countries in the North.[212]

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[207] RJ Lazarus 'Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future' (2009) 94 *Cornell Law Review* 1153, 1160.
[208] Ibid.
[209] See PK Gellert 'Bunker's ecologically unequal exchange, Foster's metabolic rift, and Moore's world-ecology: Distinctions with or without a difference?' in SR Frey, PK Gellert & HF Dahms (eds), *Ecologically Unequal Exchange : Environmental Injustice in Comparative and Historical Perspective* (2019) 107, 119.
[210] Mayer (note 142 above) 82.
[211] The concept of "environmental utilization space" … represents an abstract virtual reality: a set of bounds or constraints with respect to claims on nature by society at any point in time related to the capacity of relevant support systems and processes in the biosphere, such that society will be able to make such claims in future as well. 'One may define the carbon space as the amount of carbon (or CO2) that can be put into the atmosphere without this leading to a level of warming—or underlying concentrations of CO2—that can be considered dangerous…' H Opschoor 'Sustainable Development and a Dwindling Carbon Space' (2010) 45 *Environmental & Resource Economics* 3, 8, 9. See also K Mickelson 'Leading towards a level Playing Field, Repaying Ecological Debt or Making Environmental Space: Three Stories About International Environmental Cooperation' (2005) 43 *Osgoode Hall Law Journal* 139, 160-162.
[212] For example, see J Burton, A Marquard & B McCall 'Socio-Economic Considerations for a Paris Agreement-Compatible Coal Transition in South Africa' Energy Resource Centre Policy Paper (2019) (examining South Africa's prospects of transitioning from coal and the socio-economic considerations needed to enable a just transition).

Thus, mitigation of climate change through emissions reduction raises the issue: how should the shared responsibility for limiting climate change be shared among countries that have contributed to causing climate change in varied proportions and have different capabilities to withstand climate change impacts? Arguably, the CBDR principle, as the Rio Declaration envisioned it, provided a starting point for working differential treatment into international mitigation commitments.[213]

2.4.3 How the CBDR Principle Challenges the Difference Dynamic

Anghie has argued that European powers created a dynamic of difference when they segregated European societies from non-European societies.[214] The difference dynamic enabled European powers to institutionalise the idea that a difference in cultural systems necessitated the domination of non-Europeans.[215] Through civilisation and colonisation the dynamic of difference thrived and European law became international law.[216] The difference dynamic did not stop with colonialism. The concept development became the next tool for furthering the difference dynamic. From its inception, development has been couched, packaged and presented as a 'universal' ideal. The European powers passed off European law as universal international law. In the same way, development has been a Western ideal, packaged and promoted for the ultimate benefit of developed countries.[217] The western model of development requires third world countries to catch up with developed countries, albeit on

[213] Rajamani (note 2 above) 217.
[214] 'Jurists using the conceptual tools of positivism postulated a gap, understood principally in terms of cultural differences, between the civilized European and uncivilized non-European world; having established this gap they then proceeded to devise a series of techniques for bridging this gap, of civilizing the uncivilized': Anghie (note 3 above) 37.
[215] Ibid 56.
[216] Ibid.
[217] R Gordon & J Sylvester 'Deconstructing development' (2004) 22 *Wisconsin International Law Journal* 1, 4.

an unequal, inequitable economic playing field.[218] As cultural difference was the medium for the initial difference dynamic, poverty was the medium for this next level of the dynamic.[219]

Developing countries could not replace the old economic order with a more equitable international economic order despite their efforts.[220] In the absence of an equitable economic order, the gap which enabled the difference dynamic to thrive remained open. In the meantime, developing countries continue to pursue their development plan using the westernised model of development.[221] When it became apparent that the westernised model of development breeds international environmental problems, the result was a conceptual shift to sustainable development.[222] Sustainable development, the experts argued, would bridge the gap between economic growth and environmental protection.[223] In this way, arguably, the framers of the concept of sustainable development created a new opening for another layer of the difference dynamic to take root. Developing countries are required to ensure that their economic development meets the sustainability test. With their advanced technological and financial capabilities, developed countries are deemed to have already satisfied the nebulous sustainability requirement, even though rising GHG emissions and water and air pollution in

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[218] Ibid 77.

[219] Ibid 15. Hickel reflects: 'Why are poor countries poor? Their responses were more or less the same each year. You can probably guess them. There were always a few who thought it had something to do with people being lazy, having too many children or holding 'backwards' cultural values. Others guessed that it had to do with corruption or bad governance or poor institutions; or perhaps with environmental problems like poor soils unsuited to productive farming and climates that incubate tropical diseases. And some believed that poor countries were poor because they just were. Poor countries are just naturally poor, they assumed, and no one is really to blame for it. After all, poverty is the normal first stage of development. Poor countries are like children; they just haven't grown up yet. They haven't developed': Hickel (note 59 above) 39.

[220] As discussed in section 2.2 above.

[221] Gordon (note 62 above) 70.

[222] Ibid 66.

[223] See for example JD Sachs *The Age of Sustainable Development* (2015) 3 (emphasizing that 'sustainable development calls for a world in which economic progress is widespread; extreme poverty is eliminated; social trust is encouraged through policies that policies that strenghthen the community; and the environment is protected from human-induced degradation').

the developed world suggest otherwise.[224] Thus did sustainable development become another difference dynamic between the global North and South.[225]

The points advanced above are inter-connected with the meaning and application of the CBDR principle. Arguably, the difference dynamic, in its various facets, is connected to the CBDR principle. The connections are visible in the way that different countries have construed the meaning and application of differentiation in the climate change regime. First, let us consider the poverty index, which enabled the North, through the World Bank, to divide countries into the developed/industrialised in global North and the developing/third-world in the global South. This categorisation favoured the North, at that time. But its function in the climate change regime translates into differential treatment for the very countries the North deemed as poor and in need of the western model of development. Because climate change is inextricably linked to economic growth, third world countries see in the CBDR principle the possibility of reversing the difference dynamic's effect.[226] Chapter 3 of this study further illuminates this point. It provides an analysis of the result of the fermentation of the poverty index, that is, the climate change regime's initial binary approach towards assigning mitigation commitments on the developed/developing country dichotomy and subsequent tensions arising from that application.

The sustainable development concept evinces another connection. As discussed above, sustainable development was intended to be a universal concept applicable in the global North and South.[227] However, its application took a lop-sided turn because sustainable development,

[224] Gordon (note 62 above) 66, 67.
[225] See section 2.2.3 above.
[226] Islam (note 27 above) 48.
[227] See 2.3.2 above.

as a concept, implicitly allowed developed countries to entrench an unsustainable development model which they foisted on developing countries.[228] The connection to the CBDR principle is evident when sustainability is juxtaposed with historical responsibility in climate change mitigation. It has been argued that sustainability requires a shift from the westernised development model, characterised by fossil fuel-driven industrialisation – one major cause of climate change.[229] Concomitantly, the CBDR principle partly requires that those who led the fossil-fuel age of industrialisation should take the lead to reverse unsustainable development. Thus, the connection between sustainable development (as an enabler of the difference dynamic) and the CBDR principle is seen in the intersection of historical contribution and responsibility and deep cuts to GHG emissions for sustainable development.[230]

2.5 Conclusion

This chapter's overall import is that the European imperialist expansion of territory throughout the world is the fundamental basis for differential treatment in international law. An intended contribution to existing knowledge is to situate the concept of differential treatment in international environmental law in the context of the dynamic of difference as set out in Anghie's work.[231] The concept of a dynamic of difference, as propounded by Anghie, positions an examination of differential treatment in climate change law from a third-world perspective. This chapter drew and clarified links between the difference dynamic and the CBDR principle by tracing the history regarding the establishment of international law, with TWAIL as the framing lens. The concept of differentiation embedded in the CBDR principle attempts to reverse the difference dynamic that shaped the colonial mission's impact on the

[228] See 2.3.3 above.
[229] Gordon (note 62 above) 66.
[230] Chapter 4 examines historical responsibility as part of an analysis of climate justice and evaluates its relevance for the success of the climate change regime.
[231] Anghie (note 3 above).

third world. Despite the link between the North's industrial growth and the over-concentration of GHGs that cause climate change, there has been conflict between developed countries and developing countries over distributing the responsibility to mitigate climate change. The conflict reveals itself in the positions that some countries, acting unilaterally or as part of a negotiating bloc, have taken on the meaning and application of the CBDR principle. Chapter 3 assesses these positions and evaluates their impact on the CBDR principle's normative value in the climate change regime.

Chapter 3

The Twists and Turns of Differentiation in Climate Change Negotiations: From CBDR to CBDR-RC to CBDR-RC/NC

3.1 Introduction

Chapter 2 established that the common but differentiated responsibilities (CBDR) principle has a historical premise that goes beyond the mere mention of the South's call for a new international economic order. The third world's attempt to reverse the difference dynamic is embedded in the concept of differentiation as advanced through the CBDR principle.[1] However, developed countries, especially the US, have opposed the concept of differentiation based on historical contribution and advanced capabilities.[2] Chapter 3 evaluates the CBDR principle and the positions that major state groupings have taken on its scope and application as far as mitigation is concerned. It aims to examine the extent to which the negotiation process of the climate change regime affects present conceptions of the CBDR principle. The key negotiating positions on CBDR manifest in the various country groupings that have formed in the course of the climate change regime's development.[3] This chapter focuses on the main countries and groupings whose positions have impacted the CBDR principle's normative value, as far as mitigation is concerned. It is also instructive to note that the CBDR principle finds application in other international environmental law regimes. However, the climate change regime provides the most illustrative space to examine the CBDR principle's utility.[4] In this vein, the chapter's focus is on the landmark climate change conferences which influenced the CBDR principle's meaning and application. Thus, negotiations leading up to the United Nations Framework Convention on Climate Change (UNFCCC),[5] the Kyoto Protocol to the

[1] See chapter 2 above.
[2] See chapter 2 above. Chapter 4 focuses on how ambiguity was used to remove historical contribution as a yardstick for differentiation.
[3] LØ Blaxekjaer & TD Nielsen 'Mapping the narrative positions of new political groups under the UNFCCC' (2015) 15 *Climate Policy* 751, 752.
[4] See Chapter 1, section 1.6.1 above.
[5] United Nations Framework Convention on Climate Change (adopted 14 June 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC).

UNFCCC,[6] the Copenhagen Accord[7] and the Paris Agreement[8] have been selected to provide a background for examining the CBDR principle's journey throughout negotiations.

3.2 CBDR in Climate Change Law: From Framework Convention to Implementation Protocol and Matters Arising

This section sets out the CBDR principle's introduction into climate change law through the UNFCCC. The negotiating positions that influenced the wording of the CBDR principle are examined. From the start, the Intergovernmental Negotiating Committee (INC) struggled to capture the scope and meaning of the CBDR principle clearly in the UNFCCC. Their struggle proved to be a foretelling of the fracturing that the CBDR principle would suffer throughout climate change negotiations.[9] The Kyoto Protocol's failure to secure meaningful emissions reductions is also critiqued as part of the analysis of the CBDR principle's fracturing in the climate change regime.

3.2.1 The INC Process: Moving Climate Change from Policy to Norm

By the time the INC had gotten the mandate to coordinate the drafting of a binding document on climate change, the subject had gained sufficient traction among the international community. The Villach Conference of 1985[10] had already culminated in growing scientific and political focus on global warming. Then in 1988, Canada hosted the Toronto Conference

[6] Kyoto Protocol to the UN Framework Convention on Climate Change (Signed 11 December 1997, entered into force 16 February 2005) 2203 UNTS 148 (Kyoto Protocol).
[7] Decision 2/CP.15 Copenhagen Accord FCCC/CP/2009/11/Add.1 (18 December 2009) (Copenhagen Accord).
[8] Paris Agreement to the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) 1673 UNTS 125 (Paris Agreement).
[9] L Rajamani 'Differentiation in the emerging climate regime' (2013) 14 *Theoretical Inquiries in Law* 151, 155-160.
[10] See Report of the International Conference of the Assessment of the Role of Carbon Dioxide and of other Greenhouse Gases in Climate Variations and Associated Impacts https://library.wmo.int/index.php?lvl=notice_display&id=6321#.XUvo0S2cZQI.

on the Changing Atmosphere.[11] The conference statement warned of far-reaching impacts caused by global warming and sea-level rise.[12] Although the Toronto Conference Statement was not a negotiated document, it served as the 'high water mark' of climate change policy.[13] Governments had also requested the World Meteorological Organization (WMO) and the United Nations Environmental Programme (UNEP) to set up the Intergovernmental Panel on Climate Change (IPCC).[14] The IPCC released its first assessment report on climate change in 1990.[15] Later in the same year, the UN General Assembly adopted a resolution that established the INC to be the 'single intergovernmental negotiating process' acting under the General Assembly's auspices.[16]

Despite the urgency of the problem and the fact that the INC was time-bound to deliver its mandate,[17] the divergent views on a climate change agreement's critical aspects slowed the INC's progress.[18] The interpretation and application of differentiation were among the points of division. Although all states had contributed to the increase in GHG emissions through a wide range of activities, states had contributed in different proportions. In the past, about three-

[11] Ironically, Canada is one of the two countries that did not ratify the Kyoto Protocol which sought to shape the foundations of the CBDR principle.
[12] See Centre for International Environmental Law 'Selected international legal materials on global warming and climate change' (1990) 5 *American Journal of International Law and Policy* 513, 515. The summary statement sounded a strong alarm, warning that humanity was conducting an experiment whose consequences would be 'second only to global nuclear war'.
[13] D Bodansky 'The United Nations Framework Convention on Climate Change: A commentary' (1993) 18 *Yale Journal of International Law* 451, 462.
[14] See UNGA Res 43/53 (6 December 1988) UN Doc A/RES/43/53.
[15] IPCC '*Climate Change: The IPCC Scientific Assessment*' JT Houghton, GJ Jenkins & JJ Ephraums (eds) (1990)
[16] See UNGA Res 45/212 (21 December 1990) UN Doc A/RES/45/212. For a detailed discussion of the early history of the climate change regime see D Bodansky 'The History of the Global Climate Change Regime' in DF Sprinz & U Luterbacher (eds): *International Relations and Global Climate Change* (2001) 23.
[17] Under clause 7 of UNGA RES/45/212, the General Assembly envisioned that the INC would produce a framework convention in time for the Conference on Environment and Development in June 1992, where the convention would be open for signature.
[18] B Kjellén 'The new diplomacy from the perspective of a diplomat' in G Sjöstedt & AM Penetrante (eds), *Climate Change Negotiations: A Guide to Resolving Disputes and Facilitating Multilateral Cooperation* (2013), 55 (recounting the challenges that the INC faced during negotiatings on the UNFCCC, as chief negotiator for Sweden from 1991 to 2001.

quarters of global GHG emissions emanated from industrialised countries, with nearly a quarter originating from the US alone.[19] The remaining quarter of past global emissions originated from developing countries, where most of the world's population resides.[20] However, by some early estimates at the time, GHG emissions from developing countries would increase significantly.[21] Thus, a climate change agreement would have to consider a two-tier approach to mitigate climate change. Firstly, reduce GHG emissions from developed countries, which were historically responsible for the bulk of GHG emissions; and secondly, use the climate change regime as a vehicle to redirect the development agenda in developing countries into one of low-emissions growth by the use of climate-friendly energy sources for industrialisation.[22]

The INC's draft text showed that developing countries were clear on the basis of their participation in negotiating the UNFCCC. For instance, China noted that the international community had a common but differentiated responsibility towards climate change. To that end, China noted the historical emissions from developed countries, reasoning that developed countries should have the 'main responsibility' in addressing the problem.[23] Several other developing countries noted the historical role of developed countries and stressed that

[19] R Henson *The Thinking Person's Guide to Climate Change* (2014) 52. The US, whose population represents less than 5 percent of world's population, continues to generate about 15 per cent of global GHG emissions annually.
[20] 2019 UN Population Figures suggest that most of the growth of the world's population will occur in sub-Saharan Africa over the coming decades. See United Nations Department of Economic and Social Affairs (Population Division) 'World population prospects: Highlights' ST/ESA/SER.A/423 (2019) <https://population.un.org/wpp/Publications/Files/WPP2019_Highlights.pdf>.
[21] J Sathaye & A Ketoff 'CO_2 emissions from major developing countries: Better understanding the role of energy in the long term' (1991) 12 *Energy Journal* 161,162.
[22] Bodansky (note 13 above) 457.
[23] Intergovernmental Negotiating Committee for a Framework Convention on Climate Change (INC) 'Compilation of Possible Elements for a Framework Convention on Climate Change' Note by the Secretariat (Geneva, 20 June 1991), 26 < https://unfccc.int/resource/docs/1991/a/eng/misc02r01.pdf >.

developing countries' main priority was eradicating poverty. This priority, they reasoned, would translate into growing GHG emissions to accommodate their developmental needs.[24]

Another theme that resonated with developing countries was the sense of apprehension that climate change would become another ploy to stifle economic development in the South.[25] Thus, on the issue of financial and technical assistance, developing countries conditioned their participation on their understanding that developed countries would provide financial and technical assistance without restrictions.[26] Notably, developing countries wanted technological transfers to be on non-commercial terms and not introduce new conditions that would lead to trade barriers.[27] Developing countries also favoured creating a new financial organisation for climate change-related funding, separate from the Global Environment Fund (GEF) and whose governing board membership would consist mainly of developing countries and not developed countries.[28]

Among developed countries, there were different views on the issue of responsibility for past emissions. Some developed countries envisaged differentiated commitments along the lines of industrialised versus developing countries.[29] Other countries called for universal participation but recognised the special needs of developing countries.[30] Several developed countries, excluding the US, Soviet Union (at the time) and Japan, supported the inclusion of

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[24] Ibid 15.
[25] INC (note 23 above) 15. See also A Najam 'The South in International Environmental Negotiations' (1994) 31 *International Studies* 427, 428. This concern feeds into connections drawn in the previous chapter between the CBDR principle and the difference dynamic emanating from the pre-colonial, colonial and post-colonial era. See chapter 2 below, section 2.3.3.
[26] Ibid 27.
[27] Ibid 60, 61.
[28] Bodansky (note 13 above) 480.
[29] INC (note 23 above) 42.
[30] Ibid 43.

definitive targets and timetables for reducing GHG emissions in line with the Noordjick Declaration's call to stabilise GHG emissions 'as soon as possible'.[31]

Differential treatment evoked different interpretations and various means of application, which only served to heighten North-South tensions. After months of negotiations, disagreements on the form, text and scope of the proposed climate agreement impeded the INC's work.[32] Eventually, in the spring of 1992 and months to the Rio Conference on Environment and Development, the INC knuckled down to work out a way to produce a legal text that reflected as many compromises as possible.[33] In the end, the UNFCCC had "something for almost all of the negotiating states but left none entirely satisfied".[34] This pattern of seeking out compromises to avoid stalemates would become a permanent feature of the climate change regime.[35] The central role of ambiguation in articulating the CBDR principle come into focus in the next chapter. However, it suffices to note that the high price for preferring ambiguous treaty provisions in the name of global participation was weak enforcement mechanisms and diminishing consensus on the meaning and reach of key provisions, including those that affect differentiation.[36]

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[31] Ibid 46, 48. See Ministerial Conference on Atmospheric Pollution and Climatic Change 'Noordjick Declaration on Climate Change' (Noordwick, November 1989).The United States had stated categorically that it would not join a treaty that included binding timetables for reducing GHG emissions: S Andersen 'US Greenhouse Policy: Reactionary or Realistic?' (1991) 11 *International Challenges* 17, 18.
[32] Bodansky (note 13 above) 485-492.
[33] Ibid.
[34] P Sands 'The United Nations Framework Convention on Climate Change' (1992) 1 *Review of European Comparative International Environmental Law* 270, 270. See also CD Stone 'Beyond Rio: Against global warming' (1992) 86 *American Journal of International Law* 445, 472 (predicting that the UNFCCC would likely be a 'politely vague agreement on principles with minimal advancements on targets …').
[35] D Bodansky, J Brunnée & L Rajamani '*International Climate Change Law'* (2017) 105-115.
[36] This point is explored further, in the context of third world interests and the ambiguation of the CBDR principle, in chapter 4 below.

The UNFCCC is the first multilateral environmental agreement (MEA) that expressly incorporates the CBDR principle.[37] The climate change regime's overall objective is to stabilise GHG concentrations, bringing them to levels that do not interfere dangerously with the climate system.[38] In the context of the CBDR principle, achieving the climate change regime's overall objective is the common responsibility of all parties to the UNFCCC.[39] Articles 4(1) and 4(2) set out the operation of the CBDR principle. They provide common obligations for all parties and prescribe additional commitments for developed-country parties.[40] Furthermore, in recognition that developing countries will require financial and technological assistance to meet their commitments, Article 4(3) mandates developed countries to provide "new and additional financial resources". Article 4(5) calls on developed countries to facilitate "transfer of or access to environmentally sound technologies and know-how".[41] Furthermore, from a combined reading of the preamble and Article 4, the INC bases the differentiated commitments on contribution and capabilities. The overall import of these provisions shows that the INC's drafting of the CBDR principle drew substantially from the Rio Declaration's model of differentiation.[42] To a large extent, developing countries coalesced through the G-77 Group and influenced the INC's drafting of the above provisions on differentiated commitments.

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[37] Hitherto, MEAs incorporated the principle of differentiation through a variety of means but stopped short of including the principle of CBDR expressly. See CD Stone 'Common but differentiated responsibilities in international law' (2004) 92 *American Journal of International Law* 276, 279. See also P Dupuy & JE Viñuales, *International Environmental Law* (2015) 74.

[38] UNFCCC, art 2.

[39] The chapeau of article 3 reflects this position. It reflects a commitment towards a common objective of stabilizing concentrations of GHG emissions at safe levels.

[40] UNFCCC, art 4. Article 4(1) spells out commitments for all parties. Article 4(2) then provides that developed countries must take measures on mitigating climate change by limiting anthropogenic emissions of GHGs and protecting and enhancing sinks and reservoirs of GHGs.

[41] The provisions on financial and technology transfer were crucial for securing developing country participation in the climate change regime. For a more general discussion of developing countries' insistence on developed countries' commitment to financial and technology transfer as a prerequisite for participation in MEAs, see MA Drumbl 'Poverty, wealth, and obligation in international environmental law' 76 *Tulane Law Review* 843 (dicussing the impact developing countries' demand of financial and technology transfers in environmental governance by examing the ozone protection, climate change and biodiversity regimes).

[42] Rio Declaration, Principle 7.

3.2.2 The G-77, Climate Change and Differentiation

The Group of 77 (G-77) is the umbrella negotiating block representing the global South's collective concerns and interests.[43] The G-77 aims to hedge its collective negotiating strength against the North's economic and political dominance.[44] During negotiations towards the UNFCCC, the G-77 maintained a unified stance on the differentiation of responsibilities of the South from those of the North based on contribution and capability.[45] To this end, the UNFCCC acknowledges three points. First, developed countries' past emissions contributed to climate change; second, mitigation efforts require leadership from the North; and third, emissions in developing countries would grow to meet their social and economic needs.[46] Article 4.7 of the UNFCCC sums up the prevailing sentiments of developing countries; that their participation and compliance with their commitments depend directly on financial and technological transfers from developed countries.[47]

The G-77's position on the CBDR principle, as reflected in sections of the UNFCCC, is closely modelled after the Rio Declaration's rendition of the principle, which determines differentiated responsibilities based on historical contribution and capabilities.[48] The fact that historical emissions from industrialisation significantly contributed to causing climate change, something that developed countries are more capable of mitigating, means that developed countries should bear a more significant burden to mitigate climate change. Therefore, they

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[43] Hereinafter G-77. See<https://www.g77.org/doc/> .
[44] Ibid. China joined the membership of the G-77 group: In some literature on climate change the group is called the G-77 + China. In this chapter, reference to the G-77 group includes China.
[45] A Vihma, Y Mulugetta & S Karlsson-Vinkhuyzen 'Negotiating solidarity? The G77 through the prism of climate change negotiations' (2011) 23 *Global Change, Peace and Security* 315, 327.
[46] See UNFCCC, Preamble, art 3.1 and 4.2.
[47] UNFCCC, Art 4.7. Drumbl describes this as an innovative shared compact: Drumbl (note 41 above) 855. Here, again, we see a manifestation of the South's attempt to use the CBDR principle to reverse the difference dynamic. See chapter 2 below, section 2.3.3.
[48] Rio Declaration, Principle 7.

should assume binding commitments to reduce their GHG emissions and provide financial and technological support to help developing countries fulfil their obligations.[49]

Despite the G-77's influence and contribution to formulating the rules on differentiation, it is worth noting that differentiated responsibility for addressing climate change was a substantial compromise for developing countries.[50] Developing countries had pushed to include a 'main responsibility' principle in the following terms:

> 'While the protection of the environment is in the common interest of the international community, the developed countries bear the main responsibility for the degradation of the global environment. Ever since the Industrial Revolution, the developed countries have overexploited the world's natural resources through unsustainable patterns of production and consumption, causing damage to the global environment, to the detriment of the developing countries.'[51]

Meanwhile, developed countries envisioned a different interpretation and application of the CBDR principle and sought to limit the CBDR principle's reach in the climate change regime.[52] Thus, after ensuring that the UNFCCC's text did not include the main responsibility concept, developed countries worked to recast the meaning of differentiation fundamentally, by calibrating the CBDR principle in a manner that focuses less on historic contributions to GHG emissions.[53] The first fracture of the CBDR principle happened when the UNFCCC termed the

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[49] J Gupta 'Leadership in the climate change regime: Inspiring the commitment of developing countries in the Post-Kyoto phase.' (1998) 7 *Review of European Comparative International Environmental Law* 180, 182.
[50] Bodansky, Brunnée & Rajamani (note 35 above) 124.
[51] Beijing Ministerial Declaration on Environment and Development (adopted at Beijing Ministerial Conference of Developing Countries on Environment and Development) (14-19 June 1991) The idea of main responsibility appeared earlier in the 1989 Caracas Declaration of foreign ministers of the G-77 group: 'Since developed countries account for the bulk of the production and consumption of environmentally damaging substances, they should bear the main responsibility in the search for long-term remedies for global environment protection and should make the major contribution to international efforts to reduce consumption of such substances.'<https://www.g77.org/doc/Caracas%20Declaration.html> .
[52] L Rajamani 'The Principle of common but differentiated responsibility and the balance of commitments under the climate regime' (2000) 9 *Review of European Community and International Environmental Law* 120, 128.
[53] J Brunnée & C Streck 'The UNFCCC as a Negotiation Forum: Towards Common but More Differentiated Responsibilities' (2013) 13 *Climate Policy* 589, 592-593.

CBDR principle as the principle of common but differentiated responsibilities and respective capabilities – CBDR-RC.[54] This paved the way for developed countries to further chip away at the relevance of historical responsibility but emphasise the enhanced capabilities of some developing countries with large economies.[55]

A commonly held view in academic literature on differentiation is that the introduction of the term 'respective capabilities' in Article 3 of the UNFCCC establishes capability as a factor for differentiation, something Principle 7 of the Rio Declaration did not articulate clearly. Rajamani and Winkler, for example, subscribe to this reasoning and opine that the use of 'respective capabilities' set out the element of capabilities in determining differentiated responsibilities in climate change law.[56] However, another view is argued here. Principle 7 of the Rio Declaration's rendition of the CBDR principle is the foundation of Article 3 of the UNFCCC and it already built both elements of contribution and capabilities into the meaning of the principle. Principle 7's reference to capabilities identifies developed countries (being beneficiaries of the gains of industrialisation) as having more advanced capabilities to mitigate an environmental problem and provide support to less capable countries.[57] Therefore, the more explicit mention of capabilities in Article 3 of the UNFCCC reflects an attempt to include countries who are not historically responsible but are regarded by developed countries as

[54] Ibid.
[55] Ibid 593.
[56] H Winkler & L Rajamani 'CBDR&RC in a regime applicable to all' (2013) 14 *Climate Policy* 1, 3 (the authors note the Rio Declaration's dual establishment of contribution and capacity but contradict this view when they argue subsequently that '[t]he use of the term 'respective capabilities' in addition to CBDR suggests that there are two bases for differentiation – one based on capability, and another that draws from Rio Declaration's Principle 7 which contains a definition of CBDR based on the contribution to environmental harm.') See also L Rajamani 'Differentiation in the post-2012 climate regime' (2008) 4 *Policy Quarterly* 48; L Rajamani 'The reach and limits of the principle of common but differentiated responsibilities in the climate change regime' in N Dubash (ed), *Handbook on climate change in India: Development, Governance and Politics* (2011) 118–129.
[57] S Atapattu 'The significance of international environmental law principles in reinforcing or dismantling the north-south divide' in S Alam et al (eds), *Environmental Law and the Global South* (2015) 74, 94; Dupuy & Viñuales (note 37 above); Cullet 'Differential treatment in international law: Towards a new paradigm of inter-state relations' (1999) 10 *European Journal of International Law* 549, 577-579.

bearing a greater responsibility of addressing climate change. Consequently, by adding 'respective capabilities' in the wording of the CBDR principle in the UNFCCC, developed countries seek to widen the scope of responsibility to include some developing countries.[58]

The introduction of CBDR-RC in the UNFCCC was the beginning of the redundancy of historical contribution as a vital factor for determining differentiated mitigation commitments.[59] In addition to shifting the focus of differentiation towards capabilities, developed countries were insistent that the text of the UNFCCC must not include language that hints at legal liability for past emissions or language that implies legal obligations to transfer financial and technological assistance to developing countries based on liability.[60] Finally, to keep developing countries from possibly invoking the CBDR principle as a legal principle whose breach could invoke state responsibility, developed countries ensured that the INC framed the CBDR principle as part of the UNFCCC's 'guiding principles'.[61] The import of this

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[58] EO Babatunde 'In the light of different national circumstances: Equity under the Paris Agreement' (2019) 4 *Cambridge Law Review* 105, 129.

[59] There is considerable academic scholarship in which some authors consider the CBDR principle as ineffective and, even, divisive, based on the historical contribution limb of the CBDR principle's normative structure. They rather emphasize that some developing countries have capabilities that are akin to developed countries and therefore they should also take a leadership role in climate mitigation. See, for example, M Weisslitz 'Rethinking the equitable principle of common but differentiated responsibility: Differential versus absolute norms of compliance and contribution in the global climate change context' (2002) 13 *Colorado Journal of International Environmental Law & Policy* 473; TB Adams 'Is there a legal future for sustainable development in global warming? Justice, economics, and protecting the environment' (2003) 16 *Georgetown International Environmental Law Review* 77; MJ Bortscheller 'Equitable but ineffective: How the principle of common but differentiated responsibilities hobbles the global fight against climate change' (2009) 10 *Sustainable Development Law & Policy* 49; A Mumma & D Hodas 'Designing a global post-Kyoto climate change protocol that advances human development' (2007) 20 *Georgetown International Environmental Law Review* 619.

[60] Brunnée & Streck (note 53 above) 592-593. See also AC Revkin & T Zeller 'US negotiator dismisses reparations for climate' The New York Times (2009) <https://www.nytimes.com/2009/12/10/science/earth/10climate.html > (reporting a statement made by US chief negotiator Todd Stern that the US categorically rejects claims of reparation for past emissions).Subsequently, in negotiations leading to the Paris Agreement, developed countries continued to reject language that would create liability for historical emissions and the 'loss and damage' associated with it. See UNFCCC 'Views and Information from Parties and Relevant Organizations on the Possible Elements to be included in the Recommendations on Loss and Damage in accordance with decision 1/CP.16.1-7' (2012a) FCCC/SBI/2012/MISC.14/Add.1)

[61] Article 1 of the UNFCCC is tagged with a footnote which reads 'Titles of articles are included solely to assist the reader.' See also Sands (note 34) 272 (noting that the USA introduced the footnote as an last-ditch attempt to weaken the effect of the whole of Article 3, which set out the CBDR principle.)The chapeau of article 3 mandates

feat is that neither the CBDR principle (as a principle) nor its components (broken down into individual treaty provisions regarding differential responsibilities based on historical contribution and capabilities) are justiciable.[62]

Because of the differences in the interpretation of the CBDR principle and the compromises that the INC sought to capture, the text of the UNFCCC is unclear on what factors determine differentiation in the climate change regime. The preambular recitals point to a recognition of the historical antecedents of climate change. Article 3.1 and Article 4.7 point to a recognition that developed countries should take the lead in addressing climate change and the developing countries' ability to take concrete steps towards mitigation depends on financial and technological transfers. Yet, the emphasis on capabilities which developed countries advance to include growing third world capabilities began creating a gap between the leadership role that the UNFCCC entrusts to developed countries and the understanding that developing countries require environmental space to pursue sustainable development.[63] Despite the uncertainty surrounding the CBDR's meaning in relation to mitigation responsibilities, the Kyoto Protocol attempted to operationalise the CBDR principle.

3.2.3 Kyoto Protocol: Targets, Gaps and Questions about Fairness

At the second COP, the parties to the UNFCCC established the Berlin Mandate to set out plans to draft a protocol, the Kyoto Protocol to the UNFCCC, which would include binding

all states to be guided by the principles of the climate change in their actions to stabilize GHG concentrations in the atmosphere.

[62] Brunnée & Streck (note 53 above) 593.

[63] K Mickelson 'Leading towards a level playing field, repaying ecological debt or making environmental space: Three stories about international environmental cooperation' (2005) 43 *Osgoode Hall Law Journal* 139, 163.

emission reduction commitments.[64] The Kyoto Protocol set out emission reduction targets for industrialised countries and required them to provide financial and technical support to developing countries to mitigate climate change.[65] The Kyoto Protocol introduced no emissions reduction targets for developing country parties in recognition of the technological and financial advancement of developed countries and the fact that the largest share of historical and current global emissions emanated from developed country parties.[66] However, The Kyoto Protocol's flexible mechanisms (emissions trading,[67] joint implementation[68] and the clean development mechanism) would provide market-based incentives for climate mitigation and also allow developing countries to be part of mitigation efforts, albeit indirectly.[69]

Article 17 of the Kyoto Protocol allows developed countries listed in Annex B of the Protocol to engage in emissions trading. Through emissions trading, developed countries could transfer or acquire Assigned Amount Units (AAUs), Emission Reduction Units (ERUs), Certified Emission Reductions (CERs) or Removal Units (RMUs).[70] The Kyoto emissions trading system propelled the creation of regional emissions trading systems in the European Union.[71] Some countries such as Kazakhstan, New Zealand, Switzerland and South Korea set national emissions trading systems, as well as some subnational actors such as cities, provinces and individual states.[72]

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[64] Conference of the Parties First Session 1/CP 'The Berlin Mandate: Review of adequacy of Article 4, paragraph 2 (a) and (b), of the Convention, including proposals related to a protocol and decisions on follow-up' (1995) (Hereinafter 'Berlin Mandate').
[65] Kyoto Protocol, Annex B sets out the quantified emission reduction commitment for Annex 1 countries by percentage of the base year 1990.
[66] Berlin Mandate, art 2(b). See also UNFCCC 'Tracing the origins of the Kyoto Protocol: An article-by- article textual history' (Prepared under contract to the UNFCCC by J Depledge) FCCC/TP/2000/2 (25 November 2000), noting at Part VI deleted draft articles which included an article on 'voluntary commitments' for non-Annex 1 countries.
[67] Kyoto Protocol, art 17.
[68] Ibid, art 6.
[69] Ibid, art 12.
[70] Ibid, art 17.
[71] Bodansky, Brunnée & Rajamani (note 35 above) 192.
[72] Ibid.

Article 6 provides for the Joint Implementation mechanism which enables an Annex I party to gain ERUs for implementing projects that reduce emissions or enhance the removal of GHGs by sinks in another Annex I country. The condition precedent is that emission reductions gained from joint implementation must be additional to any reductions that would occurred otherwise.[73]

Article 12 provides for the Clean Development Mechanism (CDM). The CDM enables Annex I parties to conduct or invest in projects that reduce GHG emissions in developing countries and use the accrued CERs to contribute towards compliance with their emissions reduction targets under the Protocol.[74] Again, as with the Joint Implementation mechanism, the CERs generated under the CDM must be additional to any reductions that would have otherwise occurred.[75]

The flexible mechanisms, briefly discussed above,[76] reflect an attempt to pair strict emission reduction targets for developed countries with incentivised involvement of developing countries.[77] Nevertheless, in fidelity to the Berlin Mandate, the Kyoto Protocol's flexible mechanisms placed the mitigation burden on developed countries, as Annex I parties.[78] The Kyoto Protocol's model of differentiation is, arguably, one of the most visible attempts to reflect the leadership role of developed countries towards mitigation.[79] Furthermore, the clear dichotomy between the responsibilities of developed (Annex I) countries towards mitigation

[73] Kyoto Protocol, art 6.
[74] Ibid, art 12.
[75] Ibid, art 12 (5) (c).
[76] An in-depth analysis of the Kyoto Protocol's flexible mechanisms is beyond the scope of this study. However, the flexible mechanisms are essential to examining how the Kyoto Protocol's framing of differentiation contributed to its metamorphosis in the Paris Agreement, as discussed in chapter 4 below.
[77] Bodansky, Brunnée and Rajamani note that the attempt to introduce and implement voluntary commitments for developing countries failed. Developing countries argued that voluntary commitments would run counter to the Berlin Mandate. See Bodansky, Brunnée & Rajamani (note 35 above) 166.
[78] Ibid, 166, 167.
[79] Ibid, 166. The leadership role of developed countries comes into focus in chapter 5 where I examine the aspects of the CBDR principle which one might consider as uncontested in national climate change litigation. See chapter 5 below.

and those of developing (Non-Annex I) countries has been described as 'the clearest attempt to transform, activate and operationalize CBDR from a legal concept into a policy instrument.'[80]

However, the Kyoto Protocol failed to secure real and significant emission reduction among industrialised (Annex I) countries. To be fair, the data on emissions in the Kyoto Protocol's first commitment period suggests that most developed countries initially recorded reductions in emissions above their chosen targets.[81] However, these reductions did not happen because developed countries necessarily cut their emissions. Some countries produced and traded 'hot air', where an Annex I or Annex B country whose emissions are lower than its official emission limit sells the excess 'emission rights' to other countries that have exceeded their emission limit.[82] Furthermore, the impact of the 2008 global financial crisis on the global economy rendered emissions reduction almost effortless for some Annex I and B countries, without significant adjustments to energy consumption or fossil fuel use.[83] Consequently, when the global economy rebounded from the recession, global emissions sprang back up.[84]

In addition to the net increase in GHG emissions from developed countries in the first commitment period, one cannot deny that a portion of the increase in GHG emissions in the first commitment period of the Kyoto Protocol emanated from emerging economies in the

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[80] See CC Joyner et al 'Common but differentiated responsibilities' (2002) 26 *American Society of International Law Proceedings* 358.
[81] I Shishlov, R Morel & V Bellassen 'Compliance of the parties to the Kyoto Protocol in the first commitment period' (2016) 16 *Climate Policy* 768, 769-770.
[82] E Woerdman 'Hot Air Trading under the Kyoto Protocol: An Environmental Problem or Not?' (2005) 14 *European Environmental Review* 71 (examining hot air trading under the Kyoto Protocol and concluding that from an ethical perspective hot trading is an environmental problem because its net effect is increase, rather than decrease, in GHG emissions). See also E Richman 'Emissions trading and the development critique: Exposing the threat to developing countries' (2003) 36 *NYU Journal of International Law & Politics* 133, 167.; J Gupta 'International law and climate change: The challenges facing developing countries' (2006) *Yearbook of International Law* 119, 129 citing T Tientenberg 'The Tradeable Permits Approach to Protecting the Commons: What Have We Learned?'.
[83] GP Peters et al 'Rapid growth in CO2 emissions after the 2008–2009 global financial crisis' (2011) 2 *Nature Climate Change* 1, 2.
[84] Ibid.

