State Responsibility for Internal Displacements Caused by Climate Change

気候変動による国内強制移動の国家責任

A Dissertation Presented to
the Graduate School of Arts and Sciences,
International Christian University,
for the Degree of Doctor of Philosophy

国際基督教大学 大学院
アーツ・サイエンス研究科提出博士論文

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Abbreviations

AC	Adaptation Committee
AOSIS	Alliance of Small Island States
APTH	Articles on Prevention of Transboundary Harm from Hazardous Activities
ATCM	Antarctic Treaty Consultative Meeting
ATS	Antarctic Treaty System
BAMS	Bulletin of the American Meteorological Society
CBDR	Common but Differentiated Responsibility
COP	Conference of Parties
CRC	Committee on the Rights of the Child
EPA	US Environmental Protection Agency
FAR	IPCC First Assessment Report
GCF	Green Climate Fund
GHG	Greenhouse Gas
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit GmbH
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
IDMC	Internal Displacement Monitoring Centre
IDP	Internally Displaced Person
IEL	International Environmental Law
IHRL	International Human Rights Law
ICJ	International Court of Justice
ILA	International Law Association
ILC	International Law Commission
ILC ARS	Draft Articles on Responsibility of States for Internationally Wrongful Acts
IOM	International Organisation for Migration
IPCC	Intergovernmental Panel on Climate Change
IRL	International Refugee Law
LDC	Least Developed Countries
LDCF	Least Developed Countries Fund
LEG	Least Developed Countries Expert Group
NAP	National Adaptation Plan
NAPA	National Adaptation Programmes of Action
NDC	Nationally Determined Contribution
PCIJ	Permanent Court of International Justice
SST	Sea Surface Temperature
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCLOS	UN Convention on the Law of the Seas
UNGA	UN General Assembly
UNFCCC	UN Framework Convention on Climate Change
UNHCR	UN High Commission for Refugees
WIM	Warsaw International Mechanism

Abstract

This paper explores the role of international law, namely, State responsibility, in providing justice for internally displaced persons whose movement was forced by climate change. There is no debate that human activity is the most significant driver of climate change, and that climate change is creating environmental hazards that are having a direct, deadly impact on human health and safety. As people are forced to migrate in response to these environmental realities, and as the global North continually fails to act with the necessary urgency to address the growing crisis, legal remedies must be engaged to achieve justice. With displacements related to environmental factors now surpassing those caused by conflict or human rights abuses, it is imperative that this category of migration receive attention. This paper begins with an overview of the scope of the problem of climate-induced displacement with a focus on those internally displaced. The failure of the climate regime to meaningfully address this issue then sets the context within which the research questions emerge. These questions start by asking what is the theoretical framework of State Responsibility that makes it appropriate in the context of climate change and displacement. Chapter 3 answers this question by looking at how the principle's relevant elements have been historically understood, particularly through the International Law Commission's (ILC) codification of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARS). Then, one must determine whether there is a theoretical basis for identifying obligations related to the prohibition on transboundary harm as an internationally wrongful act in the context of climate change and displacement. Chapter 4 answers this question by establishing that obligations related to the prohibition on transboundary harm are customary law, and therefore binding, and these represent international obligations of which a breach would constitute an internationally wrongful act. Particular attention is given to the obligation to exercise due diligence, or a certain standard of care, and the theoretical framework for determining what that standard is. The final question to be answered, then, is how to apply State responsibility for transboundary harm as a remedy for States hosting climate-induced IDPs. Chapter 5 will apply the theoretical framework developed through the earlier chapters to the specific case of climate-induced displacement, making the argument that the global North owes reparations to the global South. This chapter argues that State responsibility must be assigned for the internationally wrongful act of breaching obligations owed through the prohibition on transboundary harm. It is shown here that the development of the climate regime establishes a standard of care, a level of diligence owed, and that the global North has failed to meet this standard. In the context of displacements caused by climate change, this paper shows the shortcomings of the climate regime, the appropriateness of pursuing legal action to assign State responsibility, that violating obligations arising from the prohibition on transboundary harm constitutes an internationally wrongful act, and that the global North owes reparations to the global South under existing international law.

Introduction

"The gravest effects of climate change may be those on human migration as millions will be displaced",[1] according to a UN report from 1990. Climate change is leading to increased migration on numerous levels. International society again recognized this matter in signing the Global Compact on Refugees in 2018 which included the acknowledgement that 'climate, environmental degradation and natural disasters increasingly interact with the drivers of refugee movements.'[2] Despite this widespread understanding that climate change is increasingly responsible for human displacement, there has not yet been any extensive research into the role of international law in protecting persons displaced by the adverse effects of climate change and who have not crossed an international frontier. This paper aims to fill that gap by identifying the potential for international law to provide a legal remedy for States hosting internally displaced persons (IDPs) who whose displacement can be linked to the effects of climate change. This includes asking whether the theoretical framework of State responsibility[3] makes it the appropriate principle to apply as a remedy. Then, the question arises as to whether there is a theoretical basis for identifying obligations related to the prohibition on transboundary harm as an internationally wrongful act. Finally, can State responsibility for transboundary harm be applied as a remedy for States hosting climate-induced IDPs?

Certainly any attempt to demand reparations will face challenges under the principle of non-retrospectivity, or historical responsibility, in relation to emissions. Some scholars have accepted the claims of the global North[4] that they cannot be held accountable for actions that contributed to climate change in the past. For example, Bou-Habib argues that a State's ability to pay should be the basis for assigning duty rather than their historical actions.[5] A very insightful investigation into the history of debates on this topic within the climate regime is provided by Friman and Hjerpe.[6] They first establish the importance of finding international agreement on the understanding of historical responsibility and then turn to a history of the discussions. In noting that assigning responsibility indicates obligation but not necessarily commitment, Friman and Hjerpe recognise that 'principles on distribution of responsibilities generally are intended to guide operative text that specifies commitments.'[7] Even if one

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[1] Piguet E., 'Climate Change and Forced Migration', New Issues in Refugee Research, Research Paper 153 (UNHCR, 2008) 1.

[2] Global Compact on Refugees, UN doc A/73/12 (Part II) (2 August 2018); Global Compact for Safe, Orderly and Regular Migration, UN doc A/RES/73/195 (19 December 2018), D8.

[3] 'Responsibility' is used throughout this paper as a technical legal term to refer to 'the incidence and consequences of illegal acts', as defined in Brownlie I, *Brownlie's Principles of Public International Law* (Oxford University Press, 2012) 420. By contrast, an 'obligation' in this paper refers to 'a legal duty, by which a person is bound to do or not to do a certain thing', as defined by *Black's Law Dictionary* (2nd edition, online). https://thelawdictionary.org/obligation/ accessed 4 December 2022. In this definition 'person' refers to the State, as discussed in detail at (n 218). This paper also uses 'duty' to refer to a 'requirement to perform some conduct required by law', as defined by Legal Information Institute, *Wex Online Legal Dictionary and Encyclopedia* (Cornell Law School). In this sense, duty and obligation are both used to refer to legal requirements, and responsibility refers to breaches and consequences of those requirements.

[4] Here the global North refers to Annex II Parties in the UNFCCC. While there is room for legitimate debate on the inclusion of other States within this term, the Annex II Parties are uncontroversially the most highly developed economies, have accepted that they are disproportionately responsible for GHG emissions, and are identified explicitly in the UNFCCC. A more in-depth debate on the matter is not germane to this paper.

[5] Bou-Habib P, 'Climate Justice and Historical Responsibility' (27 June 2019) 81 The Journal of Politics 4.

[6] Friman M, and Hjerpe M, 'Agreement, Significance, and Understandings of Historical Responsibility in Climate Change Negotiations' (4 May 2015) 15 Climate Policy 3. (hereafter Friman and Hjerpe)

[7] Friman and Hjerpe (n 6) 5.

accepted the argument that capacity to act should be the primary determinant of responsibility, the authors note that 'differentiated capacities to act may have been accumulated unjustly, e.g. through imperialism or colonialism' historically.[8] They then argue that 'unequal exchange' and 'unfair power relationships' should be accounted for in international agreements.[9] Finally, in noting the lack of clarity in defining these concepts in the United Nations Framework Convention on Climate Change (UNFCCC), the authors draw from the Preamble to inform an understanding of common but differentiated responsibility (CBDR) and equity principles. They interpret guidance on these principles to be 'historic and current emissions weighted against populations, and accounting for needs for development, particularly in developing countries.'[10] Therefore, defining historical responsibility is critical in advancing the regime generally and in any discussion of reparations particularly. For the purposes of this paper, it is accepted that the well-documented scientific and political developments from about 1990 serve as a reasonable point from which to begin discussions. It would be conceivable to argue that violations occurred before this time, but the evidence supporting obligations from this period onward is more conclusive.

Addressing this issue requires understanding the background in two parts: climate change and internal displacement. After providing the necessary contextual and theoretical foundations, this paper will provide commentary and analysis on the principle of State responsibility, the obligation to prevent transboundary harm, and how these apply to seeking justice for contributions to climate change. It will then be shown that internal displacements caused by climate change constitute a demonstrable material injury requiring reparations. This theoretical framework can be applied to specific case studies to demonstrate that States hosting climate-induced IDPs can invoke the responsibility the State of the global North to pursue remedies for breaches of international legal obligations.

The structure of this paper is designed to move from the theoretical to the practical and also from a broad to a narrower lens. After a brief introduction and a review of the existing literature, there is an explanation of the methodological approach employed by the author. Shifting slightly away from the theoretical discussions, the next chapter establishes the background against which this research is set, including a very general overview of the current climate crisis and internal displacements. There is then a chapter outlining the general principle of State responsibility and developing a framework to be applied to the climate crisis and the IDPs caused by it. A discussion of the prohibition on transboundary harm then establishes the wrongful act that triggers State responsibility in this context. Finally, the concepts built up lead to an exploration of the manner in which the theoretical framework can be applied to the current climate crisis with a particular focus on internal displacement as a material injury.

[8] Friman and Hjerpe (n 6) 5.
[9] Friman and Hjerpe (n 6) 6.
[10] Friman and Hjerpe (n 6) 6.

Chapter 1 - Approach

1.1 Structure of the Paper

This paper aims to build a case for assigning State responsibility for climate change based on obligations related to the prohibition on transboundary harm, supported by the United Nations Framework Convention on Climate Change (UNFCCC) obligations, acknowledgements, and understandings, and establishing that injured States suffer damages when their subjects are internally displaced. The methodology is described in the following section, then the theoretical approach is briefly described. Concluding this chapter is a limited literature review highlighting some examples of how the topic has generally been discussed in other academic works.

Chapter 2 begins with a background of the issues of climate change, how the growing climate crisis is increasingly forcing displacements, and how we conceptualise the various types of displacements. Then the chapter establishes the appropriateness of seeking reparations through legal remedies by highlighting the shortcomings of the climate regime, the justiciability of the climate crisis, and the appropriateness of bringing the matter to the courts. It is hoped that by the end of the second chapter readers can clearly see that the matter of climate-induced displacement is one of global concern that needs urgent attention. Further, one should see that internally displaced persons (IDPs) reflect a material injury for which host States are owed reparations. Additionally, the discussion on the evolution of the climate regime will establish two important points for this paper. First, that the three-decade history of the regime's development from the UNFCCC to the present makes clear which States are most responsible for causing the climate crisis and that they knew the dangers they were creating. Second, it will clearly show how the nominal efforts to address the adverse effects of climate change offered from the regime have not provided any relief in practice, and legal remedies are the most appropriate path forward for developing States.

With the first chapter establishing the overall approach to the topic, and chapter 2 providing background and explaining the significance of the topic, Chapter 3 then focuses attention on the legal foundation of the paper's central argument; State responsibility. Key elements of the principle of State responsibility related to the case of climate-induced IDPs are highlighted and explained through an overview of the codification process undertaken by the International Law Commission. The elements discussed are all of specific importance to assigning State responsibility in the case of climate-induced IDPs. Of course, one the central elements of the principle is that a wrongful act or omission has occurred, and this topic is intensely discussed in Chapter 4.

Chapter 4 asserts that the particular international obligation breached by the States most responsible for climate change is the obligation to prevent transboundary harm (the 'no-harm' principle). This chapter will explore the nature of this principle, its place in customary law, and what obligations it creates. This will establish the grounds on which injured States may seek legal remedies in the form of reparations for material injuries caused by contributions to climate change.

With the legal arguments firmly established in principle, chapter 5 will show how these arguments can be applied in practice to the issue of climate change broadly and climate-induced IDPs in particular. The chapter refers back to the elements of State responsibility outlined in chapter 3, as well as the specific wrongful acts established in chapter 4, in order to

demonstrate how State responsibility applies to the climate crisis and to climate-induced displacements. A case study of Fiji's challenges facing rising sea levels then provides a specific example through which to demonstrate how the arguments can be applied in practice.

It is hoped that this structure provides an easy to follow narrative through which to explore the topic. This structure begins with the theoretical and more abstract matters to make clear the approach being employed. Then a broad lens is used to highlight the background, narrowing to relevant but still general principles, and finally narrowing further to focus on the specific questions asked in this paper. What is the role of international law in protecting climate-induced IDPs? Is the climate regime addressing this growing problem? If not, are there existing legal pathways for remedies? What is revealed is that one key role for international law is to provide a remedy for States suffering internal displacements, that the climate regime has failed to address displacement in any substantive way, and that State responsibility offers a legal means to seek justice.

1.2 Methodology

The methodology employed in the research behind this paper was primarily desk-based. It included investigating the most appropriate theoretical approaches, which led to a deeper understanding of the relationship between social constructivism and legal positivism and, ultimately, why the latter is the most appropriate view for addressing the main themes of this paper. A literature review on existing works related to the issues at hand, including the questions left unanswered, revealed research questions in need of answers, like whether and to what extent the climate regime was addressing the protection of climate-induced IDPs, what role international law might play, and what legal options currently exist to pursue justice for those injured by the climate crisis. Further, it included desk-based research into the institutions, policies, and laws, including jurisprudence, needed to first understand the shortcomings in the existing systems and, second, to develop the legal arguments central to overcoming those shortcomings. A limited inquiry into the potential role of attribution studies provided crucial insights into the role of natural scientists in establishing grounds for climate justice. Finally, a case study based on field research provides a practical example of how the approach might be utilised. This section explains that methodology and how it contributes to the final paper.

As this paper aims to build a case for assigning State responsibility for climate change based on obligations related to transboundary harm and injuries related to displacement, the research methods employed began with determining a theoretical approach. This is included a study of research into existing understandings of social constructivism and legal positivism in order to determine the most appropriate approach. The results are described in the following sections, but it is worth noting here that a desk-based study of the philosophical and theoretical approaches was the method for establishing that the questions in this paper were best addressed from a legal positivist view.

After establishing the theoretical framework for approaching the topic, the desk-based research then focused on international law and its relation to the issue of climate-induced displacement. Primary sources of international human rights law and refugee law, scholarly commentary, and existing jurisprudence all contributed to the understanding of how each of these fields related to climate change and displacement. An overview of some of the works on these topics is found Section 1.4 Literature Review. This section also involved an extensive literature review of scholarly works related to international environmental law (IEL),

including jurisprudence of international disputes concerning environmental issues, in order to gain insights into how the laws and legal principles have been engaged historically. While both human rights and refugee law can be traced to a manageable number of sources, IEL is a collection of hundreds of treaties. What became clear was the particular relevance of more on general principles that have emerged, particularly the obligation to prevent transboundary harm. A defence of those principles as customary law is provided in Section 4.2. Finally, an exploration of the emergence and codification of the principle of State responsibility, which is drawn from primary sources, scholarly commentary, and existing jurisprudence, helps to illustrate the most widely accepted understanding of responsibility, injury, and reparations in both theory and practice.

The legal arguments rely heavily on the International Law Commission's (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ARS)[11] establishing the grounds for applying responsibility. The paper focuses mainly on the violation of the prohibition of transboundary harm as a breach of an international obligation demanding the fixing of State responsibility. The arguments that both the obligations of conduct (due diligence) and result (material harm) are binding on all States, that violations of the principle constitute legal and, potentially, material injuries, and that reparations must follow from such violations are then built on primary sources of law, existing case law, and commentary from legal scholars. After firmly establishing these principles as settled matters of international law, they are then applied to the current climate crisis.

With an understanding of the theoretical approach and the general legal arguments of how State responsibility could be applied in cases concerning climate-induced displacement, the next step in developing this paper was to apply this model to the case of planned relocations in Fiji. This case was chosen by identifying a State that was experiencing internal displacements due to the adverse effects of climate change and that could be recognised as a non-Annex II[12] country within the UNFCCC. As virtually all States around the world will be hosting some climate-induced IDPs at any given time, the former leaves too many States from which to choose. Likewise, the latter category still leaves a majority of the world (essentially any developing country). Because this research aims to understand the potential for claiming reparations, it was important to choose a State that could demonstrate material injury caused by the displacement of its subjects. States that generally respect the human rights of their subjects, including provision of basic services, and those making best efforts to address the needs of the displaced, were deemed most appropriate. In summary, the case study sought to highlight a low-emitting State with the will to protect the rights of its subjects and that is making best efforts to address the needs of climate-induced IDPs. Fiji provided a useful case to demonstrate many of the arguments developed through this research.

One significant challenge uncovered in researching this paper was establishing causal links between specific displacements and contributions to climate change by the global North. It is widely accepted and hardly controversial to assert that climate change increases the frequency and intensity of severe weather events, but it is foreseeable that potentially responsible States could argue that these events have always occurred and, therefore, no specific event can be definitively linked to climate change. This is where attribution studies can be useful. At the time of writing, the author has not found any examples of attribution studies being used in this

[11] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries - 2001' (2001) Yearbook of the International Law Commission 2, Art. 2(a). (hereafter ILC ARS) accessed https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf 30 June 2022

[12] See note 4.

way. The scope of this paper does not extend to a detailed inquiry into attribution studies and their use of scientific models to determine the degree to which specific weather events can be attributed to climate change. However, it is noted here that conducting and applying attribution studies to specific cases can contribute to the understanding of whether climate change can be causally linked to specific displacements. The degree to which this link can be established would bear significant influence on the potential for reparations. Only a brief discussion of this topic is included in this paper, but the particular relevance to the arguments is evident in that while legal injury may be established by a violation of conduct, a material injury will require proof of injury. The impact of attribution studies may be the difference between the two, so it was worth noting here in the explanation of the methodology that consideration was given to the potentially significant role of attribution studies in solidifying a legal claim for reparations.

It is hoped, finally, that this methodological approach proves the most appropriate in search of answers to the research questions asked in this paper. Desk-based research into various academic approaches helped identify the most useful means of conducting this inquiry. Conducting a literature review of existing scholarship in various fields related to this paper's focus revealed the questions that have been left unanswered. Research into both legal instruments and law in practice helped identify the most relevant legal arguments. And a brief exploration of the natural sciences' development of attribution studies highlights a potential tool to overcome the challenge of establishing causal links. Finally, field-based research in Fiji provided insights into how the model developed in this paper might be applied in practice.

1.3 Theoretical Approach

One may find various theoretical approaches relevant to an investigation of the scope of this paper. The disciple and specific research questions may all influence the determination of which is best for the specific line of inquiry. As this paper explores questions of international law, one may reasonably consider whether a traditional legal approach like positivism or a broader conceptualisation like social constructivism is most appropriate. This section introduces the potential role for social constructivist approaches to legal questions, and then clarifies why a legal positivist position has been taken in this paper.

Put simply, social constructivism is useful in investigating how law is made, how it evolves over time and, possibly, even how it is interpreted. Notably, 'from Weber, constructivists draw the insight that the social world is constructed by intersubjective understandings,' and that 'these understandings are neither external to individuals (i.e., purely material) nor are they simply inside the heads of individuals (i.e., purely subjective).'[13] John Searle furthered this understanding by arguing 'that "facts" are not all material, instead distinguishing among brute facts, social facts, and institutional facts.'[14] Brunnée and Toope then use Searle's description of a 'background' that shapes all decision making to better understand State behaviour. Importantly, Brunnée and Toope describe law in practice as something that "depends less on the properties of the rule than on the properties of the relationship of the actor to the community".'[15]

[13] Brunnée J and Toope S, 'Constructivism and International Law'. (Jeffrey L. Dunoff and Mark A. Pollack, eds) *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, Cambridge, 2012) 122. (hereafter Brunnée and Toope)
[14] Brunnée and Toope (n 13) 122.
[15] Brunnée and Toope (n 13) 133.

Social constructivists tend to struggle with applying their theory to international law. 'Most [constructivist] scholarship [on international law] focuses on processes and practices of actors' engagement with international law' rather than paying 'attention to how legal norms (as opposed to norms more broadly speaking) are generated' or developing 'a theory of law itself.'[16] A further contradiction found throughout much of the constructivist scholarship is seen when 'legal norms are assumed to operate like social norms, while it appears that "law" itself is assumed to be a formal category rather than a social construct.'[17] And according to Onuf, 'sociologically oriented theorists focus on 'why and how the "law" comes about' but neglect 'the ends and consequences of that process'.'[18] This vein of discourse on constructivist theory is useful in understanding the interconnectedness of individuals to social structures, which can be relevant to understanding how norms develop, laws emerge, and behaviour changes over time, but it is less appropriate for an evaluation of how existing law relates to a specific question.

By contrast, for positivists the 'structure of 'fixed rules' dominates their attention.'[19] The most salient point relating to scholarly approaches based in legal positivism may be Hart's insistence on considering the law as it is, not as it ought to be.[20] Research into the effective functioning of law must, by necessity, differ in its approach from research into follow-up questions about how to address failings in the law. The first seeks to evaluate while the second seeks to formulate. This paper seeks to evaluate the effective functioning of law by developing the legal arguments for applying existing law to the case of climate-induced IDPs without postulating on whether new laws are needed.

This paper applies the orthodox legal positivist approach that, as Austin insisted, law can be reduced to dictates issued by a sovereign and backed by threats.[21] In modern international law, this formulation remains correct, but the concepts of sovereigns and threats need to be more broadly understood. The sovereign can be understood as sources of law rather than monarchs, and these sources can be defined according to Searle's assertion of the need for continued collective acceptance of the validity of a rule and Hart's rule of recognition. There is no requirement that the rule of recognition refer to only one source. In international law, Hart's rule can apply to a collection of sources, including the Peace of Westphalia, the UN Charter, the Vienna Convention,[22] customary law, and any other sources that may fit the criteria for the rule of recognition. Likewise, the concept of threat need only be more broadly understood as consequences; for example, reparations, satisfaction or, in more extreme cases, sanctions or even the use of force.

Therefore, it is clear that the particular focus of this paper, the role of international law in protecting climate-induced IDPs, requires an approach rooted primarily in positivist theory. The research is fundamentally an effort to evaluate the law as it is, not as it ought to be, a function for which legal positivism is particularly well-equipped. The paper is less concerned with the formation of law but rather with its implementation in practice. It is presupposed that

[16] Brunnée and Toope (n 13) 135.
[17] Brunnée and Toope (n 13) 136.
[18] Onuf N, 'The Constitution of International Society' (1 January 1994) 5 European Journal of International Law 1, 5. (hereafter Onuf 1994)
[19] Onuf 1994 (n 18) 4-5.
[20] Totaro M, 'Legal Positivism, Constructivism, and International Human Rights Law: The Case of Participatory Development', [2 July 2008] Opinio Juris.
[21] Hart HLA, *The Concept of Law*, (3rd ed,Oxford University Press, Oxford, 2012) 6.
[22] UN, *Vienna Convention on the Law of Treaties* (23 May 1969) 1155 UNTS 331. (hereafter Vienna Convention)

States, the subjects of international law, are obligated to follow it, as will be discussed in relation to State responsibility that is, itself, rooted in legal obligations. This focus on State behaviour and formal legal obligations will benefit from an approach more closely aligned with positivism than constructivism. Constructivism would be useful in examinations into how to develop new legal or policy approaches to the issue, but that is beyond the scope of this paper. In summary, this research will rely most heavily on legal positivist approach, but there are areas where constructivist ideas will be useful.

1.4 Literature Review

This paper may be seen as an effort to portray internal displacement as a matter of climate justice. Some scholars, particularly those coming from environmental law and climate change policy, focus on climate change and address displacement as one of many effects of the climate crisis. Others, particularly those coming from fields like refugee studies, tend to focus more on displacement with a secondary interest in climate change as one of many drivers of migration. The following sections offer a non-exhaustive overview of works related to the topic with a particular focus on the works that have most influenced this paper. The aim of this review is to illustrate how the subject has been taken up by other scholars and what questions they have addressed, what questions remain to be answered, and how this paper might be situated within this field of study.

What is ultimately revealed is that scholars who focus more on the environmental questions have already made significant and intriguing arguments about possible legal approaches to seeking climate justice, but these focus on the failures of high-emitting States to reduce their contributions to climate change. In this way, these arguments can be seen as addressing the concept of greenhouse gas (GHG) emissions as a legal injury, but not necessarily a material one.[23] These works also tend to focus on more on State responsibility and less on the role of individuals or non-State actors. Where concern for the individual is raised, it is the context of understanding the place of human rights within environmental law or climate change policy.