South.[85] In part, the increase in developing countries' emissions is traceable to emissions via international trade. Developing countries have become the net exporters of GHG emissions because of increased demand for industrial production for international trade.[86] However, the climate change regime's accounting rules for GHG emissions focus primarily on territorial emissions (production-based accounting).[87] Thus, GHG inventories do not fully capture the effect of trade-related emissions (consumption-based emissions).[88]

Furthermore, the Kyoto Protocol did not set criteria for assigning emission reduction targets among Annex 1 countries. To ensure that there was at least a deal that would move climate action forward, the COP left Annex 1 countries to negotiate reduction targets.[89] The result was that Annex 1 countries negotiated comfortable targets that would present the least costs to their economies.[90] In essence, while emissions trading may have brought about some short-term gains, it undermined the long-term chances of climate change action by delaying the innovation that would propel climate-friendly energy technologies.[91]

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[85] Ibid 1.
[86] GP Peters et al 'Growth in emission transfers via international trade from 1990 to 2008' (2011) 108 *Proceedings of National Academy of Sciences* 8903, 8903.
[87] The production-based method accounting for GHG emissions (PBA) measures emissions from a country's domestic production of goods and services, regardless of whether the country consumes the goods and services or exports them. Conversely, the consumption-based accounting measures attributes all emissions along the production line of good and services to the countries that consume the goods and services: S Afionis et al 'Consumption-based carbon accounting: Does it have a future?' (2017) 8 *Wiley Interdisciplinary Reviews: Climate Change* e438, 439.
[88] Peters et al (note 86 above) 8907.
[89] KA Baumert 'Participation of developing countries in the international climate change regime: Lessons for the future' (2006) 38 *George Washington International Law Review* 365, 402. See also M Grubb, C Vrolijk & D Brack *Kyoto Protocol: A Guide and Assessment* (1999) 61-114.
[90] DJ Hay 'Post-Kyoto stress disorder: How the United States can influence international climate change policy' (2008) 15 *Missouri Environmental Law & Policy Review* 493, 509.
[91] DM Driesen 'Free lunch or cheap fix? The emissions trading idea and the climate change convention' (1998) 26 *Boston College International & Comparative Law Review* 1, 42-43.

The Kyoto Protocol did not engender the ambitious cuts in emissions required to meet the urgency of climate change impacts.[92] It did not encourage the leadership that the UNFCCC had envisioned as vital for the climate change regime's success.[93] Without the insistence on leadership, developed countries had no incentives to speed up innovation to produce environmentally sound technologies (ESTs) that would eventually replace fossil fuel based technologies.[94] Notwithstanding the Kyoto Protocol's woes, the US crippled the success of the Kyoto Protocol even before the Kyoto Protocol entered into force when it refused to ratify the Protocol.[95]

3.2.4 US, Climate Change and Differentiation

The US has one of the world's most advanced domestic legislation on environmental protection.[96] Yet, climate change complexities bring out US policy in situations where national interests clash with environmental protection that requires international cooperation, as I now discuss.[97] Although the US signed the Kyoto Protocol, there were early doubts about the Kyoto Protocol's chances of ratification. On the domestic scene, Congress, through the Byrd-Hagel Resolution,[98] had signalled an unwillingness to ratify the Kyoto Protocol. President GW Bush

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[92] AM Rosen 'The wrong solution at the right time: The failure of the Kyoto Protocol on climate change' (2015) 43 *Politics & Policy* 30, 42.
[93] D French '1997 Kyoto Protocol to the 1992 UN Framework Convention on Climate Change' (1998) 10 *Journal of Environmental Law* 227 (generally examining the Kyoto Protocol and concluding, among others, that a lack of leadership from the North was detrimental to the Kyoto Protocol's success.
[94] Richman (note 82 above) 170.
[95] AM McCright & RE Dunlap 'Defeating Kyoto: The conservative movement's impact on US climate change policy' (2003) 50 *Social Problems* 348.
[96] The United States Environmental Protection Agency works with the United States Congress to write regulations and implement the country's environmental laws. See < https://www.epa.gov/laws-regulations/laws-and-executive-orders > for comprehensive list of environmental law and executive orders.
[97] K Harrison & L Mcintosh Sundstrom 'The Comparative Politics of Climate Change' (2007) 7 *Global Environmental Politics* 1. See also *RO Keohane & DG Victor* 'The Regime complex for climate change' (2011) 9 *Perspectives on Politics* 7.
[98] United States Senate Resolution 98 – A resolution expressing the sense of the Senate regarding the conditions for the United States becoming a signatory to any international agreement on greenhouse gas emissions under the United Nations Framework Convention on Climate Change (1997-1998) (Hereinafter 'Bryd-Hagel Resolution') – (declaring that the United States should not be a signatory to the UNFCCC or the Kyoto Protocol or any other

also stated that the US would not ratify the Kyoto Protocol when he took office. He called the Kyoto Protocol an unfair and ineffective means of addressing global climate change concerns.[99]

As a nation-state, the US position on the science of climate change, its impacts on global ecosystems and human life is chequered.[100] On one end of the spectrum is found ultra-conservatives and sceptics who question the scientific basis of climate change and claim that climate change is a concocted problem aimed at defeating US economic interests.[101] Former US president, Donald Trump, called climate change a Chinese hoax and steered the US out of the Paris Agreement.[102] On the other end of the spectrum is the more liberal 'climate change believers' with ancestry traceable to former Vice President Al Gore, a forerunner in climate change advocacy.[103] Soon after his inauguration, the current US (Democrat) President, Joe

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agreement on climate change unless such an agreement also mandates commitments for developing country parties within the same compliance period).

[99] GW Bush 'Letter to Members of the Senate on the Kyoto Protocol on Climate Change' <https://www.govinfo.gov/content/pkg/WCPD-2001-03-19/pdf/WCPD-2001-03-19-Pg444-2.pdf> Senator Frank Murkowski shared similar views. See FH Murkowski 'The Kyoto Protocol in not the answer to climate change' (2000) 37 *Harvard Journal on Legislation* 345.

[100] Although similar sentiments are attributable to the citizenry, many more Americans believe that climate change is a serious threat and that their government should do more, at home and on the international scene, to tackle the problem. For example 21 young Americans have sued their government in a landmark case. They claim that continued GHG emissions in the US significantly harms their right to life and liberty. The case gained traction when a US District Court judge in Oregon upheld the notion that access to a clean environment qualifies as a fundamental right, allowing the case to proceed. See *Juliana v. United States* 217 F. Supp. 3d 1224 (D. Or. 2016).

[101] McCright and Dunlap have written extensively about white conservatives and climate change denial in America in McCright & Dunlap (Defeating Kyoto) and AM McCright & RE Dunlap 'Cool dudes: The denial of climate change among conservative white males in the United States' (2011) *Global Environmental Change* 1163.

[102] During Donald Trump's presidency, the White House released a short video titled 'The Paris Accord is a Bad Deal for America' <https://www.youtube.com/watch?v=CmiEUVVaFzs > (arguing that the Paris Agreement undermines US competitiveness and jobs and that the Agreement was badly negotiated). Again, at a side event at the COP in Katowice, Wells Griffith, President Trump's adviser on energy and climate is quoted to have said no nation should have to sacrifice economic prosperity or energy security in pursuit of environmental sustainability: See G Witte & B Dennis 'That was awkward – at world's biggest climate conference, US promotes fossil fuels' Washington Post (2018) <https://www.washingtonpost.com/world/europe/that-was-awkward--at-worlds-biggest-climate-conference-us-promotes-fossil-fuels/2018/12/10/aa8600c4-f8ae-11e8-8642-c9718a256cbd_story.html?noredirect=on> See also E Bomberg 'Environmental Politics in the Trump Era: An Early Assessment' (2017) *26 Environmental Politics* 956 (asessing the Trump adminstration's policy on global environmental issues).

[103] Former democratic Vice-President Al Gore played a lead role in the production of the documentary 'An Inconvenient Truth: A Global Warning' in 2006, a documentary which drew significant international attention to global warming resulting from human activities. See <https://www.algore.com/library/an-inconvenient-truth-

Biden, signed an executive instrument to reverse President Trump's withdrawal from the Paris Agreement.[104]

The US is a veto state in climate change politics because without US participation, international cooperation weakens, as other states question the need to make hard choices about GHG emission reduction.[105] On differentiated responsibilities for mitigating climate change, the US has couched its position in terms of fairness. Firstly, historical emissions do not translate into legal responsibility because it is difficult to find a legal principle on which to pin such responsibility. Thus, it would not be fair to make historical emissions one of the bases for differentiation.[106] Secondly, by exempting developing countries from binding emission reduction commitments, they would have a free pass to industrialise with cheaper energy sources such as oil and coal, which developed countries would be required to phase out.[107] Thirdly, developing countries would have a *carte blanche* to increase their GHG emissions. Their unfettered emissions would counteract the mitigation efforts of developed countries.[108] Indeed, the US position raises valid points. If climate change is a common concern that requires

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dvd> President Barak Obama, also a democrat, played an instrumental role in keeping climate change alive in mainstream US politics. See CJ Bailey 'Assessing President Obama's Climate Change Record' (2019) 28 *Environmental Politics* 847 (generally detailing Obama's campaign agenda on climate change and assessing his performance).

[104] The White House 'Briefing Room: Paris Climate Agreement' (20 January 2021) < https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/paris-climate-agreement/ >

[105] PS Chasek, DL Downie & JW Brown *Global Environmental Politics* 6 ed (2014) 234-235. See also L Kemp 'US-Proofing the Paris Climate Agreeement' (2017) 17 *Climate Policy* 86 (discussing the ways in which the Paris Agreement may be weakened if the US officially pulls out of the Paris Agreement and suggesting ways in which the Paris Agreement could be strengthened to ensure continued cooperation among other state parties).

[106] See B Adler 'Why the words "loss and damage" are causing such a fuss at the Paris climate talks' <https://www.vox.com/2015/12/9/9871800/paris-cop21-climate-loss-damage> (reporting lead US climate negotiator's statement that the USA and all developed countries are unanimous that they will not accept any language that invokes liability and compensation for 'loss and damage' – a term which suggests compensation for loss and damage from climate change impacts) Compensation for 'loss and damage' is, arguably, a relic of the arguments surrounding responsibility for historical emissions).

[107] Bryd-Hagel Resolution (note 68 above) (The US Senate reckoned that differential treatment, coupled with the level of emission reductions required of the US, could result in serious harm to the US economy, particularly job loss, trade disadvantages and increased energy and consumer costs).

[108] Weisslitz (note 59 above) 490.

drastic cuts in GHG emissions, it seems counter-intuitive to allow some countries to follow the same path that caused the problem while asking others to do more to limit their emissions.[109] Given that climate change touches on almost every aspect of modern economic activity and requires tough cuts to present GHG emissions, a climate regime should distribute the mitigation burden as equitably as possible.[110]

Nevertheless, a third world perspective brings out another angle of the fairness argument. First, the absence of a specific vehicle to translate historical emissions to legal responsibility is not enough to ignore developed countries' colossal contribution to climate change.[111] The science on climate change makes it possible to place the US and most developed countries within the range of moral responsibility. Scientific studies show that developed countries were the major contributors to global warming from 1850 to 2010.[112] Furthermore, on an ethical level, one cannot wish away the fact that a handful of countries have undertaken industrialisation at such great expense to the global climate system that several other countries partake in.[113] Recently, President Joe Biden announced that the US would cut emissions to 2005 levels by 50 to 52 per cent by 2030. The target aims at creating jobs and promoting US leadership in clean energy technologies.[114] It is instructive to note that the base year stated in the US target is not 1990 levels, as used in most UNFCCC documents. Arguably, this self-

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[109] Adams (note 59 above) 117-121.
[110] K Mickelson (note 63 above) 148 (detailing US arguments on fairness in differentattion in the climate change regime).
[111] Chapter 4 provides a more vigorous defence of historical responsibility which engages the US argument that imposing historical responsibility is unfair.
[112] T Wei et al 'Developed and developing world contributions to climate system change based on carbon dioxide, methane and nitrous oxide emissions' (2016) 33 *Advances in Atmospheric Sciences* 632, 642. See also J Hickel 'Quantifying national responsibility for climate breakdown: An equality-based attribution approach for carbon dioxide emissions in excess of the planetary boundary' (2020) 4 *Lancet Planet Health* e399.
[113] Mickelson (note 63 above) 154 -156.
[114] See The White House Briefing Room 'Factsheet: President Biden sets 2030 Greenhouse gas pollution reduction target aimed at creating good-paying union jobs and securing U.S. leadership on clean energy technologies' (22 April, 2021) < https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/ >.

selected base year raises questions about whether Biden's announcement reflects the US highest possible ambition.[115]

Secondly, the claim that differentiation based on the developed-developing country bifurcation gives an unfair economic advantage to the developing world is a claim that remains largely unproven.[116] Be that as it may, there are some valid layers of argument that require some unpacking. It may be fair to argue that the north-south and developed country-developing country tags are not helpful in contemporary times because some developing countries, particularly China and India, have relatively advanced and industrialised economies.[117] Indeed, it is absurd to compare China to Zimbabwe or Lesotho, although they are both categorised as developing countries.[118] Besides, market forces of demand and supply favour cheaper goods over pricy ones, generally. This could suggest that, without commitments to GHG emission reduction, developing countries can use fossil fuels in their industrialisation to beat down production costs, compared to developed countries.

However, the unfair economic advantage argument is flawed because the US, as with other developed countries, ultimately derives economic benefits (minus the cost of emissions) by outsourcing GHG emissions to the developing world.[119] In the context of ecologically

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[115] 'And, to be clear, the US is currently not on track to meet its previous NDC, let alone the new one':U Irfan '5 things to know about the new US climate commitment' Vox News (22 April 2021) <https://www.vox.com/22397364/earth-day-us-climate-change-summit-biden-john-kerry-commitment-2030-zero-emissions > See also T Bove 'Is Biden's new emissions reduction target good enough? (27 April 2021) < https://earth.org/us-emissions-reduction-target/ >.

[116] W Scholtz 'Different countries, one environment: A critical southern discourse on the common but differentiated responsibilities principle' (2008) *South African Yearbook of International Law* 113, 129.

[117] For example, according to the World Bank, China is the world's second largest economy and the largest single contributor to growth since the global financial crisis of 2008. <https://www.worldbank.org/en/country/china/overview >.

[118] W Scholtz 'Equity as the Basis for a Future International Climate Change Agreement: Between Pragmatic Panacea and Idealistic Impediment. The Optimisation of the CBDR Principle via Realism' (2009) 42 *Comparative & International Law Journal of Southern Africa* 168, 180.

[119] D Moran, A Hasanbeigi & C Springer 'The carbon loophole' in *Climate Policy* (2018) 10. In a 1991 memo from the then World Bank chief economist, which was leaked, Larry Summers justified his idea that 'dirty

unequal exchange, the GHG emissions embodied in producing goods for the developed world are not fully addressed or accounted for.[120] The emissions from the production of consumable goods and services in the developing world are attributed to developing countries, although ultimately developing countries produce these goods and services for developed country markets.[121]

Thirdly, the claim that the differentiation of responsibilities gives developing countries unfettered permission to continue to increase their emission of GHGs is untenable. The CBDR principle, as laid in the UNFCCC, embodies an admission that climate change disproportionately affects developing countries. The preamble to the UNFCCC reiterates the need to ensure that developing countries can eradicate poverty through sustainable development.[122] More importantly, the preamble acknowledges that emissions from developing countries will grow to meet their needs.[123] Since all parties recognise that third world emissions would peak before dropping, the *carte blanche* situation the US presents does not recognise the leadership role that developed countries were mandated to play.[124] In any case, differentiation is generally intended to be finite, conditioned partly on developed countries performing their leadership obligations.[125] Moreover, arguably, despite the injustice of the situation, developing countries are doing more than their fair share of mitigation

industries' could be migrated to least developed countries (LDCs). He reasoned that because LDCs are less polluted it made economic sense to dump toxic wastes there because it would do less harm. He also reasoned that since incomes are low and morbidity is high in LDCs, the need for a clean and healthy environment for their aesthetic enjoyment is not as relevant as it was in the developed world. See L Baker 'Of embodied emissions and inequality: Rethinking energy consumption' (2018) 36 *Energy Research & Social Science* 52, 53.

[120] Baker (note 119 above) 54.

[121] Moran, Hasanbeigi & Springer (note 119 above) 10. The US is the largest importer of embodied carbon dioxide from goods produced in developing countries, but consumed in the US.

[122] UNFCCC, preamble.

[123] Ibid.

[124] A Najam 'Unraveling the Rio bargain' (2002) 21 Politics and the Life Sciences 46, 48.

[125] L Rajamani *Differential Treatment in International Environmental Law* (2006) 162.

action.[126] This weakens the argument that the CBDR principle allows unfettered GHG emissions.

The posturing that the US has shown concerning applying the CBDR principle in the climate change regime implies that economic interest is the primary driver of US policy on climate change and differentiation in the climate change regime.[127] An agreement that puts a cap on GHG emissions – whether the agreement includes developing countries or not – does not serve US national interests.[128] In past situations where national interests have been in line with the need for international cooperation, the US did not oppose the idea of differentiating commitments. For example, on the issue of ozone depletion, even when there was considerable uncertainty about the nature of the problem, the US played a lead role in formulating the Montreal Protocol that also operationalised differentiation.[129]

In sum, a combination of factors contributed to the Kyoto Protocol's limited success regarding mitigation. Arguably, a more balanced reason could be that the Kyoto Protocol was, indeed, the 'wrong solution at the right time.'[130] After all, the COP could not have predicted

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[126] C Holz, S Kartha & T Athanasiou 'Fairly Sharing 1.5: National Fair Shares of a 1.5 C-Compliant Global Mitigation Effort' (2018) 17 *International Environmental Agreements: Politics, Law and Economics* 117. In a recent report, India's carbon emissions growth is set to reduce significantly: See L Myllyvirta & S Dahiya 'Rest of World Emissions: Analysis: India's CO2 Emissions Growth poised to slow sharply in 2019' Carbon Brief < https://www.carbonbrief.org/analysis-indias-co2-emissions-growth-poised-to-slow-sharply-in-2019 >.

[127] J Brunnée 'The United States and international environmental law: Living with an elephant' (2004) 15 *European Journal of International Law* 617, 644. See also C Sunstein 'The World vs. the United States and China? The complex climate change incentives of the leading greenhouse gas emitters' (2008) 55 *UCLA Law Review* 1675, 1681.

[128] C Sunstein 'Of Montreal and Kyoto: A tale of two protocols' (2007) 31 *Harvard Environmental Law Review* 1, 5 (arguing that the US stood to lose economically if had ratified the Kyoto Protocol). See also Sunstein (note 127 above) 1688. Former President Trump is quoted saying that withdrawing from the Paris Agreement (which his predecessor brokered) 'is in America's economic interest and won't matter much to the climate'. See Z Colman & K Mathiesen 'Donald Trump says US will leave Paris Climate Agreement' Climate Home News (2017) < https://www.climatechangenews.com/2017/06/01/us-leaves-paris-climate-agreement-wants-come-back/>.

[129] ER DeSombre 'The experience of the Montreal Protocol: Particularly remarkable, and remarkably particular' (2000) 19 *UCLA Journal of Environmental Law & Policy* 49, 58.

[130] Rosen (note 92 above) 32.

the global recession which, in turn, aided hot air trading. Nor could the IPCC have produced more scientific certainty than it did with the available science at that time.[131] Without more certainty, it could be argued that developed countries acted reasonably by choosing targets that were comfortable to achieve.[132] However, it could be argued that the rise in developing country emissions should not be taken out of context. A basic reading of the UNFCCC's preamble shows that increased emissions in the third world is a given and all parties to the UNFCCC recognise that the reduction in developed countries' is intended to signal a willingness to lead mitigation action.[133] Thus, the view that the Kyoto Protocol's modest performance is because of the COP's over-reliance on the binary differentiation (whereby developed countries were required to meet reduction targets and developing countries got a free pass) does not present a balanced and fair view.

In the aftermath of the Kyoto Protocol's modest performance, parties to the UNFCCC turned their attention to working towards another legally binding instrument to replace the Kyoto Protocol. The COP in Copenhagen proved to be the next round of negotiations to present another twist in applying differentiation to the mitigation efforts.

3.3 Copenhagen: A False Start, New Game-changers and Writings on the Wall

The COP in Copenhagen received significant attention. Although it was intended that the parties to the UNFCCC would agree on a new legal instrument to replace the Kyoto Protocol, the events that unfolded during negotiations made this outcome improbable.[134] Yet,

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[131] B Mayer 'Obligations of conduct in the international law on climate change: A defence' (2018) 27 *Review of European, Comparative & International Environmental Law* 130, 136.
[132] Ibid.
[133] UNFCCC, Preamble para 3.
[134] D Bodansky 'The Copenhagen climate change conference: A postmortem' (2010) 104 *American Journal of International Law* 230, 233-234.

at the COP in Copenhagen, Brazil, South Africa, India, and China (forming the BASIC Group) gained prominence and carved out a veto position for itself during the negotiations.[135] The following section shows how the Copenhagen COP and the negotiating groups that dominated the negotiations continued to shift the relevance of historical responsibility within the CBDR principle's initial intendment in the Rio Declaration.

3.3.1 The European Union, Climate Change and Differentiation

The world had high hopes for the COP in Copenhagen.[136] Two years earlier, the COP successfully launched the Bali Action Plan – a roadmap for long-term cooperative action from 2007 to 2012 and beyond.[137] The COP also set in motion an ambitious plan to conclude a legally binding agreement that would become operational after 2008.[138] However, the Copenhagen COP went down in history as one of the lowest moments for climate change and multilateralism.[139] The Copenhagen Accord was probably the only realistic outcome given deep disagreements about old issues (such as mitigation, adaptation, and climate finance), a tense atmosphere of mistrust and a disorganised negotiation process.[140] The Copenhagen COP produced the Copenhagen Accord after high-level negotiations involving large GHG emitters, representatives of vulnerable island countries and least-developed countries.[141] In the absence

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[135] X Qi 'The rise of BASIC in UN climate change negotiations' (2011) 18 *South African Journal of International Affairs* 295, 295.
[136] D Ciplet, JT Roberts & MR Khan *Power in a Warming World: The New Global Politics of Climate Change and the Remaking of Environmental Inequality* (2015) 54.
[137] UNFCCC Decision 1/CP. 13 'Bali Action Plan' FCCC/CP/2007/6/Add.1 (2007) (Bali Action Plan).
[138] See Bali Action Plan . The COP agreed to launch a comprehensive process to enable the implementation of the UNFCCC beyond 2012. See also R Clémençon, 'The Bali Road Map: A First Step on the Difficult Journey to a Post-Kyoto Protocol Agreement' (2008) 17 *Journal of Environment & Development* 70, 71.
[139] P Christoff 'Cold climate in Copenhagen: China and the United States at COP15' (2010) 19 *Environmental Politics* 637, 638.
[140] Bodansky (note 134 above) 234, 240.
[141] UNFCCC Decision 2/CP.15 Copenhagen Accord in Report of the Conference of Parties session held in Copenhagen from 7 to 19 December 2009, Addendum, Part Two: the Conference of the Parties at its fifteenth session FCCC/CP/2009/1 1/Add. Only 28 out of 125 heads of state and governments who attended the COP played a direct role in producing the Copenhagen Accord. See Bodansky, Brunnée & Rajamani (note 34 above) 110.

of the parties' consensus to adopt the Accord as the official instrument of the conference, the Copenhagen Accord remained a political agreement,[142] expressing a 'strong political will to combat climate change and keep global temperature rise below 2 degrees.'[143] Despite its goodwill, the EU, as co-host with the Danish government, could not manage the Copenhagen Conference well enough to show the leadership it professes to command in multilateral negotiations.[144]

As far as the CBDR principle and mitigation are concerned, the EU's position has been that industrialised countries must take the leading role in reducing GHG emissions. The EU posits that reductions in GHG emissions are feasible if all developed countries are involved on equal terms.[145] The EU's position on differentiation recognises that leadership ultimately requires all developed countries to make significant cuts to their GHG emissions. In this regard, the EU signed the Doha Amendment to the Kyoto Protocol target under the second commitment period (2012 to 2020) of reducing emissions by 20 per cent.[146] However, the EU also favours the view that large emitters in the third world should carry a heavier mitigation burden than least developed countries (LDCs).[147] Notwithstanding the seeming leadership

[142] The Conference of the Parties agreed to 'take note' of the Copenhagen Accord. See Decision 2/CP.15, FCCC/CP/2009/11/Add.1.
[143] Copenhagen Accord, para 1.
[144] S Andersen & S Agrawala 'Leaders, pushers and laggards in the making of the climate regime' (2002) 12 *Global Environmental Change* 41, 49 (examining state and individuals' roles in the climate change law making process and arguing that although the EU may have played a lead role in pushing for negotiating positions and rhetoric, its leadership performance has not been as successful).
[145] J Werksman, J Lefevere & A Runge-Metzger 'The EU and international climate change policy' in J Delbeke and P Vis (eds), *EU Climate Policy Explained* (2015) 117.
[146] H Neier, J Neyer & K Radunsky 'International climate negotiations – Issues at stake in view of the COP 24 UN Climate Change Conference in Katowice and beyond' Study for the Committee on Environment, Public Health and Food Safety, European Parliament, Policy Department for Economic, Scientific and Quality of Life Policies (2018) < http://www.iberglobal.com/files/2018-2/international_climate_negotiations.pdf >.
[147] T Rayner & A Jordan 'Climate change policy in the European Uninon' *Oxford Research Enclyclopaedia of Climate Science* (2016) 10.

stance, it is also arguable that the EU's seeming progress with emissions reduction is because some EU countries got away with targets set too low and thus were easy to achieve.[148]

The undoing of the Copenhagen Conference drew out the continued rift in both the understanding and application of the CBDR principle in the climate change regime.[149] Developed countries continued to urge developing countries to take on binding commitments, arguing that there cannot be a solution to climate change in the face of unfettered GHG emissions from industrialising economies in the developing world.[150] There is merit in the call for 'the widest possible cooperation'[151] to address climate change. However, developing countries counter-argue that in all major climate change instruments all parties recognise that GHG emissions from developing countries will peak later than emissions from developed countries.[152] Furthermore, part of the developed countries' leadership role involves financial and technological transfers to enable developing country emissions to peak faster and transition their economies from carbon-based energy sources to environmentally sound ones.[153] Based on this position, some developing countries with fledging industrial economies coalesced, and the BASIC Group formed.

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[148] See Climate Action Network Europe 'Off target: Ranking of EU countries' ambition and progress in fighting climate change' (2018) < https://caneurope.org/off-target-ranking-of-eu-countries-ambition-and-progress-in-fighting-climate-change/ > 5.
[149] L Rajamani 'The making and unmaking of the Copenhagen Accord' (2010) 59 *International & Comparative Law Quarterly* 824, 842.
[150] Ibid.
[151] This is a term that has characterized all the major climate change instruments, to signify that the success of the climate change regime depends on the cooperation of all state parties. See UNFCCC, preambular recital para 6, and Berlin Mandate, art 1(e). The Paris Agreement introduces 'cooperation at all levels' in its preamble: Paris Agreement Preamble, para 14.
[152] UNFCCC Preamble, para 3
[153] UNFCCC, art 4.7.

3.3.2 BASIC, Climate Change and Differentiation

The BASIC Group's emergence in climate change negotiations came on the back of heightened mistrust between developed and developing countries on issues such as mitigation and finance.[154] Each member of BASIC has such an impactful reach on the climate change regime's success that their emergence and subsequent dominance cannot go unnoticed.[155] India is set to be the world's most populous country in 2027.[156] China is presently the world's leading emitter of carbon dioxide and the world's second-largest economy.[157] Brazil controls 70 per cent of the Amazon Rainforest, an indispensable reservoir of carbon dioxide.[158] South Africa, at that time, was one of Africa's fastest-growing economies.[159] Although South Africa's economy has shrunk in recent times,[160] as South Africa prepares to rebound out of economic decline, coal remains part of its energy mix for accelerating industrial growth.[161] Thus, South Africa's place in the BASIC Group is all the more strategic.

BASIC represents not only a political struggle for dominance in climate negotiations: it also represents a warning of the pattern of state behaviour in developing countries with

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[154] K Hallding et al 'Rising Powers: The evolving role of BASIC countries' (2013) 13 *Climate Policy* 608, 623.
[155] Qi (note 135 above) 295.
[156] UN Global Issues 'Population' <https://www.un.org/en/global-issues/population>.
[157] World Bank 'The World Bank in China' < https://www.worldbank.org/en/country/china/overview >.
[158] K Hallding et al 'Together alone: BASIC countries and the climate change conundrum' (2011) 40.
[159] Ibid 31.
[160] African Development Bank Group 'South Africa Economic Outlook' <https://www.afdb.org/en/countries/southern-africa/south-africa/south-africa-economic-outlook > Youth unemployment, a high wage bill in the public sector, problems with energy generation are some of the causes of South Africa's slowing economic growth.
[161] South Africa estimates that emissions will peak between 2020 and 2025, plateau for about a year after that, and then decline. While renewable energy features in the government White Paper on South Africa's climate response, there is a tacit admission that the South Africa will continue to rely on coal reserves to propel the economy: South Africa Department of Environmental Affairs 'National Climate Change Response White Paper' (2012) <https://www.gov.za/sites/default/files/gcis_document/201409/nationalclimatechangeresponsewhitepaper0.pdf> In September 2021, South Africa submitted an updated NDC which sets a stronger target range, regarding mitigation. However, despite increasing its level of ambition, it has been suggested that South Africa's new NDC is not yet compatible with the Paris Agreement overall objective. See Climate Action Tracker 'South Africa' < https://climateactiontracker.org/countries/south-africa/>. The tension between South Africa's planned use of coal for industrial growth and its international mitigation commitments under the climate change regime is at the heart of South Africa's first climate change inspired litigation. See chapter 5 below.

industrialising economies. Now, developed countries acknowledge the economic influence of large developing countries with fledging economies.[162] As more developing countries expand their capacities to increase economic growth, the issue of carving out a fair share of what is already a diminished carbon space becomes more pronounced.[163] Presently, innovation is the most prominent driving force for a global transition to low-carbon energy sources.[164] If developed countries cannot lead the transition to low-carbon energy sources, developing countries' emissions may not peak as quickly as the climate change regime requires for its success.[165]

On the issue of differentiation, there is consensus among BASIC that developed countries must take the lead to mitigate climate change. BASIC regard equity as an essential pillar of the climate change regime[166] and point to the North's failure to meet their emission targets and honour their promises regarding financial and technological transfers to emphasise that the North cannot pass on their responsibility to the South.[167] BASIC stressed that implementing pre-2020 commitments and ambition are prerequisites for mutual trust among parties, and developed countries should take the lead in closing the pre-2020 emission gap to avoid shifting that burden to the post-2020 regime and unto developing countries.[168]

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[162] R Gordon 'The dawn of a new, new international economic order?' (2009) 72 *Duke Journal of Law & Contemporary Problems* 131,160 (noting that the composition of the players in the global economic system's hieraarchy has expanded to include some large developing countries with growing economies).

[163] The term 'carbon space' developed through climate change negotiations and generally refers to the amount of carbon emissions that the atmosphere can carry without causing irreparable harm: H Opschoor 'Sustainable development and a dwindling carbon space' (2010) 45 *Environmental & Resource Economics* 3, 9.

[164] A Malhotra & T Schmidt 'Accelerating Low-Carbon Innovation' (2020) *Joule* Abstract <https://doi.org/10.1016/j.joule.2020.09.004 >.

[165] See K Bos & J Gupta 'Stranded assets and stranded resources: Implications for climate change mitigation and global sustainable development' (2019) 56 *Energy Research & Social Science* 101215,101223 (discussing the implications of stranded assets on climate change mitigation efforts and noting that latecomers to develoment (developing countries) will need to transition quickly to low-carbon technologies in order to meet their obligations in climate change law.

[166] Hallding et al (note 158 above) 104.

[167] A Hurrell & S Sengupta 'Emerging powers, North–South relations and global climate politics' (2012) 88 *Internatioanal Affairs* 463, 470.

[168] BASIC ministerial Meeting (2017) paras 16,17,

Despite having a strong position on differentiation, BASIC does not have a unified position on the process and basis for determining the measure of responsibilities that developed countries ought to take.[169] Arguably, the inability to agree on the basis and process of differentiation for developed countries is a chink in BASIC's armour. It raises questions about the *bona fides* of BASIC's alliance and may indicate that BASIC is merely furthering national interests, not seeking fairness.[170] Nevertheless, it is important to note that despite their relatively advanced level of development (as compared to other developing countries) BASIC are, in essence, still developing countries.[171] Through the World Trade Organization (WTO), the IMF and the World Bank, developed countries continue to set the ground rules and the playing field for the global economy. They remain in control of the international economic order.[172] As it was in the colonial days, multinational corporations and the foreign investments they command are the agents of the North's economic power.[173] This situation directly affects BASIC's ability to use the international economic order to accelerate economic development without limits.[174]

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[169] Hallding et al (note 158 above) 101 (India favours a burden-sharing regime that reflects per capita emissions; China, Brazil and South Africa lean towards a system that considers historical emissions over per capita emissions).
[170] P Bidwai *The Emerging Economies and Climate Change: A Case Study of the BASIC Grouping* (2014) 13.
[171] For instance, the World Bank considers China as 'an upper middle-income country that has complex development needs… ' China's per capita income is that of developing country) See The World Bank 'The World Bank in China' <https://www.worldbank.org/en/country/china/overview>.
[172] RE Gordon & JH Sylvester *'Deconstructing Development'* (2004) 22 *Wisconsin International Law Journal* 2, 5-7.The authors note that international financial institutions determine economic policy in developing countries, as their colonial masters did. These financial institutions are funded and managed by developed countries. For example, the US President has been choosing the President of the World Bank since its inception because the US is the largest shareholder of the Bank < https://finances.worldbank.org/Shareholder-Equity/Top-8-countries-voting-power/udm3-vzz9 >.
[173] M Sornarajah 'Power and Justice: Third World Resistance in International Law' (2006) 10 *Singapore Yearbook of International Law and Contributors* 19, 29.
[174] Hurrell & Sengupta (note 167 above) 483.

The absence of a uniform understanding of how differentiation should be operationalised through the CBDR principle reveals that national interests may differ and shape different understandings on a common position even within a small group of developing countries. One may argue that the third world's unified position on differentiation has splintered.[175] This point above is formidable, but only partially. The demand for equitable access to sustainable development continues to unite developing countries.[176] Equitable access to sustainable development is only possible with a web of interconnected factors which include reliable energy.[177] Because developed countries have already diminished the carbon space, developing countries must have equitable access to low-carbon technologies to enable a more sustainable and climate-friendly economic development.[178] The gap between the demand for and supply of financial and technological transfers for sustainable development in the third world remains one challenge that has far-reaching consequences for long term mitigation efforts.[179]

Regardless of its setbacks, the Copenhagen COP gave a hint about the future of differentiation in the climate regime. The Copenhagen Accord committed developed countries to implement economy-wide reduction targets by 2020. Developing countries agreed to submit their 'nationally appropriate mitigation actions'(NAMAs).[180] The rationale behind NAMAs was for developing countries to self-determine appropriate actions that correspond with their

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[175] KA Hochstetler 'The G-77, BASIC, and global climate governance: A new era in multilateral Environmental negotiations' (2012) 55 *Revista Brasileira de Política Internacional* 53, 59.
[176] For example at India's request, the COP organized a workshop in 2012 on the topic 'access to sustainable development'. See UNFCCC News 'Workshop on equitable access to sustainable development (AWG-LCA 15) (16 May 2012) <https://unfccc.int/es/node/11003>.
[177] M Davis 'Bonn Spotlight: Equity at the core of debates' Stockholm Environment Institute (SEI) (29 May 2012) < https://www.sei.org/featured/bonn-spotlight-equity-core-debates/ > (recounting the comments of an expert in equity issues at a workshop hosted by the UNFCCC Secretariat on equitable access to sustainable development).
[178] Opschoor (note 163 above) 11, 21.
[179] G Sforna 'Climate Change and developing countries: From background actors to protagonists of climate negotiations' (2019) 19 *International Environmental Agreements* 273, 289.
[180] Copenhagen Accord, para 4, 5.

varied capabilities.[181] In this way, the concept that countries could self-determine their level of effort towards mitigation found its way into climate change policy and, later, into the Paris Agreement.

Meanwhile, a critical mass of academic scholarship had built up concerning the utility of the CBDR in climate change mitigation. Many authors opined that it was time to give the CBDR principle a more 'nuanced, dynamic' meaning and application.[182] The general view is that the CBDR principle, in its initial form, based on a blurred line between developed countries and developing countries, was not a pragmatic approach to differentiation.[183] While this point is reasonable on its face, it is vulnerable to the objection that it is the North (through the World Bank) that set up these hard-line dichotomies in the first place to advance their economic dominance.[184] They adopted a narrow construction of poverty which was defined by per capita income and other fiscal considerations to enable them create the layer of difference necessary to foist economic policies on the countries they considered poor.[185] One could argue, conversely, that developed countries oppose the binary (developed/developing country) differentiation only because it does not align with their economic dominance.[186]

Notwithstanding the point above, some authors have argued that given the urgency of the times, the focus should be on pragmatic steps towards sustained mitigation.[187] This

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[181] Bodansky, Brunnée & Rajamani (note 35 above) 112.
[182] See note 59 above. See also AM Mcpherson 'Let them eat carbon: The end of the Kyoto Protocol' (2012) 41 *Georgia Journal of International & Comparative Law* 219; J Lee 'Rooting the concept of common but differentiated responsibilities in established principles of international environmental law' (2015) 17 *Vermont Journal Of Environmental Law* 27.
[183] Ibid.
[184] See chapter 2.2 above.
[185] See chapter 2.2 above.
[186] RJ Lazarus 'Super wicked problems and climate change: Restraining the present to liberate the future' (2009) 94 *Cornell Law Review* 1153, 1156.
[187] See, for example, S Kenehan 'In the name of political possibility: A new proposal for thinking about the role and relevance of historical greenhouse gas emissions' in LH Meyer & P Sanklecha (eds), *Climate Justice and*

argument implicitly acknowledges that pragmatism may not lead to a fair outcome but that progress (meaning emissions reduction) compensates for the lack of fairness.[188] Chapter 4 engages climate (in)justice and addresses some issues arising from third world climate injustice.[189] However, it suffices to posit here that considerations of justice are crucial for progressively bringing GHG emissions down, which is the ultimate goal of the climate change regime.[190] The climate regime's inability to address third-world justice concerns is, arguably, one of the contributing factors to the climate change regime's modest success, as far as actual (not promised) emissions reduction is concerned.[191] In this regard, the two most vulnerable negotiating blocs – the Alliance of Small Island States (AOSIS) and the Africa Group – illustrate the poignancy of the climate regime's justice deficit.

3.2.3 AOSIS, Africa Group, Climate Change and Differentiation

Members of the AOSIS[192] are at the forefront of climate change impacts. An increase in global temperatures beyond 1.5 degrees Celsius will result in, among others, a significant sea-level rise that would submerge some island states.[193] The disproportionate vulnerability of small island states to climate change impacts provides them with substantial moral leverage that AOSIS has utilised well.[194] AOSIS is one of the strongest advocates of aggressive

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Historical Emissions (2017) 198, 216 (concluding that since there is so little time left to arrest climate change, fairness and equity may have to give way, partly, to political feasibility).

[188] Ibid.

[189] See chapter 4 below.

[190] L Rajamani 'The changing fortunes of differential treatment in the evolution of international environmental law' (2012) 88 *International Affairs* 606, 623.

[191] Ibid.

[192] AOSIS is an intergovernmental organization which carries out advocacy for small island states and influences environmental policy. See Bureau of the Alliance of Small Island States < http://unohrlls.org/about-sids/bureau-of-aosis/>.

[193] See Dialogue Working Paper 14, Submission from AOSIS, Fourth Dialogue Workshop (24 August 2007) < http://unfccc.int/files/meetings/dialogue/application/pdf/wp14-aosis.pdf >.

[194] C Betzold, P Castro & F Weiler 'AOSIS in the UNFCCC Negotiations: From Unity to Fragmentation?' (2012) 12 *Climate Policy* 591, 594.

mitigation action.[195] In the aftermath of the Durban COP, the AOSIS emphasised the need to keep the Kyoto Protocol alive by amending it to allow a second-commitment period.[196]

On the issue of differentiation, the AOSIS position is that all major emitters must undertake mitigation actions according to their common but differentiated responsibilities and capabilities, albeit with the appropriate financial and technical support from developed countries.[197] Although it calls on all emitters to act, AOSIS acknowledges that there should be differences in these emitters' mitigation actions. Developed countries would be required to take aggressive climate action and must be prepared to make tough cuts to their GHG emissions. AOSIS's proposed criteria for differentiation would include a combination of responsibility measured in terms of historical emissions since 1990, capability in terms of Gross Domestic Product (GDP), Gross National Index (GNI) and other economic indicators, potential to mitigate and population size.[198]

The Africa Group echoes AOSIS's position on climate change and differentiation. Historically and presently, Africa's contribution to GHG emissions is infinitesimal, but many African countries are among the poorest and most vulnerable countries who will bear a disproportionate burden of negative climate change impacts.[199] Because of limited capacity

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[195] Submission from the Alliance of Small Island States (AOSIS) FCCC/AWGLCA/2011/CRP.36, Ad Hoc Working Group on Long-Term Cooperative Action under the Convention, Decision X/CP. 17 (2 December 2011 < https://unfccc.int/resource/docs/2011/awglca14/eng/crp36.pdf>. See also AOSIS 'About us' < https://www.aosis.org/about/>.

[196] Joint Press Statement from chairs of LDC group and AOSIS (2012) <http://www.ldcclimate.org/press_release/joint-press-statement-from-chairs-of-ldc-group-and-aosis/ >.

[197] Dialogue on long-term cooperative action to address climate change by enhancing implementation of the Convention 'Submission from AOSIS' (August 2007) 5 (Hereinafter AOSIS Submission (2007)).

[198] AOSIS Submission (2007) 11.

[199] M Boko et al '2007: Africa. Climate Change: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change' ML Parry et al (eds) (2007) 433-467.

and resources,[200] African countries utilise several platforms to highlight their needs and interests,[201] with the African Group of Negotiators on Climate Change at the centre, collating and presenting African countries' focal points.[202] Adaptation and financial assistance to address loss and damage from climate are at the top of Africa's priority interests.[203] On the issue of differentiation, the Africa group shares the two-prong view of AOSIS and the EU: developed countries must take the lead to mitigate climate change, but developing countries who are major emitters must also take on mitigation actions that reflect the CBDR principle.[204] However, African countries are wary of signs that increasing temperatures will force them to carry the developed world's undischarged burden regarding mitigation.[205]

Other groupings exist and operate during climate change negotiations.[206] However, it is argued that the G-77, BASIC, the US, the EU, the AOSIS and Africa group have had the most influence on the fortunes of the CBDR principle. Although the G-77 has fragmented and some developing countries call for industrialising developing countries to do more to mitigate climate change, G-77 continues to represent the position that the North's historical emissions

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[200] A Mumma 'The Poverty of Africa's Position at the Climate Change Convention Negotiations' (2000) 19 *UCLA Journal of Environmental Law and Policy* 181, 202 (noting that '[a] lack of resources in all these spheres' largely contributes to Africa's limited performance at climate change negotiations and hampers its ability to form a distinct African position on climate change).

[201] African countries negotiate as part of the Least Developed Countries (LDC) Group, Like Minded Developing Countries (LMDC) and African, Caribbean and Pacific (ACP) Group: See C Roger & S Belliethathan 'Africa in the Global Climate Change Negotiations' (2016) 16 *International Environmental Agreements* 91, 92.

[202] See Africa Group of Negotiators < https://africangroupofnegotiators.org/>.

[203] Submission by the Arab Republic of Egypt on behalf of the African Group of Negotiators on matters related to the financing of actions to address loss and damage (2018) <http://unfccc.int/files/adaptation/application/pdf/agn_submission_on_matters_related_to_financing_of_actions_to_address_l&d.pdf > .

[204] Ibid.

[205] See Statement of H.E. Dr. Khaled Fahmy, Minister of Environment and President of the African Ministerial Conference on Environment (ACMEN) on behalf of Africa Group (2015) < https://unfccc.int/sites/default/files/cop21cmp11_hls_speech_agn_egypt.pdf >.

[206] Blaxekjaer & Nielsen (note 3 above) 752-753 (citing for example, the Umbrella Group, the Environmental Integrity Group, the Bolivian Alliance for the Peoples of Our America (ALBA), Like-Minded Developing Countries (LMDC), the League of Arab States (LAS) and Organization of Petroleum Exporting Countries (OPEC)).

cannot be wished away.[207] Although BASIC are industrialising, they are still, in many ways, developing countries – saddled with the same socio-economic problems in other less industrialised countries in the South. Thus, BASIC support an application of the CBDR principle that emphasises the historical responsibility of the North and their advanced capabilities and rules of differentiation that compel the North to close the emissions gap that their past emissions have caused.[208] The US and the EU represent the North's position that historical responsibility is not a feasible demand of developing countries.[209]Arguably, the AOSIS and Africa Group exist to emphasise the urgency of mitigation action for the most vulnerable and least responsible. In many ways, AOSIS and the Africa Group share a sense of exasperation with the climate change negotiating process.[210] Although the vast majority of scientists continue to confirm the impact of human activities on the climate, the corresponding political and legal action required to steer the world away from catastrophe is simply insufficient.[211]

Thus far, the major negotiating groups or countries that have shaped the CBDR principle's journey in the climate change regime have been identified and their positions delineated. In the next chapter, the CBDR principle's final approach towards self-differentiation is examined in light of the negotiating positions established above.

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[207] W Sterk et al 'Warsaw groundhog days: Old friends, positions and impasses revisited all over again at the 2013 Warsaw climate conference' Wuppertal Institute for Climate, Environment and Energy (2013) 6.
[208] Joint statement issued at the conclusion of the 26th BASIC Ministerial Meeting on Climate Change (20 May 2018) < https://www.environment.gov.za/mediarelease/jointstatement_conclusionof26thbasicministerialmeeting >
[209] See sub sections 3.1.4 and 3.2.1 above.
[210] For example, the President of the Maldives and his cabinet held a meeting underwater to emphasize climate change as a threat to their survival as a nation: BBC News 'Maldives cabinet makes a splash' (17 October 2019) < http://news.bbc.co.uk/2/hi/8311838.stm >.
[211] See UN Environment Programme (UNEP) 'Emissions Gap Report' Executive Summary (2019) < https://wedocs.unep.org/bitstream/handle/20.500.11822/30798/EGR19ESEN.pdf?sequence=13 >.

3.4 From Durban to Paris and Beyond: "Well below 2°C", Self-Differentiation and Erasing Historical Responsibility

The CBDR principle's final approach towards self-differentiation has its roots in the Copenhagen Accord's introduction of NAMAs for developing countries.[212] The idea that developing countries could self-determine their mitigation effort would eventually extend to all countries. From the Durban COP to the final negotiations leading to the Paris Agreement, the move to erase historical responsibility from the climate change regime becomes more visible.

3.4.1 The Emergence of Self-Differentiation and Its Elements

The negotiation journey from the Durban COP to the Paris COP introduced new normative yardsticks for differentiation, aimed at providing the impetus for achieving the UNFCCC's ultimate goal.[213] The COP in Cancun set a long-term goal to hold the increase in global average temperature to well below two degrees above pre-industrial levels while pursuing efforts to limit the temperature increase to 1.5 degrees above pre-industrial levels.[214] Despite the success at Cancun COP, [215] there was uncertainty surrounding the nature of differentiation in a post-2020 climate agreement.[216] At the Durban COP, developed countries

[212] See section 3.2 above.
[213] S Maljean-Dubois 'The Paris Agreement: A New Step in the Gradual Evolution of Differential Treatment in the Climate Regime?' (2016) 25 *Review of European Comparative International Environmental Law* 151,153.
[214] UNFCCC Decision 1/CP.16 'The Cancun Agreements : Outcomes of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention' (December 2010) (Cancun Agreements) Art 4.
[215] A year after the Copenhagen COP, the COP met in Cancun in 2010 and formally incorporated substantial portions of the Copenhagen Accord into the Cancun Agreements. The Cancun Agreements repeat para 1 of the Copenhagen Accords. Paras 36 and 49 expand on the Copenhagen Accord's introduction of nationally appropriate mitigation actions (NAMAs) for developing countries.
[216] L Rajamani 'The climate regime in evolution: The disagreements that survive the Cancun Agreements' (2011) 2 *Carbon & Carbon Law Review* 136, 143-145. By this time, the COP has agreed to extend the Kyoto Protocol into a second commitment period, from 2012 to 2020, through the Doha Amendment. The second commitment period regulated emissions from fewer industrialized countries. Canada had withdrawn from the Kyoto Protocol and Japan and Russia refused to accept new emission targets. See Bodansky, Brunnée & Rajamani (note 35 above) 114.

insisted that a post-2020 regime must be stripped of the Kyoto Protocol-style categorisation of developed and developing countries.[217] On the other hand, developing countries contended that a regime without differentiation correspondent with the UNFCCC's developed-developing country dichotomy is tantamount to an amendment of the UNFCCC.[218]

The Durban Platform for Enhanced Action (Durban Platform) attempted to satisfy both demands.[219] The Durban Platform acknowledged that climate change calls for "the widest possible cooperation" among all countries.[220] The parties also agreed to "launch a process to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties" through an Ad Hoc Working Group.[221] By using the phrase 'under the Convention', the implication was that the next agreement would not deviate from the UNFCCC's construction of the CBDR principle. Yet, by the statement that the agreement would be 'applicable to all Parties' the Durban Platform left room for a parallel implication that differentiation along the developed-developing country lines would not proceed into the next agreement.[222] Perhaps, the earliest indication of a shift in the meaning

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[217] See for example, statements of Lead USA Climate Change Negotiator, Todd Stern < https://2009-2017.state.gov/r/pa/prs/ps/2011/12/178699.htm> (stating the view of the USA on equity as 'calling for fairness to all parties. His answers implied that the USA was firmly against a differentiation of responsibilities along developed-developing country lines).

[218] Specifically, the Like-Minded Developing Countries (LMDCs) – including Bolivia, China, Cuba, Egypt, India, Iraq, Iran, Malaysia, Nicaragua, Philippines, Saudi Arabia, Thailand, Venezuela – strongly opposed further erosion of the CBDR principle. See Submission of LMDC on Further Guidance for the Nationally Determined Contributions under the Paris Agreement (30 September 2017) <http://unfccc.int/files/bodies/apa/application/pdf/214_321_131351691309535690-lmdc_submission_on_further_guidance_for_the_ndcs_under_the_paris_agreement_-_final.pdf > See also Third World Network 'Differentiation under the Paris Agreement – A Tough Fight' <https://twnetwork.org/climate-change/differentiation-under-paris-agreement-%E2%80%93-tough-fight>

[219] The use of deliberate ambiguity is widespread in climate change negotiations. A deeper analysis of deliberate ambiguity regarding differentiation is offered in chapter 4.

[220] FCCC/CP/2011/9/Add.1 'Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action' Decision 1/CP.17 (2011) (Durban Platform) preambular recital.

[221] Durban Platform, para 2.

[222] Bodansky and co-authors note that merely stating that a legal instrument is applicable to all does not make its application uniform and symmetrical. However, the use of the phrase 'applicable to all' signified a shift towards involving all parties, not just developing countries in crafting commitments. See Bodansky, Brunnée & Rajamani (note 35 above) 200, note 71.

and application of differentiation was that the Durban Platform omitted any direct reference to the UNFCC's guiding principles, including the CBDR principle.[223]

At the last two COPs preceding the Paris Conference, it became apparent that the nature of differentiation in the next climate change agreement would be distinct and likely mark a departure from the Kyoto Protocol's regime on differentiation.[224] Building on the Durban Platform, the Warsaw Decision of COP 19 did not mention the CBDR principle expressly; it merely referred to the UNFCCC, thereby creating a presumption that the Decision followed the UNFCCC's guiding principles. In the Warsaw Decision, parties agreed that all countries would submit their intended nationally determined contributions (INDCs).[225] This pledge system required states to choose their level of effort toward mitigation unilaterally. Thus, a new norm of differentiation emerged – that no country needs to do more than it was ready to do to mitigate climate change.[226]

Notwithstanding the introduction of mitigation pledges, it was still unclear whether and how the CBDR principle would feature in the next legally binding agreement. A year before the Paris COP, the Lima Call for Action reintroduced the principle of CBDR in its text and expressed differentiation as common but differentiated responsibilities and respective capabilities, in light of different national circumstances – CBDR/RC-NC.[227] Eventually, at

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[223] Durban Platform.
[224] L Rajamani & E Guérin 'Central Concepts in the Paris Agreement and How They Evolved' in D Klein et al (eds) *The Paris Agreement on Climate Change: Analysis and Commentary* (2017) 74, 81-82.
[225] UNFCCC Decision 1/CP.19 'Further advancing the Durban Platform, Report of the COP on its nineteenth Session held in Warsaw FCCC/CP/2013/10/Add.1 (11- 23 November 2013) para 2 (Warsaw Decision 1/CP.19).
[226] C Voigt & F Ferreira 'Dynamic differentiation: The principle of CBDR-RC, progression and highest possible ambition in the Paris Agreement' (2016) 5 *Transnational Environmental Law* 285, 293-294.
[227] The qualifying phrase 'in light of different national circumstances first appeared in a 2014 US-China joint statement on climate change. See The White House Office of the Press Secretary 'US-China Joint Announcement on Climate Change' Beijing, China (November 2012) para 2 <https://obamawhitehouse.archives.gov/the-press-office/2014/11/11/us-china-joint-announcement-climate-change>.

COP 21 in Paris, states reached an agreement that endorsed the CBDR/RC-NC and ushered in the Paris Agreement.

In the context of mitigation, the Paris Agreement's self-differentiation model allows states to determine their contributions towards mitigation while considering their different national circumstances.[228] The added qualification 'in light of different national circumstances' steers the meaning of differentiation away from group distinctions to individual national circumstances.[229] The Paris Agreement provides that each Party's successive nationally determined contribution (NDC) will represent 'a progression' beyond the Party's current NDC and 'reflect its highest possible ambition', reflecting its common but differentiated responsibilities and respective capabilities, in light of the different national circumstances.[230] By this provision, the Paris Agreement establishes a forward-looking, incremental approach to mitigation whereby parties can only ratchet up but not step down their NDCs.[231] The Paris Agreement falls on its provisions regarding transparency to build on trust and confidence and facilitate ambitious NDCs.[232] The Paris Agreement mandates that parties undertake a periodic and comprehensive 'global stocktake' to assess the collective progress towards meeting the long-term goal.[233] While a global stocktake is fundamental to measuring the Paris Agreement's progress with mitigation actions, its aim is to perform a collective assessment.[234] However, the

[228] Paris Agreement, art 3 (stating that all parties are to communicate their nationally determined contributions (NDCs) and Art 4.4.
[229] C Streck, M von Unger & N Krämer 'From Paris to Katowice: Cop-24 tackles the Paris rulebook' (2019) 16 *Journal for European Environmental and Planning Law* 165, 183.
[230] Paris Agreement, art 4.3.
[231] Voigt & Ferreira (note 226 above) 295-296.
[232] Paris Agreement, art 13. Article 13 establishes a Transparency Framework to 'build mutual trust and confidence and to promote effective implementation'.
[233] Paris Agreement, art 14.1.
[234] J Friedrich 'Global stocktake (Article 14)' in D Klein et al (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (2017) 319, 321-322.

Paris Agreement makes room for individualised assessments, which are factored into the global stocktake under the transparency framework.[235]

It has been said that the Paris Agreement offers a more 'dynamic' approach to differentiation because the bottom-up pledge-and-review model the Paris Agreement adopts is 'nuanced' and makes room for parties to consider a wide range of factors when they determine their national contributions as parties to the UNFCCC.[236] Furthermore, ambition, coupled with the ratchet-up approach to NDCs and the global stocktake, it is argued, act as boundaries of sorts to ensure that self-differentiation still achieves the overall goal to reduce global emissions and, at the same time, honours state sovereignty.[237]

Despite the seemingly 'evolved'[238] approach to differentiation, it is uncertain how self-differentiation supports a fair distribution of the mitigation burden. Firstly, the requirement to submit NDCs is one of the Paris regime's soft obligations; it carries no binding effect, albeit the Paris Agreement as a whole is a treaty and, therefore, is binding on the parties to it.[239] Secondly, the Paris Agreement removed all direct references to historical emissions and historical responsibility.[240] The erosion of historical emissions and responsibility relegates the

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[235] Ibid 322.
[236] Voigt & Ferreira (note 226 above) 301.
[237] Bodansky, Brunnée & Rajamani (note 35 above) 224.
[238] The term 'evolution' has been used to characterize the CBDR principle's different forms, especially regarding mitigation in the climate change regime from the UNFCCC to the Paris Agreement. For example, Rajamani and other scholars have used the term in her analysis of the CBDR principle's journey through the climate change regime: Rajamani (note 51 above).; Rajamani (note 8 above).; L Rajamani 'Ambition and differentiation in the 2015 Paris Agreement: Interpretative possibilities and underlying politics' (2016) 65 *International and Comparative Law Quarterly* 493. See also Streck, Von Unger & Krämer (Paris to Katowice).; and Maljean-Dubois (note 201 above). My view, which I advance further in chapter 4, is that contrary to the mainstream view that the CBDR principle is going through an evolutionary process, we can better describe its journey through the climate change regime as a metamorphosis.
[239] L Rajamani 'The 2015 Paris Agreement: Interplay between hard, soft and non-obligations' (2016) 28 *Journal of Environmental Law* 337, 337.
[240] In contrast, paragraph 3 of the UNFCCC's preamble notes the impact of historical emissions. Although a similar reference to historical emissions appeared in the preamble of a draft version of the Paris Agreement, it did not make it into the final text of the Paris Agreement. See UNFCCC 'Draft Paris Outcome: Revised draft

effect of their past emissions to the background and pressurises developing countries to increase their mitigation efforts, but without the support that underpinned their involvement in the climate change regime in the first place.[241] Thirdly, the global stocktake's collective approach potentially insulates the parties from an assessment of the adequacy of their individual NDCs.[242] Nevertheless, the next phase of entrenching self-differentiation in the climate change regime is seen with the COP's adoption of further rules for implementing the Paris Agreement.

3.4.2 The Paris Rulebook and Self-Differentiation for Climate Mitigation: Beyond Paris and Katowice

The Paris Agreement left a large aspect of its implementation and compliance with the parties. Thus, after the Paris COP, parties worked to produce a set of rules which provides more detail and elaborates on the nature of their obligations.[243] Adopted in Katowice in 2018, the Katowice Texts[244] are a set of decisions that provide guidelines and modalities for the Paris Agreement's procedures and mechanisms and flesh out the parties' obligations under the Paris

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conclusions proposed by the Co-Chairs' FCCC/ADP/2015/L.6/Rev.1 (5 December 2015) <https://unfccc.int/files/bodies/awg/application/pdf/draft_paris_outcome_rev_5dec15.pdf> See also T Jayaraman & T Kanitkar 'The Paris Agreement: Deepening the climate crisis' (2016) *Economic and Political Weekly* 10,11.

[241] Joint Statement Issued at the Conclusion of the 25th BASIC Ministerial Meeting on Climate Change, (November 2017) < https://unfccc.int/sites/default/files/resource/BASIC-25-Statement-as-adopted-13-Nov-2017.pdf>.

[242] AS Tabau 'The Paris Agreement: Rebooting climate cooperation evaluation of the Paris Climate Agreement according to a global standard of transparency' (2016) 10 *Carbon & Climate Law Review* 23, 32. See also Rajamani (note 226 above) 504.

[243] UNFCCC Decision -/CP.24 'Preparations for the implementation of the Paris Agreement and the first session of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement' (19 March 2019)

[244] The UNFCCC website terms the full set of the decisions made to operationalize the Paris Agreement as 'the Katowice Climate Package' < https://unfccc.int/process-and-meetings/the-paris-agreement/the-katowice-climate-package/katowice-climate-package >.

Agreement.[245] The contentions surrounding the extent to which the Paris regime would swing between common and differentiated obligations remained at the centre of the negotiations.[246]

The Paris Rulebook keeps full faith with the concept of self-differentiation. It continues to give the parties wide discretion to determine the type and form of their NDCs – whether, for instance, they are quantified or quantifiable, conditional or unconditional.[247] On the issue of ambition, the Paris Rulebook requires states to provide information on how they have addressed fairness and ambition when submitting their NDCs.[248] However, there are no rules that specify the types of information that would support a determination of fairness and ambition. This means that states not only self-determine their contributions; they also have complete discretion in selecting the yardstick for showing that their NDCs reflect fairness and ambition.[249]

The success of the Paris regime is a matter for assessment in the years ahead. Nonetheless, from the NDCs submitted so far, it is possible to glean the likely trajectory of state behaviour on differentiation. So far, 192 parties have submitted their first NDCs to the UNFCCC Secretariat via its Interim Registry.[250] Developed countries' NDCs took on economy-wide targets (regarded as the most stringent type of contribution) and developing countries chose less stringent targets such as peaking targets and reporting policies and

[245] L Rajamani & D Bodansky 'The Paris rulebook: Balancing international rpescriptiveness with national discretion' (2019) *International & Comparative Law Quarterly* 1, 5.
[246] D Bodansky & L Rajamani 'The issues that never die' (2018) 12 *Carbon & Climate Law Review* 184, 189.
[247] Rajamani & Bodansky (note 245 above) 7.
[248] UNFCCC 'Decision 4/CMA.1: Further guidance in relation to the mitigation section of decision 1/CP.21'(19 March 2019) FCCC/PA/CMA/2018/3/Add.1, Annex 1, sec 6.
[249] Rajamani & Bodansky (note 245 above) 9-10.
[250] See NDC Registry (Interim) < https://www4.unfccc.int/sites/NDCStaging/Pages/Home.aspx>.

actions.[251] This trend maps on to the Paris Agreement's provisions on mitigation actions.[252] However, the NDCs show signs of continuing disparities in pledges and actual action between developed and developing countries. Although the Paris Agreement recognises the need for financial and technical support for developing countries to implement their contributions, developed countries have given little information on financial and technological transfers in their NDCs.[253]

Regarding equity, the Paris Rulebook does not contain agreed rules on how state parties will operationalise equity in the stocktake.[254] Given that the parties could not agree on objective criteria for equity and that the global stocktake measures collective (not individual national) efforts, one could infer that the Paris Rulebook implicitly leaves the matter of equity for states to determine in the process of assessing their collective effort.[255]

3.4.3 Summing up the Dominant Positions on Differentiation

Although the Paris Agreement has embraced self-differentiation, the dominant positions on differentiation remain and continue to drive contestations in climate change negotiations.[256] Much of the contestation remains centred on the emissions gap, the developed

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[251] P Pauw, K Mbeva & H van Asselt 'Subtle differentiation of countries' responsibilities under the Paris Agreement' (2019) 5 *Palgrave Communications* 86, 89. Parties have since submitted a second round of new or updated NDCs. 191 parties have submitted their second NDCs as of July 2021. See UNFCCC 'Nationally determined contributions under the Paris Agreement: Synthesis report by the secretariat' FCCC/PA/CMA/2021/8 <https://unfccc.int/sites/default/files/resource/cma2021_08_adv_1.pdf >.
[252] Paris Agreement, Article 4.4.
[253] Pauw, Mbeva & van Asselt (note 251 above) 90.
[254] W Obergassel et al 'Paris Agreement: Ship moves out of the drydock: An assessment of COP24 in Katowice' (2019) 13 *Carbon and Climate Law Review* 3, 9.
[255] Rajamani & Bodansky (note 245 above) 15.
[256] See J Shankleman, A Nardelli & A Chaudhary 'India ditches key climate meeting after disrupting G-20' (Bloomberg Green) 27 July 2021 < https://www.bloomberg.com/news/articles/2021-07-27/india-ditches-key-climate-meeting-after-disrupting-g-20-summit > (reporting that India stayed away from a two-day meeting in London aimed at preparing for a successful COP later in the year. India's main point of contention was the use of net-zero emissions in an earlier G-20 communique on climate change talks).

countries' failure to lead emissions reduction and unfulfilled pledges by developed countries to assist with energy transition in developing countries.[257] The BASIC Group and the US positions on historical responsibility represent the heart of the conflict between justice and pragmatism.

Based on the statements of top US government officials who negotiated the UNFCCC, the US position on differentiation is linked strongly to its view that climate change is less of an environmental problem and more of an energy problem.[258] Since energy generation for continued industrialisation is directly linked to economic and political power, the US opposes any international climate agreement that curtails their economic dominance.[259] That climate change's impacts will not affect the US as adversely as it will affect the most vulnerable (yet least responsible) countries goes to harden the US position.[260] Based on these facts and also since the US is the most historically responsible country, it seems rational, from a realist viewpoint, that US negotiators strongly reject historical responsibility as a marker for differentiation, especially regarding mitigation.[261] Although the US attempts to play a leadership role to redeem its image, the ultimate goal has been to ensure US interests remain covered in all climate-related agreements.[262]

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[257] Ibid.
[258] Association for Diplomatic Studies & Training 'Negotiating the United Nations Framework Convention on Climate Change' < https://adst.org/2015/12/negotiating-the-united-nations-framework-convention-on-climate-change/ > (Excerpts from interview with Robert Reinstein who was a chief negotiator for the US during negotiations for the UNFCCC: 'The climate change issue was really all about energy and economics').
[259] See sub-section 3.1.4 above.
[260] Sunstein (note 127 above) 1680-1681.Notwithstanding the lessened negative impacts, the US continues to expend money to address from the security related issues arising from climate change: A Mehta 'Climate change is now a national security priority for the Pentagon' Defense News (27 January 2021) < https://www.defensenews.com/pentagon/2021/01/27/climate-change-is-now-a-national-security-priority-for-the-pentagon/ > Climate change is also projected to exacerbate the immigration crisis the US faces as thousands of people find their way into the US: A Lustgarten 'The great climate migration' New York Times Magazine (23 July 2020) < https://www.nytimes.com/interactive/2020/07/23/magazine/climate-migration.html >
[261] Sunstein (note 128 above) 9, 30-33.
[262] C Farand 'US will keep seat at climate talks after it leaves Paris deal' Climate Home News (3 November 2019) < https://www.climatechangenews.com/2019/11/03/us-will-keep-seat-climate-talks-leaves-paris-deal/ >.

BASIC is positioned at the other end of the contestation. Brazil, China, India and South Africa have peculiar attributes as a group and as individual countries. China and India alone are home to more than one-third of the global population – about 3.7 billion people.[263] This fact arguably could justify increased emissions in China and India after factoring in the percentage of consumer-based emissions that China and India absorb through trade.[264] South Africa and Brazil are constrained in their use of natural resources to resuscitate their economies, the same path the North used to industrialise. In this way, arguably, developed countries are kicking away the ladder they used to climb up to economic and political dominance.[265] Thus, an insistence on operating historical responsibility on differentiation equally seems the intuitively accurate approach for BASIC because this position redirects the pressure to reduce emissions back to the countries who caused the problem in the first place.

Notwithstanding the above, the BASIC Group's position brings on complications that raise uncomfortable issues. In this regard, China stands out as the country whose economic development has come at the expense of exploiting other third world countries.[266] China provides loans and grants in exchange for crude oil, minerals and other natural resources.[267] China, too, has adopted the strategy that allows engagement with third world governments on the one hand and separation from domestic issues of accountability on the other hand. This

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[263] According to the latest UN projections, India will overtake China as the world's most populous country by 2027: United Nations Department of Economic and Social Affairs 'World Population Prospects 2019: Highlights' (2019) <https://population.un.org/wpp/Publications/Files/WPP2019_10KeyFindings.pdf >.

[264] M de Ferrer 'Why we're all to blame for China and India's 'filthy' CO2 emissions' Euro News (6 February 2021) < https://www.euronews.com/green/2021/02/06/why-we-re-all-to-blame-for-china-and-india-s-filthy-co2-emissions >.

[265] HJ Chang *Kicking Away at the Ladder: Development Strategy in Historical Perpective* (2002) 4 (quoting German economist Friedrich List who argued that '[i]t is a very common clever device that when anyone has attained the summit of greatness, he kicks away the ladder by which he has climbed up, in order to deprive others of the means of climbing up after him'.

[266] D Moyo *Winner Take All: China's Race for the World's Resources* (Ebook Version) (2012) 44.

[267] Ibid 131-132.

makes Chinese multinational firms no different from multinational corporations domiciled in the North. [268] China's influence and power in the third world could give it significant control of vast natural resource reserves.[269] The point one gathers from juxtaposing US avoidance of and BASIC Group's insistence on historical responsibility is that both sides wield their positions as shields to safeguard their economic advancement.[270]

Although justice is an abstract concept, its infusion into climate change law and policy is necessary to secure the cooperation of developing countries who are embarking on the same development path which the North touted as the sure road to economic prosperity.[271] In the absence of cost-effective climate-friendly energy sources and with permanent sovereignty over their natural resources, developing countries' journey towards economic development may not fit the parameters of sustainable development.[272] While the North demands that the South pursue sustainable development, the blueprint for such sustainable development is largely absent.[273] Multinational corporations in developed countries own the intellectual property and the financial means to develop environmentally sound technologies to drive sustainable growth.[274] Thus far, developed countries have been reluctant to release or share environmentally sound technologies (ESTs) with the third world on a concessional basis.[275]

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[268] G Mohan & M Tan-Mullins 'The geopolitics of south-south infrastructure development: Chinese-financed energy projects in the global south' (2019) 56 *Urban Studies* 1368, 1382.
[269] Moyo (note 266 above) 132.
[270] K Khoday 'Emerging south and the evolution of sovereignty over natural resources' in *Global Community Yearbook of International Law and Jurisprudence: Global Trends: Law, Policy & Justice Essays in Honour of Professor Giuliana Ziccardi Capaldo* (2013) 41, 51-52.
[271] D Shapovalova 'In defence of the principle of common but differentiated and respective capabilities' in B Mayer & A Zahar (eds), *Debating Climate Law* (2021) 63, 66.
[272] Davis (note 177 above).
[273] 'Although it is global North consumption that is responsible for the vast majority of the world's ecological destruction, distance and wealth tend to make these consequences invisible to tis beneficiaries': R Gordon 'Unsustainable development' in S Alam et al (eds), *International Environmental Law and the Global South* (2015) 50, 68.
[274] M Glachant & A Dechezleprêtre 'What role for climate negotiations on technology transfer?' (2016) 17 *Climate Policy* 962, 962.
[275] A Abdel-Latif ' Intellectual property rights and the transfer of climate change technologies: Issues, challenges, and way forward ' (2014) 15 *Climate Policy* 103, 106-107.

Developed countries have not shown the commitment needed to deliver on their pledges to support climate efforts in developing countries.[276] Historical responsibility affords the first and crucial step for building trust and meaningful and long-lasting reductions in emissions.

3.5 Conclusion

The findings in this chapter on the experience of the CBDR principle in the climate regime may be equally applicable to other international environmental law regimes. Nevertheless, the findings are especially illustrative of the CBDR principle's influence on the success of the climate change regime's overall goal regarding mitigation. Climate change negotiations have exposed the opposing positions on the meaning and application of the CBDR principle for mitigation. The Kyoto Protocol sought to give meaning to historical responsibility by differentiating between emission targets for developed countries and voluntary mitigation for developing countries. Although the Kyoto Protocol delivered modest emission reductions, the reasons for its dim performance were inaccurately premised on the so-called rigid application of the CBDR principle, although the absence of leadership by developed countries played a significant role. Differentiation in the UNFCCC initially aligned with the Rio Declaration's intendment, which laid down historical contribution and capabilities as the markers for differentiation. Gradually, through subsequent negotiations, the climate change regime moved the markers of differentiation away from historical contribution and capability until, eventually, self-differentiation replaced CBDR in the Paris Agreement. The Paris Agreement has eliminated direct references to historical emissions and the responsibility it

[276] 'Rich countries are not providing evidence that they will meet the promised $100 billion target from 2020 onwards': CARE International 'Hollow commitments: An analysis of developed countries' climate finance plans' (June 2021) < https://careclimatechange.org/wp-content/uploads/2021/06/Hollow-Commitments_Final.pdf > 1.

evokes, leaving state parties to self-determine the extent to which their historical emissions inform their self-determined mitigation commitments and the ambition they attach to them.

Of all the negotiating positions on differentiation, the US position and the BASIC Group's position on historical responsibility stand out. Although both sides use their positions to insulate their economic (industrial) advancement, historical responsibility is closely attached to justice as an essential pillar of the climate regime. Its relevance is not only to address third-world interests, but to secure just and lasting emission reductions. The next chapter addresses injustice in the climate change regime. It also justifies why historical responsibility, now almost erased from the climate change regime, provides a crucial pathway for meaningful mitigation.