Those coming from the field of refugee studies and related areas, by contrast, tend to focus more on the protection needs of the individuals displaced, thus a focus almost exclusively on the individual and their rights. When the accountability of States is raised, it is in relation to their obligations to ensure the rights of individuals. In this way, those fields related to refugee studies have not yet taken up the question of accountability for the causes of displacement.

Uniquely, this paper focuses exclusively on the role of States, both in their accountability for causing the climate crisis and for the rights and obligations toward their own subjects. This may be seen as bridging these two approaches by adopting the efforts of environmental and climate change scholars to assign responsibility to those driving displacement and the rights of the States suffering displacements to protect their own subjects. Through its assertion that the most appropriate role for international law in this context is to provide a remedy for the States whose subjects are being displaced by holding accountable the States most responsible for the climate crisis that is forcing displacement, this paper offers a way of unifying these approaches: it assigns both the roles of rights holders and those of duty bearers to States rather than individuals. Most importantly, and in contrast to other related discussions on State responsibility for climate change, this paper identifies internal displacement due to the

[23] See Section 3.8.2 Material and Legal Injuries.

adverse effects of climate change as a particular material injury to the State in which people have been displaced.

This review provides a brief mention of some of the works relating to each of these concepts. It begins with mentioning a few works on the development of the climate regime that influenced this paper. This is not a very inclusive list of the extensive literature that exists, but it highlights some background information that is discussed in more detail in later sections on the climate regime. This section of the review is followed by notes on how scholars have sought to assign responsibility to States for their roles in contributing to the climate crisis. Scholarship on the science of climate change has been excluded as it is beyond debate. Next is a short overview of some works exploring the place of human rights in climate change discussions. The review ends with an overview of some of the influential works on displacement. Finally, the conclusion will offer the research questions taken up in this paper.

1.4.1 Literature on the Development of the Climate Regime

The aim of this section is to briefly mention some of the works related to climate justice that have influenced this paper. Doing so then reveals the questions not addressed in the existing literature. Significantly, these works have approached the issue with a focus on the responsibility of the States most egregiously contributing to the causes of climate change, and on the legal injury that is their failure to heed scientific recommendations on reducing GHG emissions. This is by no means an exhaustive list of every work in this field, but it offers a general overview of the prevailing discussions in the field. The picture that emerges is one of significant advances in arguments for assigning State responsibility for the legal injury of failing to mitigate the climate crisis, but a lack of applying those arguments to the material injury of internal displacements in other States.

One might first look at the emergence and evolution of the climate regime itself. Birnie, Boyle, and Redgwell's textbook on international environmental law notes that the idea for an international convention on climate change arose at a 'meeting of experts in Ottawa in 1989', followed by the Intergovernmental Panel on Climate Change (IPCC) in 1990, with the UN General Assembly initiating negotiations later in 1990, and culminating with the UNFCCC[24] in 1992.[25] A useful overview of the three pillars of the climate regime is provided by Broberg.[26] Both Persson[27] and Schipper[28] then offer helpful explorations of the emergence and development of adaptation as the second pillar of the climate regime. Finally, insightful

[24] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107. (hereafter UNFCCC)
[25] Birnie P, Boyle A, and Redgwell C, *International Law and the Environment* (OUP, Oxford, 2018) 147, 356. (hereafter Birnie, et al)
[26] Broberg M, 'Interpreting the UNFCCC's Provisions on "Mitigation" and "Adaptation" in Light of the Paris Agreement's Provision on "Loss and Damage"' (27 May 2020) 20 Climate Policy 5, 528. (hereafter Broberg)
[27] Persson Å, 'Global Adaptation Governance: An Emerging but Contested Domain' (2019) 10 *WIREs Climate Change* 6, 4. <https://onlinelibrary.wiley.com/doi/10.1002/wcc.618#:~:text=Global%20adaptation%20governance%20is%20defined,adaptation%20as%20a%20public%20goal.> accessed 21 February 2021 (hereafter Persson)
[28] Schipper ELF, 'Conceptual History of Adaptation in the UNFCCC Process' (2006) 15 Review of European Community & International Environmental Law 1. (hereafter Schipper)

commentaries on loss and damage in the climate regime can be found from Mace and Verheyen.[29]

Bernauer and Schaffer[30] rightly discuss the challenges to enforcement in international regimes. They recognize that 'the climate regime has no centralized enforcement mechanisms'[31] and, instead, relies on 'decentralized enforcement in the form of political and economic pressure imposed by governments and other actors'.[32] This reflects a recognition that, while legally-binding instruments may create an environment in which countries feel they will not be disadvantaged by reducing GHG emissions, the enforcement element of the regime may still need support from a social constructivist approach aimed at changing the behaviour of those failing to comply. However, this view fails to account for the potential role of existing international legal instruments and mechanisms for assigning State responsibility, recognising injured States, and paying reparations. What is significant is that the authors correctly note the absence of specific enforcement mechanisms in the climate regime and that reality leaves open the possibility of pursuing remedies through more general mechanisms.

Another important area of existing literature relevant to this paper is that done on loss and damage within the climate regime. Loss and damage is a relatively new concept in climate change governance. It has emerged as a third pillar alongside mitigation and adaptation. The latter has been the source of much of the discussion on the human rights impacts brought about by climate change and its adverse effects, as well as from efforts to address climate change. What this review shows is that adaptation might be interpreted as a kind of acceptance of the inevitability of climate change's impacts on many communities and the measures to manage those effects. By contrast, loss and damage offers an opportunity to investigate who are the culprits and who are the victims in a system of redress when adaptation is not possible. In more formal terms, this pursuit involves identifying duty bearers (responsible States) and rights holders (injured States). The possibilities for research in this area are of critical importance, especially as it relates to IDPs. If State responsibility can be assigned, then reparations to the injured must necessarily follow. While this field is still emerging, it may be here that legal positivist approaches are most critical. As Brownlie stated in reference to state responsibility for pollution, 'I think it is still true to say that in a general way, both the layperson and the lawyer pay more attention to policy issues if somewhere ahead there is the defined possibility of liability or responsibility.'[33] The same logic certainly applies to climate change governance, too.

Works like these, as well as the source materials like the IPCC, the UNFCCC and its COPs (Conference of Parties), offer sufficient evidence for the realities of climate change, the worldwide understanding that has existed for decades, and institutionalising an international regime aimed at addressing climate change. There is no need for further proof of this background, but it is worth briefly noting that extensive literature does exist on the subject and these few mentioned here have provided useful insights for this paper. The questions they leave open, and that this paper aims to answer, are whether and to what extent the climate

[29] Mace M, and Verheyen R, 'Loss, Damage and Responsibility after COP21: All Options Open for the Paris Agreement' [1 July 2016] Review of European, Comparative & International Environmental Law 25, 198. (hereafter Mace and Verheyen)
[30] Bernauer, T and Schaffer, LM, 'Climate Change Governance' in Levi-Faur D (ed) *The Oxford Handbook of Governance* (Oxford University Press, Oxford 2012). (hereafter Bernauer and Schaffer)
[31] Bernauer and Schaffer (n 30) 446
[32] Bernauer and Schaffer (n 30) 446
[33] Brownlie I, 'State Responsibility and International Pollution: A Practical Perspective' in Daniel Barstow Magraw (ed) *International Law and Pollution* (University of Pennsylvania Press, 1991) 120-125, 121.

regime is addressing loss and damage, specifically the loss and damage associated with displacement.

1.4.2 Literature on Accountability for Climate Change

This section highlights a few works that have explored ways of holding emitting States accountable for their contributions to climate change. It is far from exhaustive, but it offers an overview of the academic approach to this topic. What is emerges is a field that has focused largely on the wrongfulness of the responsible States, less on the damage to injured States, and almost not at all to the specific injury of displacement. As noted, this reflects a general tendency toward addressing the wrongfulness of contributing to the climate crisis as a legal injury instead of focusing on specific material injuries. What is missing in this existing literature is an argument for assigning responsibility to high-emitting States, the global North, for the material injury of forcing internal displacements in the global South.

Perhaps the most in-depth analysis of State responsibility for climate change is provided by Verheyen.[34] She offers a detailed exploration of the obligations created by the climate regime on States, as well as customary rules like the no-harm principle. While this work was of great value to the current paper, it focused much more on the obligations of conduct than those of results (material injuries), and it failed to mention displacement at all as a form of damage resulting from climate change. Another useful work on States responsibility for climate change generally is provided by Voight,[35] though even this work fails to include displacement as a material injury. Another example of literature aimed at climate justice comes from Jervan, who goes beyond the climate regime itself to offer a useful study into the jurisprudence of transboundary harm[36] to summarise how this highly relevant customary law has been understood in practice. Collectively, one begins to see that while there is a growing body of scholarship exploring means of addressing climate justice, and even some employing the argument of State responsibility for climate change, these works have focused much more attention on the wrongfulness of the responsible States (legal injury) than on the damage caused to injured States (material injury). Further, even when addressing material injuries, the existing literature has not yet identified displacement as a particular material injury entitling injured States to a remedy. This paper will reinforce the argument that State responsibility can be assigned for contributions to climate change and that the shortcomings of the climate regime make pursuing this legal remedy appropriate. Then it aims to answer the question not yet addressed: in assigning State responsibility, does internal displacement constitute a material injury for which reparations are owed to the injured State?

1.4.3 Literature Connecting Climate Change to Human Rights

As much of the existing literature on this topic reveals, the need to address the human rights issues related to climate change is of growing concern. As the UNFCCC has grown from mitigating and adapting to include loss and damage, many scholars have begun to include the human rights aspects of this evolving field into their work. This body of work on human rights and climate change is growing. This section notes some of the existing works on this topic in order to highlight what is missing from the discussion. What becomes clear is that

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[34] Verheyen RKA, *Climate Change Damage and International Law: Prevention Duties and State Responsibility* (BRILL, *ProQuest Ebook Central,* 2005). (hereafter Verheyen)

[35] Voigt C, 'State Responsibility for Climate Change Damages' (2008) 77 *Nordic Journal of International Law* 1–2, 3. (hereafter Voigt on Damages)

[36] Jervan M, 'The Prohibition of Transboundary Environmental Harm. An Analysis of the Contribution of the International Court of Justice to the Development of the No-Harm Rule' (25 August 2014) (SSRN Scholarly Paper, Rochester, NY, Social Science Research Network) 22. https://papers.ssrn.com/abstract=2486421 accessed 19 March 2021 (hereafter Jervan)

much of the discussion on human rights and climate change has been focused on ensuring that mitigation and adaptation measures respect human rights. Other more recent works emphasise how failing to address the causes of the climate crisis may be tantamount to human rights violations. The most relevant works to this paper even start to examine the connections between State responsibility and human rights in the context of displacement. What is lacking form this discussion is whether State responsibility for climate change can include claims of material injuries in the context of an injured State's rights and obligations to ensure the human rights of its subjects.

Atapattu reports the first explicit reference to human rights in international climate change governance comes in the Bali Action Plan's call to respect human rights when pursuing measures to address climate change.[37] Respecting human rights while implementing mitigation and adaptation measures is the area in which most discussions of human rights can be found within the context of climate change governance. Ensuring the rights of the displaced is given noticeably less attention. In her overview of the development of the climate change regime, Atapattu importantly notes the obligation placed on the most developed nations 'to help those developing countries that are most vulnerable to the adverse impacts of climate change to meet the cost of adaptation.'[38] Recognising the idea of common but differentiated responsibility (CBDR) is significant in building the case that the global North owes reparations to the global South as the creator of climate change. This idea is becoming more pronounced as the regime increasingly considers loss and damage caused by climate change and not just mitigation and adaptation. Atapattu makes the point that the UNFCCC itself 'is rather silent on the impact of climate change on human beings,'[39] but that sentiment fails to acknowledge the implicit understanding that should be read in the language of the UNFCCC, particularly the definition of 'adverse effects' contained in Article 1,[40] and that the ultimate goal of the entire climate change regime is to ensure humanity's survival.

This book offers an insightful discussion into the emergence of human rights considerations within the climate regime, but the focus is very much on ensuring human rights while addressing the climate crisis rather than how the adverse effects of climate change are threatening human rights. However, this gap is at least partially addressed through the work of van Asselt and Zelli who considered the overlap between international institutions dealing with issues related to climate change. They rightly assert that the climate regime does not exist in a vacuum but, rather, that it works together with other institutions. The most relevant point to this paper is that the authors specifically discuss the institutional connections between climate change governance and human rights. Interestingly, they note that climate change has been taken up as a matter of importance by institutions focused on human rights, as well as those charged with protecting refugees. This is an interesting way to discuss the topic as most other works seek to explain the extent to which the climate regime is concerned with human rights while van Asselt and Zelli have noted the extent to which the human rights regime is concerned with climate change. They importantly clarify that climate-induced IDPs are not legally refugees, but that both the UN High Commission for Refugees (UNHCR) and the

[37] Atapattu SA, *Human Rights Approaches to Climate Change: Challenges and Opportunities* (Routledge 2016) 25. (hereafter Atapattu)
[38] Atapattu (n 37) 22
[39] Atapattu (n 37) 23
[40] UNFCCC (n 24) Art. 1

International Organisation for Migration (IOM) have unofficially assumed the role of advocating on their behalf.[41]

The work of van Asselt and Zelli is significant in the extent to which it discussions displacement, particularly IDPs, in the context of climate change. Their shifting of the lens from the perspective of the climate regime to that of the human rights regime perhaps reflects the pivot point between the scholarship from environmental law to that of human rights law. Still, this work moves from viewing the accountability for causing climate change as being on the State to the resulting human rights threats being on the individuals. It sidesteps the role of the host State as primary protector of the rights of its subjects.

The current paper aims to address this by confirming that the host State is obligated to protect the human rights of its subjects, and by posing the question as to whether the States responsible for climate change are impeding the fulfilment of this obligation. One existing work that heavily influenced this line of inquiry comes from Cullet. Cullet offers one of the most effective arguments for placing obligations related to loss and damage on the global North. In examining human rights within the climate change regime, he largely focuses on 'equity, one of the core concepts of the existing regime that provides direct and indirect links to human rights.'[42] He laments that while the Kyoto Protocol is an environmental treaty in principle, its real focus is on economic development and economic growth.[43] However, he also recognizes that the CBDR principle is 'noteworthy because few international treaties have gone so far in the realisation of the implementation of differentiation.'[44] Cullet then extrapolates from the CBDR principle to form an argument for a more anthropocentric objective for climate change governance.

'Concerning people, the climate change regime needs to move beyond its traditional international environmental law model to encompass consideration of the specific vulnerabilities of individuals and communities.'[45] He reiterates this point in arguing that 'climate change is much more than an environmental and economic issue but also a core human rights issue.'[46] To support these arguments, Cullet reminds readers that even in the language of climate regime instruments, especially as it relates to the CBDR principle, 'the focus is on the improvement of the situation of the poorest or most disadvantaged.'[47] In addition to this position of differentiation as a reflection of an intention to focus on human rights, Cullet offers evidence for the idea of CBDR having existed in human rights instruments even earlier. He recognizes that the 'principle of progressive realisation of socio-economic rights, whereby states are required to fulfil these rights only within the parameters of their resources, is an example of differential treatment.'[48] This is a very elegant argument demonstrating the interconnection between a common theme in human rights law and the significance of the CBDR principle in climate change governance. This argument also plays a role in understanding what obligations States owe to their subjects, how displacement impedes the fulfilment of those obligations, and how that impediment constitutes injury

[41] van Asselt H and Zelli F, 'International Governance: Polycentric Governing by and beyond the UNFCCC' in Andrew Jordan and others (eds), *Governing Climate Change* (1st edn, Cambridge University Press 2018) 34. (hereafter van Asselt and Zelli)
[42] Cullet P, 'The Kyoto Protocol and Vulnerability: Human Rights and Equity Dimensions', in Stephen Humphreys (ed) *Human Rights and Climate Change* (Cambridge University Press 2009) 184. (hereafter Cullet)
[43] Cullet (n 42) 200
[44] Cullet (n 42) 187
[45] Cullet (n 42) 183
[46] Cullet (n 42) 195
[47] Cullet (n 42) 187
[48] Cullet (n 42) 186

suffered by developing States. This will be explored in more detail in a later section, but it is worth noting the influence of Cullet's work in formulating this idea.

One of the most thorough works on loss and damage is found in the chapter by Simlinger and Mayer in *Loss and Damage from Climate Change*,[49] and this includes recognition of the connections to human rights issues. This is an important work providing an overview of the legal issues related to loss and damage in the international climate regime. While much of the article deals more broadly with environmental regulation, one section is devoted specifically to the issue of human rights in relation to climate change. Additionally, some of the more general legal issues may be applicable to the protection of displaced persons. One interesting question raised regarding this issue is the extent to which the responsibility to assist developing and underdeveloped States obligates developed States to contribute to the protection of climate-induced IDPs. However, this paper does not address these obligations to assist that are created by the climate regime but, instead, asserts a clear distinction between assistance and reparations and argues that reparations are the more appropriate option. Of course, it is important to note that there is a pronounced difference between aid being offered and reparations being demanded. This topic will be explored further in a later section, but it is significant that the existing literature recognises some level of duty[50] assigned to the most developed States.

As the works in this review move ever-closer to the current paper, one finds the most influential work in Wewerinke-Singh's book *State Responsibility, Climate Change and Human Rights Under International Law*.[51] This work provides a number of legal cases, identified by Wewerinke-Singh, in which issues related to loss and damage have been raised. Specifically, the author explores extensively the question of whether reparations are owed to those whose rights are infringed by the adverse effects of climate change.[52] In addition to the jurisprudence provided, Wewerinke-Singh uses principles of international law to help determine what would be required for the duty bearers (responsible States) to be identified and obligated to pay reparations. In rightly arguing that harm from GHG emissions is 'a reasonably foreseeable action'[53] based on publicly available scientific data related to climate change, Wewerinke-Singh makes a compelling case that the North could and should be responsible for paying reparations. However, this paper contends that such reparations are owed to the States whose subjects are being displaced rather than to the individuals directly. As argued in a later section, the municipal mechanisms to provide for the needs and rights of its subjects are the purview of the State, and international law in this context is for settling disputes between States. Bypassing the State suffering displacements ignores their right to provide for their own subjects, as well as their obligation to protect the rights of those subjects.

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[49] Simlinger F and Mayer B, 'Legal Responses to Climate Change Induced Loss and Damage' in R Mechler and others (eds), *Loss and Damage from Climate Change* (Springer International Publishing 2019).

[50] Here 'duty' refers to what Simlinger and Mayer assert is a legal obligation, created within the climate regime, to provide assistance to the global South. Whether and to what extent this is an absolute legal obligation or rather one simply demanding best efforts is beyond the scope of this paper. However, it is worth noting here that it is a distinctly separate topic from whether States have breached their international obligations to mitigate climate change.

[51] Wewerinke-Singh, M., *State Responsibility, Climate Change and Human Rights Under International Law* (Hart, 2019). (hereafter Wewerinke-Singh)

[52] Wewerinke-Singh (n 51) 136-143

[53] Wewerinke-Singh (n 51) 137

This review shows that there exists a growing body of scholarship concerned with the connections between the climate crisis and human rights. Works like the one from Atapattu examine how the climate regime addresses human rights, while van Asselt and Zelli look at how human rights bodies address climate change. Cullet offers a significant theoretical concept in his view of the CBDR principle, but it is not then applied to IDPs and State responsibility. Simlinger and Mayer provide a detailed understanding of loss and damage, including linking it to human rights, but it recognises obligations to assist the global South while failing to identify the legal obligation to make reparations for injuries. Finally, Wewerinke-Singh's book is very closely aligned with the goals of this paper, but it focuses on the individuals as the injured parties rather than the State. All of these works contributed significantly to this paper, but each left something unanswered. Overall, what emerged was a picture of the academic field relating to human rights and climate change that failed to link State responsibility for creating the climate crisis with the injury of displacement, particularly in terms of that injury being to the States hosting IDPs. This paper asserts that the protection of human rights is within the purview of the host State, and that in the absence of evidence to the contrary one should assume that the host State is willing to ensure those rights. In the context of climate change and human rights, then, one must take up the question of whether the global North owes reparations to the global South for impeding their ability to fulfil those protection obligations. In the next section, the literature relating to displacement will demonstrate the connection between human rights and displacement.

1.4.4 Literature on Climate-Induced Displacement

The previous sections have highlighted some of the existing scholarship that has influenced this paper. These include works from academics working in environmental law and climate change policy, as well those in human rights. Each section moves this discussion closer to the main focus of this research: climate-induced internal displacement. This section provides the final step between the existing literature and what, hopefully, is the unique argument of this paper. After a brief background on refugees and IDPs, there is a brief inclusion of influential works on climate-induced external displacements, internal displacement more broadly, and a useful examination of relevant municipal processes. What this review reveals is that the traditional conceptions of refugees and IDPs exclude climate-induced IDPs. Further, the existing literature largely either focuses on external migration caused by climate change, internal displacement caused by anything other than climate change, or how municipal policies are addressing climate-induced IDPs. In short, refugee scholars have focused increasingly on the role of international law in protecting those displaced across borders who fall outside the legal refugee definition. However, there is very little work being done in respect to climate-induced IDPs, particularly concerning the role of international law. This paper responds to that gap by exploring the potential for international law to provide a remedy for States hosting climate-induced IDPs (injured States) against those States contributing most to climate change (responsible States). It looks specifically at situations in which the displacement is both internal and caused by climate change, and focuses on the role of international rather than municipal law.

Literature on displacement largely sits apart from those works relating to climate change, the environment, and human rights, with the greatest overlap obviously being the latter. A number of scholars, primarily from refugee studies, have been conducting research into

climate-induced displacement.[54] Within this field, one finds that most works related to displacement caused by climate change focus on cross-border (external) displacements. These works generally address the issue as it relates to international human rights law and, by analogy, as it is relevant to refugee law. Internal displacement already faces criticisms that refugee law is not applicable because the 1951 Convention does not include 'climate' as one of the grounds for refugee status, but it has the added challenge of dealing with displacements that do not meet the criteria of the condition of alienage. Still, refugee law offers useful analogies. It is important to note some of the significant existing works, how they have informed the current paper, and what areas need further research.

As this paper aims to bridge these varied fields, it may be helpful to include some context for how legal terminology like 'refugee' and 'IDP' are understood. Alborzi offers useful insights on the theoretical link between refugees (the restrictive definition in the 1951 Convention) and IDPs (fitting the loose definition understood by layperson to describe refugees).[55] In the Twentieth Century, 'the need for appropriate international legal instruments offering a clear-cut definition of refugees, and stating the rights and duties of States in their dealings with this group, was felt because Europeans incrementally understood that the refugee issue should be dealt with in a regionally and internationally coordinated manner rather than by nationally entrenched policies.'[56] However, immigration policy being a guarded right of sovereign States, international agreement could only be found on the most restrictive definitional terms. The eventually agreed upon refugee definition codified in the 1951 Convention failed to include the broader view that refugees are 'people in flight, seeking shelter away from their usual geographical living space, and within the confines of another collective entity.'[57] Thus, the refugee definition excludes people fleeing disasters or environmental degradation, and IDPs are further excluded because they have not crossed an international frontier. This leaves open the question as to what role international law plays in the protection of climate-induced IDPs.

The study of complementary protection in international refugee law (IRL) serves as a valuable field from which to draw analogous understanding of protecting those who fall outside of the 1951 Convention. Works by Zimmermann and Wennholz,[58] Goodwin-Gill,[59] Perluss and Hartman,[60] Weiss,[61] McAdam,[62] Hailbronner,[63] Lauterpacht and Bethlehem,[64] and others,

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[54] See, for example, McNamara KE and Gibson C, '"We Do Not Want To Leave Our Land": Pacific Ambassadors at the United Nations Resist the Category of "Climate Refugees"' (2009) 40 *Geoforum* 3; see also Behrman S and Kent A, *Climate Refugees: Beyond the Legal Impasse?* (Routledge, New York. 2018).
[55] Alborzi MR, *Evaluating the Effectiveness of International Refugee Law: The Protection of Iraqi Refugees* (BRILL, 2006, ProQuest Ebook Central). accessed 7 September 2020 <https://ebookcentral-proquest-com.othmer1.icu.ac.jp:2443/lib/icujp1-ebooks/detail.action?docID=467886> (hereafter Alborzi, *Effectiveness*)
[56] Alborzi, *Effectiveness* (n 55) 160-161
[57] Alborzi, *Effectiveness* (n 55) 160
[58] Zimmermann A and Wennholz P, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary* (Oxford University Press, 2011).
[59] Goodwin-Gill GS, '*Non-Refoulement* and the New Asylum Seekers'(1986) 26 Virginia JIL 897.
[60] Perluss D and Hartman JF, 'Temporary Refuge: Emergence of a Customary Norm' (1986) 26 Virginia JIL 551.
[61] Weis P, 'Convention Refugees and De Facto Refugees, in Melander and Nobel (eds), *African Refugees and the Law* (1978) 20.
[62] McAdam J, 'Complimentary Protection and Beyond: How States Deal with Human Rights Protection', (UNHCR, *New Issues in Refugee Research*, Working Paper No. 118, Geneva, August 2005).
[63] Hailbronner, K., '*Non-Refoulement* and "Humanitarian" Refugees: Customary International Law or Wishful Thinking?' (1986) 26 Virginia JIL 857.
[64] Lauterpacht E and Bethlehem D, 'The Scope and Content of the Principle of *Non-Refoulement:* Opinion' in Feller, Turk, & Nicholson (eds) *Refugee Protection in International Law,* 87.

provide insights on international standards and practice, as well as the legal basis of State obligations toward protected persons. These works all contribute to the understanding of protection for those who fall outside of the 1951 Convention's definition of refugees, even though they are not specifically discussing IDPs, climate-induced or otherwise.