Chapter 4

Climate Justice and the Third World: Bringing back Historical Responsibility

4.1 Introduction

In Chapter 2, I argued that the common but differentiated responsibilities (CBDR) principle is deeply rooted in the pre-colonial and third-world colonial antecedents of modern international law. The CBDR principle can be viewed as a third world attempt to reverse the difference dynamic that has shaped the making of international law and the sub-field of international environmental law.[1] The key negotiating positions that have influenced the CBDR principle's scope and meaning concerning climate change mitigation have been identified and analysed. In chapter 3, it was argued that the current climate change regime has chipped away at the CBDR principle's historical responsibility component. Climate change brings the North/South divide into focus because of its link to economic development.[2] The inequity is reflected in the fact that third world countries are least responsible for climate change but are most affected by its impacts. This situation makes mitigating climate change a matter of justice.[3]

Justice is a broad concept with several theoretical perspectives. Climate change implications bring up several angles from which justice is understood.[4] For example, environmental justice theories address what would be a fair way to distribute the burdens and benefits of climate change, [5] and distributive justice is at play in concepts that offer ways of distributing the responsibility to address climate change.[6] Remedial justice theories attempt to construct just outcomes by ensuring that those who suffer loss and damage because of climate

[1] As discussed in chapter 2 above.
[2] As discussed in chapter 2 above.
[3] J Goodman 'From global justice to climate justice? Justice ecologism in an era of global warming' (2009) 31 *New Political Science* 499, 501.
[4] R Maguire & B Lewis 'The influence of justice theories on international climate policies and measures' (2012) 8 *Macquire Journal of International & Comparative Environmental Law* 16, 23-24.
[5] D Schlosberg & LB Collins 'From environmental to climate justice: Climate change and the discourse of environmental justice' (2014) 5 *Wiley Interdisciplinary Reviews: Climate Change* 359.
[6] See A Chandani 'Distributive justice and sustainability as a viable foundation for the future climate regime' (2007) 1 *Carbon & Climate Law Review* 152.

change will have redress.[7] Energy justice centres on the inequality of access to energy resources.[8] For each of these theories, scholars have developed a range of permutations.[9] However, no single theory of justice can fully address all the complexities of justice arising from climate change.[10] At best, the different concepts of justice work in unison, rather than against each other, towards a just climate change regime.[11]

This chapter focuses on climate justice as a concept emanating from the broader idea of global justice.[12] Global justice is a branch of cosmopolitan theory.[13] Moral cosmopolitanism attempts to extend justice theories – generally seen as applicable only to national issues – to international problems, on the basis that human beings are all bound by the same set of moral laws, regardless of national borders.[14] Climate justice is centred on the view that the causes and impacts of climate change and the efforts to address them through mitigation and adaptation are not equitably distributed.[15] Four interconnected factors undergird climate justice as a concept.[16] Firstly, industrialised countries bear a greater responsibility for climate change because of their historical and current emissions. Secondly, developing countries are less

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[7] A Williams 'Promoting justice within the international legal system: Prospects for climate refugees' in BJ Richardson et al (eds), *Climate Law and Developing Countries: Legal and Policy Challenges for the World Economy* (2009).
[8] L Guruswamy 'Energy justice and sustainable development' (2010) 21 *Colorado Journal of International Environmental Law & Policy* 231, 231.
[9] J Rachels *The Elements of Moral Philosophy* 4 ed (2003) 34, 35.
[10] Maguire & Lewis (note 4 above) 24.
[11] Ibid.
[12] 'Global justice is a theoretical stand that addresses the issues of "just distribution of benefits and burdens across the world"…': A Choudhary 'Global justice' in A Farazmand (ed), *Global Encyclopedia of Public Administration, Public Policy, and Governance* (2018) 1, 1.
[13] Ibid. Cosmopolitan theory is a moral idea that distributive justice applies to global issues. Thus, cosmopolitanism pl aces human beings at the core of the just distribution of resources and posits that obligations human beings hold towards other human beings transcend national borders.
[14] D Miller *National Responsibility and Global Justice* (2007) 24. This chapter is not concerned with the political version of cosmopolitanism which argues that moral obligations can only bind all people if they are subject to the same political authority than can enforce those moral obligations.
[15] T Dietz, RL Shwom & CT Whitley 'Climate change and society' (2020) 46 *Annual Review of Sociology* 135, 144.
[16] J Baskin 'The impossible necessity of climate justice?' (2009) 10 *Melbourne Journal of International Law* 424, 426.

capable of addressing climate change impacts. Thirdly, developing countries have socio-economic needs that require an increase in demand for energy; and fourthly, the earth's carrying capacity for carbon dioxide is now insufficient to allow developing countries to emit as much GHGs as industrialised countries emitted in their pursuit of development.[17]

Climate justice may be divided into procedural and distributional climate justice. Procedural climate justice is concerned with decision-making processes about climate change impacts and fair and accountable responses.[18] At the international level and in relation to mitigation, procedural climate justice is concerned with fair decision-making about mitigating climate change in the context of this study.[19] The major decision-making body in the climate change regime is the Conference of the Parties (COP); thus, the conduct of negotiations comes into focus. Distributional climate justice is concerned with a just distribution of the costs and benefits associated with climate change.[20] Regarding mitigation and this study, distributional justice emphasises CBDR and equitably sharing the remaining carbon space between the developed and third worlds.[21]

This chapter examines climate justice from a procedural and distributional justice angle in relation to the CBDR principle. In terms of procedural justice, negotiations on the CBDR principle's application to mitigation commitments are examined. It has been shown that the CBDR principle has been at the heart of disagreements in the climate change regime.[22] These disagreements made the CBDR principle a candidate for constructive ambiguity as a diplomatic

[17] Ibid 426-427.
[18] P Newell et al 'Toward transformative climate justice: An emerging research agenda' (2021) *Wiley Inter-disciplinary Reviews: Climate Change* e733, e736.
[19] Ibid.
[20] Ibid e737.
[21] Ibid.
[22] As discussed in chapter 3.

means to contain conflicts and move decisions on mitigation forward. This chapter offers a critical analysis of the effect of constructive ambiguity on negotiations involving the CBDR principle, using the critical discourse analysis approach and frame theory.

Secondly, in terms of distributional justice, the CBDR principle's historical contribution component directly connects with the issues arising from sharing the responsibility to mitigate among countries. This chapter engages the arguments put forward to advance historical responsibility and examines them in light of opposing views suggesting that historical responsibility has diminished relevance in the climate change regime. It also examines how historical responsibility could be practicalised in the current climate change regime.

4.2 Ambiguating Differentiation: A Panacea or A Bad Pill?

It has been shown that since the climate change regime's inception, developed and developing countries have disagreed on the actual meaning and application of the CBDR principle, especially regarding mitigation.[23] During negotiations, state representatives use diplomatic tools to resolve or evade disagreements over draft treaty provisions. One such diplomatic tool is constructive ambiguity: 'the deliberate use of ambiguous language in order to achieve agreement during negotiation of a legal text.'[24] The contestations surrounding the CBDR principle's meaning and application have made differentiation a target for constructive

[23] J Brunnée & C Streck 'The UNFCCC as a negotiation forum: Towards common but more differentiated responsibilities' (2013) 13 *Climate Policy* 589, 590.
[24] E Friedman 'Evasion strategies in international documents: When "constructive ambiguity" leads to oppositional interpretation' (2017) 14 *Critical Discourse Studies* 385, 385.

ambiguity in the negotiation process.[25] This section analyses constructive ambiguity and determines whether its use has obscured climate justice in the climate change regime.

4.2.1 Decision Making and Constructive Ambiguity During Negotiations: The Basics

One of the peculiar features of multilateral environmental agreements (MEAs) is that decision making takes place under the auspices of the COP, which is the institutional core of MEAs.[26] The COP and its decision-making processes are central to global climate change governance in the climate change regime.[27] It has been argued that the COP and its subsidiary bodies play a role akin to legislation in the climate change regime.[28] This argument finds strength in the fact that the COP decisions in the climate regime have established several ad hoc working groups whose work has influenced the content of climate change instruments.[29] To illustrate this point, one can cite recent examples such as the Ad-hoc Working Group for the Durban Platform for Enhanced Action, the Cancun Agreements, and the Lima Call for Action. In addition to this authoritative decision-making, the COP also serves as the body vested with the power to adopt the text of a negotiated agreement under the climate change regime.[30]

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[25] S Biniaz 'Comma but differentiated responsibilities: Punctuation and 30 other ways negotiators have resolved issues in the international climate change regime' (2016) 6 *Michigan Journal of International Law* 37, 40.
[26] J Brunnée 'COPing with consent: Law-making under multilateral environmental agreements' (2002) 15 *Leiden Journal of International Law* 1, 4.
[27] A Vihma 'Climate of consensus: Managing decision making in the un climate change negotiations' (2015) 24 *Review of European, Comparative & International Environmental Law* 58, 60. See also United Nations Climate Change 'Processes and Meetings' < https://unfccc.int/process-and-meetings/bodies/the-big-picture/what-are-governing-process-management-subsidiary-constituted-and-concluded-bodies > The COP is assisted in its functions by two permanent subsidiary bodies, ad hoc subsidiary bodies and the UNFCCC secretariat, among others.
[28] Brunnée (note 26 above) 51.
[29] Vihma (note 27 above) 60.
[30] Brunnée (note 26 above) 4.

The negotiation process is what drives the work of the COP. During negotiations, negotiators and other participants at the COP seek to build consensus by framing contentious issues. Frames are core organising ideas or storylines used to contextualise and engage different interpretations to unpack multifaced issues.[31] Consequently, how a particular problem is framed in decision-makers' minds determines how they conceptualise the problem and the solutions they propose to solve it.[32] In the context of climate change negotiators and other participants at COPs have developed and championed several frames around the issue of differentiated responsibilities for mitigating climate change. For the sake of relevance, I limit my discussion to the economic frame, the ethics frame and the conflict frame.[33]

The economic frame presents climate change in terms of economic growth.[34] This framing influences the view that the annexe-based differentiation of countries that exempts developing countries from binding emission reduction targets gives them an unfair economic advantage. The ethics frame emphasises what is right or just and what is wrong or unjust regarding the causes and impacts of climate change.[35] This framing emphasises the historical responsibility for climate change and corresponding state actions to remedy the injustice therein.[36] The conflict frame envisions climate change as a clash of interest groups. This framing reflects in North/South disagreements over the nature of the climate crisis and how to address it. It also extends to the coalitions that states have formed to advance their interests during negotiations, as discussed in Chapter 3. While the North presents climate change as an

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[31] M Hjerpe & K Buhr 'Frames of climate change in side events from Kyoto to Durban' (2014) 14 *Global Environmental Politics* 102, 104.
[32] L Vanhala & C Hestbaek 'Framing climate change loss and damage in UNFCCC negotiations' (2016) 16 *Global Environmental Politics* 111, 113.
[33] I draw from frames that Hjerpe and Buhr utilized in their analysis of issue framing during climate change side events at climate change conferences. See Hjerpe & Buhr (note 31 above).
[34] Ibid.
[35] Ibid 105.
[36] Ibid.

environmental problem with implications for energy and reduction in GHG emissions, the South casts climate change in the development mould and emphasises access to energy and resources.[37] The economics, ethics and conflict frames further shape the critical analysis of historical responsibility later in this chapter.[38]

Frames do not operate in isolation. Generally, negotiations involve political positions which reflect national interests.[39] Consequently, diplomacy plays a central role in the conduct of negotiations. Concerning climate change negotiations, negotiators, NGOs, and other stakeholders use diplomatic channels and techniques to elevate certain frames over others.[40] When negotiators meet to finalise draft treaty texts, the main challenge is capturing as many interests as possible to build consensus.[41] In the context of climate change negotiations, discourse analysis provides a useful vantage point for examining the way negotiators arrive at consensus or compromise on contentious issues. In broad terms, discourse analysis is language in action. It is the study of meanings given to language, whether written or spoken and the actions that entities carry out when language is used in specific contexts.[42] Discourse analysis finds expression in several aspects of communication, including the field of diplomacy. The branch of discourse studies directly applied in diplomacy is constructive ambiguity.[43] Constructive ambiguity rests on the premise that addressing contentious issues in an

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[37] Ibid.
[38] See section 4.2 below.
[39] B Kjellén 'The new diplomacy from the perspective of a diplomat: Facilitation of the post-Kyoto climate talks' in G Sjöstedt & AM Penetrante (eds), *Climate Change Negotiations: A Guide to Resolving Disputes and Facilitating Multilateral Cooperation* (2013) 48, 53-54.
[40] Hjerpe & Buhr (note 31 above) 104.
[41] Biniaz (note 25 above) 39.
[42] JP Gee & M Handford 'Introduction' in JP Gee & M Handford (eds), *Routledge Handbook of Discourse Analysis* (2012) 1, 1.
[43] M Byers 'Still agreeing to disagree: International security and constructive ambiguity' (2020) 8 *Journal on the Use of Force and International Law* 91, 93. See also GR Berridge, A James & L Llyod *The Palgrave Macmillan Dictionary of Diplomacy* (3 ed) 2012 (defining constructive ambiguity as 'the deliberate use of ambiguous language on a sensitive issue in order to advance some political purpose').

unambiguous way could lead to a breakdown in negotiations. Thus, constructive ambiguity is a necessary tool for avoiding prolonged conflict.[44] The overall effect is that different interpretations arise through fusing imprecise words or terms or structuring particular sentences that are open to several meanings or creating disparities between segments of the treaty text.[45] The end result of using constructive ambiguity in an agreement is that contending parties all leave negotiations with the impression that they have secured their positions in the text of the agreement.[46]

Ambiguity advocates profess some benefits of using constructive ambiguity. Firstly, ambiguity secures more time for negotiation. When negotiators arrive at a deadlock on specific issues, negotiators use ambiguous language to allow negotiators to keep their respective preferences to the interpretation of the conflicting issue. In this way, ambiguity creates room for parties to revisit the conflicting issues at a later time.[47] Secondly, ambiguity may be productive because it can isolate contentious issues, so that they do not take over the entire negotiation process and cripple progress on an outcome. Thus, if parties are willing to leave some issues unresolved for a time, ambiguity aids to move other issues forward.[48] Thirdly, ambiguity helps to protect state officials and negotiators against domestic criticism. Ambiguity gives negotiators the leeway to create their interpretations while accepting other negotiators' interpretations. The different interpretations exist together to reduce the negotiators' risk of suffering domestic political criticism.[49] Furthermore, ambiguity can help to create a sustainable

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[44] Friedman (note 24 above) 385.
[45] Byers (note 43 above) 94-95 (citing instances in international legal instruments in which constructively ambiguously language was used to draft certain legal provisions.
[46] T Graham Jr. & B Mobley 'Deliberate ambiguity in modern arms control and the ABM treaty' (2001) 36 *The International Spectator* 19, 20.
[47] D Mitchell 'Cooking the fudge: Constructive ambiguity and the implementation of the Northern Ireland Agreement, 1998-2007' (2009) 24 *Irish Political Studies* 321, 323.
[48] Ibid.
[49] Ibid.

negotiation process because it enables the culture of compromise and drives disagreements in a channelled and predictable way.[50]

Notwithstanding the benefits above, ambiguity theorists are not oblivious to the potential harms of ambiguity. Perhaps the biggest disadvantage of using ambiguity in treaty-making is that it could produce poor outcomes.[51] In multilateral treaty negotiations with several parties and their different interpretations, the likely result of using constructive ambiguity is 'lowest common denominator outputs'.[52] Ambiguity enables prolonged and sustained disagreements which remain hidden under the guise of seeking compromise.[53] Negotiations are more prone to exploiting the use of ambiguity to the fullest extent possible once they have been allowed to produce their different interpretations of a text. This makes implementing a treaty more cumbersome.[54] In addition, ambiguity makes terms opaque. This affects the strength of the treaty's compliance mechanisms because parties could rightly claim that their mal-performance was consistent with their understanding and interpretation of the ambiguous provision in question.[55]

Since ambiguity can produce counter-productive outcomes, it follows that negotiators should decipher between negotiations that could benefit from ambiguity and those that may not. This is imperative because ambiguity becomes counter-productive over time – often happening gradually year after year until the long-term costs outweigh the short-term

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[50] D Pehar 'Use of Ambiguities in Peace Agreements' (2000) *Language & Diplomacy* 163, 164.
[51] Mitchell (note 47 above) 323 (noting that constructive ambiguity 'has a perilous double-edged character').
[52] M Elmehed 'Disambiguating the Brussels agreement : A study of ambiguity in the Serbia-Kosovo normalisation process' Thesis presented for Degree at Lund University (2016) 18.
[53] Pehar (note 50 above) 172.
[54] Ibid.
[55] I Fischhendler 'When ambiguity in treaty design becomes destructive: A study of transboundary water' (2008) 8 *Global Environmental Politics* 111, 113.

benefits.[56] To reduce the high costs associated with constructive ambiguity, Fischhendler opines that it could be helpful for negotiators to watch out for early signs that ambiguity may be more detrimental than beneficial.[57] Based on a critical analysis of constructive ambiguity in peace agreements, one could argue that time is crucial in separating constructive ambiguity from destructive ambiguity.[58] The more time-sensitive an issue is, the more constructive ambiguity can become destructive.[59] In addition, it has been argued constructive ambiguity could be destructive for the weaker opposing side because evasive language tends to favour the side that wields more political power.[60] Having outlined the potentials and pitfalls that come with constructive ambiguity, the next section examines the use of constructive ambiguity in the UNFCCC concerning the CBDR principle.

4.2.2 Ambiguated Differentiation in the UNFCCC

Negotiations for the Rio Declaration on Environment and Development [61] and the United Nations Framework Convention on Climate Change[62] happened around the same time, but not simultaneously.[63] Another subtle point to note is that although the Rio Declaration negotiations happened before negotiations for climate change, the Inter-governmental Negotiating Committee (INC) had agreed to include the CBDR principle in the preamble and

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[56] Ibid 132.
[57] Ibid.
[58] For example, Mitchell analyses the effect of the constructive ambiguity as part of strategies to resolve the Northern Ireland conflict and opines that constructive ambiguity was partially successful because it gave the opposing sides ample time to get used to moving towards unambiguous terms: Mitchell (note 47 above) 333.
[59] See R Moncel 'Unconstructive ambiguity in the Durban climate deal of COP 17 / CMP 7 ' (2012) 12 *Sustainable Development Law & Policy* 6, 6 (arguing that by choosing to use constructive ambiguity on time sensitive issues, the international community may have closed the window of opportunity left to keep global warming within the two-degree limit).
[60] Friedman (note 24 above) 398 (observing that constructive ambiguity in conflict management between Israel and Palestine went in favour of Israel, the more politically powerful side).
[61] Rio Declaration on Environment and Development (adopted 13 June, 1992) 31 ILM 874 (Rio Declaration).
[62] United Nations Framework Convention on Climate Change (adopted 14 June 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC).
[63] IM Porras 'The Rio Declaration: A New Basis for International Co-Operation' (1992) 1 *Review of European, Comparative & International Environmental Law* 245, 249 note 16.

in the article on principles in the UNFCCC.[64] The two points above form a useful backdrop for analysing the reach of constructive ambiguity regarding the CBDR principle in the climate change regime because the INC merely agreed to include the CBDR concept. This leaves the reader to determine whether the INC would repeat the Rio Declaration's rendition in Principle 7 or construct another interpretation of the CBDR concept.[65]

Subsequently, the INC's version of the CBDR principle was not identical with Principle 7 in the Rio Declaration. Principle 7 provides, in part, that

> 'In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command'.

Principle 7's reference to the markers of differentiation is more express and directly linkable to the CBDR principle. Principle 7 explains the two markers as 'the pressures developed countries and their societies place on the environment (past and ongoing contribution to an environmental problem) and the 'technologies and financial resources they command' (capabilities).[66]

Conversely, Article 3.1 of the UNFCCC establishes CBDR as a principle as follows:

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[64] See Ibid 253 (quoting UNGA 'Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the work of the first part of its fifth session, held at New York from 18 to 28 February 1992) A/AC 237/18 (Part I).
[65] The INC's use of open language to commit to the CBDR principle's inclusion in the UNFCCC while keeping a non-committal tone as to whether the INC would repeat the CBDR principle as rendered in the Rio Declaration makes the ambiguation surrounding differentiation more striking. See Porras (note 63 above) 249.
[66] Rio Declaration, Principle 7.

> 'The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of *equity* and in accordance with their *common but differentiated responsibilities and respective capabilities.* Accordingly, the developed country Parties should *take the lead* in combating climate change and the adverse effects thereof.'[67]

From the above, Article 3.1 does not provide any information about the determinants of differentiation. Nevertheless, it makes a vague reference to developed countries by singling them out to 'take the lead in combatting climate change and the adverse effects thereof.'[68] We are left to find the basis for differentiation and, implicitly, the developed countries' leadership mandate because no provision ties developed countries' historical emissions and responsibility (as a marker of differentiation) to differentiation explicitly.[69]

Again, Article 4 mandates developed countries to facilitate finance and promote the transfer of environmentally sound technologies (ESTs) to enable developing countries to implement their obligations.[70] Article 4 also directly links developing countries' capacity to implement their commitments under the UNFCCC to the transfer of financial resources and technology from developed countries.[71] Although these provisions map onto the marker associated with advanced technological and financial capabilities, the UNFCCC does not tie them together with the CBDR principle.[72]

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[67] Emphasis added.
[68] Biniaz (note 25 above) 40.
[69] Ibid 44.
[70] UNFCCC, art 4.
[71] UNFCCC, arts 4 (4), 4 (7). Article 11 also establishes a Financial Mechanism for the provision of financial resources and transfer of technology to developing countries on a concessional basis. Presumably, financial and technological transfer would enable developing countries leap-frog over unsustainable development, which would help their emissions to peak quickly.
[72] Brunnée & Streck (note 23 above) 593.

This leaves us with the most visible difference between Principle 7 and Article 3.1. Given that the drafting of the two provisions took place in the same period, it could be argued that although Article 3.1 drew from the overall import of Principle 7, the express mention of 'respective capabilities' in Article 3.1 suggests a variated meaning. In essence, the CBDR principle, as it appears in the UNFCCC, could be interpreted to advance the point that differentiated responsibilities should translate into a greater mitigation burden not only for developed countries but also for developing countries with industrialising economies, such as the BASIC group, in proportion to their capabilities.[73]

The only mention of historical emissions, and arguably responsibility thereof, is in the UNFCCC's preamble. This placement of historical emissions and responsibility in the preamble also deserves some analysis. Preambles and their place in the treaty structure go as far back as treaties themselves.[74] Despite their long-standing existence, preambles still generate controversy regarding their legal status in treaty interpretation. On the one hand, there is the view that preambles can create legally binding obligations in a treaty. This may be called the interpretive school of thought.[75] On the other hand, other writers resist this position and argue that the preamble plays a mere ceremonial role and thus could never create legal obligations. This may be called the ceremonial school of thought.[76]

In the context of climate change law, the operation of the interpretive school of thought is discernible regarding the preambular placement of historical emissions. In the UNFCCC, the preamble notes, among others, that 'the largest share of historical and current global emissions

[73] Ibid.
[74] MH Hulme 'Preambles in Treaty Interpretation' (2015) 164 *University of Pennsylvania Law Review* 1281, 1283.
[75] Ibid 1285.
[76] Ibid 1286.

of greenhouse gases has originated in developed countries.[77] This reference to historical emissions is the closest and only reference to an admission of the historical emissions and, implicitly, historical responsibility. Considering this, one could argue that as a matter of legal interpretation, the preamble's mention of historical emissions (and, impliedly, historical responsibility) influences the meaning and application of the CBDR principle in the UNFCCC. The Vienna Convention on the Law of Treaties (VCLT)[78] strengthens this view because it places preambles among the main tools for treaty interpretation.[79]

Arguably, from the point above, the search for the basis of differentiation requires a holistic reading of the UNFCCC. The preamble hints at contribution as a marker of differentiation and hints further at how the COP should operationalise differentiation: that is, by allowing developing countries a buffer period within which their emissions would rise to meet their socio-economic needs and requiring developed countries to cut back on their emissions.[80] Therefore, one could read historical responsibility into the meaning of the CBDR principle so that historical emissions would carry equal weight as capabilities. While this line of reasoning has not been tested judicially,[81] the Kyoto Protocol's use of the CBDR principle for setting out differentiated responsibilities for industrialised and developing countries supports the significance of the preamble's reference to historical emissions in the UNFCCC.[82]

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[77] UNFCCC, Preamble para 3.
[78] Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).
[79] Hulme (note 74 above) 1298. Hulme further argues that the VCLT considers preambles as part of the treaty text for purposes of interpretation.
[80] UNFCCC, Preamble para 3.
[81] Although climate change litigation has taken off in national courts, international tribunals, in the particular the International Court of Justice, have kept their distance, to a large extent. Furthermore, it has been argued that an international court's intervention regarding the meaning and application of the CBDR principle is seen as potentially detrimental because the issue is extremely acrimonious. See chapter 5 below.
[82] Brunnée & Streck (note 23 above) 593 (arguing that the Kyoto Protocol was 'consonant with the CBDRC principle and, in particular, with the notion of developed-country leadership on climate action'). See also M Prys-Hansen 'Differentiation as affirmative action: Transforming or reinforcing structural inequality at the UNFCCC?' (2020) 34 *Global Society* 353, 364.

The Paris Agreement's handling of historical emissions and responsibility further supports the stance that preambles could carry legal interpretive weight. In the Paris Agreement, there is no reference to historical emissions.[83] Historical responsibility no longer has a concrete textual grounding in the Paris Agreement as a yardstick for differentiation.[84] With the erasure of historical emissions from the text of the Paris Agreement, the COP cut the last normative cord linking historical emissions to differentiated responsibility, thereby rendering the chances of its re-entry into the climate change regime more challenging.[85] Therefore, one can infer that if negotiators considered the preamble a ceremonial textual piece, they would have maintained the preambular recital on historical emissions. Whereas the UNFCCC left the interpretive door open, the Paris Agreement shut it.

Despite the ambiguations analysed above, developed countries and developing countries still disagreed on the basis for the developed countries' mandate to 'take the lead' to mitigate climate change. Developing countries contended that the basis for leadership rested on their historical contribution to climate change and their advanced capabilities, while developed countries preferred an interpretation that avoids historical responsibility.[86] To satisfy

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[83] T Jayaraman & T Kanitkar 'The Paris Agreement: Deepening the climate crisis' (2016) 51 *Economic & Political Weekly* 10, 12.

[84] Elements for the draft negotiating text show drafting options that captured differentiation to include historical responsibility. See for example Option 2 for Preamble to the Paris Agreement: 'The Parties to this agreement, In pursuit of the ultimate objective of the Convention as stated in its Article 2, Being guided by the principles of the Convention as set out in its Article 3, including that Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with historical responsibility, common but differentiated responsibilities and the provisions of Article 4 of the Convention / evolving common but differentiated responsibilities and respective capabilities / evolving economic and emission trends which will continue post-2020, in order to progressively enhance the levels of ambition…'(emphasis added) See Lima Call for Climate Action Annex < https://unfccc.int/files/meetings/lima_dec_2014/application/pdf/auv_cop20_lima_call_for_climate_action.pdf > (Lima Call for Action Annex).

[85] Prys-Hansen (note 82 above) 364 (noting that self-differentiation, in relation to mitigation, is now a norm in the climate change regime).

[86] Biniaz (note 25 above) 40.

both sides, the word 'Accordingly' appears at the beginning of Article 3. Each side could then interpret the basis for leadership on whichever aspect of the markers of differentiation would suit their negotiating position.[87]

4.2.3 Ambiguation After Kyoto Protocol and in the Paris Agreement

The Copenhagen Accord continued to use carefully worded but ambiguous expressions of commitment to capture hard-won compromises.[88] As with the UNFCCC, the parties agreed that mitigation requires 'deep cuts' to GHG emissions.[89] Therefore, the Accord recognises the need to achieve the peaking of global emissions 'as soon as possible', fully understanding that developing country emissions will 'take longer to peak' because of the overriding social and economic priorities they face.[90]

As negotiations progressed after the Cancun COP, the disagreements regarding applying the CBDR principle to mitigation commitments and equity raged on. To avoid a deadlock, the COP at Durban decided that the Durban Platform for Enhanced Action[91] would be implemented 'under the Convention',[92] leaving an open interpretation as to how a post-Kyoto Agreement would reflect the initial intendment of the CBDR in the UNFCCC. Developing countries took the phrase 'under the Convention' to mean that the post-Kyoto Agreement would honour the Annex-based differentiation which the Kyoto Protocol

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[87] Ibid.
[88] NK Dubash 'Copenhagen: Climate of mistrust' (2009) 44 *Economic and Political Weekly* 8 (detailing disagreements and compromises reached over the wording of the Copenhagen Accord).
[89] Decision 2/CP.15 Copenhagen Accord FCCC/CP/2009/11/Add.1 (18 December 2009) (Copenhagen Accord) para 2.
[90] Copenhagen Accord, para 2.
[91] The COP agreed to set an ad-hoc body to oversee the process of preparing the next legally-binding agreement on climate change. See FCCC/CP/2011/9Add.1 'Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action' Decision 1/CP.17 (Durban Platform for Enhanced Action).
[92] FCCC/CP/2011/9/Add.1 'Outcome of the work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention' Decision 2/CP. 17.

implemented.[93] Meanwhile, developed countries had also championed another interpretation whereby the Durban Decision stated that a post-Kyoto Agreement would be 'applicable to all'. This phrase left open the possibility that commitments under the Agreement would apply symmetrically to all parties, negating the developing countries' interpretation of the phrase 'under the Convention'.[94]

At the Lima COP, the Lima Call for Climate Action reintroduced the CBDR principle but called it the principle of 'common but differentiated responsibilities and respective capabilities, in light of different national circumstances' (CBDR-RC/NC).[95] By this renaming, another level of ambiguation was set in motion. The Paris Agreement's final text left out all references to historical emissions and historical responsibility.[96] The effect of the erasure is that developed countries succeeded in deemphasising historical contribution. By introducing 'different national circumstances,' the Paris Agreement gave priority to the argument (championed by developed countries) that national capabilities (unlike historical emissions) do not remain static, and therefore changes in capabilities should reflect in mitigation commitments over time.[97]

Nevertheless, developing countries have maintained their broad position and have preserved some aspects of the ethos of Principle 7 in subtle yet noticeable ways. For example, on the basis of the UNFCCC's preamble and Article 4 of the Paris Agreement, there is an implicit reference to historical emissions by the admission that peaking will take longer for

[93] Moncel (note 59 above) 10.
[94] Ibid.
[95] UNFCCC Decision -/CP.2 Lima Call for Action.
[96] Rio Declaration, principle 7.
[97] L Rajamani 'Ambition and differentiation in the 2015 Paris Agreement: Interpretative possibilities and underlying politics.' (2016) 65 *International & Comparative Law Quarterly* 493, 508.

developing countries.[98] Article 4 also urges developed countries to 'continue taking the lead by undertaking economy-wide absolute emissions reduction targets'.[99] Developing countries should 'continue enhancing their mitigation efforts' but should 'move over time towards economy-wide emission reduction in the light of the different national circumstances'.[100] Again, the Paris Agreement provides that developed countries must provide financial support for developing countries to meet their obligations.[101] From these provisions, it is reasonable to envisage that developing countries will continue to harmer on historical emissions [102] and stress the direct link between financial and technical support for implementing their obligations in the Paris Agreement.[103]

In sum, there are varied forms that constructive ambiguation has taken to produce an ambiguated concept of differentiation. By the use of open language, textual placement and deliberate omissions, negotiators have created three distinct interpretations of the CBDR principle, with varying degrees of similarity to the initial intendment of Principle 7. Article 3.1 can be interpreted in two ways. First, by reading the preamble and various provisions in the UNFCCC together, the CBDR principle provides the basis for differentiating mitigations commitments between developed countries and developing countries based on historical contribution and advanced capabilities.[104]

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[98] Paris Agreement, art 4.1, UNFCCC, preamble.
[99] Ibid art 4.4.
[100] Ibid art 4.4.
[101] Ibid art 4.5 and art 9.1, read together.
[102] See for example Joint Statement issued at the Conclusion of 28th BASIC Ministerial Meeting on Climate Change, Brazil (16 August 2019), para 5 <https://www.environment.gov.za/mediarelease/jointstatement_issuedatconclusionof_28basicmeeting2019brazil>
[103] J Kreienkamp & L Vanhala 'Climate change loss and damage' Global Governance Institute Policy Brief (March, 2017) < https://www.ucl.ac.uk/global-governance/sites/global-governance/files/policy-brief-loss-and-damage.pdf> (drawing linkages between demands for compensation for climate change loss and damage and claims of historical responsibility of developed countries for climate change).
[104] UNFCCC, preamble and arts 3.1, 4.3 and 4.7.

A second option springs from adding the phrase 'respective capabilities' in Article 3 of the UNFCCC. Developed countries interpret the addition to encompass technological and financial capabilities changes, especially in third-world countries whose technological and financial capabilities are advancing but are not yet at par with industrialised countries.[105] A third option, captured as self-differentiation in the Paris Agreement, is arguably the most open-ended form of differentiation. Self-differentiation operates without markers but relies on self-determined national circumstances.[106] However, the Paris text introduced the vague phrases 'progression' and 'highest possible ambition' to tone down the open-ended nature of self-differentiation.[107] The following section assesses the overall effect constructive ambiguity has had on the climate change regime from a third world perspective.

4.2.4 Assessing the Impact of Constructive Ambiguity in Differentiation: A Third World Approach

Differentiation in the climate change regime has been contentious since the beginning of climate change law-making.[108] Given the complexities attending climate change,[109] its direct link to every country's energy and economic development choices, and the fact that international cooperation is crucial,[110] the argument that ambiguating differentiation helped to engage the international community for the past two decades seems persuasive.[111]However,

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[105] Brunnée & Streck (note 23 above).
[106] L Rajamani 'The 2015 Paris Agreement: Interplay between hard, soft and non-obligations' (2016) 28 *Journal of Environmental Law* 317, 355-356.
[107] Paris Agreement, art 4.3.
[108] D Bodansky & L Rajamani 'The issues that never die' (2018) 12 *Carbon & Climate Law Review* 184, 184.
[109] RJ Lazarus 'Super wicked problems and climate change: Restraining the present to liberate the future' (2009) 94 *Cornell Law Review* 1153, 1160.
[110] Ibid 1160-1161.
[111] Even with all the compromises the parties made the Paris Agreement was at the point of unravelling several times during the negotiations. An observer noted that two days to the end of negotiations towards the Paris Agreement, the draft text contained more than 800 brackets, signifying disagreements: IISD Earth Negotiations Bulletin 'Report of main proceedings for 7 December 2015 : Paris Climate Change Conference - November 2015'

with the unfolding of each successive negotiation, the destructive tendencies of ambiguation become apparent when differentiation is considered in light of climate justice. The overall effect of ambiguating differentiation is that it has removed historical responsibility as a marker for differentiation.[112] The more apparent interpretive options available for implementing the CBDR principle, for mitigation, are titled towards an assessment of capabilities only. Since historical responsibility is closely linked to climate justice, the erosion of historical responsibility directly affects the justice framework in the climate regime.[113]

A third world approach to assessing the usefulness of constructive ambiguity in framing the CBDR principle for mitigation is justified. This is because much of the Paris regime's success or failure depends on continued engagement with and cooperation of third world countries.[114] Gupta has developed an analytic tool for assessing the climate change regime from a third world perspective which she named 'GAP' analysis. A third world 'GAP' approach' to climate change requires examining if the goals of developing countries are addressed; if there is a bias in arguments concerning the interpretation of the text of treaties in the regime; and if there is a pattern of inequity in the climate change regime.[115]

A modified version of Gupta's analytic tool is suitable for examining whether an ambiguated concept of differentiation obscures or uncovers climate justice. The modified

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(December 2015) < https://enb.iisd.org/events/paris-climate-change-conference-november-2015/report-main-proceedings-7-december-2015 >.

[112] RS Dimitrov 'The Paris Agreement on climate change: Behind closed doors' (2016) 16 *Global Environmental Politics* 1, 4.

[113] S Mason-Case & J Dehm 'Redressing historical responsibility for the unjust precarities of climate change in the present' in B Mayer & A Zahar (eds), *Debating Climate Law* (2021) 170, 174-175.

[114] B Mayer 'The relevance of the no-harm principle to climate change law and politics' (2016) 19 *Asia Pacific Journal of Environmental Law* 79, 80.

[115] J Gupta 'Climate Change: A GAP analysis based on Third World Approaches to International Law' (2010) 53 *German Yearbook of International Law* 341, 348-351. GAP' therefore stands for 'goals', 'arguments' and 'patterns of inequity'.

version evaluates whether ambiguating the CBDR principle has furthered the climate regime's overall goal and whether the process of ambiguating the CBDR principle has produced patterns of inequity.[116] A third factor – potential for change – provides additional value. The potential for a regime to evolve into a regime that fosters fairness arguably provides a foundation for assessing the long-term impact of ambiguation.[117] Thus, this section proceeds to evaluate constructive ambiguity for differentiation by assessing the climate change regime's ultimate goal, patterns of inequity and potential for change.

The climate change regime's ultimate goal is to keep the global temperature rise well below two degrees while pursuing efforts to limit the increase to 1.5 degrees above pre-industrial levels.[118] Arguably, the ultimate goal is closely tied to climate justice. Unless the ultimate goal is achieved, third world countries will bear the most intense negative impacts. To meet this goal, the IPCC has repeated urgent calls for the international community to move towards net-zero emissions to avert dangerous and irreversible climate change.[119] Other studies and reports have warned that the time frame left to make meaningful gains in mitigation is all but closed.[120] Despite the urgency of the scientific community's warning, the time-sensitive

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[116] My use of a modified version of Gupta's GAP analysis is justified in chapter 1 above.

[117] The regime on ozone layer depletion is example of a regime that evolved in time to accommodate key concerns of different contracting parties. Arguably, the regime's ability to provide a built-in measure of fairness, allowing time for developing countries to transition from using ozone depleting substances, time for innovating environmentally friendly alternatives and the regime's ability to foster international cooperation went a long way to ensure the regime's success. See ER DeSombre 'The experience of the Montreal Protocol: Particularly remarkable, and remarkably particular' (2000) 19 *UCLA Journal of Environmental Law & Policy* 49.

[118] Paris Agreement, art 2.1.

[119] In the IPCC's latest report, the Panel is emphatic that achieving global net-zero carbon emissions is a requirement for stabilizing global average temperatures: IPCC 'Summary for Policymakers' in Masson-Delmotte et al (eds) *Climate Change: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (2021) < https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf > 40 (IPCC 'Summary for Policymakers').

[120] See for example, D Tong et al 'Committed emissions from existing energy infrastructure jeopardize 1.5 °C climate target' (2019) 572 *Nature* 373. See also World Meteorological Organisation 'United in Science: High-level synthesis report of latest climate science information convened by the Science Advisory Group of the UN Climate Action Summit 2019' (2019)
< https://library.wmo.int/index.php?lvl=notice_display&id=21523#.YUA95p77RQI >.

nature of mitigation has not paired well with the use of constructive ambiguity for assisting the CBDR principle's application. The Paris Agreement's self-differentiation model is the culmination of the regime's reliance on ambiguity to cover up the deep roots of North/South conflict over differentiation.[121] However, the result is that there are no objective benchmarks for distributing the mitigation burden among different countries. Vague expressions such as 'highest possible ambition' and 'progression', described as boundaries for self-differentiation, are undefined and left for states to determine.[122]

From the point above, two points emerge in respect of climate justice and third world concerns. First, constructive ambiguity has produced an outcome that does not reflect attention to climate justice. As shown in the preceding section, the ultimate benefit derivable from constructive ambiguity is that it allows all parties time to accept clear, unambiguous terms. This has not happened regarding the CBDR principle's role in driving mitigation action. The prolonged use of constructive ambiguity to drive mitigation action has left a wide emissions gap, which makes meeting the ultimate goal more challenging. The emissions gap speaks directly to climate justice concerns because accountability for historical emissions has not materialised. Arguably, therefore, ambiguating differentiation bred destructive consequences for climate justice and third world concerns.