Historically, evolving views on the treatment of refugees is not a new phenomenon. From the early approach to those fleeing Russia to the view of those fleeing 1930s' Germany to the 1951 Convention and beyond, 'there was a gradual shifting of the attention of international law makers from the original phenomenon of statelessness, through a socially oriented phase, to an individualistic approach vis-à-vis refugees.'[65] There is absolutely no reason to assume that a shift towards addressing the growing concern of IDPs and those forced to migrate due to climate change, and even those at the intersection who are internally displaced by the effects of climate change, is not possible. However, in the seventy years since 1951, refugee laws 'have failed to evolve in such a way as to prevent erosion of international consensus on the purpose and value of traditional methods of refugee protection.'[66] Alborzi notes that, arguably, the specification of Convention reasons for qualifying as a refugee 'can probably be attributed to the fact that the new definition was felt to have "covered all the main categories likely to need protection at the time."'[67] However, times have changed, and while there may be an argument for re-examining the categories that now require protection, such a discussion is beyond the scope of this paper. What is important here is that Alborzi's work raises some interesting points.

In the context of the climate crisis, one potential obstacle to applying an approach similar to the 1951 Convention to those forced to migrate by climate change might be found in the manner in which the Convention 'provides a case-by-case individualistic approach to refugee definition which has often tended negatively to impact its efficiency when it comes to dealing with situations of mass exodus.'[68] This importantly applies to displacements caused by climate change as they are unlikely to be individualised. This paper accepts these orthodox views that the refugee definition is narrow, it excludes IDPs, it is unlikely to radically change, and it is ill-equipped to deal with situations of mass exodus. However, this paper then asserts that these obstacles may be overcome by seeking reparations through the application of State responsibility. IDPs are less likely to suffer the kind of political break with their country of origin that would require invoking international protections such as those defined in the 1951 Convention. Therefore, there is no need to redefine the refugee definition to protect climate-induced IDPs. And if the host State can seek reparations, the matter is not one of individualistic approach for each displaced person. Instead, the injured State receives reparations based on the totality of the injury stemming from the displacement. These topics are discussed in more detail in a later section, but it is worth noting the influence of the questions raised by Alborzi.

On the subject of climate change displacement, McAdam offers some informative background on both the scientific predictions of climate change displacement as well as the developments in international institutions' attempts to understand and address the issue.[69] This includes

[65] Alborzi, *Effectiveness* (n 55) 162
[66] Alborzi, *Effectiveness* (n 55) 171
[67] Alborzi, *Effectiveness* (n 55) 163
[68] Alborzi, *Effectiveness* (n 55) 166
[69] McAdam J, 'Climate Change Displacement and International Law: Complementary Protection Standards' in Legal and Protection Policy Research Series PPLA/2011/03 (UNHCR, Geneva, 2011).

identifying the first modern use of the concept of environmental displacement[70] as 'a UNEP report in 1985 by El-Hinnawi,' that the IPCC in 1990 warned that 'millions of people would likely be uprooted by shoreline erosion, coastal flooding and agricultural disruption,'[71] and that UNHCR raised the issue of climate change migration 'as a normative protection gap at the 2010 High Commissioner's Dialogue on Protection Challenges.'[72] Even though this background focuses on external migration, it is equally relevant to internal displacement. The fact that the international community was aware of the risks of forced migration is not changed by whether those movements were across international frontiers. All of this helps establish a useful timeline for when the risks climate change posed to human displacement were known. The relevance of this background will become clear when discussing the case for reparations based on the foreseeability of transboundary harm. What is important here is to note McAdam's influential work on our understanding of this issue, and to recognise that this paper departs from her work primarily in addressing the legal questions which most significantly differentiate internal and external displacements.

While her work focuses on cross-border rather internal displacement, McAdam importantly raises relevant questions that need to be addressed. First, she asks whether 'it is arbitrary to identify "climate change" as a driver of forced migration, while omitting other causes such as poverty, general conflict, or lack of opportunity (especially since they may impact on the lives of even more people)'.[73] However, identifying the driver of forced migration has a direct impact on the options available for remedies. For example, there has not been a widespread acknowledgement from the global North that they are disproportionately responsible for poverty, general conflict, or lack of opportunity in the global South. Climate change is another matter. Countries have already been divided based on their level of development (Annex I and Non-Annex I, for example) and established that one group bears responsibility for the GHG emissions causing climate change. This will be explored in more detail in a later section, but it is worth noting here that identifying climate change displacement as a driver could lead to assigning State responsibility and the reparations that follow. Second, McAdam asks, being that 'climate change overlays pre-existing pressures—overcrowding, unemployment, environmental and development concerns—[could it] provide a 'tipping point' that would not have been reached in its absence'?[74] This, too, supports the argument that identifying climate change as a driver allows a unique opportunity to seek international remedies not available to all drivers of forced migration. McAdam's work is one of the best representations of scholarship connecting climate change and displacement. However, it does not attempt to assign responsibility for climate-induced displacement, nor does it address the issue of IDPs. It is, instead, focused on international protections for externally displaced persons.

Of particular interest to the current paper is those works related specifically to *internal* displacement. The primary sources of law related to IDPs more generally can be found in the

https://www.unhcr.org/4dff16e99.pdf accessed 25 April 2021 (hereafter McAdam on Climate Change Displacement)

[70] This paper employs the term climate-induced displacement to refer specifically to those displacements that can be linked to the adverse effects of climate change. However, the term environmental displacement is useful in reference to the broader category of migrants who move because of environmental factors which may or may not be linked to climate change; for example, earthquakes, volcanoes, disasters whether they are linked to climate change or not. Climate-induced displacement should be understood as a subset of environmental displacement.

[71] McAdam on Climate Change Displacement (n 69) 5

[72] McAdam on Climate Change Displacement (n 69) 7

[73] McAdam on Climate Change Displacement (n 69) 9-10

[74] McAdam on Climate Change Displacement (n 69) 9

Guiding Principles,[75] the Great Lakes Pact[76] and the Kampala Convention.[77] Significant commentary on these instruments comes from Ní Ghráinne, who usefully summarizes the legal situation of IDPs regardless of the cause of their displacement in noting that by 'virtue of remaining inside an international frontier, IDPs are not allocated a legal status', but 'are nonetheless protected by Human Rights and Humanitarian Law, and by analogy, Refugee Law'.[78] Her work on IDP law heavily influences this paper. And other works help to link IDP law to international refugee law, like Phuong's assertion that IDPs and refugees 'often find themselves in the same material conditions'.[79] By contrast, other works (see Bennett at n 107) have established the clear separation between refugees and IDPs. These scholars have helped to create an understanding that IDPs and refugees are separate categories in law, but that refugee law can be useful by analogy. Finally, David Cantor's work, 'The IDP in International Law'? Developments, Debates, Prospects',[80] helps to summarize the ongoing academic debates of the role of international law in internal displacement. All of these works contribute to an understanding of the relationship between IDPs and refugee law, but none have focused on climate-induced displacement or climate justice. They each partially answer the question as to what role international law plays in protecting IDPs, but none address the questions of whether State responsibility can be applied for causing displacement or whether reparations are owed to States suffering internal displacements in the context of climate change. This paper aims to address those gaps.

The edited work from Matthew Scott and Albert Salamanca, *Climate Change, Disasters, and Internal Displacement in Asia Pacific*: *A Human Rights-Based Approach*, has contributed significantly to the understanding of policies related to climate-induced IDPs. This work asserts that 'the Guiding Principles are effective in providing a coherent framework' but 'these principles need to be integrated into national and sub-national law, policy, and practice in order to have an impact,' and, further that they 'must be complemented by more detailed standards and guidelines.'[81] It is significant that the collection focuses on domestic law and policy. This reflects the understanding that a State's obligations to its subjects under international human rights law falls within its domestic sovereignty. The current work shares this understanding and focuses on how State responsibility applies when a State's ability to fulfil those obligations is impeded. The book from Scott and Salamanca is an important example of the crucial investigations into the relationships between States and their subjects, and a demonstration of how those relationships are distinct from the relations between States.

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[75] UN High Commissioner for Refugees (UNHCR), *Guiding Principles on Internal Displacement*, 22 July 1998, ADM 1.1,PRL 12.1, PR00/98/109. https://www.refworld.org/docid/3c3da07f7.html accessed 26 February 2021 (hereafter Guiding Principles)

[76] Norwegian Refugee Council/Internal Displacement Monitoring Centre (NRC/IDMC), *The Great Lakes Pact and the Rights of Displaced People: A Guide for Civil Society*, September 2008, available at: https://www.refworld.org/docid/48d390a42.html accessed 3 February 2019. (hereafter Great Lakes Pact)

[77] African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), entered into force 6 December 2012. https://au.int/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa (hereafter Kampala Convention)

[78]Ní Ghráinne B, 'Internally displaced persons' in Wolfrum, R. (ed.) Max Planck encyclopedia of public international law (2015) [D1]. (hereafter Ní Ghráinne)

[79] Phuong C, 'Internally displaced persons and refugees: conceptual differences and similarities' in *The international protection of internally displaced* persons (Cambridge University Press, Cambridge, 2004). (hereafter Phuong)

[80] Cantor D, 'The IDP in International Law'? Developments, Debates, Prospects' (2018) 20 International Journal of Refugee Law 20, 9.

[81] Scott M and Salamanca A (eds), *Climate Change, Disasters, and Internal Displacement in Asia and the Pacific: A Human Rights-Based Approach* (Routledge, London, 2021) 2. (hereafter Scott and Salamanca)

It also illustrates the fallacy in assuming that surrogate protections are needed for climate-induced IDPs. It should be assumed that States are willing to provide for their own subjects unless there is evidence to the contrary.

Another important difference setting the current paper apart from that of Scott, Salamanca, and their contributing authors is the focus on reparations. The earlier work looks at the municipal laws and policies divided between the phases of prevention, protection during displacement, and durable solutions to displacements. It does not explore the possibility of reparations, the role of international law, or the application of State responsibility. In this way, the current paper draws insight into domestic circumstances from the information provided by Scott (et al), and then looks at how international remedies like reparations may help injured States improve their domestic capacity to provide for climate-induced IDPs.

There can be no question that all of the works mentioned in this section have influenced this paper. Certainly there are many more works that could be included, but these from Alborzi, McAdam, Ní Ghráinne, Cantor, and Scott and Salamanca represent an overview of some of the leading scholarship on this topic. They all approach the subject from a different perspective, and each contributes valuable understanding. However, they leave open the question of the role of international law in protecting climate-induced IDPs. This paper aims to address the question by asserting that international law offers a means to assign State responsibility for the causes of displacement in this context and, therefore, a path to remedy.

1.4.5 Conclusion of Literature Review

This review mentions only a small number of works from the growing body of scholarship concerned with the related fields of environmental law, climate change policy, and refugee law. These works illustrate the importance of the climate regime, State responsibility for the climate crisis, human rights and displaced persons. While all the works discussed served to influence this paper, they also left many questions unanswered. The inquiry begins from a recognition that the climate regime is failing to address loss and damage, specifically the loss and damage associated with displacement, which leads to the question of what alternatives exist in international law. As a possible means to a remedy, this paper identifies State responsibility. The first question raised is whether the theoretical framework of State responsibility makes it appropriate in the context of climate change and displacement. The second question is whether there is a theoretical basis for identifying transboundary harm as an internationally wrongful act in this context. The final research question, then, brings together the theoretical frameworks to determine how applying State responsibility for transboundary harm applies to contributions to climate-induced displacement. The existing literature lacks the necessary arguments for assigning responsibility to high-emitting States, the global North, for the material injury of forcing internal displacements in the global South. This paper supplies those arguments.

The existing research into State responsibility for climate change does not answer these specific questions, either. Some have rightly argued that State responsibility can be assigned for contributions to climate change, but these are focused on legal injuries and have left open the discussions of what constitutes material injuries. This paper argues that internal displacement constitutes a material injury for which reparations are owed to the injured State.

Still other works raise the issue of the relationship between human rights and climate change, though most focus on the place of human rights within the regime rather than the impact of climate change on human rights. This is changing, however, as increasingly scholars turn their

attention toward to adverse effects of climate change on human rights. This recognition that human rights should be more prominent in the climate regime is important in its implications for the most vulnerable in developing countries, and indeed the developing States themselves, who are most significantly impacted by climate change, especially when considering cases of climate-induced IDPs. However, much of the existing literature sidesteps the role of the host State as primary protector of the rights of its subjects and, instead, focuses on the individuals whose rights are threatened or violated. Cullet very usefully provided the inspiration for considering how displacement impedes the fulfilment of a State's obligations to ensure the rights of its subjects, and how that impediment constitutes injury suffered by developing States. Other works in this area focus too much on 'assistance' for developing States instead of reparations, which this paper will argue are the more appropriate response. Further, this paper will insist that such reparations are owed to the States whose subjects are being displaced rather than to the individuals directly.

Finally, this literature review noted that the existing literature on displacement largely failed to address the specific class of displaced persons addressed in this paper. Scholars have looked at external displacements caused by climate change, internal displacements regardless of the cause, and when bringing together the concept of internal displacement and climate change the works focused on municipal law rather than international law. This paper aims to link State responsibility for creating the climate crisis with the injury of displacement, particularly in terms of that injury being to the States hosting IDPs. It is hoped that doing so will fill these gaps by looking specifically at situations in which the displacement is both internal and caused by climate change, and examining the role of international rather than municipal law.

There are obviously far more works than could be mentioned in this literature review, but it is hoped that these provide an overview of the prevailing academic discussions on the topics of the climate regime, the links between human rights and the climate crisis, and climate-induced IDPs. This paper began with questions about whether and to what extent the climate regime was addressing loss and damage in the context of these climate-induced IDPs. It soon became clear that it was failing. Through conducting this literature review, would became clear was that the real research questions were around the role of international law in protecting the displaced. If the climate regime was failing, what were the legal protections available? As it became clear that providing remedies may be the most useful means of employing international law, the questions emerged as to whether State responsibility could be assigned for climate change and, if so, could displacement be identified as a material injury. The literature review provided the foundation for understanding what work had already been done and what questions remained to be answered.

Chapter 2 - Background

This chapter discusses the background information necessary to understand the climate crisis, the issue of climate-induced displacement and how it is conceptualised, and why the legal arguments presented in this paper are both necessary and appropriate. There is no debate in the scientific community that climate change is real and that it is primarily driven by human activity.[82] Therefore, the following sections begin with understanding the history of when these facts become evident.

2.1 Climate Change

One could easily fall into an infinite regression trying to determine when climate change became a recognised concern. One finds, albeit sporadically, news articles warning about climate change at least as far back as 1912. They show warnings that burning coal is raising the earth's temperature, that the North Pole is heating up and, as early as 1933, even that carbon dioxide is the cause.[83] Without much debate one could argue that the modern environmental movement started with Rachel Carson's 1962 book *Silent Spring*,[84] and that this was followed by a decade of increased awareness and concern about the natural world. The 1960s saw the increase in awareness about environmental issues leading to minds changing, then behaviours, which eventually led to the development of non-binding statements of a vague intention to act at the 1972 United Nations Conference on the Human Environment (Stockholm Convention). The Stockholm Declaration on the Human Environment (Stockholm Declaration), proclaimed, *inter alia*, 'Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights-even the right to life itself.'[85] While this did not constitute a legally-binding agreement, it was signed by 112 countries, with none objecting, in the UN General Assembly. The text produced at Stockholm was a clear statement of international understanding of the indisputable link between the environment and the enjoyment of human rights. It would be twenty years before the climate regime completed its next important step with the adoption of the UNFCCC at the 1992 Rio Conference.[86] However, it is clear that from the earliest warnings at the beginning of the Twentieth Century, climate change increasingly drew attention from the media, scientific communities, and political leaders, an emerging understanding of the importance of environmental issues led to the Stockholm Declaration, and an international framework to address climate change was formalised in 1992's UNFCCC. It would be nothing short of dishonest to suggest that States were not aware of the dangers and causes of climate change well before 1990, and this fact establishes two important prerequisites for fixing State responsibility; being aware of the risks and having the opportunity to act.

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[82] IPCC, 'Summary for Policymakers,' In: *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, eds. Masson-Delmotte, V., P. Zhai, A. Pirani, S.L. Connors, C. Péan, S. Berger, N. Caud, Y. Chen, L. Goldfarb, M.I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T.K. Maycock, T. Waterfield, O. Yelekçi, R. Yu, and B. Zhou (Cambridge University Press, Cambridge, 2021), 4 [A.1].

[83] Ribeiro C, 'Beyond Google: my afternoon trawling trove for the first mentions of climate change' *The Guardian* (London 27 June 2020) Culture. <https://www.theguardian.com/books/2020/jun/28/beyond-google-my-afternoon-trawling-trove-for-the-first-mentions-of-climate-change> accessed 29 July 2021

[84] Carson R, *Silent Spring* (Houghton Mifflin, Boston, 2002).

[85] Stockholm Declaration on the Human Environment, in Report of the United Nations Conference on the Human Environment (1972) UN Doc. A/CONF. 48/14, at 2 and Corr. 1. (hereafter Stockholm Declaration)

[86] UNFCCC (n 24)

It is worth acknowledging here that the UNFCCC does not constitute 'a fully formed and detailed regulatory regime', but it does create the framework for the 'further development of related legal instruments'.[87] While the absence of legally-binding obligations in the UNFCCC may appear to be a means of avoiding responsibility, the very creation of the UNFCCC reflects the widely understood dangers of climate change, thus, establishing that the global North was aware of the risks of harm its actions posed. Signing the UNFCCC provides a concrete point at which the international community agreed that climate change was happening, that it was dangerous, that was caused primarily by human activity, and that there were means to mitigate its adverse effects. With the hindsight of observing the lack of action on the part of those most responsible for climate change, the UNFCCC Preamble reads like a confession.

According to the Platform on Disaster Displacement, the growing issue of displacement caused by environmental factors has been explicitly 'addressed in the Sendai Framework for Disaster Risk Reduction 2015-2030, the 2016 Agenda for Humanity, the 2030 Agenda for Sustainable Development, the [UNFCCC] 2015 Paris Agreement that established the Task Force on Displacement (TFD), and most recently, the Global Compact for Safe, Orderly and Regular Migration (GCM) and Global Compact on Refugees (GCR).'[88] In 2020 there were 40 million new internally displaced persons globally, and more than 30 million of those were directly related to extreme weather events.[89] There is no debate that human activity is the most significant driver of climate change and that climate change is creating environmental hazards in the form of immediate-onset and slow-onset events, from increasingly dangerous cyclones to droughts and heatwaves, climate change is already having a direct, deadly impact on human health and safety. As people are forced to migrate in response to these environmental realities, and as the global North continually fails to act with the necessary urgency to address the growing crisis, legal remedies must be engaged to achieve justice.

2.2 Climate-Induced Displacement

This section looks in more detail at the links between climate change and displacement. It is true that most human migration results from a variety of factors working together to influence decisions. In the context of environmental migration or displacement, disasters may cause sudden displacements, their effects may be worsened by economic or political conditions, they may be a contributing factor that adds to a cumulative effect, or they may lead to conflict which, in turn, drives displacement. The following paragraphs briefly highlight some of the ways climate change causes displacement.

Disaster displacement is perhaps the most easily recognised link between climate change and displacement. GHG emissions are driving temperatures up, warmer global temperatures drive more dangerous weather events, and the ensuing disasters displace people. The widely-agreed view of a disaster is as 'a situation of serious disruption of the functioning of a community or society due to the interaction of hazardous events with conditions of exposure, vulnerability, and capacity.'[90] Clearly the growing climate crisis is increasingly causing such disruptions.

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[87] Birnie, et al (n 25) 357

[88] — Platform on Disaster Displacement, 'Context'. <https://disasterdisplacement.org/the-platform/the-context> accessed 29 July 2021

[89] — IDMC, 'Internal Displacement 2020'. <https://www.internal-displacement.org/database/displacement-data> accessed 30 July 2021

[90] Platform on Disaster Displacement, Internal Displacement in the Context Of Disasters and the Adverse Effects of Climate Change; Submission to the High-Level Panel on Internal Displacement by the Envoy of the Chair of the Platform on Disaster Displacement (May 2020), 16. https://www.un.org/internal-displacement-

The warnings in the IPCC's First Assessment Report (FAR), in 1990, made clear that continued GHG emissions would lead to increasingly dangerous weather events,[91] and that has proven to be the case over the last three decades. There is no debate that the frequency and severity of severe weather events that cause these disasters are increasing due to climate change. This is a clear and direct driver of displacement.

Less clear but equally important is the role climate change plays as a contributing factor in driving displacement when one single cause may not be identifiable. The adverse effects of climate change can serve as a threat multiplier for the exacerbation of 'preexisting pressures such as overcrowding, unemployment, poor infrastructure, pollution and environmental fragility.'[92] This is a significant area in need of further research. It is challenging to determine the extent to which climate change causes displacement when it is one of many factors, but doing so will be relevant to accurately determining the number of climate-induced IDPs. This paper asserts that any situation in which climate change is a significant factor, even if it is not the sole factor, should be seen as climate-induced displacement. Again, determining the manner in which reparations might be calculated will be challenging in these unclear situations, but that is a point for a future stage of research. This paper looks specifically at *whether* reparations are owed rather than precisely how much they should be.

Finally, climate change may contribute to other factors that drive displacement, like conflict. Conflict over resource scarcity may be older than recorded history, and the climate crisis is leading to increased tensions that can erupt in conflict. 'Evidence suggests that changes in rainfall patterns amplify existing tensions (IPCC), a prime example being Syria and the role a drier climate played in the country's civil war.'[93]

There is no debate that environmental factors can influence human movements and even force displacements. This may involve clear, direct triggers like an immediate or slow-onset disaster. The adverse effects of climate change may contribute to a nexus dynamic, a culmination of multiple factors, that lead to displacement. Increasingly, the connections between climate change and conflict are being recognised and displacements resulting from those conflicts should be considered within the context of climate-induced displacement. Having established some of the important links between climate change and displacement, the following section explains how climate-induced displacement is situated as a subset within the wider context of environmental displacement.

2.2.1 Defining Environmental and Climate-Induced Displacement

Displacement in the context of this paper refers to the involuntary movement of persons. One may reasonably ask what is meant by 'environmental' compared to 'climate-induced', or why

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panel/sites/www.un.org.internal-displacement-panel/files/27052020_hlp_submission_screen_compressed.pdf accessed 24 November 2022

[91] Tegart WM, Sheldon GW, and Griffiths DC, (eds) *Intergovernmental Panel on Climate Change Working Group 2: First Assessment Report: Impacts Assessment of Climate Change* (1990), 5-1 https://www.ipcc.ch/report/ar1/wg2/ accessed 30 August 2021 (hereafter IPCC FAR WGII)

[92] IOM, 'Migration in the Republic of Fiji: A Country Profile 2020' (8 March 2021) PUB2020/087/L, 7. https://publications.iom.int/books/migration-republic-fiji-country-profile-2020 accessed 9 March 2022

[93] UNFCCC, 'Conflict and Climate' (12 July 2022). https://unfccc.int/blog/conflict-and-climate accessed 26 November 2022

either of these should be treated separately from other causes (e.g. conflict, political, or economic displacement). First, it should be noted that the terminology is used as a descriptive and not as a legal classification. Such a classification does not exist in international law, and this paper does not suggest any need for that to change. This section, then, will briefly discuss some of the key terminology, distinguishing 'environmental' from 'climate-induced', as well as a more in-depth explanation of how this paper interprets displacement in this context. and posit the reason that those forcibly displaced by climate change should be addressed uniquely. This helps to establish the importance of identifying the cause of displacements. What becomes clear is the reasoning behind the choice of key terms, why these distinctions matter, and which categories are beyond the scope of this paper's inquiry.

Some scholars look broadly at environmental displacement (which may include, but is not limited to, climate-induced displacement) to conceptualise how the natural environment drives migration. Heslin, et al. include the entirety of this overarching category in noting that of 'those displaced in 2016, nearly 25 million were displaced by natural disasters',[94] but they go on to provide a highly nuanced approach to the topic. One can glimpse the many distinctions between various categories of environmental migration in the International Organisation for Migration (IOM) definition of persons who 'for reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to have to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their territory or abroad.'[95] This highlights a key issue in discussions regarding environmental displacement broadly, which is the challenge of defining the various types of displacement. As this definition shows, one must consider temporal categories of temporary or permanent, spatial categories of internal or cross-border, urgency qualifications of immediate or slow-onset,[96] and the difficult to ascertain qualifier of the extent to which the movement was voluntary. The latter is particularly challenging in cases of slow-onset displacement. This is even further complicated when focusing specifically on climate-induced displacement as there must be the additional consideration of whether or to what extent the environmental factor that caused the displacement can be linked to climate change.