The second point that emerges from using constructive ambiguity to address the time-sensitive mitigation issue relates to loss and damage.[123] Loss and damage resulting from

[121] Bodansky & Rajamani (note 108 above) 188-189.
[122] L Rajamani & D Bodansky 'The Paris rulebook: Balancing international prescriptiveness with national discretion' (2019) 68 *International & Comparative Law Quarterly* 1, 6.
[123] The interpretation of loss and damage in the Paris Agreement and previous instruments also provide a vivid picture of constructive ambiguity at work to gloss over the deep tensions over compensation for loss and damage. While historical responsibility is at the heart of the third world's call for a fund for loss and damage, separate from the adaptation fund, this section does not fully analyse loss and damage and the strategies developed country

climate change is now inevitable because climate change impacts are unfolding with increasing intensity. Extreme weather events, drought and unprecedented flooding are causing loss and damage, especially in the third world.[124] The slow pace of mitigation is arguably attributable to an ambiguated meaning of the CBDR principle, which enabled developed countries to divert focus from their historical responsibility for climate change. This deflection increased tensions with industrialising third world countries, some of whom have adopted a hardened position about emissions reduction.[125] Meanwhile, the most vulnerable developing countries must count their losses and repair the damage caused by climate change impacts.[126] Consequently, constructive ambiguity has had a destructive effect on prospects of realising the climate change regime's ultimate goal and on addressing justice concerns.

To assess whether there are patterns of inequity regarding the place of responsibility for past emissions in the climate change regime, it is helpful to look at the nature of negotiations surrounding the three main climate change instruments. During and after climate change

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negotiators have adopted to evade their contribution to climate change related loss and damage. For further analysis, see E Calliari 'Loss and damage: A critical discourse analysis of parties' positions in climate change negotiations' (2018) 21 J*ournal of Risk Research* 725.; and L Siegele 'Loss and damage (Article 8)' in D Klein et al (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (2017) 224. See also E Calliari, O Serdeczny & L Vanhala 'Making sense of the politics in the climate change loss & damage debate' (2020) 64 *Global Environmental Change* 102133. For arguments in support of an international compensation fund, see S Adelman ' Climate justice, loss and damage and compensation for small island developing states' (2016) 7 *Journal of Human Rights and the Environment* 32.

[124] See for, example, A Harding 'Madagascar on the brink of climate-change induced famine' BBC News (25 August 2021) < https://www.bbc.com/news/world-africa-58303792 > (reporting that the UN Food Programme is attributing the drought and famine in Madagascar to climate change). See also AO Jegede, 'Africa versus climate change loss and damages: Exploring AU regional channels for influencing national policy ' (2018) 5 *Journal of African Foreign Affairs* 207, 209.

[125] India, the second most populous country in the world, is holding on to the position that developed countries should take responsibility for their historical emissions: See J Shankleman, A Nardelli & A Chaudhary 'India ditches key climate meeting after disrupting G-20' Bloomberg News (27 July 2021) < https://www.bloomberg.com/news/articles/2021-07-27/india-ditches-key-climate-meeting-after-disrupting-g-20-summit >.

[126] In 2019, extreme weather events affected Mozambique, Zimbabwe and the Bahamas most, and between 2000 and 2019, Puerto Rico, Myanmar and Haiti were most affected by extreme weather impacts: D Eckstein, V Künzel & L Schäfer 'Global Climate Risk Index' GermanWatch (2021) < https://www.germanwatch.org/en/cri >.

negotiations, environmental activists have hinted at last-hour attempts by developed country negotiators to secure compromises with promises of increasing donor aid or threats of withdrawing it.[127] It has been reported that the US offered the Palau aid as a way of freezing Palau's campaign to elicit support for an advisory opinion from the International Court of Justice (ICJ) on legal aspects of climate change.[128] Aside from the economic inducement, 'huddle diplomacy' has come to be accepted as a means of reaching a deal.[129] The huddle process involves key negotiators convening on the floor of the plenary to debate contentious text.[130] Although any negotiator can join the huddle, only those in the inner rings of the huddle are influential.[131] This huddle process has the side-effect of leaving developing countries with weak or small negotiating teams out of crucial decision-making junctures.[132]

The negotiating process of the climate regime brings back old arguments about the reality of unequal treaties in international law. The phenomenon of unequal treaties may seem to be behind the times because the Vienna Convention on the Law of Treaties (VCLT) prefers a narrow definition of 'coercion' for purposes of invalidating a treaty.[133] However, arguably, the narrow

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[127] L Sealey-Huggins '"1.5°C to Stay Alive": Climate change, imperialism and justice for the caribbean' (2017) 38 *Third World Quarterly* 2444, 2448-9 (detailing meetings in which US officials threatened to withdraw aid and schemed to marginalize others in months leading up to the Copenhagen COP). See also P Bond ' "Climate Capitalism" Won At Cancun – Everyone Else Loses' (2010) < https://www.globalresearch.ca/climate-capitalism-won-at-cancun-everyone-else-loses/22409 >; and D Ciplet, J T Roberts & M R Khan *Power in a Warming World: The New Global Politics of Climate Change and the Remaking of Environmental Inequality* (2015) ix, 66.

[128] S Beck & E Burleson 'Inside the system, outside the box: Palau's pursuit of climate justice and security at the United Nations' (2014) 3 *Transnational Environmental Law* 17, 26.

[129] D Bodansky, J Brunnée & L Rajamani *International Climate Change Law* (2017) 80.

[130] L Rajamani 'The Warsaw climate negotiations: Emerging Understandings and Battle Lines on the Road to the 2015 climate agreement' (2014) 63 *International & Comparative Law Quarterly* 721, 724 note 16 (describing huddle diplomacy' and its origin).

[131] Ibid.

[132] DAJ Tong 'Common in Durban but differentiated in Paris? Equity under the Durban platform of climate negotiations' Thesis presented for the degree of LLM at the University of Auckland (2015) 73 note 429. See also Bodansky, Brunnée & Rajamani (note 129 above) 80.

[133] VCLT arts 51, 52. Articles 51 and 52 of the Vienna Convention restrict the use of coercion, as ground for invalidating a treaty, to coercion by threat or use of force against the state in question or coercion of the person of the state's representative. See also M Craven 'What happened to unequal treaties? The continuities of informal empire' (2005) 74 *Nordic Journal of International Law* 335 (exploring reasons why the issue of unequal treaties lost ground and became insignificant, particularly after the Vienna Convention on the Law of Treaties).

construction of the coercion in the VCLT enables developed countries to cement their economic dominance by offering or threatening to provide or restrict economic aid.[134] Conversely, developed countries have yet to make good on their financial pledges towards mitigation and adaptation.[135]

Finally, the Paris Agreement serves as a launchpad to assess the climate change regime's potential for change. The Paris Agreement does not mention historical responsibilities or historical emissions at all.[136] The omission of historical responsibility sends the message that the climate change regime's emphasis on the impact of historical emissions has shifted. Furthermore, the Paris Agreement's global stocktake emphasises a collective assessment of progress.[137] While it is fair to argue that a collective stocktake could encourage deeper cooperation, one cannot overlook the overall effect of the collective approach on third world interests regarding historical responsibility. The Paris Agreement's disregard of historical responsibility turns a blind eye to the fact that developed countries have left a chunk of their past emissions unaccounted for despite committing to the Kyoto Protocol.[138] Consequently, the Paris regime's potential for change, to reintroduce historical responsibility as a way to heighten accountability and validate third-world concerns, appears slim.

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[134] 'By restraining the discussions on coercion to the threat or use of force, the regime of the VCLT left unanswered some of the most important problems of international politics related to systemic inequalities and vitiated consent. Thereby, it crystallized the North/South cleavage…': GD Negro 'The validity of treaties concluded under coercion of the state: Sketching a TWAIL critique' (2017) 10 *European Journal of Legal Studies* 39, 55.

[135] A 2020 OXFAM assessment of developed countries' pledges of climate finance suggests that the actual value of climate finance to developing countries, excluding disguised loans, could be less than half of what developed countries reported: OXFAM 'Climate finance shadow report: Assessing progress towards the $100 billion commitment' (2020) < https://oxfamilibrary.openrepository.com/bitstream/handle/10546/621066/bp-climate-finance-shadow-report-2020-201020-en.pdf >.

[136] As discussed in section 4.1.2 above.

[137] Paris Agreement, art 14.

[138] J Hickel 'Quantifying national responsibility for climate breakdown: A equality-based attribution approach for carbon dioxide emissions in excess of the planetary boundary' (2020) 4 *Lancet Planet Health* e399, e402.

In sum, the ambiguated CBDR principle has lasting effects on climate justice. Now that the Paris Agreement has pushed historical responsibility out of the treaty text, it is reasonable to imply that the absence of historical responsibility leaves capabilities as the only known basis of differentiation.[139] This prevailing meaning of the CBDR principle suits US interests and is, at least, convenient for other industrialised countries.[140] Arguably, an interpretation that rests on capability alone perpetuates the difference dynamic, whereas an understanding that factors in historical responsibility injects fairness into the process of distributing the mitigation burden.[141] A CBDR principle founded on the notion that third-world countries have a capability deficit, where these capabilities are situated in the developed world, can become the pretext for interventions that perpetuate neo-liberal, capitalist approaches to mitigation.[142] Arguably, such a situation perpetuates the difference dynamic because it feeds into the pre-colonial notion that third world countries lack qualities that developed countries can only bestow.[143] A CBDR principle whose only known normative benchmark is capability is convenient for developed

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[139] A Gupta & H van Asselt 'Transparency in multilateral climate politics: Furthering (or distracting from) accountability?' (2019) 13 *Regulation & Governance* 18, 26.

[140] Since the beginning of climate change negotiations, US negotiators have refuted any implication of guilt, responsibility or culpability for their historical emissions. See for example J Pickering, S Vanderheiden & S Miller '"If equity's in, we're out": Scope for fairness in the next global climate agreement' (2012) 26 *Ethics & International Affairs* 423, 432 (noting the US negotiator Todd Stern's remarks that if the phrase 'equity' was used in the Durban Platform for Enhanced Action 'we're out'). See also P Bond 'Climate Debt Owed to Africa : What to demand and how to collect?' (2010) 2 *African Journal of Science, Technology, Innovation & Development* 83, 84 (quoting Todd Stern's statement that the US categorically rejects the 'sense of guilt or culpability or reparations'.

[141] I discuss the means of effectuating historical responsibility in this chapter's final section below.

[142] For example, there are concerns that the US government-sanctioned solar geo-engineering research and funding at Harvard University is a breeding ground for eco-imperialism. These imperialist tendencies are visible in the way the US is touting geo-engineering as a viable, market-driven tool for managing GHG emissions. Surprise has argued that the advancement of research and funding into solar geoengineering is designed to disguise US hegemony. See K Surprise 'Stratospheric imperialism: Liberalism, (eco) modernization, and ideologies of solar geo-engineering research' (2020) 3 *Environment & Planning E: Nature and Space* 141. Thus, Stephens and Surprise argue that 'solar geo-engineering research is rooted in and perpetuates the unjust concentration of political and economic power': JC Stephens & K Surprise 'The hidden injustice of advancing solar geoengineering research' (2020) 3 *Global Sustainability* 1, 1.

[143] J Dehm 'Carbon colonialism or climate justice? Interrogating the international climate regime from a TWAIL perspective' (2016) 33 *Windsor Yearbook of Access to Justice* 129, 142-143.

countries. However, it shows destructive effects on justice as a crucial element for the climate change regime's success.[144]

Thus, after two decades of negotiations, the signs of the long-term costs of ambiguity regarding differentiation are all the more palpable in the climate change regime. Differentiation in the climate change regime has not evolved or simply changed, but has undergone a metamorphosis. A change in differentiation connotes alterations of certain parts of the concept whilst others remain unchanged.[145] On the contrary, a metamorphosis regarding the CBDR principle amounts to a radical shift[146] in which the old notions of differentiation, premised on equity and responsibility, are falling away and a new concept called self-differentiation has gained ground. What makes self- differentiation a metamorphosis of differentiation is the removal of historical responsibility. Although there are ongoing debates on normative aspects of climate governance, the focus has shifted away from basing normative action on distributional justice.[147] Historical contribution to a problem is so bound up with the old concept of differentiation (the CBDR principle) in IEL that its erasure qualifies the new concept of differentiation (self-differentiation) as a metamorphosis.[148] The harder negotiators try to

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[144] Ibid 143.

[145] See U Beck *The Metamorphosis of the World* (2016) 17. I borrow from Beck's explanation of metamorphosis the fundamental point that a metamorphosis does not merely change some components of a thing or phenomenon. Thus, as noted above, notions of change are usually expressed with words like 'evolution', which many scholars use to describe the journey of the CBDR principle through the climate change regime. See, for example, Rajamani (note 97 above).; C Voigt & F Ferreira 'Dynamic differentiation: The principle of CBDR-RC, progression and highest possible ambition in the Paris Agreement' (2016) 5 *Transnational Environmental Law* 285.; and S Maljean-Dubois 'The Paris Agreement: A new step in the gradual evolution of differential treatment in the climate regime?' (2016) 25 *Review of European Comparative International Environmental Law* 151.

[146] Beck (note 145 above) 17.

[147] R Faulkner 'The unavoidability of justice - and order - in international climate politics: From Kyoto to Paris and beyond' (2019) 21 *British Journal of Politics & International Relations* 270, 276.

[148] Because of the tensions arising from applying differentiation in the climate change regime, developed countries involved in other subsequent MEA have steered clear of including differentiation in the text of such agreements. For instance, in the Minamata Convention on Mercury, which was negotiated in 2013 (around the same time when the Cancun Agreements were being negotiated), the only mention of differentiation appears in the preambular recital as a cursory acknowledgment. Thus 'what we see as a result arguably of contestations in the climate regime is the systematic dismantling of a pervasive architecture of differentiation …' See D French & L Rajamani

obscure historical responsibility for past emissions, the more glaring its uncomfortable reality becomes.

4.3 The Uncomfortable Reality of Historical Emissions and Responsibility

Historical emissions (and responsibility thereof) have driven tensions between developed countries and the third world to volatile standoffs.[149] By definition, historical emissions are emissions of GHGs that happened in the past because of the activities of previous generations.[150] Generally, the view that agents are responsible for situations that they cause is a well-known principle of remedial responsibility, and it resonates with the polluter-pays principle in IEL.[151] Remedial responsibility also calls into issue corrective justice – the notion that justice should seek to correct past wrongs where one side has gained unfairly from the wrong and disadvantaged the other side.[152] Therefore, in the context of climate change, looking to the historical emitters of GHGs would seem the intuitive thing to do. However, climate change is more challenging than other situations in which historical wrongs call for some measure of responsibility or compensation because of the complexities arising from apportioning a commensurate quantum of obligations.[153] These complexities emerge from the

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'Climate change and international environmental law: Musings on a journey to somewhere' (2013) 25 *Journal of Environmental Law* 437, 443.

[149] See Biniaz (note 25 above) 58 (noting that during negotiations towards the Paris Agreement, a mysterious, last-minute replacement of the word 'should' with 'shall' nearly collapsed the entire negotiations. The change would have created a distinction between the legal character of mitigation for developed and developing country parties. This would have, potentially, signaled an implied return to the binary differentiation model of the Kyoto Protocol, something the US and other developed countries resisted).

[150] A Gosseries 'Historical emissions and free-riding' (2004) 11 *Ethical Perspectives* 36, 36.

[151] D Miller 'Distributing responsibilities' (2001) 9 *Journal of Political Philosophy* 453, 455.

[152] T Honderich *The Oxford Companion to Philosophy* 2 ed. (2005) Corrective justice feeds into the discussion on historical emissions and justice. Developing countries partly ground calls for financial and technical assistance to adapt to climate change on the premise that developed countries have benefitted unfairly their wrongs even if developed countries were unaware that their industrialization would cause harm. See section 4.2 below.

[153] D Heyd 'Climate ethics, affirmative action, and unjust enrichment' in P Sanklecha & LH Meyer (eds), *Climate Justice and Historical Emissions* (2017) 22, 27.

non-identity and excusable ignorance arguments. These arguments have, in turn, generated scholarly debate on the 'beneficiary pays' principle and the 'ability to pay' principle.

4.3.1 Figuring Out the Identity Problem

The first head of arguments against historical responsibility centres on what some scholars call the identity problem. The crux of this line of argument is that linking historical emissions to a specific group of duty-bearers is not easy.[154] First, the previous generations whose emissions have contributed to the problem are dead.[155] Second, even if they were alive, it is difficult to show that previous generations have wronged the present generation because they did not know or could not have known that their actions would harm present and future generations.[156] Again, even if the past emitters knew or should have known, it would be hard to identify them and for the past emitters to identify the present generation as the victims.[157] Thus, the prospects of easily holding historic emitters responsible are not appealing because it is difficult to determine the perpetrators and their victims to establish a sufficient causal link between the two.[158]

These difficulties have sparked academic thought. While some scholars lean towards theories that prioritise harm avoidance, others focus on theories that examine burden-sharing. For example, Caney supports the view that harm avoidance justice may be a more viable alternative to a normative structure that upholds burden-sharing. He argues that some sacrifice is required to avert dangerous climate change. Thus, he argues that those with the power to

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[154] G Duus-Otterström 'The problem of past emissions and intergenerational debts' (2014) *Critical Review of International Social & Political Philosophy* 448, 465.
[155] S Caney 'Environmental degradation, reparations and the moral significance of history' (2006) 37 *Journal of Social Philosophy* 464, 469.
[156] Heyd (note 153 above) 27.
[157] Ibid.
[158] Ibid.

ensure that agents act to mitigate climate change must use that power to shield the most vulnerable victims from the existential threats of climate change.[159]

Theories based on harm avoidance are essential, even imperative, in present times. Many of the IPCC's predicted climate change impacts are already unravelling.[160] For example, the past seven years have been the hottest in the history of mean temperature recording.[161] Consequently, heat-related deaths have soared along with incidents of heat-related illnesses.[162] Thus it is reasonable to argue that this urgency demands that all countries increase their ambition to aid harm avoidance instead of calling for a formula for burden-sharing.[163]

Notwithstanding the concession above, it is argued here that harm avoidance theories implicitly discount a third world perspective of climate change. A focus on harm avoidance inevitably puts cleaning up the mess of climate change ahead of distributing the tasks of mitigating climate change.[164] This would have been ideal had there not been layers of injustice embedded in the genesis of climate change.[165] Science has proven the connection between climate change and industrialisation.[166] In the same way, historical facts prove the connection between colonial powers' imperial expansion on the one hand and the third world colonisation as it relates to the science of climate change on the other hand.[167] The economic injustice that

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[159] S Caney 'Two kinds of climate justice: Avoiding harm and sharing burdens' (2014) 22 *Journal of Political Philosophy* 125, 147.
[160] IPCC (Summary for Policymakers) 6.
[161] National Aeronautics and Space Administration (NASA) '2020 tied for warmest year on record, NASA analysis shows' (14 January 2021) < https://www.nasa.gov/press-release/2020-tied-for-warmest-year-on-record-nasa-analysis-shows >.
[162] World Health Organization 'Heat and health' (1 June 2018) <https://www.who.int/news-room/fact-sheets/detail/climate-change-heat-and-health>.
[163] Harm avoidance informs the call for "widest possible cooperation" to address climate change. See Paris Agreement, preamble.
[164] E Neumayer 'In defence of historical accountability for greenhouse gas emissions' (2000) 33 *Ecological Economics* 185, 187-188.
[165] Ibid 188.
[166] IPCC Climate Change 1995: The Science of Climate Change JT Houghton et al (eds) (1996) 218.
[167] Mason-Case & Dehm (note 113 above) 174.

accompanied the colonisation and the lop-sided emergence of international law are good reasons to uphold a normative burden-sharing structure.[168] Thus, burden sharing is, arguably, a better base on which to build the solidarity required to address climate change than harm avoidance theories.[169]

4.3.2 Excusable Ignorance Arguments

Proponents of the excusable ignorance argument hold that an agent should not be liable for costs associated with the consequences of her actions if, at the time of performing those actions, she was excusably ignorant of the consequences of her actions.[170] In the context of climate change, the excusable ignorance argument advances the idea that there can be no liability for past emissions because past generations of emitters were ignorant of the consequences of their emissions.[171] Since the past generations were unaware and also could not have known that their emissions would significantly contribute to present-day climate change, proponents of excusable ignorance posit that their ignorance is excusable.[172]

Under the issue of excusable ignorance, two types of ignorance are discernible: First, ignorance of the effect of past emissions. The second strand of ignorance is implicit. It has been argued that past emitters in developed countries had no way of knowing that their emissions would cause climate change.[173] They did not know their activities amounted to giving themselves unfair access to the atmosphere as a common resource.[174]

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[168] Ibid.
[169] A Williams 'Solidarity, justice and climate change law' (2009) 10 *Melbourne Journal of International Law* 493, 504.
[170] D Bell 'Global climate justice, historic emissions, and excusable ignorance' (2011) 94 *The Monist* 391, 394.
[171] D Butt 'Historical emissions: Does ignorance matter?' in LH Meyer & P Sanklecha (eds), *Climate Justice and Historical Emissions* (2017) 61, 61.
[172] Bell (note 170 above) 394.
[173] J Moss & R Kath 'Historical emissions and the carbon budget' (2019) 36 *Journal of Applied Philosophy* 268, 273.
[174] Ibid.

Despite the logical appeal of the excusable ignorance argument, the existence of excusable ignorance, which its proponents assert, is only partially defensible. In moral philosophy, it is possible to distinguish between blame and responsibility.[175] The absence of fault (blame) does not detract from the fact that a wrong has happened and that an agent should take responsibility for the wrong, even if she could not have known her actions would cause the wrong.[176] In the context of climate change, the UNFCCC and Paris regimes have stayed clear of couching mitigation action in language that suggests blame. The preamble to the UNFCCC states that the largest share of historical emissions emanates from developed countries and calls for leadership which resonates with the idea of taking responsibility, not blame seeking.[177] Thus, the argument that ignorance excuses responsibility has diminished grounding.

The issue of ignorance deserves additional critique. Proponents of the ignorance argument strongly advance the point that past generations had no way of knowing that their high-emitting activities would have the colossal effect it now has on the world.[178] Since there is no definite way of determining the level of awareness of past emitters in the absence of documentary evidence,[179] some arguments against historical responsibility deserve some critique. For instance, Zahar has argued that it is impossible to determine whether developed countries engaged in excessive emissions from the data presented in the IPCC's 1990 report

[175] SM Gardiner 'Ethics and climate change: An introduction' (2010) 1 *Wiley Interdisciplinary Reviews: Climate Change* 54, 56.
[176] Ibid.
[177] UNFCCC, preamble,
[178] Gosseries (note 150 above) 69.
[179] Butt (note 171 above) 67.

on climate change.[180] Thus, developing countries (especially China, India and Brazil) merely use historical responsibility as political rhetoric.[181]

The argument above has some merit. As noted in Chapter 3 above, both the US and BASIC use their positions on differentiation to advance economic power.[182] However, assuming that there is insufficient documentary evidence to refute the North's excusable ignorance,[183] an alternative issue that comes up, even if hypothetically, is whether knowledge of the harmful effects of emissions would have changed the wrong conduct of past emitters.[184] The history of the industrial era, its integral role in the imperial expansion and its propellant effect on colonialism offer useful clues.[185] One can reasonably infer from the quest to acquire economic power, larger territories and control over the world's natural resources that characterised the eighteenth century through to the twentieth century that knowledge of the damaging effects of emissions would have made little difference.[186] After learning of the impact of their emissions, the conduct of developed countries does not support the kind of ignorance being urged as a defence.[187] Developed countries have continued down the path of

[180] A Zahar 'Historical responsibility for climate change is propaganda' in B Mayer & A Zahar (eds), *Debating Climate Law* (2021) 190, 203.
[181] Ibid 194 .
[182] See chapter 3, section 3.4.3 above.
[183] Although one cannot point to widespread information as to the harms of over-concentration of GHG emissions in the atmosphere, there are references to early writings as far back as 1896 that warned of global warming induced by anthropogenic increases in GHG emissions. For example, see Butt (note 171 above) 65 (noting that some writers have pointed to Svante Arrhenius's 1896 paper on the effect of high amounts of carbon dioxide in the atmosphere, implying that there was at least some indication at that time of the dangers surrounding over-concentration of carbon dioxide in the atmosphere).; P Singer *One World: The Ethics of Globalization* (2000) 34 (arguing that GHG emissions were no longer excusable after the 1990s).; See also B Metz & H Grassl 'Climate change: Science and the precautionary principle' in *Late Lessons from Early Warnings: Science, Precaution, Innovation* (2013) 339. Table 14.1 details a chronology of early publications on the effect of increased amounts of carbon dioxide in the atmosphere on global temperatures.
[184] See Butt (note 171 above) 68.
[185] See chapter 2 above.
[186] Butt (note 171 above) 67.
[187] Ibid 68-69.

fossil-fuel-based industrialisation.[188] Thus, past circumstantial evidence and subsequent mal-conduct (after the alleged time of ignorance) cast doubt on the validity of excusable ignorance.

Moreover, it has been argued that imposing responsibilities on ignorant historical emitters would amount to unfairly placing the interests of those invoking the responsibility (the South) over the interests of the bearers of the responsibility (the North) and does not adequately consider their ignorance.[189] In response to this argument, one should acknowledge the point that allocating mitigation costs requires sacrifice.[190] Arguably, from a third world perspective, the sacrifice should emanate first from the developed world because they have the wealth and capabilities to make such a sacrifice and still be well off. In any case, with so little of the carbon space left for their use, developing countries have a limited capacity to sacrifice for the sake of mitigating climate change.[191]

4.3.3 Beneficiary Pays Principle

Thus far, I have argued that the contours of historical responsibility reach beyond the identity problem and that the excusable ignorance argument has flaws. Conversely, The beneficiary pays principle proceeds on the premise that an agent bears responsibility for a wrong from which she has benefitted.[192] To illustrate the beneficiary pays argument, Page and Gosseries have propounded separate but interconnected positions. First, Page links the concept of unjust enrichment to the idea of benefitting from a wrong.[193] He concludes that we can liken

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[188] H Shue 'Global environment and international inequality' (1999) 79 *Internatioanal Affairs* 531, 536.
[189] Bell (note 170 above) 398.
[190] Caney (note 159 above) 134.
[191] H Opschoor 'Sustainable development and a dwindling carbon space' (2010) 45 Environmental & Resource Economics 3,11.
[192] B Berkey 'Benefiting from unjust acts and benefiting from injustice : Historical emissions and the beneficiary pays principle' in LH Meyer & P Sanklecha (eds), *Climate Justice and Historical Emissions* (2017) 123, 125.
[193] EA Page 'Give it up for climate change: A defence of the beneficary pays principle' (2012) 4 *International Theory* 300, 313.

states that benefitted from climate change by exhausting the atmosphere's carrying capacity to agents who benefit from flawed transfers and acquisitions of benefits.[194] Since the flawed transfers may not be wrong in themselves, the remedial responsibility is for the agent to give up (as opposed to pay back) the benefit gained to rectify the wrong.[195] In the context of climate change mitigation, it is arguable that developed countries have to give up the benefits they unjustly acquired from industrialisation by deaccelerating their GHG emissions.[196]

For his part, Gosseries propounds his concept of unjust enrichment based on transgenerational free riding. In the context of climate change, Gosseries's view is that developed countries are free-riders on modern developing states in the sense that they have benefitted from their historical exploitation of the carbon space without internalising all of the associated costs.[197] Based on this free-riding, developed countries would owe a duty to refrain from reaping economic benefits without paying the full cost of their industrialisation by making deep cuts to their GHG emissions.[198]

From the points above, the beneficiary pays argument answers the injustice that inheres in the argument that developed countries owe no historical responsibility for their past emissions because they simply benefitted from industrialisation without knowing of the disadvantage they created at the height of industrialisation.[199] After colonisation, the third world did not opt to have an undeveloped capacity to access and use the finite carbon space. A direct correlation exists between developed countries' capacity to access and use the carbon

[194] Ibid 313-314.
[195] Ibid 314.
[196] Ibid 316.
[197] Gosseries (note 151 above) 43-44.
[198] Ibid 51.
[199] Mason-Case & Dehm (note 113 above) 174.

space and their exploitation of the peoples and natural resources of the third world, without consequence.[200]

The point above is instructive because it helps to clarify the relevance of the assumption embedded in the beneficiary pays principle. The beneficiary pays principle proceeds implicitly on the assumption that each agent (country) is allotted a specific portion of the carbon space and no more, or that there is a certain moral obligation each state owes to leave enough of the carbon space for others.[201] In clarifying the relevance of this assumption, the point is not to prefer one option over the other. The point here is that third world countries did not get the same early chance to access the carbon space as did developed countries.[202] Developed countries used colonialism and the international economic structure they built to advance themselves.[203] While developing countries were paying back monetary debts to international banks, developed countries were piling up the ecological debt, which they seem keen on passing off to the third world.

The injustice handed out to the colonial and post-colonial third world is juxtaposed with the benefits developed countries reaped to provide the premise for the argument that any relevance to be attached to the assumptions presented above should be minimal, at best. The injustice the beneficiary pays principle seeks to address does not stem only from exhausting the carbon space and benefitting from it, regardless of the existence of allotments or the duty to leave a share for others who constitute the majority. The injustice stems from using the very legal system which could have corrected the injustice to thwart third-world access to the carbon

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[200] Ibid.
[201] Berkey (note 192 above) 131 note 11.
[202] Mason-Case & Dehm (note 113 above) 185.
[203] MR Islam 'History of the North-South divide in international law' in S. Alam et al (eds), *International Environmental Law and the Global South* (2015) 1, 39-41.

space. The basis for the beneficiary pays principle is the double standards that marked the third world colonisation, which created an economic chasm between developed and developing countries.[204]

The beneficiary pays principle has come up against a peculiar argument to the effect that even if developed countries shot GHG emissions up in the industrial era, developing countries have also enjoyed the fruits of industrialisation.[205] By implication, this argument suggests that developing countries should be historically culpable too.[206] Examples such as technological advancements, agricultural mechanisation, internal combustion and steam engines are proffered to illustrate this point.[207] In response, this line of argument omits some crucial factors. Developed countries used colonisation to set up the difference dynamic,[208] and the so-called benefits came at the expense of exploiting third world natural resources and labour.[209]

Before concluding on the beneficiary pays principle, it is appropriate to consider another objection to its use in apportioning historical responsibility. Page has argued that the beneficiary pays principle may be handicapped in that it does not consider that the beneficiaries of historical emissions did not receive the benefits with the understanding that they came with

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[204] See chapter 2, section 2 above.
[205] Zahar (note 180 above) 196.
[206] Ibid 199.
[207] Ibid.
[208] See chapter 2, sub-section 2.1.2.
[209] 'European powers had been controlling vast regions of the South since as early as 1492. Indeed, Europe's Industrial Revolution was only possible because of the resources they extracted from their colonies. The gold and silver they siphoned out of the mountains of Latin America not only provided capital for industrial investment; it also allowed them to buy land-intensive goods from the East, which freed them to transfer their own labour power from agriculture to industry. Later, they came to rely on sugar and cotton – produced by enslaved Africans – that was shipped in from their colonies in the New World, grain from colonial India and natural resources from colonial Africa, all of which provided the energy and raw materials they needed to secure their industrial dominance. Europe's development couldn't have happened without colonial loot.': J Hickel *The Divide: A Brief Guide to Global Inequality and Its Solutions* (2017) 41.

moral burdens attached.[210] Page also argues that the bequeathed benefits from past generations were forced upon them in the sense that they could not have refused them. Thus, it would be unfair to hold agents responsible for benefits that they could not have declined.[211]

Again, we can answer this argument by looking at the present behavioural patterns of current beneficiaries. Developed countries' quest to further advance their economies, evidenced by continued GHG emissions, does not support the suggestion that the beneficiaries consider the benefits of their carbon-reliant development to be forced on them. They may be taken to have become constructively aware of the moral burdens attached to having those benefits.

Finally, some scholars advance the ability to pay argument in answer to the arguments supporting a beneficiary pays approach to establishing historical responsibility. The ability to pay principle holds that agents with greater ability should bear a corresponding duty to mitigate a problem. In the context of climate change, wealthy countries should assume more responsibility than less wealthy countries to mitigate climate change.[212] The prevailing standard for determining capacity is economic wealth, measured in terms of a country's gross domestic product (GDP).[213] The ability to pay principle is forward-looking. Its focus is on who can pay to rectify the harm, not who caused it.[214]

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[210] EA Page 'Distributing the burdens of climate change' (2008) 17 *Environmental Politics* 556, 563.
[211] Ibid.
[212] L Ringius et al 'Burden sharing and fairness principles in international climate policy' (2002) 2 *International Environmental Agreements: Politics, Law and Economics* 1, 5.
[213] Ibid 7.
[214] S Caney 'Climate Change and the duties of the advantaged' (2010) *Critical Review of International Social & Political Philosophy* 203, 213.

Caney proposes a 'history-sensitive' ability to pay principle, in answer to such arguments. To supplement historical responsibility, he suggests that those who can pay for mitigating climate change should do so, but we should create two groups of duty bearers.[215] The first group would include those whose wealth came about in unjust ways; the second group would consist of those whose wealth did not come about in unfair ways.[216] In this way, the first group should bear a greater mitigation burden than the second group.[217] Caney's 'history-sensitive ability to pay principle' puts the ability to pay principle into a context that recognises that some countries have acquired the ability to pay through a means that disadvantaged some other countries.

Caney's history sensitive ability to pay principle undergirds the view of developed countries that the CBDR principle should translate into greater responsibility for developing countries whose economies allow them to have improved capabilities to address climate change. The addition of 'respective capabilities' to the phrasing of the CBDR principle in the UNFCCC implies that some countries who are not historically responsible for climate change have a greater mitigation burden because of their advanced capabilities. In this sense, the BASIC group's industrialising economies suggest that they have relatively advanced mitigation capabilities. While this view is valid, Caney's history sensitive construction of the ability to pay principle does not detract from the point that developed countries must act first. The CBDR principle does not operate indefinitely. Its function as a correcting tool for injustice rests on the presumption that after the correcting process, developing countries will have to take on more mitigation responsibilities.[218]

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[215] Ibid 218.
[216] Ibid 217-218.
[217] Ibid 218.
[218] L Rajamani *Differential Treatment in International Environmental Law* (2006) 162.

Based on the above, it is arguable that the climate change regime could have minimised detrimental effect of ambiguating differentiation. As the central decision-making body, the COP could have factored in strategies for addressing historical emissions and responsibility by developing principles on which to latch historical responsibility for past emissions. Arguably, the three versions of differentiation evinced from the analysis above could be viewed as three stages of the CBDR principle, had developed countries given effect to the initial intendment of Principle 7 of the Rio Declaration. First, differentiation based on historical contribution and advanced capabilities would have driven developed countries' emissions down. The resulting leadership would then have paved the way for a good faith engagement with high emitting third world countries, by which time the buffer period for peaking in industrialising countries would have closed. After that, there would have been sufficient grounding for high emitters in the third world to reduce their emissions based on their advancing capabilities. Finally, self-differentiation would then operate to gradually migrate other developing countries from voluntary commitments to more stringent mitigation action, in line with the national circumstances. The success of the progression presented above hinges on implementing historical responsibility.

No easy fixes avail themselves in situations where the disadvantaged majority lacks the political muscle to advance essential considerations for justice.[219] Nevertheless, the calls for

[219] The general idea is that developing countries make politically unrealistic demands for money, which is always a non-starter for developed countries. For example, see Association for Diplomatic Studies and Training: Oral History Collections 'Negotiating the United Nations Framework Convention on Climate Change < https://adst.org/2015/12/negotiating-the-unfccc-the-whole-world-was-against-us/ > (interview transcripts detailing comments of top-US climate change negotiators recounting experiences during negotiations towards the UNFCCC. Robert Reinstein, Deputy Assistant Secretary of State for Environment, Health and Resources from 1990 to 1993 recounted 'The whole world was against us and for various reasons. The developing countries wanted the money and technology for free …'.

legitimising historical responsibility for past emissions deserve a good-faith consideration because of the far-reaching consequences of ignoring climate justice concerns. If historical responsibility is still relevant and should be considered, the next enquiry is how should it be deployed in the service of climate justice? The answer to this enquiry is found in the emerging academic discourse on degrowth.

4.3.4 Degrowth: A Way to Practicalise Historical Responsibility?

On the whole, global GHG emissions will continue rising.[220] Updated NDCs show a decline in GHG emissions that do not correspond with the urgency of climate crises.[221] Aside from historical emissions and responsibility thereof, one cannot ignore the fact that GHG emissions from the third world will increase in the coming years. Presumably, developing countries' emissions will increase to accelerate economic growth to provide basic living necessities such as clean water and reliable electricity.[222] On the other hand, developed countries' increasing emissions are, arguably, less in aid of survival and more in support of overindulgent lifestyles.[223] It is interesting to note that people in third world countries aspire to these unsustainable lifestyles.[224] However, scientific data and the realities of the impact of climate change will not allow developing countries to pursue economic development in the

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[220] L Rajamani et al 'National "fair shares" in reducing greenhouse gas emissions within the principled framework of international environmental law' (2021) *Climate Policy* 1, 2.

[221] See UN Climate Press Release 'Full NDC synthesis report: Progress, but still a big concern' (17 September 2021) < https://unfccc.int/news/full-ndc-synthesis-report-some-progress-but-still-a-big-concern >.

[222] This presumption brings up the debate about luxury and survival emissions. From an ethical perspective, it has been argued that it is not fair to require some countries to give their ability to provide necessities for their people so that other countries can retain (or even increase) their luxurious standards of living. Consequently, it is absurd to place the same value on the emissions from the rice paddies of a poor community and emissions from the luxuries of affluent societies. See H Shue 'Subsistence Emissions and Luxury Emissions' (1991) 15 *Law and Policy* 39.

[223] Agarwal and Narain pose the question: 'Can we really equate the carbon dioxide contributions of gas guzzling automobiles in Europe and North America or, for that matter, anywhere in the Third World with the methane emissions of draught cattle and rice fields of subsistence farmers in West Bengal or Thailand?': A Agarwal & S Narain *Global Warming in an Unequal World: A Case of Environmental Colonialism* (1999) 3.