This paper argues the importance of causal differentiation in seeking to fix responsibility and reparations. Obviously only displacements linked to climate change could be claimed as injuries resulting from climate change. Another definition offered by IOM distinguishes the subcategory of climate migration as 'the movement of a person or groups of persons who, predominantly for reasons of sudden or progressive change in the environment due to climate change, are obliged to leave their habitual place of residence, or choose to do so, either temporarily or permanently, within a State or across an international border.'[97] This definition includes both voluntary and involuntary movements, but it is significant that it names them separately. Further, the Cancun Agreement identifies 'climate change induced displacement, migration and planned relocation' as three separate categories.[98] This paper takes the more inclusive view that any movement driven predominantly by the adverse effects of climate

[94] Heslin A, et al, 'Displacement and Resettlement: Understanding the Role of Climate Change in Contemporary Migration', in R. Mechler et al. (eds.), *Loss and Damage from Climate Change*, 242. (hereafter Heslin, et al)
[95] Heslin, et al (n 94) 240.
[96] Matias DM, 'Slow onset climate change impacts: global trends and the role of science-policy partnerships', Discussion Paper 24 (German Development Institute, 2017).
[97] IOM, Environmental Migration Portal. https://environmentalmigration.iom.int/environmental-migration accessed 26 November 2022
[98] Conference of the Parties to the United Nations Framework Convention on Climate Change, "The Cancun Agreement" (10 December 2010) FCCC/CP/2010/7/Add.1 Paragraph 14(f). (hereafter Cancun Agreement)

change must be seen as, at least to some degree, involuntary and, therefore, forced. It also asserts that all forced movement, even planned relocations, are a form of displacement if in the absence of the adverse effects of climate change the movement would not have been triggered. This inclusive view can be found in the International Law Association's (ILA) Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise, which defines displacement as 'the movement…of persons who are forced or obliged to leave their homes' either internally or externally, and regardless of whether the movement is sudden- or slow-onset.[99] It is for these reasons that this paper adopts the term 'climate-induced displacement' in arguing that these are movements amounting to a material injury.

While the focus of the research presented here is on internal displacement, allowing one to set aside considerations distinctly related to external movements, there are other definitional considerations to address. A more detailed discussion on the importance of distinguishing between internal and external displacements is found in Section 2.2.2.

The term 'climate-induced' is used to define the driver of displacement more narrowly than 'environmental', but the term displacement is used more broadly to include planned relocations. This climate-induced displacement can be either immediate-onset or slow-onset, and either temporary or permanent. The extent to which the movement is voluntary may be less clear. As noted in the Section 2.2, the adverse effects of climate change can be a 'threat multiplier'[100] that combines with other factors of vulnerability to have the cumulative effect of driving displacement. This gives further cause to take the widest possible view of displacement. Any movement significantly influenced by climate change should be considered displacement. In this way, 'environmental displacement' includes all persons fitting the IOM definition, 'displacement' includes planned relocations, and 'climate-induced IDPs' are all such persons who have not crossed an international frontier and whose displacement was precipitated, at least in part, by the climate crisis.

As noted, the causal and spatial[101] nature of the movement are the most significant distinctions for this paper. The other distinctions within the category of environmental migration are less relevant to this research. If the main driver of displacement is climate change, then whether it is immediate or slow-onset should not be a factor in determining either injury or responsibility. That is not to say that these categories do not offer distinct challenges. Immediate-onset events may be more easily identified as direct triggers for displacement, but they may be more difficult to establish nexus between, for example, particular events and climate change.[102] On the other hand, slow-onset events like sea-level rise may be more easily linked to climate change but more difficult to prove are the direct trigger for displacement. However, this paper views both as being grounds for assigning State responsibility and requiring reparations. Likewise, whether the displacement is temporary or permanent does not change whether responsibility can be assigned. While it is certainly

[99] ILA, Sydney Declaration of Principles on the Protection of Persons Displaced in the Context of Sea Level Rise, Resolution 6/2018, Annex, Definitions (b)
. (hereafter Sydney Declaration) https://disasterlaw.ifrc.org/sites/default/files/media/disaster_law/2021-03/ILAResolution_6_2018_SeaLevelRise_SydneyDeclaration.pdf accessed 6 April 2023.
[100] UNHCR and UNU, 'Climate change, vulnerability and human mobility: perspectives of refugees from the East and Horn of Africa' (2012). https://www.unhcr.org/protection/environment/4fe8538d9/climate-change-vulnerability-human-mobility-perspectives-refugees-east.html accessed 9 July 2022
[101] The significance of differentiating the spatial nature of the displacement (internal or external) is discussed in more detail in the Section 2.2.2.
[102] A more detailed discussion on causal linkages is provided in Section 3.8.3.

possible that it could impact calculations of the amount of reparations owed, it should not affect *whether* reparations are owed.

In summary, environmental migration is a broad category including all manner of movements related to the natural environment while, by contrast, climate-induced migration is a subcategory only including those environmental factors linked to climate change. Additionally, this paper asserts that all displacements precipitated by the adverse effects of climate change should be consider displacements, including planned relocations. A further subdivision can be understood in the spatial condition between those internally and externally displaced, and that explanation is provided in the following section. This paper focuses explicitly on this category; those who are internally displaced and whose displacement can be linked to climate change. This in no way suggests that the material needs of these various categories are not similar or, at times, identical, nor is it meant to imply that any category is more deserving of attention than another. The legal questions asked and answered in this paper are unique to climate-induced internal displacement and that alone is the reason for this specific focus.

2.2.2 Internal vs. external (Spatial Differences)

Differentiating displaced persons on spatial grounds is significant. Externally displaced persons as defined by the Convention Relating to the Status of Refugees (1951 Convention)[103] are legally classed as refugees. Environmental factors are not included in the 1951 Convention definition of grounds, but it is important to understand the legal differences between internal and external displacement. The legal questions regarding external movements are quite different as the role of surrogate protection, non-refoulement, and international burden sharing, *inter alia*, may be more appropriate themes. For internal displacement, this paper focuses on the unique possibility that this represents a material injury to the host State which is obligated to provide for and protect its own displaced subjects. Therefore, this section is important in establishing the legal grounds for separating these two groups. Internally displaced persons (IDPs) are not protected by the same legal instruments and mechanisms as refugees even if they otherwise meet the conditions. It is important to understand why these groups are treated differently in the law. For the scope of this discussion, the necessity of maintaining a distinction between these groups can be summarized in two broad but related points: the importance of alienage, and the incompatibility of the limited rights accorded by the 1951 Convention with the status of IDPs. Following an exploration of these points, this section will also offer a comment on the extent to which a new legal framework for the protection of IDPs is emerging.

Legally, external migration can be said to be different from internal movements because of the condition of alienage. An external migrant is an alien, not a national or habitual resident of their host State. This is significant, though some scholars have argued it need not be. In arguing against the importance of alienage, Lee asks, ‘is it justifiable to use international border-crossing as the sole or most important criterion for determining people's eligibility to international protection when they are compelled to leave their homelands?’[104] While there may be an abstract debate to be had on the nature of the nation-state, it is unrealistic to challenge the evolution of the international system from the Peace of Westphalia to the

[103] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137. (hereafter 1951 Convention)
[104] Lee L, ‘Internally Displaced Persons and Refugees: Toward a Legal Synthesis?’ [1996] Forced Migration Review 9, 30. (hereafter Lee)

present. Lee may be right to note the 'irrelevance of boundaries'[105] to those in need of protection, but he neglects the importance of boundaries to the international legal regime. The reality is that it is not only 'justifiable', but it is a necessary clause in the refugee definition that one be outside their own country in order to access international protection.[106] To assert that international actors should exercise authority over domestic (internal) displacement, is to challenge the foundation of international law; sovereignty. As Phuong describes it, the adherence to the requirement for alienage 'derives from the principle of state sovereignty which remains the basis of the international legal system'.[107] Phuong echoes Shacknove's position that alienage is what makes a refugee 'so situated that international protection is possible'.[108] Bennett emphasizes this point in arguing that '[i]t is not by virtue of being displaced that the refugee conventions are activated; rather, it is by virtue of having crossed a border.'[109]

Further, it is precisely this obligation of the host State to provide for its own subjects, rooted in its sovereignty, that leads to the recognition that forced internal displacements amount to a material injury to the host State. The role of the State as the primary protector of human rights was strongly emphasised in the UN's High Level Panel on Internal Displacement,[110] and has been written about elsewhere.[111] The important point to make here is that there is no controversy in asserting that the host State bears the primary responsibility of protecting its subjects when they have not crossed an international frontier. International protections like those accorded to refugees are only appropriate when one meets the condition of alienage.

There are also specific aspects of the 1951 Convention explicitly tied to the importance of alienage. Article 1(E) makes the point clearly, stating the 'Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.'[112] Art. 1(C)4 would also be incompatible as it calls for the cessation of international protection when one 'has voluntarily re-established himself in the country which he left'.[113] This could not logically apply to IDPs who remain in their country. Art. 5 states that 'Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.'[114] One could argue that this offers a means to circumvent these incompatibilities, but accepting that the State hosting IDPs will (or should) provide more robust rights and protections than those provided by the Convention reinforces the position that internal and external migrants must remain independent legal categories. In other words, such an argument reinforces the position that it is the host State that owes protection to IDPs, in contrast to the international protections needed for refugees or other cross-border migrants.

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[105] Lee (n 104) 33.
[106] 1951 Convention (n 103) Art. 1(A)2.
[107] Phuong (n 79) 22.
[108] Phuong (n 79) 21.
[109] Bennett J, 'Rights and borders:' [1999] Forced Migration Review 4, 33.
[110] UNSG, 'Shining a Light on Internal Displacement A Vision for the Future', Report of the UN Secretary-General's High-Level Panel on Internal Displacement (September 2021).
[111] Aycock B, Jacobs C, Mosneaga A, 'Justice or charity? Climate change in the UN High-Level Panel on Internal Displacement report', Researching Internal Displacement Blog (13 October 2021). (hereafter Aycock, et al)
[112] 1951 Convention (n 103) Art. 1(E).
[113] 1951 Convention (n 103) Art. 1(C)4.
[114] 1951 Convention (n 103) Art. 5.

This raises another problem of incompatibility in that the 1951 Convention offers only limited rights and protections. Rutinwa correctly notes that 'refugees being foreigners, many rights accorded to them are restricted and it does not make sense to extend rights so restricted to IDPs who are citizens in their own country.'[115] Specifically, Art. 7(1) tells contracting States they 'shall accord to refugees the same treatment as is accorded to aliens generally'.[116] This requirement to extend to refugees rights equal to those of other aliens is found throughout the 1951 Convention, particularly related to the juridical rights described in Chapter II,[117] the employment rights in Chapter III,[118] and access to welfare as described in Chapter IV.[119] To treat nationals, either citizens or habitual residents, as aliens would be to unnecessarily downgrade their legal status to one of limited rights. It would not be desirable to treat IDPs as aliens in their own country, nor is it realistic to expect refugees to be treated as nationals in a foreign country. It is worth reiterating that climate-induced migrants would not qualify as refugees based on the grounds of environmental factors causing displacement, but the treatment of cross-border migrants still provides useful context for understanding why, when all else is equal, internal and external migrants have separate legal needs.

In addition to these limitations on rights, there is also the problem that some of the rights accorded through the 1951 Convention have exceptions attached. For example, Articles 32 and 33 allow expulsion or refoulement on grounds of public safety and national security, but States would not be permitted to deport their own nationals. Attempting to apply refugee protections to IDPs likely places IDPs in an even more vulnerable position. It is worth reiterating that climate-induced migrants would not qualify as refugees based on the grounds of environmental factors causing displacement, but the treatment of cross-border migrants still provides useful context for understanding why, when all else is equal, internal and external migrants have separate legal needs.

IDPs, by definition, have not crossed an international frontier, and the requirement for alienage is essential to the refugee definition or for inquiries into the needs of climate-induced cross-border displacements. Not only does alienage make the protection of displaced persons a matter for international law, but many aspects of the 1951 Convention, the fundamental instrument in the protection of refugees, would be inappropriate if applied to nationals in their own country. Therefore, extending current instruments to include IDPs would further disadvantage them. The alternative is to recognise internal displacements as a form of material injury to the host State, provide reparations for those injuries, and thus empower the host State to fulfil the obligations it owes its subjects. If displaced persons cross an international frontier, then there likely exists a different legal need and the material injury may not be to the State from which the persons were displaced.