[224] Mahmud reflects that 'post-colonial people have a noxious past, a degraded present, and someone else's enviable present as their future': T Mahmud 'Postcolonial imaginaries: Alternative development or alternatives to development?' (1999) 9 *Transnational Law & Contemporary Problems* 25, 28.

same way as developed countries have done.[225] The urgency of a development model for developing that is climate-friendly and sustainable is all the more apparent.[226]

However, contrary to the prevailing claim that economic development can co-exist with environmental protection and ecological sustainability to produce 'green growth', its feasibility is difficult to justify.[227] Even if detaching economic growth from GHG emissions had a chance of success, that would require a drastic shift from fossil fuels to renewable energy.[228] Considering that the window for making that drastic shift has been squandered,[229] there is not enough time if the Paris Agreement's carbon budget for 1.5 degrees and 2 degrees will be respected at the current growth rates.[230]

Based on the predictions above, scientists and ecological economists are advocating degrowth strategies for developed countries.[231] Degrowth is 'a planned reduction of energy and resource throughput designed to bring the economy back into balance with the living world in a way that reduces inequality and improves well-being'.[232] Degrowth strategies call for economic policies that move the economic activity away from capitalism, the economic legacy the North have thrust on the world.[233] Capitalism thrives with continuous and exponential

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[225] M Davis 'Bonn spotlight: Equity at the core of debates' Stockholm Environment Institute (29 May 2012) < https://www.sei.org/featured/bonn-spotlight-equity-core-debates/ >.
[226] Ibid (quoting SEI climate expert, Sivan Kartha, that 'many [developing] countries are going to have to start reducing emissions well before they have lifted their people out of poverty or built necessary infrastructure – much less reached developed-country living standards').
[227] J Hickel & G Kallis 'Is green growth possible?' (2020) 25 *New Political Economy* 469. See also T Vadén et al 'Raising the bar: On the type, size and timeline of a "successful" decoupling' (2020) 30 *Environmental Politics* 462.
[228] J Hickel 'What does degrowth mean? A few points of clarification' (2020) *Globalizations* 1, 1.
[229] Tong et al (note 120 above).
[230] Hickel (note 228 above) 1.
[231] For instance, see A Grubler et al 'A low energy demand scenario for meeting the 1.5 C target and sustainable development goals without negative emission technologies' (2018) 3 *Nature Energy* 515.
[232] Hickel (note 228 above) 2.
[233] J Hickel 'Is it possible to achieve a good life for all within planetary boundaries? '(2019) 40 *Third World Quarterly* 18, 30. Some scholars have called capitalism's current reign 'the capitalocene'. The capitalocene 'highlights the destructive and accelerating logics of resource depletion and petrochemical dependency within

production and consumption growth.[234] Degrowth requires that economic policymakers in developed countries conduct their policies towards powering down production and consumption, which would propel reductions in GHG emissions.[235] There are at least two outcomes of degrowth for developing countries. Firstly, degrowth provides a wider window for developing countries to access more of the remaining carbon space for their development.[236] This effect of degrowth on the South is, arguably, a necessary step towards reversing the difference dynamic, which enabled the North to appropriate more than their fair share of the carbon space and plundered the South's natural resources for their industrialisation.[237]

Secondly, degrowth provides a buffer period for developing countries to deconstruct and rebuild a concept of development that does not replicate the unsustainable production and consumption patterns associated with capitalism.[238] Nevertheless, a counterpoint may be considered which posits that degrowth could negatively impact third world countries. The concern is that since many third world economies rely on the export of their raw natural resources and manufacturing for consumption in the North, degrowth could have a less desirable side effect on third world economies.[239] Although the concern appears valid, from an economic justice perspective, over-consumption in the North and continued exploitation of Southern human and natural resources cannot be the solution to poverty eradication in the

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capitalism as a world system': J Davis et al 'Anthropocene, capitalocene, … plantationocene?: A manifesto for ecological justice in an age of global Crises' (2019) 13 *Geography Compass* e12438, e12439.

[234] Hickel (note 233 above) 30.

[235] For a full analysis of degrowth, see J Hickel *Less Is More: How Degrowth Will Save the World* (2020).

[236] Ibid 429.

[237] Hickel (note 228 above) 5.

[238] See Joint Statement '30th BASIC Ministerial Meeting on Climate Change' (8 April 2021) para 5 (emphasizing that developing countries need time and policy space for a just transition of their economies). These envisaged reforms might include economic reforms that promote self-sufficiency, human well-being and a more ecologically aligned approach to production and consumption: Hickel (note 228 above) 5. See also Mahmud (note 224 above) 33.

[239] Hickel (note 228 above) 5.

South.[240] Since colonisation, unsustainable development in the North and a global economy that enables inequality have been at the heart of many socio-economic problems in the third world.[241] Conversely, fair international prices for labour and natural resources for the South engenders economic justice. Carrying out such economically just policies calls for degrowth policies in the North.[242]

Because the Paris Agreement has backtracked on historical responsibility,[243] one could argue that degrowth affords an ethical window for developed countries to show real leadership that produces equitable results for the third world. Subsequent COPs will likely build on the existing structures for accountability, namely the collective stocktake and the ratchet-up mechanism to push ambition towards GHG emissions reduction.[244] Arguably, degrowth presents a chance for developed countries to structure their future NDCs to reflect a commitment to prioritising inter-generational equity.

Notwithstanding the virtues of the degrowth movement, some critical points deserve mention. There is the concern that degrowth policies could take on the same money-centred approach that characterises capitalism, whereby the benefits of degrowth, in relation to the biosphere, are quantified in monetary terms. Hornborg has argued that 'all-purpose money' has shaped 'the way we think even about non-monetary phenomenon'.[245] Heikkuriren and co-

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[240] Hickel (note 228 above) 5.
[241] A Escobar 'Degrowth, postdevelopment, and transitions: A preliminary conversation' (2015) 10 *Sustainability Science* 451.
[242] Hickel (note 228 above) 5.
[243] Jayaraman & Kanitkar (note 83 above) 12.
[244] See UN Climate Change Conference UK 2020 'COP 26 explained' < https://ukcop26.org/wp-content/uploads/2021/07/COP26-Explained.pdf >.
[245] A Hornborg 'The world-system and the earth system: Struggles with the society/nature binary in the world-systems analysis and ecological marxism' (2020) 26 *Journal of World-Systems Research* 184, 197. Hornborg's view was in relation to resource transfers, in the context of world-systems theory. However, I draw on his view that we tend to value nature in monetary terms to make my point.

authors have proposed a view which could reduce the chances that degrowth policies adopt a capitalist approach. They suggest that for degrowth policies to work, non-paid activities such as physical activity in community-supported agriculture will have to replace monetary transactions.[246] They argue that monetary transactions only serve as catalysts of ecologically unsustainable growth.[247] At first blush, the view above appears radical. However, a more nuanced point to be extracted from it is that degrowth requires a radical shift from quantifying human interaction with nature in monetary terms.

Consequently, the degrowth movement is most formidable if it 'does away with economism and growth' and if it offers a 'vision of a society with a stable and leaner metabolism, where well-being stems from equality, relation and simplicity, and not material wealth.'[248] Here, too, Heikkurenin's view is radical when he argues that the present civilisation may have to collapse and make way for a new civilisation, if degrowth will succeed.[249] Yet, his view echoes the imperative that human beings' interaction with nature must change fundamentally to reflect a respect for the elements that sustain human life on earth.[250]

Despite the potential for degrowth to redress the erasure of historical responsibility in the climate change regime, another concern presents itself in the form of Northern resistance. As with former attempts to steer international law and inter-state relations towards economic justice, it could be argued that degrowth is likely to suffer a similar fate as the post-colonial NIEO movement. An international legal system that is set up by the minority group it enriches

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[246] P Heikkurinen, J Lozanoska & P Tosi 'Activities of degrowth and political change' (2019) 211 *Journal of Cleaner Production* 555, 565.
[247] Ibid.
[248] G Kallis 'In defence of degrowth' (2011) 70 *Ecological Economics* 873.
[249] P Heikkurinen 'Degrowth: A metamorphosis in being' (2019) 2 *Environment & Planning E: Nature and Space* 528, 528.
[250] Mahmud (note 224 above) 33.

is not likely to correct itself.[251] Nevertheless, it is arguable that there is a difference between the post-colonial struggle for economic and social justice and the ongoing global paradigm shift towards global equality and ecological justice. The evidence of the difference is seen in the rise in solidarity among youth and social activism across continents, which cut through racial and economic barriers.[252] The upsurge in climate-related litigation also points to an informed global civil society network that is seeking justice outside the negotiation process.

4.4 Conclusion

The analysis of ambiguation and its effect on the CBDR principle for mitigating climate change has provided insights into constructive ambiguity's destructive reach. The CBDR principle's journey through the changing scenes of climate change diplomacy and the regime's norm/law-making process shows not an 'evolution' as some scholars have described,[253] but a complete metamorphosis. The fractures have exposed the gap created by the Paris Agreement's erasure of historical responsibility. Nevertheless, arguments in support of historical responsibility are still relevant. Historical responsibility constitutes the sinews of climate justice. Although the Paris regime shows little promise for reinstating historical responsibility, the degrowth movement provides a pathway for putting historical responsibility to practice. Degrowth in developed countries will provide some space for developing countries' emissions to peak. Degrowth could be the key to decolonising and deconstructing development Admittedly, degrowth policies may not garner political support in developed countries. Degrowth policies risk suffering the fate of the post-colonial attempt to restructure the legal and economic order. However, the difference between the failed NIEO and CERDS and the

[251] A Anghie 'Legal Aspects of the New International Economic Order' (2015) *6 Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 145, 146.
[252] R Clémençon 'The two sides of the Paris climate agreement: Dismal failure or historic breakthrough?' (2016) *Journal of Environment & Development* 1, 20.
[253] See chapter 3, sub-section 3.4.1 above.

emerging degrowth movement is that non-state actors with a vested interest in climate justice are using litigation to advance climate justice. The next chapter explores the role that international and national climate change litigation could play in reintroducing historical responsibility into current notions of the CBDR principle.

Chapter 5

In Search of Fairness in the Court

5.1 Introduction

Developing countries propounded the common but differentiated responsibilities (CBDR) principle to counteract the difference dynamic created by colonisation and Westphalian international law. In the Rio Declaration, the CBDR principle aims to establish differential treatment based on differences in contribution and capabilities.[1] However, the CBDR principle in the climate change regime has undergone a metamorphosis, and its markers have changed.[2] Climate justice for the third world has suffered setbacks which have caused a near-erasure of the CBDR principle's historical responsibility component. The result is that third world countries are hemmed in with mitigation commitments on one side and their developmental needs on another. The degrowth movement calls on developed countries to show leadership by abandoning 'resource-hungry global economic growth'[3] and moving towards an equitable and sustainable way of balancing human well-being with environmental protection.[4]

In this chapter, I focus on climate change litigation as another avenue for highlighting climate justice. Thus far, the International Court of Justice (ICJ) has not waded into climate change litigation. This chapter, therefore, examines the ICJ's potential to build on the *erga omnes* concept and the emerging human right to a healthy environment to establish the states' common responsibility to mitigate climate change. The court's jurisprudence on transboundary harm is also analysed for potential avenues for extending the no-harm rule[5] to climate change

[1] As argued in chapter 2 above.
[2] See chapter 4.1 above.
[3] P Heikkurinen 'The nature of degrowth: Theorising the core of nature for the degrowth movement' (2021) 30 *Environmental Values* 367, 368.
[4] As discussed in chapter 4.3.4.
[5] The no-harm rule makes a state responsibility for activities done on its territory which cause harm to other states: J Crawford *Brownlie's Principles of International Law* 8 ed (2012) 353. See section 5.2 below.

mitigation. Next, the views of two jurists on the ICJ's potential to propel climate action are examined and critiqued.[6] In the third and fourth sections, I turn to litigation in national courts. Admittedly, climate-related litigation in national courts has increased in recent times.[7] However, this chapter focuses on two decided cases. The selected cases are justified based on their direct relation to the relevance of historical contribution towards mitigation action in the climate change regime. Furthermore, the selected cases map onto the North/South dichotomy which informs the study's focal research questions. The third section analyses the Dutch decisions regarding the case between Urgenda Foundation and the Netherlands government.[8] The case represents the first time a national court has expressly taken judicial notice of the CBDR principle and employed it to guide its reasoning.[9] The CBDR principle's relevance in determining the ambition level of national mitigation commitments is examined. The fourth section turns to the South African case between Earthlife and the South African Ministry of Environmental Affairs[10] to explore how litigation further exposes the continuing conflict between ambition and economic growth for industrialising third world countries.

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[6] The two jurists are Bodansky and Sands. Their views provide foundation for examining to what extent an ICJ decision could help reintroduce historical responsibility into current notions of differentiation in the climate change regime. See section 5.2 below.

[7] J Peel & J Lin 'Transnational climate litigation: The contribution of the global south' (2019) 113 *American Journal of International Law* 679, 680. For a more recent, global appraisal of climate related litigation in national courts, see also Climate Change Litigation: Comparative Perspectives in I Alogna, C Bakker & JP Gauci (eds) *Climate Change Litigation: Global Perspectives* (2021).

[8] See Urgenda Foundation v. The State of Netherlands (Ministry of Infrastructure & the Environment) C/09/456689/HAZA13-1396 (2015) (English Translation) (Urgenda Case); The State of the Netherlands (Ministry of Infrastructure and the Environment) v. Urgenda Foundation 200.178.245/01 (2018) (English Translation) (Urgenda Appeal); and The State of Netherlands (Ministry of Economic Affairs and Climate Policy) v. Stitcing Urgenda Supreme Court (Civil Division) ECLI:NL:HR:2019:2006 (2019).

[9] PG Ferreira ' "Common but differentiated responsibilities" in national courts: Lessons from Urgenda v. The Netherlands' (2016) 5 *Transnational Environmental Law* 329, 335.

[10] Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others (65662/16) [2017] 2 All SA 519 (GP) (*Thabametsi*).

5.2 Testing the CBDR Principle at the International Court of Justice

One of the points advanced in this section is that the ICJ is well placed to adjudicate on issues that involve the court's thorough assessment of settled international environmental principles that have a bearing on international obligations for climate change mitigation. Arguably, there are settled international legal principles and concepts that could provide the foundation for the ICJ to adjudicate on issues that involve evaluating the CBDR's relevance to mitigation commitments. I examine the potential for the *erga omnes* concept and an emerging human right to a healthy environment to drive the ICJ's reasoning on the common responsibilities aspect of the CBDR principle. I also draw on Mayer's arguments regarding the relevance of the no-harm principle for determining the overall obligation to mitigate climate change. A key point of agreement is that the CBDR principle, as intended in the Rio Declaration, honours historical responsibility and builds on the no-harm principle.[11] This section further grounds the point in arguments supporting a judicial assessment of differentiation towards mitigation.

5.2.1 Erga Omnes Obligations, Human Rights and Climate Change: Establishing a Common Responsibility

The ICJ is yet to encounter a climate change-related case. But even if an ICJ intervention should materialise, how might and should the court deal with the CBDR principle? Arguably, the court could deconstruct the CBDR principle by separately determining the common responsibilities aspect of the CBDR principle and then evaluating the element of differentiation on its own. The advantage of this approach is that it isolates the contested aspect of the CBDR

[11] B Mayer 'The relevance of the no-harm principle to climate change law and politics' (2016) 19 *Asia Pacific Journal of Environmental Law* 79, 82.

principle, namely differentiation. Thus, by deconstructing the CBDR principle, the court could minimise possible political backlash.

One potential route for the ICJ to take on the legal issues surrounding GHG emissions and shared responsibility could be to assess the obligation to reduce GHG emissions in light of *erga omnes* obligations. *Erga omnes* obligations – obligations each state owes to the international community as a whole – come into play where a particular phenomenon has acquired such an intrinsic value that it must be safeguarded or managed in the collective interest of the international community as a whole.[12] This obligation is a special kind of obligation. It is only invoked where there is fundamental international good or interest 'on which the whole international community bases its existence and its functioning, and whose protection can only be assured by all states if they operate collectively.'[13]

Traditionally, *erga omnes* obligations have been shaped by peremptory norms such as the general prohibition on the threat or use of force, slavery, genocide and crimes against humanity.[14] However, the ICJ has widened the potential reach of *erga omnes* obligations. For example, the court has ruled that the obligation to ensure the right to self-determination is an *erga omnes* obligation.[15] The court's willingness to widen the type of international goods whose protection merit the high normative ranking of *erga omnes* could be the foot in the door that the UN General Assembly uses to propel an international judicial intervention.

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[12] G Sciaccaluga *International Law and the Protection of 'Climate Refugees'* (2020) 97-98.
[13] Ibid 98.
[14] Crawford (note 5 above) 578.
[15] See Legal Consequences for the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) 2004 ICJ Rep 136, paras 87-88.

There is merit in exploring the normative value of *erga omnes* obligations as a conduit for involving the ICJ in the climate change crisis. First, the *erga omnes* concept is well established in the jurisprudence of the ICJ.[16] An added advantage is that it is sufficiently abstract to enable the ICJ to build new thinking around the collective effort needed to combat climate change. One could consider the *erga omnes* concept as a plain canvas to incorporate solidarity, cooperation and inter-generational equity in climate change adjudication.[17] Secondly, considering the general seriousness the international community has attached to climate change since the late 1990s, there is little doubt that climate change deserves the attention of the ICJ.[18] The Paris Agreement received near perfect ratification, signalling an international commitment of sorts towards addressing climate change.[19] Sciaccaluga makes a strong point that we can infer an emerging customary rule from the existing generalised support for the international climate change regime, which is viable outside of questions of the regime's effectiveness.[20] This point is instructive because it bases the possibility of an emerging custom on the almost uniform, repeated and consistent state practice of state representation during treaty negotiations and the sense of legal obligation attached to using the climate change regime to mitigate climate change.[21]

Sciaccaluga's point derives its strength from the suggestion that the ICJ does not have to make a definitive pronouncement on the principles underpinning the climate change legal

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[16] Crawford (note 5 above) 583.
[17] Young has opined that considerations such as precaution, duties of due diligence and the principle of inter-generational equity could be potential building blocks of *erga omnes* obligations related to environmental protection: MA Young 'International adjudication and the commons' (2019) 41 *University of Hawai'i Law Review* 353, 376.
[18] M Wewerinke-Singh, J Aguon & J Hunter 'Bringing Climate Change before the International Court of Justice: Prospects for Contentious Cases and Advisory Opinions' in I Alogna, C Bakker & JP Gauci (eds), *Climate Change Litigation: Global Perspectives* (2021) 393, 394.
[19] Sciaccaluga (note 12 above) 102.
[20] Ibid 103.
[21] Ibid 102.

regime (such as the CBDR principle) from the outset. Nonetheless, the court can ride on the normative appeal of the *erga omnes* concept to advance the call for solidarity and deep cooperation to combat climate change.[22] The *erga omnes* concept's relevance helps to advance Scholtz's idea of 'custodial sovereignty' over environmental resources. Each state exercises custodial sovereignty over global environmental resources, and other states expect the custodian-state to protect the environmental resources for the common good of humanity.[23] Scholtz's extension of custodial sovereignty to the atmosphere makes a strong case for advancing *erga omnes* obligations regarding each state's use of the atmosphere. Since each state exercises control over some portion of the atmosphere, all states must exercise custodial sovereignty over the atmosphere for the common good of mankind.[24]

In addition to engaging the issue of *erga omnes* obligations to address climate change, another area of possible examination for common responsibility is human rights. There is a formidable consensus that climate change will disrupt human lives and prevent many people from realising their human rights.[25] The framers of the Universal Declaration of Human Rights did not include environmental rights as universal human rights, nor do the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights explicitly make room for environmental rights.[26] Despite spirited efforts to craft one, an unequivocal statement of a human right to healthy environment in international

[22] W Scholtz 'Custodial sovereignty: Reconciling sovereignty and global environmental challenges amongst the vestiges of colonialism' (2008) 55 *Netherlands International Law Review* 323, 335.
[23] Ibid 337.
[24] Ibid 339-340.
[25] UN High Commissioner, Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights, UN Doc. A/HRC/10/61 (15 January 2009).
[26] R Bratspies 'Claimed not granted: Finding a human right to a healthy environment' (2017) 26 *Transnational Law & Contemporary Problems* 263, 269 (noting, among others, that only the African Charter on Human and Peoples Rights has provided expressly for the right to a healthy environment).

law is only now fledging.[27] The United Nations Human Rights Council (UNHRC) has made the first move to formally acknowledge access to a safe, clean, healthy and sustainable environment as a human right.[28] The issue will be debated further at the UN General Assembly (UNGA). It remains to be seen how the UNGA receives the UNHRC's resolution. It is instructive to emphasize the non-binding status of UNGA resolutions and declarations in international law.[29] The Human Rights Council's recognition of the right to a healthy environment is welcome and laudable.[30] But this recognition does not guarantee automatic acceptance as a norm of customary international law or incorporation into treaty law.[31]

Before the UN Human Rights Council's recognition, one had first to read and interpret some basic rights together to invoke the right to a healthy environment. For example, we can imply the right to a healthy environment from the right to health and even life.[32] The right to food and the right to safe water are near impossible to enjoy without the guarantee of a healthy environment.[33] In the context of climate change, the view that treaties clothe human rights with validity manifests in the legal wrangling that preceded the Paris Agreement's inclusion of

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[27] Ibid 268. See also JH Knox 'Constructing the human right to a healthy environment' (2020) 16 *Annual Review of Law & Social Science* 79, 81.
[28] See United Nations General Assembly Human Rights Council 'The human right to a safe, clean, healthy and sustainable environment' UN Doc A/HRC/48/L.23/1 (8 October 2021).
[29] I have discussed the inequity inherent in the non-binding nature of resolutions at the General Assembly, where third world countries carry the majority, in chapter 2. See chapter 2, section 2.2.3 above.
[30] UN News 'Access to a healthy environmental, declared a human right by UN rights council' (8 October 2021) < https://news.un.org/en/story/2021/10/1102582 >.
[31] For example, the US has earned a reputation for advocating for human rights but refusing to ratify human rights treaties. Even when the US does ratify a human rights treaty, it attaches an exhaustive list of reservations, declarations and understandings that limit US obligations substantially: JL Dunoff, SR Ratner & D Wippman *International Law Norms, Actors, Process: A Problem-Oriented Approach* (3 ed) 2010 437.
[32] In India, for example, the Supreme Court has given meaning to the right to a healthy environment as incidental to realising the right to life: see *Andhra Pradesh Pollution Control Board-II v M.V. Mayudu* (2001) 1 SCC 62; *T.N Godavarman Thirumulpad (87) v Union of India* (2006) 1 SCC 1 and *Mehta v Union of India* (2004) 6 SCC 588. In his separate opinion in the Gabcikovo-Nagymaros Case, Judge Weeranmantry affirmed that environmental protection is the 'sine qua non' for several fundamental human rights such as the right to health and right to life: *Gabčikovo-Nagymaros Project (Hungary v Slovakia) [1997]* ICJ Rep 88, 91 (Gabčikovo-Nagymaros case)
[33] R Bratspies 'Do we need a human right to a healthy environment?' (2015) 13 *Santa Clara Journal of International Law* 31, 51.

human rights in its preamble. Although there had been references to human rights in the body of the Paris Agreement itself during the early drafting stages, the final text of the Paris Agreement has no reference to human rights.[34] Arguably, although the reference to human rights in the Paris Agreement's preamble is commendable, a mere preambular reference fails to capture the enormity of the climate crisis in an international agreement which seeks to address climate change.[35]

Notwithstanding further steps necessary to maintain the emerging right to a healthy environment, it has been argued that human rights can and do exist on their own and do not need international and domestic law for validity.[36] Thus, we can find the roots of the right to a healthy environment not in international instruments but the conduct of people and states.[37] In this sense, youth activism on climate change exemplifies the "bottom up" emergence of the right to a healthy environment.[38] Young people are demanding more action from their governments to forestall the climate crisis to assert and protect environmental rights.[39] The young climate activists' concerns are valid. Climate change will make the earth 2.4 degrees

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[34] Ad Hoc Group on the Durban Platform for Enhanced Action, Negotiating text, advance unedited version Feb. 12, 2015 12bis, 26 (Option 4) <https://unfccc.int.files/bodies/awg/application/pdf/negotiating_text_12022015@200.pdf>.

[35] See S Adelman 'Human rights in the Paris Agreement: Too little, too late?' (2018) 7 *Transnational Environmental Law* 17.

[36] Bratspies (note 26 above) 273.

[37] Boyd notes that over 100 countries recognize the constitutional right to a healthy environment either explicitly or through judicial interpretation: DR Boyd 'The implicit constitutional right to live in a healthy environment' (2011) 20 *Review of European Community & International Environmental Law* 171, 172.

[38] Bratspies describes the act of claiming a right (through clear and physical action) which then provides room for the right to exist, as a bottom-up vision of human rights: Bratspies (note 26 above) 273.

[39] See, for example, J Jung et al 'When a girl awakened the world: A user and social message analysis of Greta Thunberg' (2020) 12 *Sustainability* 2707. For recent climate change cases in national courts, see Sabin Center for Climate Change < https://climate.law.columbia.edu/>. In 2020, six Portuguese youth sued 33 countries in the European Court of Human Rights. They claim that the respondent countries have failed to take adequate action on climate change and have violated their human rights. See Sabin Center for Climate Change Law 'Duarte Agostinho and Others v. Portugal and 32 Other States' < http://climatecasechart.com/non-us-case/youth-for-climate-justice-v-austria-et-al/>. See also Fridays for Future < https://fridaysforfuture.org/ >.

Celsius warmer than pre-industrial levels if global efforts miss the Paris Agreement's goal.[40] Many young people could become climate refugees in places where the rise in sea levels, famine, and drought will cause forced migration.[41] Since many of the places that will suffer the impacts of sea-level rise, drought and famine are in the third world, the rift between North and South, rich and poor, and powerful and weak endangers intergenerational and intragenerational equity.[42] Thus, arguably, as young people continue to lead the climate action charge, the right to a healthy environment receives its validity from their very conduct.

In this way, youth activists are playing the role of norm entrepreneurs in the search for a human right to a healthy environment.[43] By Sunstein's definition, norm entrepreneurs are 'people interested in changing social norms.'[44] He opines that norm entrepreneurs can produce 'norm bandwagons' or 'norm cascades'.[45] Norm bandwagons happen when small changes in social behaviour lead to bigger changes, as more people accept a new norm. Norm cascades happen with fast changes in norms.[46] In relation to climate change, we can argue that young climate activists are catalysing norm bandwagons around the right to a healthy environment as pivotal to their very existence on earth.[47] As this bottom-up movement continues to gather

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[40] See Climate Action Tracker 'Temperatures' < https://climateactiontracker.org/global/temperatures/ > (Last updated, 1 July, 2021).
[41] J Henley 'Climate crisis could displace 1.2bn people by 2050, report warns' The Guardian (9 September 2020) < https://www.theguardian.com/environment/2020/sep/09/climate-crisis-could-displace-12bn-people-by-2050-report-warns >.
[42] AV Sanson & SEL Burke 'Climate change and children: An issue of intergenerational justice' in N Balvin & DJ Christie (eds), *Children and Peace: From Research to Action* (2020) 343, 346.
[43] Young people are using the internet and social media to encourage activism on climate change. See Fridays for Future Movement < https://fridaysforfuture.org >; Children's Environmental Rights Initiative (CERI) < https://www.childrenvironment.org/who-we-are >.
[44] CR Sunstein 'Social norms and social roles' (1996) 96 *Columbia Law Review* 903, 909.
[45] Ibid.
[46] Ibid.
[47] For example, in 2021 a group of young people in Australia submitted a request to the Special Rapporteurs on human right and the environment, the rights of indigenous peoples and the rights of persons with disabilities to intervene and seek an explanation from the Australian government's commitment to mitigating climate change and its impacts on young people, indigenous peoples and persons with disabilities. See Environmental Justice Australia (October, 2021) < http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20211025_14762_complaint.pdf >.

momentum and more people start to explore options for claiming their environmental rights, there will arise a need for an international court, such as the ICJ, to consider reasons for granting and thereby institutionalising environmental rights. Recently, the UN Human Rights Council has adopted a resolution concerning human rights and the environment in which it supports the work of the Special Rapporteur on human rights and the environment.[48] The Special Rapporteur's mandate involves, among others, studying human rights obligations regarding the enjoyment of a safe, clean, healthy and sustainable environment.[49] Although the UNHRC's Resolution does not carry the force of law, it is argued here that it lends strong backing to ongoing efforts to elevate environmental considerations within the international human rights framework.

5.2.2 The ICJ's Jurisprudence on the No-Harm Rule

The principle that "no state has the right to use or permit the use of its territory in such a manner as to cause injury … in or to the territory of another or the properties or persons therein"[50] has its origin in older international norms and practices that fostered friendliness and good neighbourliness among states.[51] Over time, the no-harm rule has been described as the cornerstone of international environmental law.[52] However, the climate change regime has not made room for the application of the no-harm rule as far as mitigation is concerned.[53] The following sub-section shows the ICJ's engagement with the no-harm principle.

[48] UNGA Res 46/7 UN Doc A/HRC/RES/46/7 (23 March 2021) (UNGA Res 46/7).
[49] UNGA Res 46/7, art 6.
[50] *United States v Canada* (1941) 3 UNRIAA 1905, 1965.
[51] PM Dupuy & JE Viñuales *International Environmental Law* (2015) 55.
[52] Mayer (note 11 above) 81.
[53] Ibid 79.

In *Legality of the Threat or Use of Nuclear Weapons*,[54] the central issue was whether the threat or use of nuclear weapons in any circumstance was allowed in international law. Although the issue did not directly invite the environmental implications of using nuclear weapons, one of the arguments raised against the legality of nuclear weapons was that it violates international environmental law. The ICJ's advisory opinion acknowledged the importance of safeguarding the environment and held that the use of nuclear weapons *could* be catastrophic to the human environment.[55] The court held that the 'existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other State or of areas beyond national control is now part of the corpus of international law relating to the environment.'[56]

Nevertheless, the court fell short of opining that the threat or use of nuclear weapons was inconsistent with international law. The court held that the use of nuclear weapons could be catastrophic for the human environment and would breach the obligation to avoid transboundary harm. However, the court backtracked and held that it could not state definitively that the threat or use of nuclear weapons were legal or illegal in extreme circumstances in which states act on their inherent right of self-defence.[57]

In 1997, the Gabčikovo-Nagymaros project presented another avenue for the ICJ to decide a contentious matter which directly involved the environment. The case concerned a

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[54] Legality of the Threat or Use of Nuclear Weapons [1996] ICJ Rep 226 (Nuclear Weapons Case).
[55] Nuclear Weapons Case para 29, emphasis added.
[56] Nuclear Weapons Case paras 29, 32. On this point, the court's reference to the principle against transboundary harm as being part of the corpus of international law left open the issue whether the court regarded the principle as part of general principles of international law, customary law or treaty. The court's vagueness is all the more palpable if juxtaposed with the Judge Weeranmantry's dissenting opinion in the Nuclear Weapons Case. He held that 'principles of environmental law thus do not depend for their validity on treaty provisions. They are part of customary international law. They are part of the sine qua non for human survival.': Dissenting Opinion of Judge Weeramantry 502-503.
[57] Nuclear Weapons Case.

dam construction project over the Danube River which runs through Hungary and Czechoslovakia.[58] Regarding the principle against transboundary harm the court recognised Hungary's concerns for its natural environment as the basis for Hungary's eventual retreat from the treaty.[59] Furthermore, the court reaffirmed the importance of environmental protection when it repeated its *dictum* in the *Nuclear Weapons case* that states have a general obligation to ensure that their activities do not cause harm to other states or areas beyond national jurisdiction. It emphasised this principle as 'part of the corpus of international law relating to the environment.'[60]

Finally, the *Case concerning Pulp Mills on the River Uruguay*[61] sheds light on the ICJ's more recent position on transboundary harm. The case involved Uruguay's construction of pulp mills on the bank of River Uruguay which also forms part of the boundary between Uruguay and Argentina and which both states used for recreation, fishing, domestic drinking and tourism. The two countries had signed the Statute of the River Uruguay treaty which sought to regulate their shared use of River Uruguay. Argentina sued Uruguay at the ICJ claiming that the pulp mills presented concerns of river pollution, destruction of biodiversity, harmful effects on health and fish stocks, among others.[62]

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[58] The two countries had signed an agreement that included building locks at the Gabčikovo end of the river in Czechoslovakia and the Nagymaros end of the river in Hungary. Hungary eventually terminated the treaty over environmental concerns. Slovakia, which had become independent, proceeded to dam the river. The parties submitted the dispute to the ICJ.

[59] Gabčikovo-Nagymaros Case, para 53. Notwithstanding this recognition, the court held that Hungary would only terminate the treaty on grounds of necessity. After examining the grounds of necessity as set out in the ILC Draft Article on State Responsibility, the Court held that Hungary had not satisfied the elements of necessity.

[60] Gabčikovo-Nagymaros Case, para 53.

[61] Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay) [2010] ICJ Rep 156 (Pulp Mills Case).

[62] Pulp Mills Case, para 15.

The ICJ held that procedural duties to notify, inform and cooperate were based on the principle of prevention.[63] The principle of prevention also has its roots in the due diligence that each is required to exercise in its territory.[64] The court restated the principle that it is 'every state's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States' and reaffirmed that the duty to avoid transboundary harm is part of the body of international environmental law.[65]

As the cases above show, the ICJ's jurisprudence on the no-harm principle suggests a settled view that the rule against transboundary harm is part of the international law governing the environment. What remains unclear is how the no-harm rule applies to climate change. Although there is some scepticism concerning the no-harm rule's applicability in climate change,[66] its potential for aiding the ICJ to adjudicate on the differentiation aspect of the CDBR principles are highlighted below.

5.2.3 No-harm Principle in Climate Change Law: Obstacles and Opportunities

Mayer has noted that climate change is far more complex a problem than those raised in the cases cited above.[67] GHG emissions harm the entire climate system and not a particular region or country. Although climate change results in widespread negative impacts, it is difficult to place a direct causal link between the emissions emanating from a particular country and the impacts occurring in a given place.[68] Climate change is a transboundary problem, but

[63] Pulp Mills Case, para 81.
[64] Pulp Mills Case, para 101.
[65] Pulp Mills Case, para 101.
[66] See C Campbell-Duruflé 'The significant transboundary harm prevention rule and climate change: One-size-fits-all or one-size-fits-none?' in B Mayer & A Zahar (eds), *Debating Climate Law* (2021) 29.
[67] Mayer (note 11 above) 85.
[68] B Mayer *The International Law on Climate Change* (2018) 70.

it is the accumulated GHG emissions over a long period and in several places, that causes widespread instability in the climate system.[69]

Mayer has analysed the three likely objections against applying the no-harm principle to climate change; namely the *lex specialis* argument, the objection to collective responsibility and the political expediency argument.[70] Notably, the objection regarding the political expediency of using the no-harm principle says that applying the no-harm principle could interfere with climate negotiations and heighten tensions.[71] As with arguments against historical responsibility, this objection has its merits. Even without the application of the no-harm rule, a lot of acrimony has attended over two decades of climate change negotiations. Any attempt to take away the power of states to voluntarily accept commitments towards addressing climate change could be disastrous.[72] The possibility that applying the no-harm principle will open the floodgates for third world demands for monetary compensation is one of the core reasons for western states' opposition to developing the principle to address climate change.[73]

Notwithstanding the concern above, conversely, one could argue that after more than two decades of negotiations, the world is still not on the path to achieving the long-term goal.[74] Negotiations have not mended climate injustice. In this vein, Mayer's restrictive adaptation of compensation to climate change is persuasive. Under this adapted concept of reparation for the

[69] Ibid.
[70] Mayer (note 11 above) 86-89.
[71] Ibid 88.
[72] D Bodansky 'The role of the International Court of Justice in addressing climate change: Some preliminary reflections' (2017) 49 *Arizona State Law Journal* 689, 707.
[73] Mayer (note 11) 89.
[74] L Rajamani et al 'National "fair shares" in reducing greenhouse gas emissions within the principled framework of international environmental law' (2021) Climate Policy 1, 1.

transboundary harm that climate change is causing, the emphasis is less on providing full monetary compensation. Instead, the focus is on 'an explicit admission by industrial states that excessive greenhouse gas emissions constitute a wrongful act with grave consequences entailing their responsibility.'[75] Furthermore, as Mickelson points out the issue of historical responsibility should not be reduced merely to payment of compensation, because the damage that GHG emissions have caused to the environment cannot be quantified in monetary terms.[76] To do so would amount to perpetuating the capitalist ways of thinking about the environment that caused so much degradation in the first place.[77] Thus, Mayer's restrictive adaptation strengthens the point that an admission of historical responsibility for climate change is crucial step towards restoring trust and solidarity in the climate change regime.[78]

Consequently, there is no way of predicting how the ICJ may impact the climate change litigation scene, if ever it will. The analyses above suggest that the *erga omnes* concept, the emergent human right to a healthy environment and a modified no-harm principle could potentially impact the ICJ's opinion on the CBDR principle. Yet, examining scholarly predictions on the ICJ's potential to drive mitigation efforts is not out of place. The next section is a critical comparative analysis of two such predictions regarding the possible ways in which the ICJ may be invited to adjudicate on climate change.

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[75] Mayer (note 11 above) 102-103.
[76] K Mickelson 'Leading towards a level playing field, repaying ecological debt or making environmental space: Three stories about international environmental cooperation' (2005) 43 *Osgoode Hall Law Journal* 139, 156.
[77] Ibid.
[78] W Scholtz & G Ferreira 'Climate change negotiations and transitional justice: The advent of a carbon truth and reconciliation commission?' (2015) 48 *Comparative & International Journal of Southern Africa* 42, 57-58.

5.3 Juristic Predictions on the ICJ's Possible Intervention

Sands and Bodansky have taken turns to assess the potential of the ICJ's adjudicatory process to propel climate action.[79] This section is a comparative critique of their outlook on the ICJ's potential role in addressing climate change. Sands and Bodansky are not the only scholars to have written about a possible role for the ICJ regarding international climate change law.[80] However, their outlooks on the ICJ provide a dual-lens for assessing the relevance of international adjudication. Bodansky's view is coloured by his first-hand involvement in the negotiation process. Sands' opinion of the ICJ's relevance has the hallmarks of an international lawyer with rich experience in international courtroom practice. An intended contribution is to engage the comparative critique to determine how an ICJ opinion may help reintroduce historical responsibility into current notions of differentiation in the climate change regime. The critique is organised around three categories of comparison: general perception of the ICJ's relevance regarding climate change mitigation, types of issues the ICJ should avoid and potentially 'safe' issues the ICJ could approach.

5.3.1 General Perception of the ICJ's Relevance

The International Court of Justice (ICJ) has maintained a loud silence on the climate crisis, despite attempts to persuade it to wade into the matter.[81] Some scholars have pointed out that an advisory opinion delimiting the obligations and responsibilities of states to prevent

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[79] P Sands 'Climate change and the rule of law: Adjudicating the future of international law' (2016) 28 *Journal of Environmental Law* 19; Bodansky (note 72 above).

[80] See, for example, A Korman & G Barcia 'Rethinking climate change: Towards an International Court of Justice advisory opinion' (2012) 37 *Yale Journal of International Law Online* 35; M Law 'The Chagos Request: Does it herald a rejuvenation of the International Court of Justice's advisory function?' (2018) 9 *Queen Mary Law Journa*l 25; Wewerinke-Singh, Aguon & Hunter (note 18 above). See also JC Glickenhaus 'Potential ICJ advisory opinion: Duties to prevent transboundary harm from GHG emissions' (2014) 22 *NYU Environmental Law Journal* 117.

[81] In 2011, the President of Palau, a small island nation, spoke at the UN General Assembly and argued that the implications of climate change called for the ICJ's intervention: Press Conference on Request for International Court of Justice Advisory Opinion on Climate Change (3 February 2012) < https://www.un.org/press/en/2012/120203_ICJ.doc.htm >.

transboundary harm caused by GHG emissions would send the right message to the international community.[82] The ICJ's authoritative voice on climate change could help evince new norms, clarify old ones and influence state behaviour positively, they argue.[83]

Indeed, the potential for the ICJ to influence the development of international environmental law is notable. The ICJ is well placed to identify and confirm international environmental issues through its adjudicatory function. Secondly, the ICJ can use its advisory opinions to contribute to and develop general principles relevant to international environmental law. Thirdly, the ICJ's position as the judicial arm of the UN is critical for emphasising the importance of international environmental law in modern international law.

The ICJ acts as a pseudo world court.[84] Although it does not have mandatory jurisdiction, its role in advancing the rule of law on the international plane is significant. Only the ICJ 'can address all areas of the law and accord them their proper place within an overall scheme'.[85] Thus, it is not odd that commentators are calling for the ICJ's involvement in combatting climate change. The general perception concerning a possible role for the ICJ in the climate change regime oscillates between cautious optimism and scepticism.

Both Sands and Bodansky start off with an initial skepticism of an ICJ intervention in the climate change crisis. Subsequently, both scholars admit that they have moved from their initial stance over time.[86] They now share the view that there may be a place, even if limited,

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[82] Korman & Barcia (note 80 above) 36.
[83] Ibid. See also Glickenhaus (note 80 above) 153-154.
[84] MN Shaw *International Law* 6 ed (2008) 1057.
[85] BN Patel 'Recommendations on the enhancement of the role and effectiveness of the International Court of Justice and state practice: The gap between recommendation and practice (1971-2006)' (2007) 11 *Singapore Yearbook of International Law* 99, 114.
[86] Bodansky (note 72 above) 692; Sands (note 79 above) 20.

for the ICJ in the global effort to combat climate change.[87] Sands opines that international courts and tribunals have the potential to 'forge international legitimacy' because they can influence the global public on a global issue.[88] In assessing the ICJ's prospects, Sands' approach honours his expertise as an international lawyer with extensive international courtroom practice. He analyses issues of standing before the ICJ, establishment of facts, the ICJ's role in identifying and clarifying the applicable law and the court's propensity to handle the legal issues before it. He concludes, hopefully, that 'amidst the warming of the atmosphere, and the melting of the ice, and the rising of the seas, the international courts shall not be silent.'[89]

Bodansky takes a different approach to assessing the ICJ's relevance. He analyses a potential role for the ICJ around four points of discussion. First, he notes that adjudication and negotiation play different roles in resolving international disputes.[90] He argues that the climate change regime gives primacy to state autonomy, which is better served through negotiation, rather than adjudication.[91] Secondly, he analyses climate change litigation and argues that litigation in an international court (such as the ICJ) presents fewer legitimacy hurdles than litigation in national courts.[92] Thirdly, Bodansky argues that the ICJ's role is, at best, a complementary role and that the ICJ's intervention would be counter-productive if it ends up hindering the negotiation process.[93] Nevertheless, Bodansky also shares the view that the ICJ's

[87] Sands (note 79 above) 23.
[88] Ibid 26.
[89] Ibid 33-34.
[90] Bodansky (note 72 above) 703-705.
[91] Ibid 695.
[92] Ibid 704.
[93] Ibid 705-706.

adjudicatory function could be put to good use to advance some limited points towards achieving more ambitious climate change action.[94]

Both scholars are somewhat hopeful that an opinion from the ICJ on certain issues could offer some positive energy for climate change action. While Sands' focus is on the mechanics of courtroom practice, Bodansky's main disquiet with international adjudication is that it goes against the grain of the unique negotiation process that characterises the climate change regime.[95] One observation emerges from Bodansky's negotiation-centric assessment. From the outset, he paints a vivid picture of the climate change negotiations, in which negotiators appear oblivious to interjections of international lawyers who urge the negotiators to consider the legal bearing of established international environmental law principles.[96]

The conclusion one draws is that as far as negotiators are concerned, international environmental law principles are too vague or too soft to offer any assistance in solving the issue of who bears more responsibility to address climate change and what rules govern the sharing of such responsibility. This statement informs his point that an ICJ intervention can only be complementary to the negotiation process.[97] Yet Bodansky admits, later on, that climate change negotiations are not likely to tackle climate justice issues and argues that 'adjudication could readily address issues of climate justice through claims for climate change damages by victim states.'[98]

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[94] Ibid 692.
[95] Ibid 695-699
[96] Ibid 697-698.
[97] Ibid 705.
[98] Ibid 703.

By his admission that negotiations may not ever produce a just outcome, Bodansky undermines the strength of his negotiation-centric assessment, even if partially. Arguably, the lack of attention to climate justice concerns is one of the central issues that impede the climate change negotiation process. If the negotiation process has little hope of delivering justice to countries that have contributed least to causing climate change but who are the most vulnerable to its impacts, it is problematic to consider the negotiation process as a process that holds the main key to addressing climate change.[99] On this limited point, Bodansky's insistence on holding up negotiation as the preferred dispute resolution tool is problematic because negotiations have not yielded a meaningful reduction in global GHG emissions. The mistrust between developed countries and developing countries has only deepened over time, prompting scholars to explore creative ways of restoring trust between the North and the South.[100]

One may argue that Bodansky takes a realist view to assessing the climate change regime's fidelity to the negotiation process. Bodansky argues that states are unlikely to accept obligations regarding mitigations which have not gone through the negotiation process because GHG emissions are closely linked to energy stability and economic progress.[101] Nevertheless, the stunted success of the negotiation-centric climate change regime has direct consequences on whether the current generation will leave future generations a planet that is worse off than they received. Therefore, Bodansky's view that negotiations will continue to dominate

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[99] Given the limited success of the negotiation-centric regime, other non-state initiatives have gained momentum, in attempt to drum up mitigation action. For instance some multinational corporations have formed the alliances to drive businesses towards net zero emissions. See B Morgan '101 companies committed to reducing their carbon footprint' (Forbes, August 2019) < https://www.forbes.com/sites/blakemorgan/2019/08/26/101-companies-committed-to-reducing-their-carbon-footprint/?sh=75674c34260b > Some city governors have also shown commitment towards making their cities less carbon-reliant. See C Green '7 Ways U.S. States are leading climate action' (May 2019)
< https://unfoundation.org/blog/post/7-ways-u-s-states-are-leading-climate-action/ >.

[100] For example, Scholtz and Ferreira have explored the possibility of using transitional justice models. They argue that the notion of transitional justice is suitable for divisive situations which are coloured by historical events: Scholtz & Ferreira (note 78 above) 44.

[101] Bodansky (note 72 above) 7.

international climate action suggests that the international community is stuck with a process that may not have a timely solution for addressing climate change. Arguably, the upsurge of climate change-related litigation in national courts may suggest that adjudication could influence negotiating positions, rather than play a mere complementary role.[102]

5.3.2 The Issues to Avoid

Both authors agree that although the ICJ may find itself adjudicating a contentious case, it is more likely and feasible that its intervention will happen through an advisory opinion. In this regard, both authors opine on the types of issues that the ICJ should avoid. On Sands' part, the ICJ should avoid adjudicating on issues of historical responsibility because such issues are not likely to produce useful outcomes.[103] He argues that an ICJ opinion best serves the entire international community by looking forward; "what is to be done, rather than what has been done".[104] Similarly, Bodansky advises the ICJ against wading into "hot-button" issues which could blight the court's reputation and worsen tensions among negotiating parties.[105] Interestingly, the single example Bodansky gives for hot-button topics is the meaning of the CBDR principle.[106] Since historical responsibility is integral to the early formation of the CBDR principle, it is reasonable to infer that both authors do not think that the ICJ could positively influence the interpretation and application of the CBDR principle.

Notwithstanding the above, each author's reason for arriving at that view is different. From Sands' international courtroom practice-oriented standpoint, historical responsibility is a

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[102] See section 5.4 below. The *Urgenda* cases illustrate the influence national courts can have on a country's international obligations regarding mitigation.
[103] Sands (note 79 above) 30. Sands suggests that a previous request for an ICJ intervention did not go forward because its applicants waded into issues of historical responsibility.
[104] To be fair, Sands admits a connection between past conduct and forward-looking conduct. Ibid 30.
[105] Bodansky (note 72 above) 708.
[106] Ibid.

redundant issue that serves no material present or future purpose.[107] From Bodansky's negotiation-centric perspective, attempting an interpretation of the CBDR principle may very well disturb the negotiation process without producing a good outcome because parties' positions are too entrenched to be altered by an ICJ interpretation.[108]

Both authors make good points. However, another viewpoint is arguable. Despite all the contestations over the CBDR's scope and relevance regarding mitigation, one could argue that two points are fairly uncontested. Firstly, developed countries should play a leadership role to mitigate climate change.[109] French has argued that state practice generally suggests that differentiation requires developed countries to take the lead because of their contribution to environmental degradation.[110] Secondly, third world emissions will take longer to peak than emissions in the developed world.[111] These points map on arguments premised on historical responsibility and differential treatment. Thus, they could form the foundation on which the ICJ espouses a normative position on the CBDR principle.

5.3.3 Potentially Safe Issues

Despite their measured scepticism of the ICJ's intervention, both authors present potential issues which could benefit from international adjudication. Sands opines that it could be useful to ask the ICJ to provide guidance on the content of any existing obligation under international law on state conduct regarding the duty or obligation to prevent climate change

[107] Sands (note 79 above) 30.
[108] Bodansky (note 72 above) 708.
[109] Ferreira (note 9 above) 343.
[110] D French 'Developing states and international environmental law: The importance of differentiated responsibilities' (2000) 49 *International & Comparative Law Quarterly* 35, 48.
[111] See United Nations Framework Convention on Climate Change (adopted 14 June 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC) Preamble. See also Paris Agreement to the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) 1673 UNTS 125 (Paris Agreement).

or the duty or obligation to address the impacts of climate change.[112] Another issue which the ICJ could resolve is whether the commitment to limit global warming to 2 degrees celsius is an international obligation for states.[113] Bodansky's assessment of potential ICJ-friendly issues revisits the principle against transboundary harm. The ICJ could expand on and clarify the International Law Commission's Draft Articles on transboundary harm, especially the nature and scope of the duty to avoid transboundary harm.[114] The Draft Articles state that the standard of the duty to avoid transboundary harm is one of due diligence. The ICJ is well placed to provide useful criteria for determining due diligence.[115] The authors' positions resonate with Mayer's argument that the principle against transboundary harm is one that the ICJ has accepted as a fundamental norm of international law. Thus, a case concerning climate change could offer the ICJ the opportunity to expand and enrich the law against transboundary harm.

Sands and Bodansky have opposing views on the potential for the ICJ to settle the scientific dispute surrounding climate change. Sands considers that such an intervention could be the most important thing the ICJ could do.[116] On the other hand, Bodansky opines that the ICJ is less likely to succeed in a dispute and argues that the ICJ "has no expertise or institutional authority relating to climate science."[117] Despite the ICJ's lack of scientific expertise, Bodansky's view is vulnerable to one objection, which is that he provides no backing for his view.[118] With its handling of opposing scientific opinions in the *Whaling in Antarctica* case,[119]

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[112] Sands (note 79 above) 30.
[113] Ibid 31.
[114] Bodansky (note 72 above) 709.
[115] Ibid.
[116] Sands (note 79 above) 29.
[117] Bodansky (note 72 above) 709.
[118] Ibid. Bodansky's only observation is that even the IPCC's international assessments which are widely accepted as credible have not yet settled the scientific dispute over climate change. Therefore, fifteen judges with no scientific expertise could not succeed with the same task. He does not point to any procedural or substantive provision in the Statute of the ICJ that bars the court from determining highly technical issues, based on expert evidence.
[119] Whaling in the Antarctic (Australia v. Japan; New Zealand intervening) 2004 ICJ Rep 216.

the ICJ has shown that it can stand up to the task of assessing complex scientific evidence.[120] In *Whaling in Antarctica*, the court relied on expert presentations from Australia and Japan to determine the issue of necessary lethal methods in relation to Japan's Whaling program in the Antarctic. The court based its ruling on the parts of the experts' testimonies that both parties agreed with.[121] Complex and specialised evidence is fast becoming the mainstay of international adjudication. Since judges cannot be experts in all areas of human endeavour, the ICJ will inevitably have to embrace expert evidence if it is to remain a relevant international tribunal in the twenty-first century.[122] Thus, contrary to his prediction, one could conclude that if the ICJ is faced with the prospects of inviting expert opinion on the scientific aspects of climate change, there would be no difficulty distilling a legal position from such expert opinions.

Relatedly, another inferable contradiction with Bodansky's assessment of ICJ-friendly and non-friendly issues is evident regarding the ICJ's potential to provide guidance on compensation for loss and damage. In his view, an ICJ decision on compensation for loss and damage could have a bearing on national litigation in the short term and shift projections on international litigation in the long term.[123] Bodansky's hope for a positive outcome regarding loss and damage feeds into his lack of confidence in the climate change negotiation process to address climate justice.[124] Given that climate justice is a broad issue and has the potential to deepen North-South divisions, the absence of confidence in the negotiation process implies that the climate change regime may never address climate justice. Thus, the contradiction arises

[120] Sands (note 79 above) 30.
[121] MM Mbengue 'Between Law and Science: A Commentary on the Whaling in the Antarctic Case' (2015) 2 *Questions of International Law* 178, 182.
[122] LC Lima 'The Evidential Weight of Experts before the ICJ: Reflections on the Whaling in the Antarctic Case' (2015) 6 *Journal of International Dispute Settlement* 621, 635.
[123] Bodansky (note 72 above) 711.
[124] Ibid 703.

because Bodansky turns to the ICJ as the potential forum for addressing loss and damage because loss and damage is, in some ways, inextricably linked to historical responsibility – an issue that he labels a hot-button issue. Small island countries have been fighting to include loss and damage in climate change agreements since the beginning of the climate change regime.[125]

The issue of compensation for loss and damage has been controversial, precisely because of its potential to dredge up the issue of historical responsibility.[126] Although Bodansky is measured in his hope that the ICJ could turn the tide in favour of island states, his admission that such a decision could ripple into future climate change negotiations[127] suggests a recognition that loss and damage and compensation are hot-button issues.

The debate about a possible role for the ICJ in international climate change law evokes both hope and scepticism. The ICJ's handling of the nuclear crisis in its advisory opinion on the legality of the threat or use of nuclear weapons tilts the balance towards scepticism. If the need to appear politically correct and avoid confronting powerful states such the US and other permanent members of the UN Security Council overpowers the ICJ, it is reasonable to expect a stunted response from the ICJ. Nevertheless, one cannot rule out the possibility that the ICJ may want to assert its dominance as a pseudo-world court, even if in theory, to carve impactful inroads into the climate change regime.

Evidently, the call for the ICJ to intervene in the climate crisis has reached a crescendo. Arguably, if the ICJ chooses to assert itself, no issue should be off the table, as a matter of

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[125] L Siegele 'Loss and Damage (Article 8)' in D Klein et al (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (2017) 224, 225.
[126] E Calliari, O Serdeczny & L Vanhala 'Making sense of the politics in the climate change loss & damage debate' (2020) 64 *Global Environmental Change* 102133, 102137.
[127] Bodansky (note 72 above) 711.

course. Addressing climate justice, with all its warts, is crucial to the climate change regime's success. Issues such as the impact of historical emissions on present day climate change mitigation commitments, the compensation for loss and damage and the legality of actions taken to mitigate climate change that amount to transboundary harm are issues that may demand a sustained engagement with the ICJ. Whether the ICJ intervenes by way of a contentious case or an advisory opinion, the clout attached to ICJ decisions, generally, could create more momentum for climate action. A bold ICJ intervention may be near because climate change has reached crisis level and national courts have already baptised themselves into climate change litigation.

5.4 Litigating Justice and the CBDR Principle: *Urgenda Foundation v The Netherlands*

Apart from an ICJ intervention which involves the CBDR principle, national courts have drawn attention to the CBDR principle as it relates to the national mitigation commitments. In particular, the decisions on the case between Urgenda Foundation and the Netherlands government are likely the first of their kind to incorporate the CBDR principle as an interpretive tool to determine the Netherlands' level of ambition towards mitigation.[128] This section examines the Dutch courts' decisions in the case between Urgenda Foundation and the Dutch government. The intended contribution is to examine how national courts in the North are approaching climate justice as they exercise the judicial function.

[128] Ferreira (note 9 above) 335.

5.4.1 Urgenda: How the Dutch Courts Repurposed the CBDR Principle

Urgenda Foundation (Urgenda), a civil society group,[129] wrote to the Ministry of Infrastructure and Environment, asking it to commit to reducing carbon dioxide emissions in the Netherlands by 40 per cent (compared to 1990 levels) by 2020. In reply to Urgenda, the Netherlands Ministry noted that while the Netherlands and the European Union (EU) were committed to mitigating climate change, the EU position has been for all states to work together to mitigate climate change, with no free riders.[130] EU had offered to work towards a 30 per cent reduction (collectively), provided other countries would pursue similar reductions.[131] Subsequently, Urgenda sued the Netherlands (via its Ministry of Infrastructure and Environment) in The Hague District Court. Urgenda sought an order to compel the Netherlands to reduce the total volume of Dutch GHG emissions or have them limited by 25 to 40 per cent (compared to 1990 levels) by 2020. The plaintiffs claimed, among others, that the Netherlands government bears a duty of care towards the plaintiffs (and those they represented) to mitigate the potential for dangerous anthropogenic climate change.[132] The High Court held that the Netherlands government was required to increase its level of ambition to mitigate climate change to discharge its duty of care. Accordingly, the court ordered the Netherlands government to increase its ambition to at least a 25 per cent reduction in GHG emissions compared to 1990 levels.[133] Subsequently, the Hague Court of Appeal upheld the High Court's decision.

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[129] Urgenda's work focuses on advocacy towards creating a 'sustainable and circular economy powered by renewable energy and green resources'. See Urgenda Foundation < https://www.urgenda.nl/en/home-en/ >
[130] Urgenda Case, para. 2.6-7.
[131] Urgenda Case, para 2.7.
[132] Urgenda Case, para 3.1.
[133] Urgenda Case, para 5.1.

The District Court and the Court of Appeal referred to key international climate change documents, which enabled them to make three findings concerning the state of GHG emissions in the Netherlands and their impact on global climate change.[134] Firstly, the Netherlands' per capita emissions are among the highest in the world.[135] Secondly, to avert dangerous climate change, Annex 1 countries, of which the Netherlands is part, must reduce GHG emissions by 25 to 40 per cent compared to 1990 levels by 2020.[136] And third, the Netherlands' level of GHG reduction was below the level required to avert hazardous climate change.[137]

The combined effect of the Dutch courts' reliance on international policy documents is instructive for the continuing discourse on fairness in climate change law. For instance, the High Court reasoned that the principle of fairness has specific consequences for industrialised counties. Thus, industrialised countries are obligated to take the lead because their historical emissions are the main causes of climate change.[138] Their disproportionate use of fossil fuels for industrialisation created economic growth and prosperity. Consequently, the court reasoned that their wealth and advanced economic development place them in a position to take more ambitious mitigation actions.[139] The court's notion of fairness maps onto the intendment of the

[134] The court relied on reports of the Intergovernmental Panel on Climate Change (IPCC), the United Nations Emissions Gap Reports, as well as the Emissions Database for Global Atmospheric Research (EDGAR) and international agreements on climate change. See Urgenda Case, para. 2.8 to 2.52.
[135] Urgenda case, para 4.79. See also Urgenda Appeal, para 26.
[136] Urgenda Case, para 4.29. See also Urgenda Appeal, para 72.
[137] Urgenda case, para 4.31 and 4.84. See also Urgenda Appeal, para 76.
[138] See Urgenda Case, para 4.57 and 4.90. The High Court drew a causal link between Dutch GHG emissions, climate change and its effect on the Dutch living climate. Although the court did not consider the effect of Dutch GHG emissions on the climate in other parts of the world this is inferred by its admission that Dutch GHG emissions contributed to global climate change. However, see para 64 of the Urgenda Appeal case: The court alludes to a difference between proving a causal link for purposes of imposing a positive order on the State as opposed to a causal link for purposes of imposing damages on the State. This view aligns with the prevailing position of industrialized countries regarding the issue of 'loss and damage' in the Paris regime.
[139] Urgenda Case, para 4.57.

CBDR principle, which the Rio Declaration envisaged,[140] but which the UNFCCC captured ambiguously.[141]

The Netherlands government, in turn, argued that its contribution to the reduction of GHG emissions would not suffice to reduce GHG emissions significantly if other countries do not make significant cuts to GHG emissions too.[142] Again, the court chose to rely on scientific data emphasising that any reduction in GHG emissions anywhere in the world is crucial to global efforts to mitigate climate change.[143] Finally, the government attempted the 'unfair economic advantage' argument. The government claimed that a higher reduction path for the Netherlands would negatively affect Dutch businesses because stricter emission reductions would make Dutch companies less competitive, which would give an unfair economic advantage to non-Dutch enterprises.[144] One would have expected that the Netherlands would have provided detailed analysis and scenarios to demonstrate the loss in percentage profit for Dutch businesses that would have to reduce their GHG emissions. Such evidence was not forthcoming, and the court rejected the claim.[145]

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[140] Ibid, The court noted that '[t]he principle of fairness …expresses that industrialised countries have to take the lead in combating climate change and its negative impact. The justification for this … lies … in the fact from a historical perspective the current industrialised countries are the main causers of the current high greenhouse gas concentration in the atmosphere and that these countries also benefitted from the use of fossil fuels, in the form of economic growth and prosperity. Their prosperity also means that these countries have the most means available to take measures to combat climate change.' Thus the court observed that the basis for differentiation, are historical responsibility and capabilities, as with the Rio Declaration. This observation enabled the court to establish that the Netherlands owes its people a duty of care to address climate change in a meaningful way. See also Ferreira (note 9 above) (generally arguing that the High Court used the common but differentiated responsibility principle as an interpretive tool to determine the duty of care of the Netherlands).

[141] The impact that ambiguating the CBDR principle has had on climate justice has been discussed in section 4.1 above.

[142] Urgenda Case, para 4.78.

[143] Urgenda case, para 4.79.

[144] See Urgenda Case, para 4.82 The US has made similar arguments against stringent GHG emission reduction targets. See chapter 3, section 3.2.4 above.

[145] Urgenda Case, para 4.82 above. The court noted that the Netherlands had not provided evidence to support their claim. The court held that there was emerging evidence which contradicts the 'unfair economic advantage' argument. Other studies also show that the cost of 'business as usual' mitigation actions on the global economy far outweighs the cost of aggressive GHG emission reduction worldwide. See K Gillingham 'Carbon calculus' (2019) 56 Finance & Development 6 < https://www.imf.org/external/pubs/ft/fandd/2019/12/pdf/the-true-cost-of-

Urgenda Foundation convinced a Dutch High Court and, subsequently, the Court of Appeal, that the Netherlands bears a duty of care (towards the present and future generations of Dutch people) to mitigate climate change. The Court of Appeal affirmed that the Netherlands had breached that duty of care and acted unlawfully by failing to take adequate measures to mitigate climate change. In December 2019, the Dutch Supreme Court upheld Urgenda's case.[146] The EU had already submitted its first collective Nationally Determined Contribution (NDC) by the time the case travelled through the Dutch courts. However, the latest communication of the EU's NDC shows a more ambitious emissions reduction target of at least 55 percent by 2030.[147] It is unclear if or how the Dutch Supreme Court's ruling influenced the EU's updated NDC.

Nevertheless, the decisions in *Urgenda* are binding in the Netherlands. The decisions compel the Dutch government to implement more ambitious policies to mitigate climate change. Aside from *Urgenda*'s impact on Dutch climate policymaking, the judgments show the Dutch courts' appreciation of the linkages between climate change and human rights.[148] In particular, the appeal court's decision resonates with the UN Special Rapporteur on Human Rights on the right to a safe and healthy environment.[149] The right to a healthy environment is still far from being considered part of customary international law.[150] However, arguably, decisions such as *Urgenda* validate the Special Rapporteur's work and go to build evidence of

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reducing-greenhouse-gas-emissions-gillingham.pdf >; See also R Calel et al 'Temperature Variability Implies Greater Economic Damages from Climate Change' (2020) 11 *Nature Communications* 2020 1.

[146] Press Release by Urgenda Foundation < https://news.smart.pr/urgenda/media-release-climate-case-nl >.

[147] Climate Action Tracker < https://climateactiontracker.org/countries/eu/ >.

[148] P Minnerop 'Integrating the "duty of care" under the European Convention on Human Rights and the science and law of climate change: The decision of the Hague Court of Appeal in the Urgenda Case' (2019) 37 *Journal of Energy & Natural Resources Law* 149, 177.

[149] Ibid.

[150] There are scattered references to human rights and the right to a healthy environment, generally, in the climate change regime. See UN Special Rapporteur on human rights and the environment, DR Boyd 'Statement on the human rights obligations related to climate change, with a particular focus on the right to life' (25 October 2018), paras 6-21.

growing state practice. The fact that national courts in other countries are referencing *Urgenda* to reinforce their reasoning establishes *Urgenda*'s prominence among national climate change cases.[151]

5.4.2 A Ray of Hope for Fairness?

Urgenda's success is an excellent reason to celebrate climate change activism. *Urgenda* is part of an emerging group of national cases whose rulings have held states directly responsible for climate change.[152] Non-governmental Organisations (NGOs)[153] and individuals continue to pile pressure on global leaders and governments to address climate change aggressively.[154] The increasing influence of non-state actor groups in the climate change regime should not be overlooked. It is argued here that the upsurge in national climate change-related litigation could be considered a sign that the climate change regime, centred on multilateral negotiations, can only play a limited role in addressing climate change. This point draws strength from the fact that although the Paris Agreement qualifies as a treaty, some of its key provisions are couched in permissive, non-mandatory terms.[155] This means that the Paris climate change regime is itself in need of external enforcement and compliance structures to succeed. National litigation, as evidenced by *Urgenda*, could provide the space for driving ambition at the national level.

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[151] In the Australian case between Gloucester Resources Limited and the Minister for Planning, a New South Wales court cited the *Urgenda* decisions in determining issues related to establishing a causal link between GHG emissions and climate, the binding force of the Paris Agreement and carbon leakage. See *Gloucester Resources Limited v. Minister for Planning* [2019] NSWLEC 7, paras 521-524, 539.

[152] O van Geel 'Urgenda and beyond: The past, present and future of climate change public interest litigation' (2017) *Maastricht University Journal of Sustainability Studies* 56, 61.

[153] Some recent climate change-related cases have been initiated by NGOs: Apart from *Urgenda* and *Thabametsi*, see also Friends of the Irish Environment v. The Government of Ireland et al [2019] IEHC 747.

[154] See for example J Nevett 'The Greta effect: Meet the schoolgirl climate warrior' BBC News (May, 2019) < https://www.bbc.com/news/world-48114220 > See also the German case initiated by a German youth group contesting the constitutionality of the German climate change legislation: *Neubauer et al v. Germany* (BvR 2656/18/1 BvR 78/20/1 BvR 96/20/1 BvR 288/20).

[155] See L Rajamani 'The 2015 Paris Agreement: Interplay between hard, soft and non-obligations' (2016) 28 *Journal of Environmental Law* 317.

Notwithstanding the goodwill that non-state actors enjoy, the fact is that states remain the most influential actors and the most crucial drivers of policy and legal interventions for international climate change mitigation.[156] *Urgenda* furthers the call to address global climate justice.[157] Arguably, it reaffirms the point that the historical antecedents of climate change are indispensable to shaping 'the highest possible ambition' requirement to make the Paris Agreement successful. It is momentous that a court in an industrialised country has called out its government and mandated it to show more commitment towards addressing a problem that it contributed significantly to cause.[158] The fact that the move to hold the Netherlands accountable originated from its citizens' concerns over intergenerational fairness (even if concerning only the Dutch people) is also important. It is a crucial step towards bringing people and societies closer to the core elements of fairness in climate change mitigation.[159]

The point above is instructive, particularly concerning the CBDR principle's normative pull, for two reasons. Firstly, on the international level, political expediency and economic considerations have gone ahead of justice and intergenerational equity in relation to CBDR principle and mitigation. However, at the national level, decisions such as *Urgenda* show that national courts are more in tune with the concerns of climate justice. Granted, national courts

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[156] van Geel (note 152 above) 66 (noting that ultimately, only governments, through their appointed policymakers, can address climate change meaningfully). See also K Bouwer 'The unsexy future of climate change litigation' (2018) 30 *Journal of Environmental Law* 483, 493 (generally discussing emerging trends in national climate change litigation and arguing that national litigation, such as the Urgenda litigation, could slow the pace of the policy changes required to address climate change).

[157] Ferreira (note 9 above) 337-338.

[158] J Spier '"The 'strongest' climate ruling yet": The Dutch Supreme Court's Urgenda judgment' (2020) 67 *Netherlands International Law Review* 319, 320.

[159] See example, in a New Zealand climate change litigation, the court cites an affidavit by Professor Hansen, 'a leading expert in climate change': 'We will not preserve a habitable climate system unless developed nations act without further delay, both to phase out their own emissions and to aid the balance of nations in the development of their own carbon free energy sources': *Thomson v. The Minister for Climate Change Issues* [2018] 2 NZLR 160, para 3.

do not have to face public criticism. Generally, they are not accountable to political constituents through elections.[160] One may argue that the shield of independence is absent for political representatives and negotiators. Be that as it may, the judicial authority to determine legal issues that lead to enforceable decisions is available precisely to bring finality to contentious matters. National decisions have no direct bearing on future climate change negotiations. However, it is reasonable to infer that the interpretation national courts put on the CBDR principle is informed by a sense of historical responsibility for past GHG emissions. This goes to reinforce the continued relevance of historical responsibility in interpreting the CBDR principle.

Secondly, as discussed in Chapter 3 above, high emitters in the third world have been criticised for hiding behind the developing country label to increase their GHG emissions.[161] Some scholars interpret the reluctance of developing countries towards committing to economy-wide reduction targets as intransigence and argue that their position puts vulnerable developing countries in danger.[162] While it may be too simplistic to put all countries under two labels, these same labels link with the history behind the over-concentration of GHG emissions.[163] When one considers that the tags flow from a long history of dominance and structured economic dependence, the North's call to abandon the labels is, in part, self-

[160] The Dutch government's opposition to the *Urgenda* decisions rest substantially on the claim that the doctrine of separation of powers does not permit the judicial arm of government to give decisions which have executive and legislative consequences. For some analysis of this point, see L Burgers & T Staal 'Climate action as positive human rights obligation: The Appeals judgement in Urgenda v. The Netherlands' (2019) 49 *Netherlands Yearbook of International Law* 223.
[161] See chapter 3, section 3.4 above.
[162] See for example, K Hochstetler & M Milkoreit 'Responsibilities in transition: Emerging powers in the climate change negotiations' (2015) 21 *Global Governance* 205, 215-218. See also J Lee 'Rooting the concept of common but differentiated responsibilities in established principles of international environmental law' (2015) 17 *Vermont Journal of Environmental Law* 27, 31-32.
[163] As discussed in chapter 4 above.

serving.[164] Be that as it may, even if the developed-developing country label is no longer useful in contemporary times, historical responsibility for emissions that characterised centuries-long industrialisation remains as relevant to the success of the climate change regime as the 'enhanced' capabilities that some developing countries may have.[165]

The High Court's reasoning in *Urgenda* provides a useful means of distinguishing between causation for the purpose of distributing differentiated responsibilities and causation for purposes of determining compensation for damage caused by climate change.[166] Arguably, causation of global warming could be distinguished from causation of the negative impacts of climate change. This distinction further gives support to Mayer's adapted use of the no-harm principle as a normative guide for delineating state responsibility to mitigate through emissions reduction.[167] Therefore, abandoning the developed-developing country label should not have to mean an erasure of the historical emissions which contributed significantly to causing climate change.

Meanwhile, developed countries are poised to continue to pressure developing countries with emerging economies to commit to stringent reductions without holding themselves to those same rigorous standards.[168] In the nineteenth and twentieth centuries, developed countries shaped international law to suit their economic interests while keeping the third world

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[164] A Anghie 'Legal aspects of the New International Economic Order' (2015) *6 Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 145, 148. For a contrary view, see SV Scott 'Is the crisis of climate change a crisis for international law: Is international law too democratic, too capitalist and too fearful to cope with the crisis of climate change?' (2007) 14 *Australian International Law Journal* 31, 38.
[165] Mayer (note 11 above) 80.
[166] See Urgenda case, para 64.
[167] See Mayer (note 11 above) Part 3.
[168] G20 Italia 2021 'Joint G20 Energy-Climate Ministerial Communiqué' (23 July 2021) <https://www.g20.org/wp-content/uploads/2021/07/2021_G20-Energy-Climate-joint-Ministerial-Communique.pdf >.

economically dependent on them.[169] But, as more developing countries industrialise their economies and the demand for energy sources increases, the friction between development priorities and GHG emissions reduction could heighten. South Africa's first climate change-related litigation highlights the conflict between increasing ambition and economic growth for industrialising third world countries.

5.5 Litigating the Thorny Side of Justice: Building a Coal Plant in a Carbon-Constrained World

In *Urgenda*, the Dutch courts considered international documents on climate change, which enabled them to conclude that the Netherlands' mitigation action was far less than ambitious.[170] The High Court specifically mentioned and incorporated the CBDR principle as an aid for determining the Netherlands' duty of care to the Dutch people, and by extension, the level of ambition of the Netherlands' mitigation action.[171] In this section, the CBDR principle's relevance is not in direct focus as in *Urgenda*. The case between Earthlife Africa Johannesburg and South Africa's Minister of Environmental Affairs (*Thabametsi*)[172] presents an opportunity to engage, from a judicial standpoint, how the justice deficit in the climate change regime affects industrialising third world countries.

5.5.1 Finding Fairness: Two Contending Interests in the *Thabametsi*

To better appreciate the court's ruling, a brief background to the contending positions is necessary. South Africa is the fourth largest coal-exporting country in the world.[173] It has the

[169] A Anghie 'The evolution of international law: Colonial and postcolonial realities' (2006) 27 *Third World Quarterly* 739, 748.
[170] Spier (note 158 above) 351-353. See also Urgenda case, para 2.
[171] Urgenda case, paras 2.36, 2.38.
[172] Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others (65662/16) [2017] 2 All SA 519 (GP).
[173] J Carruthers 'Energy, environment, and equity in South Africa' (2019) 12 *Environmental Justice* 112, 114.

second-highest emissions intensity for electricity generation of any country in the world because low-quality coal is burned (locally, for electricity) and high-quality grade coal is exported (for foreign exchange).[174] Consequently, coal's prominence in South Africa's energy and economic policy is locked in.[175] Despite South Africa's vast coal reserves, water, required in large quantities for the older generation of coal plants, is scarce.[176] Water security is in a delicate state because the country experiences relatively low rainfall and high evaporation.[177] Coal mining comes at the cost of massive water pollution, even in places that are already water-stressed.[178] Contrary to state regulations, post-mining rehabilitation does not always happen and some contracts have been awarded in environmentally sensitive areas.[179]

The negative impacts of coal mining and the use of large amounts of water affect poor black communities more directly.[180] Typically, poor black communities are dotted along the coal mines and abandoned open-pit mines. These communities experience direct health complications because of air pollution, limited access to clean water, forced removals and loss of land-based livelihoods.[181] Although 20 per cent of electricity goes to households, there are many rural areas without electricity.[182] Yet, many labour movements oppose renewable energy development for fear that a focus on renewable energy will wipe out jobs that employ many

[174] S Chandrashekeran et al 'Rethinking the green state beyond the Global North: A South African climate change case study' (2017) 8 *Wiley Interdisciplinary Reviews: Climate Change* e473, e476.
[175] J Burton, A Marquard & B McCall 'Socio-Economic Considerations for a Paris Agreement-Compatible Coal Transition in South Africa' (2019) Policy Paper, Energy Resource Centre, University of Cape Town < www.climate-transparency.org > 3.
[176] Carruthers (note 173 above) 115.
[177] Ibid.
[178] See, for example, GM Ochieng, ES Seanego & OI Nkwonta 'Impacts of Mining on Water Resources in South Africa: A Review' (2010) 5 *Scientific Research and Essays* 3351.
[179] Carruthers (note 173 above) 115.
[180] Ibid.
[181] J Cock 'Resistance to coal inequalities and the possibilities of a just transition in South Africa' (2019) 36 *Development Southern Africa* 860, 864.
[182] Carruthers (note 173 above) 114.

black people, such as those in the coal mining industry.[183] Tragically, the very communities that suffer from coal mining and are more vulnerable to compounded climate change impacts attach wealth and job creation to coal mining instead of destruction and injustice.[184] This unhealthy attachment to coal further hampers efforts towards a just transition from coal to renewable and sustainable energy in South Africa.[185]

It is against the above backdrop that the Thabametsi case unfolded. As part of plans to address the country's acute energy crisis, the South African government approved a plan for Thabemetsi Power Project (Pty) Ltd (Thabametsi Project) to construct a coal-fired power plant that would be operational until 2061. South African law provides that an entity planning to build a coal plant in South Africa requires, among others, an environmental authorisation from the Chief Director of the Department of Environmental Affairs (DEA).[186]

In February 2015, the Chief Director of DEA granted Thabametsi Project authorisation to build a coal plant. Earthlife Africa, a non-profit organisation, founded to mobilise civil society around environmental issues,[187] appealed the Chief Director's authorisation to the Minister of Environmental Affairs. The Minister conceded that the climate change impacts assessment of the proposed coal plant was not comprehensive if it was even considered before the Chief Director's authorisation. She reasoned that in any case, climate change impacts would be considered during the process of granting an emissions licence for the project at a later

[183] When the Energy Ministry reached an agreement with private power producers to speed up renewable energy supplies, coal transporters sued to challenge the Energy Minister's actions. See *Coal Transporters Forum v. ESKOM Holdings Ltd and others* (42887/2017) [2019] ZAGPPHC 76.
[184] Cock (note 181 above) 867.
[185] Chandrashekeran et al (note 174 above) 80.
[186] National Environmental Management Act 107 of 1998 (NEMA) sec 24.
[187] Earthlife Africa < http://earthlife.org.za/>.

stage.[188] Nevertheless, the Minister mandated Thabametsi Project to undertake a climate impact assessment before commencing the project.[189] Notwithstanding her admission that Thabametsi Project had not conducted a proper climate change impact assessment, the Minister upheld the Chief Director's authorisation.[190]

Earthlife sued in the High Court of the Gauteng Province, seeking judicial review of the Chief Director's authorisation and the Minister's decision to allow the authorisation to stand. Earthlife claimed that the Chief Director was obliged to consider the climate change impacts of the proposed coal plant before approving, and he failed to do so. Earthlife further claimed that the Minister's endorsement of the authorisation was unlawful because she could not have revoked her decision if Thabametsi Project had failed to conduct a climate impact assessment.[191] Earthlife claimed that based on section 24 of the NEMA,[192] the proposed coal-fired power plant's climate change impacts were relevant factors that the Chief Director should have considered, which he did not.[193]

The DEA argued that neither South Africa law nor international law expressly mandates an authorising agency to consider a climate change impact assessment before granting authorisation. The DEA claimed that South Africa's obligations to reduce GHG emissions are broadly framed and do not prescribe specific measures that the government must implement to reduce emissions.[194] He also argued that South Africa's mitigation measures must balance its

[188] Thabametsi Case, para 62.
[189] Thabametsi Case, para 63, 66.
[190] Thabametsi Case, para 65.
[191] Thabametsi Case, para 10.
[192] NEMA, sec 24.
[193] Thabametis Case, para 11. NEMA requires that in granting environmental authorization the relevant authority must consider all factors, including pollution, environmental degradation likely to be caused if the authorization is approved or not.
[194] Thabametsi Case, para 18.

development needs and its international obligations towards addressing climate change.[195] In the short term (up to 2025), South Africa's economic challenges could make it difficult for a rapid transition into a low carbon and climate-resilient society.[196] Thus, the DEA argued, Earthlife's objection to the Chief Director's authorisation was out of context since addressing poverty and economic inequality are overriding priorities for the country.[197]

The Gauteng Province High Court upheld Earthlife's judicial review claim and held that the Chief Director had failed to comply with the NEMA when he disregarded the coal plant's impacts on climate change. The court also held that the Minister erred when she found that the Chief Director had failed to order a climate change impact assessment but did not mandate the Chief Director to reconsider the authorisation. The court ordered the Minister to reconsider Earthlife's appeal in light of the potential climate change impacts of building the power plant. In reaching its decision, the court considered the basic science of climate change and the impact of coal-fired plants on global GHG emissions and South Africa's vulnerability to climate change impacts. The court also relied on the precautionary principle, intergenerational fairness, and sustainable development in interpreting the applicable section of the NEMA.[198]

5.5.2 Choosing Economic Growth over Emissions and Vulnerability? South Africa's Uncomfortable Reality

It is instructive to note that in compliance with Environmental Impact Assessment Regulations, Thabametsi Project undertook an environmental impact assessment of the proposed project in line with an approved scoping report from the DEA. The Environmental

[195] Thabametsi Case, para 18.
[196] Thabametsi Case, para 19.
[197] Thabametsi Case, para 18.
[198] Thabametsi Case, para 80, 82.

Impact Report did not quantify the GHG emissions from the power station or consider the potential for water-related problems arising from building the power plant. Instead, the report noted that the proposed plant's contribution was 'relatively small' in the context of national and global emissions.[199] After the Minister decided on the requirement of a climate change impact assessment, Thabametsi Project undertook both a GHG assessment and a climate resilience assessment for the proposed power station. This second assessment quantified the GHG emissions of the proposed project throughout construction and found its contribution to global GHG emissions to be 'very very large'.[200] The resilience assessment showed that the proposed project would likely increase water stress in the area designated for the project and that the project itself was in danger of facing challenges with water supply.[201]

The ruling in *Thabametsi* has been hailed as a positive step.[202] It serves to nudge national policies closer towards a just transition from coal in hopes that South Africa can improve on its status as a 'weak green state'.[203] Although the Gauteng court's decision compelled the Minister to reconsider her approval of the Thabametsi coal plant project, the decision did not halt the project in the first instance. In January 2018, the Minister reviewed her decision as the Gauteng Court had ordered.[204] The Minister acknowledged that the increased risks of water scarcity and high GHG emissions associated with the project implied a high social cost.

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[199] Thabametsi Case, para 42- 44.
[200] ERM, Greenhouse Gas Assessment for the 1200MW Thabametsi Coal-fired Power Station in Lephalale, Limpopo Province, South Africa: Final Report (January 2017) 1.
[201] ERM, Climate Resilience Assessment for the 1200MW Thabametsi Coal-fired Power Station in Lephalale, Limpopo Province, South Africa: Final Report (January 2017) x.
[202] TL Humby 'The Thabametsi case: Case No 65662/16 Earthlife Africa Johannesburg v Minister of Environmental Affairs' (2018) 30 *Journal of Environmental Law* 245.
[203] Chandrashekeran et al (note 174 above) 83.
[204] See Minister Environmental Affairs Republic of South Africa 'Reconsideration of the Appeal against The Environmental Authorisation issued for The Proposed Establishment Of The 1200mw Thabametsi Coal-Fired Power Station and Associated Infrastructure Near Lephalale, Within The Jurisdiction Of The Waterberg District Municipality, In The Limpopo Province' < https://cer.org.za/wp-content/uploads/2018/01/Thabametsi-Appeal-Decision-30-January-2018-2.pdf>.

However, she reasoned that this did not amount to a fatal flaw, as long as the project's benefit could be justified and motivated.[205] Accordingly, the Minister confirmed the environmental authorisation for the project.[206] Subsequently, in December 2020, a court in Pretoria reversed the Minister's approval.[207] The second judicial intervention could suggest that NGOs will continue to drive climate litigation in hopes that they can curtail the government's plans of opening new coal-fired power plants.

It is also instructive to note that South Africa has a renewable energy sector, primarily based on wind and solar energy.[208] Despite heavy reliance on coal, there are also state-sanctioned private investments into smaller-scale renewable projects.[209] It has been argued that the country has promising renewable energy potential which has gone untapped.[210] It has also been argued that successive governments have failed to integrate the fragmented policies surrounding energy regulation and sustainable development.[211] The country's Renewable Energy Independent Power Producers Procurement Programme (REIPPPP) attempted to harness its endowments in renewable energy. However, the REIPPPP's stunted success has led to calls to have the REIPPPP scrapped and replaced with a more ambitious plan to move the country towards increased and integrated renewable energy creation.[212]

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[205] Reconsideration of Appeal para 4.9.
[206] Reconsideration of Appeal para 4.9. For a critique of the Minister's decision, see Humby (note 198).
[207] *Earthlife Africa NPC and Another v The Minister of Environmental Affairs and others* Case Number 21559/2018 (High Court of South Africa, Gauteng Division, Pretoria) (19 November 2020).
[208] T Murombo 'Regulating energy in South Africa: Enabling sustainable energy by integrating energy and environmental regulation' (2015) 33 *Journal of Energy & Natural Resources Law* 320, 320.
[209] Chandrashekeran et al (note 169) 82.
[210] A Lawrence *South Africa's Energy Transition* (2020) 14.
[211] Murombo (note 208) 348.
[212] Lawrence (note 210 above) 111. See also C Muzondo, R Bridle, A Geddes, M Mostafa & J Kühl 'Power by all: Alternatives to a privately owned future for renewable energy in South Africa' International Institute for Sustainable Development (IISD) GSI Report (2021) < https://www.iisd.org/system/files/2021-04/alternatives-privately-owned-renewable-energy-south-africa.pdf >.

The opposing themes highlighted by *Thabametsi* do not directly engage the CBDR principle. Unlike *Urgenda*, *Thabametsi*'s significance regarding the CBDR principle's reach is more visible from a 'development versus environment' standpoint. South Africa is in a tight spot because a just transition from coal to more sustainable and renewable energy sources will come at substantial economic costs. The economic ramifications for poverty reduction, rural electrification and other social interventions cannot be overlooked.[213] Arguably, regardless of differences in specific political and economic dynamics, the South African situation foretells the predicament of other third world countries whose economies are reliant on natural resources that are increasingly becoming stranded. Emerging studies suggest that as the developed countries come under increased pressure to de-carbonise their economies, stranded assets and technologies that support their fossil fuel industries will be transferred to the third world in the name of development.[214] Presently, aside from the transfer of stranded assets, other third world industrialising countries with coal and oil reserves are reluctant to transition their economies away from fossil fuel dependence.[215]

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[213] Burton, Marquard & McCall (note 175 above).

[214] See, for example, K Bos & J Gupta 'Stranded Assets and Stranded Resources: Implications for Climate Change Mitigation and Global Sustainable Development' (2019) 56 *Energy Research & Social Science* 101215. The authors define stranded assets as 'investments whose value falls, that are prematurely retired, that are subject to costly retrofitting or that become liabilities. They note that developing countries who are late-comers to industrialization and economic development face the challenge of developing technologies that may become stranded too quickly or even worse 'inherit' stranded technologies from western countries under the guise of development aid. See also J Gupta & E Chu 'Inclusive Development and Climate Change: The Geopolitics of Fossil Fuel Risks in Developing Countries' (2018) 17 *African & Asian Studies* 90.

[215] The concept of just transition finds more meaning in this context. Industrialised and industrialising countries have argued that climate change action through mitigation should happen with due regard for jobs and livelihoods that will be affected by the transition from fossil fuels to renewable energy. See Just Transition Research Collaborative 'Mapping just transition(s) to a low-carbon world' (December, 2018) < https://cdn.unrisd.org/assets/library/books/pdf-files/report-jtrc-2018.pdf > See also J Shankleman, A Nardelli & A Chaudhary 'India ditches key climate meeting after disrupting G-20' Bloomberg Green (27 July 2021) < https://www.bloomberg.com/news/articles/2021-07-27/india-ditches-key-climate-meeting-after-disrupting-g-20-summit > (noting that India objected to language in a G-20 communique on climate change that commits to net-zero emissions).

Arguably, such a transfer of stranded assets and technologies, accompanied by the increase in emissions, could replicate some of the challenges South Africa is facing with coal lock-in. The result of moving financial investments in stranded natural resources such as coal from the North to the third world, in the absence of rapid transfers of environmentally sound technologies (ESTs),[216] is that the third world's carbon budget could balloon beyond the carbon space.[217] It could further be argued that even if an unintended consequence, the transfer of stranded assets and technologies to the third world, while developed countries upgrade to climate-friendly technologies, supports an abiding difference dynamic.

Thus, although subtle, the CBDR principle's connection traces back to what a properly functioning concept of differentiation could have achieved.[218] An initial reduction in emissions in the developed world would have paved the way for a larger carbon space for third world countries to operate within. Concomitantly, the leadership role executed by developed countries would have put industrialising third world countries on notice that they would be required to make more ambitious cuts to their emissions.[219]

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[216] See Shankleman, Nardelli & Chaudhary (note 215 above) noting that sources at the G-20 meeting in London cited inadequate financial pledges to enable energy transitions in the third world as one of the reasons for India's refusal to commit to net-zero emissions by 2050).

[217] J Gupta, A Rempel & H Verrest 'Access and Allocation: The Role of Large Shareholders and Investors in Leaving Fossil Fuels Underground' (2020) 20 *International Environmental Agreements* 303, 316. See also R Chevallier 'South Africa's Dilemma: Reconciling Energy-Climate Challenges with Global Climate Responsibilities' in P Draper & I Mbrimi (eds), *Climate and Trade: The Challenges for Southern Africa* (2010) 149.

[218] See chapter 4.3. I argued there that the three strands of differentiation could be considered as the three stages of differentiation, had developed countries accept historical responsibility for their past emissions.

[219] See chapter 4, 4.2.2 above.

5.6 Conclusion

The negotiation-based climate change regime is yet to deliver a solution that sets the world on track to achieve net-zero GHG emissions.[220] As the reality continues to sink in that climate change is a long-term problem with serious inter-generational consequences, non-state actors are using the litigation route to drum up the issues of fairness that have gone unaddressed. The ICJ has kept silent on climate change thus far, and it is not certain whether the ICJ's intervention will ever happen. However, the analyses above suggest that there are avenues for the ICJ to shape the CBDR principle's meaning and application regarding mitigation. The *erga omnes* concept is an established concept but is also malleable and suitable for establishing common responsibilities. The potential for the ICJ to establish the common responsibility to mitigate climate change as an *erga omnes* obligation is further strengthened by the emerging right to a healthy and safe environment. It has been argued that the ICJ should not wade into determining issues connected to historical responsibility, and by extension, differentiation. But a modified application of the no-harm rule could be a conduit for the ICJ to engage issues bordering on differentiation, such as compensation for loss and damage resulting from climate change. Furthermore, the leadership role of developed countries and delayed peaking of GHG emissions in the third world are uncontested aspects of differentiation. An ICJ opinion on the scope and application of these aspects could bring clarity to some aspects of the CBDR principle.

The two selected cases, *Urgenda* and *Thabametsi*, demonstrate the CBDR principle's relevance in different ways. In *Urgenda,* the facts and issues raised in the case allowed the

[220] COP 26 provides a crucial platform for state parties to reaffirm their commitment to keeping global temperature increase to 1.5 degrees: C Farand, J Lo & M Darby 'Has COP 26 bent the curve below 2C?' (Climate Home News 6 November 2021) <https://mailchi.mp/climatehome/g20-leaves-the-heavy-lifting-to-cop26-2687569?e=c257cf23e5 > The outcomes emanating from COP 26 are beyond the timeframe of this study.

Dutch courts to engage directly with the CBDR principle and other international environmental law principles. The High Court's decision was premised on the doctrine of duty of care. But, the CBDR principle served as an interpretive tool that the court used to carve out the connection between duty of care and the Netherlands' level of ambition towards mitigation. Historical responsibility played a significant role in the court's reasoning that the Netherlands' level of ambition was not commensurate with their contribution to climate change through their historical emissions. Since the *Urgenda* decisions, other European courts have referenced the decisions and drawn on the rationale that industrialised countries have fallen far short of what they consider to be a fair share of the mitigation effort. Thus, although climate change negotiations have not produced markers to measuring equity regarding each country's mitigation effort, there is a growing awareness of historical responsibility in national courts in the developed world. Non-state actors' activism has raised the climate crisis beyond politics and economics. Inter-generational equity and accountability for emissions are now part of the social discourse on climate change.

In *Thabametsi*, an indirect connection between the court's ruling and the CBDR principle's relevance is discernible. South Africa's recent economic downturn makes it all the more crucial that the country fixes its energy sector to drive industrial growth. However, the reliance on coal to revamp the South African economy goes against the grain of water security and the global effort to cut GHG emissions. South Africa's predicament is testament and feeds into the analysis of the third world colonisation in relation to economic development. The North has engrained an unsustainable development model in the international legal system. The decision in *Thabametsi* shows that national courts in the South recognize the urgency of the climate crisis and therefore require more ambition from their governments, regardless of developing countries' negligible contribution to climate change. Developed countries have

skirted around their historical contribution to climate change. Now, a heavier burden falls on the third world to curtail their sovereign right to use their natural resources. In this way, *Thabametsi* adds to complexities arising from the developed countries' delayed leadership towards mitigating climate change.

The following concluding chapter presents the findings of my study of the CBDR principle in the climate change regime, its historical roots, its journey through climate change negotiations, its manifestations in the discourse around climate justice and its influence on litigation.

Chapter 6

Rethinking Common but Differentiated Responsibilities for Climate Change Mitigation

6.1 Introduction

Chimni has argued that 'the history of international law cannot be neglected at a time when it threatens to become internal law, which is the same as global law'.[1] I would add that the history of international law cannot be neglected in understanding the relevance of the CBDR principle at a time when the earth's sustainability is so critically threatened.

The purpose of this study was to apply a third world approaches to international law (TWAIL) perspective to assessing the relevance of the common but differentiated responsibilities (CBDR) principle for climate change mitigation. Specifically, my interest was in the utility of the historical responsibility concept as a driver for justice, regarding mitigation through emissions reduction. Thus, the overarching objective was to analyse the relevance of historical responsibility in applying the CBDR principle to climate change mitigation. Mitigating climate change requires sharing the responsibility of reducing greenhouse gas (GHG) emissions among countries. Countries contributed in different proportions to causing climate change and countries have different levels of capabilities to address and adapt to climate change. Despite a far smaller contribution to the build-up of GHGs and weak capabilities for addressing climate change impacts, developing countries face the most adverse impacts of climate change.

The rationale for differentiation regarding global mitigation commitments rests on the fact that contribution and vulnerability are running at cross-purposes. This, in turn, makes mitigating climate change a matter of justice. Thus, the primary research question I sought to

[1] BS Chimni 'The past, present and future of international law: A critical third world approach' (2007) 8 *Melbourne Journal of International Law* 499, 511.

answer was: to what extent does the historical responsibility concept influence the CBDR principle's relevance to climate justice and climate change mitigation? This concluding chapter summaries the findings and conclusions drawn from the study. I also draw on the findings of the study to make recommendations and offer insights on possible areas for further research.

6.2 Summary of Insights on TWAIL, CBDR, Climate Justice and Climate Change Litigation

Chapter 2 addressed the first focal research question, namely pre-colonial and colonial antecedents of modern international law impact the CBDR principle's emergence in international environmental law and climate change law? In Chapter 2, a TWAIL perspective was used to situate the CBDR principle in the context of some pre-colonial and colonial concepts in international law. Using Anghie's analytic frame, the dynamic of difference, Chapter 2 drew and clarified links between the European-led imperialist expansion which created international law and the emergence of differential treatment in international environmental law (IEL). It was argued that the World Bank's definition of poverty and development (as its remedy), and even sustainable development continued to strengthen the effect of the dynamic of difference long after the colonial era.

Chapter 2 also drew some links between the industrial growth of the pre-colonial and colonial era and present-day climate change. Specifically, I established that the use of coal and oil (which are packed with GHGs) for industrialisation was integral to the European imperialist expansion and, later, the economic dominance that the North enjoys. Apart from dominating the economic system, developed countries touted capitalist, market-driven economic development as the sure way for developing countries to advance their economies. These conditions worsened climate change by encouraging environmentally unsustainable development globally.

As environmental problems worsened and more developing countries accelerated economic development, the interconnections between environmental protection and sustainable development became more evident. The Rio Declaration on Environment and Development (Rio Declaration) propounded the CBDR concept, which combined common obligations for addressing environmental problems with differential treatment based on levels of contribution to an environmental problem and varying levels of financial and technological means for addressing the problem. In answer to the focal question, my overarching point was that differential treatment, manifested in IEL as the CBDR principle, could be regarded as the third world's attempt to reverse the discriminatory effects of the difference dynamic. In the absence of a new international economic order to correct the economic injustices of the colonial era, differential treatment would ensure that developed countries are accountable for environmental harms they have caused and which they are more capable of addressing.

In Chapter 3 the focus rested on the climate change regime and the CBDR principle. The aim was to determine how developed and developing countries used the CBDR principle to further their interests and how key negotiating positions on the CBDR principle affected the CBDR's normative value. I traced the CBDR principle's journey by analysing the three main climate change agreements: the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol to the UNFCCC (Kyoto Protocol) and the Paris Agreement. Other climate change instruments such as the Copenhagen Accord, the Durban Platform for Enhanced Action, and the Lima Call for Action were briefly discussed in the process of mapping out the CBDR principle's journey through the climate change regime. In particular, the G-77 group strongly influenced the UNFCCC's construction of the CBDR principle and its expression of the historical responsibility component of the principle. However, developed countries especially the United States of America (US), argued that some developing countries

with more enhanced (financial and technological) capabilities should also take on binding commitments. A compromise was created and CBDR was expressed in Article 3 of the UNFCCC as common but differentiated responsibilities and respective capabilities (CBDR-RC). This construction differs from the Rio Declaration's expression of differentiation in Principle 7. Developed countries succeeded in introducing enhanced capabilities as a stand-alone marker for differentiation in the climate change regime. However, the Kyoto Protocol allocated mitigation commitments based on the Rio Declaration's two-fold markers, namely historical responsibility and capabilities. Thus, developed countries took on binding emission reduction targets to reflect their contribution to historical GHG emissions and their advanced capabilities resulting from the early industrialisation.

The next phase of the CBDR principle's journey begun after the Kyoto Protocol failed to drive substantial GHG reductions. Scholars argued that developing countries with increasing emissions should carry a heavier mitigation burden than the rest of the developing world. Brazil, South Africa, India and China (BASIC) stood out at the Conference of the Parties (COP) in Copenhagen. BASIC's GHG emissions are high, but still insignificant when compared, in per capita terms, to developed countries' historical emissions. The Copenhagen COP produced the Copenhagen Accord. Although it carried only political force, the Copenhagen Accord's introduction of nationally appropriate mitigation actions (NAMAs) was the first hint that differentiation in the climate change would take another turn. Eventually, the Paris Agreement was signed in 2015. It ushered in a model of differentiation based on mitigation actions determined by countries' self-determination of their commitments, in light of the national circumstances. In this way, what begun as the CBDR principle in the Rio Declaration turned into CBDR-RC and finally to common but differentiation responsibilities and respective capabilities, in light of different national circumstances (CBDR-RC/NC). This final shift in the

meaning and application of differentiation feeds into the Paris Agreement's core provision on mitigation which is built around countries' voluntary communication of nationally determined contributions (NDCs).

In Chapter 3 the thread of the difference dynamic was further woven into the climate change regime. In particular, the chief argument of developed countries that some high emitters in the third world (such as BASIC) no longer fit under the developing country category refers back the post-colonial definition of poverty. I argued that this argument is partly self-serving because developed countries created the developed/developing country dichotomy to advance the difference dynamic. Thus, developed countries' opposition to developed/developing dichotomy reflects their double standards, because the dichotomy no longer aligns with their economic interests.

The objective of tracing the CBDR principle's journey through climate change negotiations was to isolate and examine the core positions that have influenced the fortunes of the CBDR principle. The findings from my analysis suggested that although most developed countries are reluctant to accept historical responsibility for past emissions, the US position on differentiation presents the most rigid position. I also demonstrated that after the G-77 group's initial role in articulating differentiation in the UNFCCC, BASIC's combined emissions, their political and economic interests have supplanted the collective third world interests. Thus, the US and BASIC positions have impacted the CBDR principle's meaning the most, for their respective economic and political interests. This interest-driven approach to influencing the CBDR principle's normative strength has led to a near erasure of historical contribution as a determinant of differentiation. It was argued further that the relevance of historical responsibility for climate change mitigation should not be viewed singly from the collective

third world perspective. Rather, the bigger perspective from which to assess the relevance of historical responsibility is justice.

In Chapter 4 the goal was to answer the focal question, what aspects of the climate change regime's negotiating process obscure climate justice and to what extent does historical responsibility enhance climate justice? In addition, Chapter 4 briefly explored how historical responsibility can be practicalized for mitigating climate change. I examined climate justice from a procedural and distributional justice angle in relation to the CBDR principle. In terms of procedural justice, the effect of the negotiation process on the CBDR principle's application to mitigation commitments was examined. Chapter 4 provided critical analysis of the effect of constructive ambiguity on negotiations involving the CBDR principle, using the critical discourse analysis approach and frame theory. It was argued that the use of constructive ambiguity to direct the course of the CBDR principle in the negotiation process weakened the climate change regime's justice framework. The three strands of interpretation that constructive ambiguity produced led to the gradual metamorphosis of the CBDR principle.

The Paris Agreement's model of differentiation is couched in terms of self-differentiated nationally determined obligations towards mitigation. I argued that self-differentiation constitutes a metamorphosis of the CBDR principle because self-differentiation has removed historical responsibility from the considerations that determine differential treatment. The Paris Agreement attempts to limit the operation of self-differentiation by introducing other normative benchmarks, such as ambition and progression to ensure that all national mitigation actions reflect their highest possible ambition, which increases over time. However, I argued that the sustained use of constructive ambiguity, even in the face of

indications that disagreements of historical responsibility were worsening over time, created destructive effects.

A modified version of Gupta's GAP analytic tool was used to critically appraise constructive ambiguity, in light of climate change regime's ultimate goal, patterns of inequity and the potential of change. I argued that constructive ambiguity regarding the meaning and application of the CBDR principle hampers the efforts to realise the climate change regime's ultimate goal. The patterns of inequity laced into the negotiating process also enabled negotiators from developed countries to use economic pressure as a way of securing support for ambiguating the CBDR principle. Regarding the climate change regime's potential for change, I argued that Paris Agreement's provisions disregard historical responsibility. This suggests a dismissal of scientific evidence that a large chunk of historical emissions have gone unaccounted for. Instead of clarifying the basis of developed countries' leadership mandate, the Paris Agreement merely acknowledges a slower pace of peaking for third world countries. The arguments summarised above thus support the finding that the use of constructive ambiguity in the negotiation process obscured issues of climate justice.

In terms of distributional justice, the CBDR principle's historical contribution component directly connects with the issues arising from sharing the responsibility to mitigate among countries. Thus, Chapter 4 offered critical analysis of the arguments concerning historical responsibility. I examined arguments favouring historical responsibility and arguments opposing historical responsibility. Based on my critique of both positions, a key finding of chapter 4 was that the three strands of interpretation of differentiation could be viewed as three stages of differentiation. First, differentiation based on historical contribution and advanced capabilities would have driven developed countries' emissions down. The

resulting leadership would then have paved the way for a good faith engagement with high emitting third world countries, by which time the buffer period for peaking in industrialising countries would have closed. After that, there would have been sufficient grounding for high emitters in the third world to reduce their emissions based on their advancing capabilities. Finally, self-differentiation would then operate to gradually migrate other developing countries from voluntary commitments to more stringent mitigation action, in line with the national circumstances. The crucial element for the success of the progression presented rests on implementing historical responsibility. Based on the points summarised above the finding is that distributional justice is relevant and incidental to historical responsibility. Contrary to other findings that historical responsibility only fuels disagreements, historical responsibility could have directed the course of CBDR principle to produce a more just outcome.

Based on the points above, the last part of Chapter 4 engaged the emerging concept of degrowth as one possible route for practicalising historical responsibility in the developed world. It was argued that degrowth policies provide a wider window for developing countries to have more of the remaining carbon space, to continue their development. More importantly, degrowth policies could provide the incentive for developing countries to deconstruct and rebuild a concept of sustainable development that is truly sustainable. I also argued that since the Paris Agreement makes no clear reference to historical responsibility, degrowth offers an ethical leeway for developed countries to take the lead to address climate change.

In Chapter 5, the goal was to examine in what ways climate change litigation could reintroduce historical responsibility into current notions of the CBDR principle. Chapter 5 focused on the potential role the International Court of Justice (ICJ) could play to shape the CBDR principle's meaning and application to mitigation in climate change. It was argued that

the *erga omnes* concept and the no-harm rule are established international legal principles. The ICJ's jurisprudence on *erga omnes* obligations and transboundary harm could be the foundation for an ICJ opinion involving the CBDR principle. In particular, Mayer's restrictive adaptation of the no-harm rule provides grounding for establishing the historical responsibility of developed countries. These arguments are strengthened by the emerging human right to a safe, clean, healthy and sustainable environment, which undergirds the enjoyment of other fundamental human rights. It was argued further that youth and civil society activism, which is evidenced partly by national climate change litigation, validate the existence of the right to a healthy environment, regardless of the outcome of the international law-making process.

Chapter 5 also critiqued the international law jurists' opinions about the ICJ's role concerning climate change. Sands and Bodansky presented a dual angle for assessing the ICJ's adjudicatory potential regarding climate change. Regarding the CBDR principle and adjudicating on the CBDR principle, both authors opined that the ICJ should not stray into matters involving historical responsibility. However, I argued that despite the contestations involving historical responsibility, the leadership role of developed countries and the recognition that peaking of GHG emissions will take longer for third world countries are two fairly uncontested aspects of historical responsibility. The points could therefore form the basis for the ICJ's opinion on the CBDR principle's meaning and relevance for climate change mitigation. Chapter 5 provides grounding for finding that the ICJ can and should step up to provide judicial guidance on the scope and meaning of the CBDR principle for climate change mitigation, particularly through emissions reduction. The no-harm rule, the *erga omnes* concept and the emergent human right to a healthy environment provide sufficient foundation for the ICJ to judicial guidance to drive mitigation.

For analysis of climate change-related litigation in national courts, two cases were selected, namely *Urgenda v The State of Netherlands (Urgenda)* and *Earthlife Africa Johannesburg v Minister of Environmental Affairs and others* (*Thabametsi*). The *Urgenda* decisions showed how the Dutch High Court, Court of Appeal and Supreme Court used their understanding of the CBDR principle in the adjudicatory process. In particular, the High Court's understanding of historical responsibility was crucial to the court's determination that the Netherlands' emission reduction targets fell far below the duty of care owed to the Dutch people. The *Urgenda* decisions have had a rippling effect outside the Netherlands. Other national courts have relied on the courts' reasoning for upholding claims concerning climate change and for testing the adequacy of national actions towards mitigating climate change. Based on *Urgenda*, two points were emphasized. Firstly, the argument that developing countries are increasing their emissions does not absolve developed countries of their historical responsibility and, by extension, their obligation to reduce their emissions. Their historical contribution to causing climate change remains as relevant to the climate change regime's success as the enhanced capabilities that some developing countries may have. Secondly, I argued that national decisions, such as in *Urgenda*, suggest that national courts are in tune with concerns of climate justice. Thus, it is reasonable to infer that the interpretation national courts put on the CBDR principle is informed by a sense of historical responsibility for past GHG emissions. Ultimately, this goes to reinforce the continued relevance of historical responsibility in interpreting the CBDR principle

The decision in *Thabametsi* and subsequent events in South Africa did not call for a direct analysis in relation to the CBDR principle. The complexities of South Africa's heavy reliance on coal to drive industrial and economic growth are heightened by the global urgency of the climate change crisis. In *Thabametsi*, the High Court relied on international legal

principles such as sustainable development and inter-generational equity to affirm its ruling that the Minister of Environmental Affairs failed to exercise her discretionary authority when she granted approval for building the Thabametsi coal plant. The Court held that the Minister's approval did not consider the proposed coal plant's contribution to GHG emissions and its impact on the country's vulnerability to climate change impacts. The decision in *Thabametsi* and subsequent events suggest that national courts in the South recognize the urgency of the climate crisis and therefore require more ambition from their governments, regardless of developing countries' negligible contribution to climate change. Developed countries have skirted around their historical contribution to climate change. Now, a heavier burden falls on the third world to curtail their sovereign right to use their natural resources. In this way, *Thabametsi* adds to complexities arising from the developed countries' delayed leadership towards mitigating climate change. Developed countries would have executed their leadership in recognition of their historical contribution to climate change, and this would have put industrializing third world countries on notice that they would eventually be required to reduce their emissions.

Through an integrated literature review approach and with TWAIL as the main framing lens, this study has shown that historical responsibility is crucial to applying the CBDR principle for climate change mitigation. The study finds that the CBDR principle is part of an attempt to reverse the difference dynamic which characterizes the colonial and post-colonial concept of development. Nevertheless, the contestations surrounding historical responsibility in the climate change regime reveal the interest-driven positions among developed and developing countries, notably the United States of America and the BASIC group of industrializing third world countries. The study further finds that despite these interest driven positions, the CBDR principle's metamorphosis damages the justice pillar of the climate

change regime's normative framework. Although the Paris Agreement regime has almost erased historical responsibility from its framing of the CBDR principle, its continued relevance is not lost. In addition to the emerging discourse on post-growth theories, notably the concept of degrowth in developed countries, non-state actors are using litigation to highlight climate justice issues and propel mitigation action.by the courts

6.3 Recapping Significance of the Study

The study was limited to the historical responsibility component of the CBDR principle. Although references were made to the capability component of the CBDR principle, financial and technological transfers were not the main focus of the study. Some aspects of the study were generalized. This may limit the potential for the study's findings to be applied in country specific literature. Furthermore, the selection of two cases for analysing the role climate change litigation could play in reintroducing historical responsibility into current notions of differentiation could be regarded as restrictive. Despite these limitations, the study has made a significant contribution to existing knowledge by synthesizing relevant, but scattered data.

To recap, the thesis made the following contribution:

A historically sensitive approach was taken in Chapter 2 to explore the ways in which the CBDR principle is connected to the differences set up in the pre-colonial and colonial era to subordinate the third world. Anghie's concept of a dynamic of difference was expanded to cover the emergence of differential treatment in international environmental law. This study answered the call to 'examine the ways in which the North-South divide has compromised the

effectiveness of international environmental law'.[2] Differentiation on the basis of one-sided criteria such as civilization, poverty and (to an extent) sustainability created layers of discrimination which the CBDR principle attempts to address, especially regarding climate change mitigation.

The study built on limited literature review on constructive ambiguity in the climate change regime and examined the linguistic tools negotiators deployed to ambiguate the CBDR principle. This was done through the lens of frame theory as well as critical discourse analysis. In addition the study evaluated what impact the ambiguation had on climate justice by extending Gupta's analytic TWAIL approach. A modified version of Gupta's GAP analysis is used to determine whether ambiguation has been useful for shaping the CBDR principle. In her article, Gupta focuses on bias emanating from scholarly arguments about interpreting climate change legal instruments.[3] However, she does not reference or point to a substantial body of literature to signal the bias she claims.[4] Although it is possible to conduct extensive literature review to assess her claim of scholarly bias against third world interests, this study did not cover such a wide scope. A more modest approach was taken whereby the 'arguments' component of Gupta's GAP analytic tool was replaced with another analytic marker – potential for change. The potential for change marker added value to existing knowledge on assessing the climate change regime's potential for change, to advance third world concerns and address climate justice.

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[2] S Attapatu & CG Gonzalez 'The north-south divide in international environmental law: Framing the issues' in S Alam et al (eds), *International Environmental Law and the Global South* (2015)1, 2.
[3] J Gupta 'Climate change: A GAP Analysis based on Third World Approaches to International Law' (2010) 53 *German Yearbook of International Law* 341,349.Gupta notes that assessing whether the arguments show a bias requires a thorough understanding of the arguments of scholars.
[4] Ibid 366-368.

The study adds value to academic discourse on historical responsibility by synthesizing and merging arguments that show historical responsibility's relevance to climate justice and emerging post-growth concepts. In particular, the study considered what potential emerging theories on degrowth may have for putting historical responsibility into practice in the developed world.

The study also contributed to existing knowledge on national and international litigation on climate-related issues. It contributed by placing the CBDR principle's initial intendment within the legal reasoning behind the selected decisions discussed in Chapter 5. The study also critiqued and complemented literature concerning the possibility that an ICJ opinion could be beneficial, particularly regarding the scope and application of the CBDR principle for mitigation.

6.4 Recommendations and Suggestions for Future Research

Climate change has short-term and long-term consequences. The present generation has to find ways of limiting GHG emissions and also safeguard the climate system for future generations. The inequalities and injustice that characterize climate change and its impacts feed into the seemingly overused North-South dichotomy. Nevertheless, the climate change regime's inability to drive enough ambition towards rapid cuts in emissions calls for a rethinking on how the regime has influenced the meaning and basis of differential treatment. The following recommendations and suggestions for future research should therefore be viewed in light of the ultimate goal of limiting global temperature increase to 1.5 degrees Celcius:

1. It is recommended that research on third world positions on climate change and mitigation should account for the pre-colonial and colonial influence on the development of international environmental law. The third-world sensitive analysis should go beyond merely linking differential treatment to calls for a new international economic order. In this regard, more research is required to incorporate TWAIL into climate change law analysis. This is imperative because third world countries' concerns must be given due attention if the Paris Agreement is to succeed in addressing climate change.

2. It is also recommended that policymakers and state representatives involved in the negotiation process should consider the destructive effects of using constructive ambiguity. Specifically, constructive ambiguity should not be used to delay the process of confronting difficult and contentious issues involving climate change mitigation. In this vein, state representatives should consider using other dispute resolution mechanisms to resolve teething problems regarding loss and damage and compensation thereof. Further research could be conducted to examine the interconnections between ambiguating the CBDR principle and implementing Article 8 of the Paris Agreement which deals with loss and damage.

3. Climate change related litigation is gaining attention, which makes the ICJ's silence even more obvious. The legal issues concerning climate change are ripe for the ICJ's consideration, even if advisory in nature. It is recommended that, through research and publication, more scholars and civil society groups should continue to proffer opinions regarding the potential benefits of the ICJ's intervention. A sustained academic and

civic engagement on the ICJ's role in shaping international law regarding climate change will help to prepare the ICJ for adjudicating on climate change.

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