It might be argued that the process of developing a new legal regime specifically for the internally displaced is already underway. While there is no legally binding instrument providing protections specifically for IDPs, the UN's Guiding Principles on Internal Displacement (Guiding Principles)[120] might be seen as a step in the evolution of an emerging normative framework. It can be argued that social constructivist approaches like UNHCR's

[115] Rutinwa B, 'How tense is the tension between the refugee concept and the IDP debate? [1999] Forced Migration Review 4, 29-31.
[116] 1951 Convention (n 103) Art. 7(1).
[117] 1951 Convention (n 103) Chapter II.
[118] 1951 Convention (n 103) Chapter III.
[119] 1951 Convention (n 103) Chapter IV.
[120] Guiding Principles (n 75).

issuing of the Guiding Principles is a developmental stage in the evolution of a legal positivist, or legal institutionalist, framework. One can easily see, for example, the manner in which the Universal Declaration of Human Rights[121] (UDHR) was published as a non-binding instrument; a social constructivist approach to addressing human rights concerns. From its introduction in 1948, the UDHR was on an evolutionary trajectory toward a binding legal regime. In the decades that followed, the different elements of the UDHR were enshrined in legally-binding instruments. Particularly significant steps were the 1951 Convention that codified the right to seek asylum, and the International Covenant on Civil and Political Rights[122] (ICCPR) and International Covenant on Economic, Social, and Cultural Rights[123] (ICESCR), both signed in 1966, that make up the foundation of the international human rights legal framework. However, it is still the primary responsibility of the host State to ensure all of these rights, and it is the wrongful acts of the responsible States that are impeding the fulfilment of these obligations.

In the same way that international human rights law (IHRL) evolved from a social constructivist beginning into a legal positivist institution, it is plausible to see the Guiding Principles as the starting point for a legal regime protecting IDPs. While not a legally-binding instrument in itself, the Guiding Principles are gaining authority as they are referenced in developing regional and national laws. In Africa, for example, the Great Lakes Pact[124] 'binds member states to implement the Guiding Principles in their domestic legislation.'[125] The Kampala Convention also legally binds States Parties to language taken directly from the Guiding Principles.[126] This process indicates the very real possibility that the Guiding Principles, in part or in whole, will increasingly find themselves codified in legal instruments that will solidify protections for IDPs, and host States will be responsible for complying with these obligations.

Further developments can be seen in domestic legislation at the national level in countries around the world. Colombia, Burundi, Angola, and 'other governments, such as those of Georgia, Liberia, Nepal and Sri Lanka have used the [Guiding] Principles as a basis for domestic laws and policies.'[127] This growing collection of States represents the gradual building toward a consensus on what legal protections are owed to IDPs, and what obligations should be imposed on States. It is also clear by the wide-ranging developments in municipal law that one must assume States are willing to provide for their subjects unless there is reason to question this willingness. Despite these developments, the current lack of legal instruments dedicated to the protection of IDPs means injured States must, when possible, take advantage of existing legal structures by framing displacement issues in ways that fit within existing mechanisms like IHRL, dispute settlement, and State responsibility.

There is no question that climate-induced displacement falls outside the refugee definition enshrined in the 1951 Convention. It is also clear that the condition of alienage is critical to

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[121] UN General Assembly, *Universal Declaration of Human Rights* (10 December 1948) 217 A (III). available at: https://www.refworld.org/docid/3ae6b3712c.html accessed 26 February 2021 (hereafter UDHR)
[122] UN General Assembly, *International Covenant on Civil and Political Rights* (16 December 1966) 999 UNTS 171. https://www.refworld.org/docid/3ae6b3aa0.html accessed 26 February 2021 (hereafter ICCPR)
[123] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights* (16 December 1966) 993 UNTS 3. https://www.refworld.org/docid/3ae6b36c0.html accessed 26 February 2021 (hereafter ICESCR)
[124] Great Lakes Pact (n 76).
[125] Ní Ghráinne (n 78) [3i].
[126] Kampala Convention (n 77).
[127] Ní Ghráinne (n 78) [2].

the understanding the legal needs of displaced persons. While the 1951 Convention may not protect climate-induced migrants, it offers useful analogies into how cross-border migrants differ from IDPs in their legal condition. Even if all other conditions were met, it would not be appropriate for the protection of IDPs because of the manner in which it allows differential treatment between external migrants and host-country nationals. As nationals in their own country, it would not be desirable to allow States to assign IDPs a lesser legal status than that which they are entitled as nationals. Therefore, it is necessary to view spatial differences as significant factors regardless of the reason for the displacement.

Another significant reason for distinguishing internal displacement in the context of this research is the focus on legal remedies in the form of reparations. External displacements may require international protections for displaced persons, but crossing a border may eliminate, or prevent, the injury to the home State. And if international mechanisms assume the responsibility of providing protection, then which State could claim injury? The point to note is that the differences are significant enough to place external displacement beyond the scope of this inquiry. This paper explores the potential for States suffering internal displacement to claim injury, assign responsibility, and demand reparations. That requires these categories remain distinct.

Climate change and environmental factors are clearly missing from the refugee definition. But it is important to note that even if one constructs some argument for including such grounds, IDPs would still require separate legal considerations. Taken together with the previous section on causal differences this leads to an understanding that this paper focuses on climate-induced IDPs, meaning those whose displacement was at least in part forced by the adverse effects of climate change and who have not crossed an international frontier. The terminology is intentional and reflects a particular understanding of certain drivers of displacement. It bears repeating that this is not intended to imply a legal classification but, rather, merely as a descriptive category to identify the particular sector of the population of concern to this paper. The existence of this category constitutes a material injury to the host State which can, in response, seek to assign State responsibility and demand reparations.

2.3 Appropriateness of Legal Action

It is important to understand why reparations are the appropriate means to address climate-induced IDPs. This section will offer two main reasons for pursuing reparations over other options. In Section 2.3.1, an overview of the development of the climate change regime will highlight the manner in which it has attempted to address the adverse effects of climate change and failed. It will show how adaptation is intended to serve as a backstop when mitigation fails and, subsequently, how loss and damage is meant to be engaged when adaptation fails. Ultimately, all three of these pillars of the climate regime have failed to provide a just remedy to the States hosting climate-induced IDPs, so legal recourse is now appropriate. Further, this section will note the injustice of focusing on aid over reparations, and why aid is not the best remedy for climate-induced IDPs and the States hosting them. Then, Section 2.3.2 is included to assert why legal paths to justice and the justiciability of climate change and its adverse effects are most appropriate. The final section will explore why it is the role of the host State to seek reparations from the global North through the International Court of Justice (ICJ).

2.3.1 Shortcomings of the Climate Change Regime

In the UNFCCC, '"mitigation" was established as the first pillar of international climate change law, with "adaptation" as its second.'[128] A third pillar, loss and damage, becomes more prominent in the Paris Agreement.[129] Broberg aptly describes these pillars as three lines of defence against climate change. Mitigation represents the first line, aimed at curbing greenhouse gas emissions. Next is adaptation, which is necessary to address the adverse effects of climate change that are already being felt. Loss and damage then represents the final defence, for 'those situations where adaptation is insufficient.'[130] In relation to displacement, this can be seen as mitigation focusing on reducing the root causes of climate change, adaptation aiming to prevent, *inter alia*, displacement and other threats already being realised, and loss and damage as an avenue for redress when adaptation is not possible. Importantly, displacement should not be seen as an adaptation strategy, though it too often is. Any form of forced displacement must be seen as a failure of adaptation measures and should trigger responses under the loss and damage framework. Building a seawall might be seen as an adaptation strategy aimed at saving a coastal village, but having to relocate that village must be seen as a failure of the seawall strategy and, therefore, a matter of loss and damage. By first looking at the development of adaptation approaches, including the instruments and mechanisms that have been created, and how they relate to climate-induced IDPs in particular, and then at loss and damage, it will be understood that these options do not offer ideal remedies for displacement.

According to the Platform on Disaster Displacement, 'during the period 2009 – 2019, the Internal Displacement Monitoring Centre (IDMC) recorded a combined total of 249.7 million new displacements in the context of sudden-onset disasters.'[131] Recognising that these figures come from the preceding decade, it is clear that climate change is already impacting large numbers of people and will unquestionably lead to further displacements. Mitigation focuses on reducing the causes of climate change, but this paper is more concerned with the adverse effects of climate change both now and in the future. Therefore, reducing the future number of climate-induced displacements makes adaptation strategies an appropriate place to begin this discussion. It is also important to note that these numbers do not include slow-onset events or migrations driven by nexus dynamics where climate change may not be immediately obvious as a primary factor. While reliable data on the latter categories is more difficult to ascertain, it is enough to note here that the displacement of, on average, more than 20 million people per year due to environmental causes represents a significant issue, and that preventing displacement through adaptation is an appropriate entry point for this discussion.

Perrson describes the history of adaptation in three phases. The first phase lacked substance 'where "facilitative" rather than direct action commitments were made by Parties in the 1992 Convention text', and adaptation 'was portrayed as offering an alternative to ambitious mitigation commitments.'[132] This was followed by a second phase, from 2001 to 2007, when 'advances were made on establishing adaptation funds, introducing National Adaptation Programmes of Action (NAPAs) for least developed countries (LDCs), and programs on

[128] Broberg (n 26) 528.
[129] Conference of the Parties, *Paris Agreement*, (Dec. 12, 2015) U.N. Doc. FCCC/CP/2015/L.9/Rev/1. (hereafter Paris Agreement)
[130] Broberg (n 26) 528.
[131] — Platform on Disaster Displacement, 'Internal Displacement in the Context of Disasters and the Adverse Effects of Climate Change – Submission by the Envoy of the Chair of PDD – Disaster Displacement', 14. <https://disasterdisplacement.org/staff-member/internal-displacement-in-the-context-of-disasters-and-the-adverse-effects-of-climate-change> accessed 1 March 2021
[132] Persson (n 27) 4.

knowledge-sharing.'[133] From 2007, 'adaptation developed into a "framework," by becoming institutionalized as an equal pillar to mitigation.'[134] The developments in the most recent phase are of particular relevance to this paper.

This evolution into an institutionalized framework can be seen as really beginning with the Intergovernmental Panel on Climate Change's (IPCC) Fourth Assessment, in 2007.[135] The Kyoto Protocol, in 1997, only passively mentions adaptation without creating any substantive obligations directly. For example, Article 12(8) requires the global North 'to assist developing country Parties that are particularly vulnerable to the adverse effects of climate change to meet the costs of adaptation.'[136] It is significant that the Kyoto Protocol is a legally-binding treaty, but the language does not include any specific obligations other than to generally 'assist'. The fact that the Kyoto Protocol includes this reference to adverse effects is also important when it is understood to include socio-economic systems and human health and welfare. Also during this first phase, the 2001 Marrakesh Accords placed more emphasis on adaptation, but the focus was primarily on environmental adaptations such as 'coastal zone management, soil and water conservation and soil restoration,'[137] as opposed to more explicitly acknowledging the adaptations related to human security. It has been noted that the IPCC's earlier reports, too, 'paid only scant attention to adaptation, vulnerability or equity.'[138] The Fourth Assessment, however, explores in great detail the urgent need for substantial adaptation measures to address the adverse effects of climate change. Further, the report explicitly recognized the many challenges displacement creates. Population displacement is recognised as having a negative effect on health.[139] In summarising findings from the IPCC's Third Assessment, the Fourth Assessment notes that 'health impacts associated with such socioeconomic dislocation and population displacement are substantial.'[140] It further specifies that 'population displacement can lead to increases in communicable diseases and poor nutritional status resulting from overcrowding, and a lack of safe water, food and shelter.'[141] The IPCC also acknowledged that 'migrations can impede economic development.'[142] These recognitions highlight the importance of preventing the creation of future climate-induced displacements as the best means to avoid these adverse effects. Additionally, it is in the Fourth Assessment that estimates on the costs related to displacement are first reported, but this will be discussed in relation to calculating injuries, for example in the case of Fiji in Section 5.6.4. This clearly demonstrates that human displacement, at least its prevention, is meant to be addressed in adaptation strategies within the climate regime. And Persson has rightly identified the IPCC's 2007 publication of the Fourth Assessment as the point at which adaptation becomes more prominent in the climate change regime.

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[133] Persson (n 27) 4-5.
[134] Persson (n 27) 5.
[135] Solomon S, et al (eds) *Intergovernmental Panel on Climate Change: Climate Change 2007: The Physical Science Basis: Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2007). (hereafter IPCC Fourth Assessment)
[136] Conference of the Parties to the United Nations Framework Convention on Climate Change, 'Adoption of the Kyoto Protocol to the United Nations Framework Convention on Climate Change' 3d Sess., (Dec. 10, 1997) UN Doc. FCCC/CP/1997/L.7/Add.1 Art. 12(8). https://unfccc.int/resource/docs/convkp/kpeng.pdf accessed 15 February 2021 (hereafter Kyoto Protocol)
[137] Conference of the Parties to the United Nations Framework Convention on Climate Change, "The Marrakesh Accords" (2001) FCCC/CP/2002/13, I(7)a(iii).
[138] Schipper (n 28) 82-83.
[139] IPCC Fourth Assessment (n 135) 335.
[140] IPCC Fourth Assessment (n 135) 394.
[141] IPCC Fourth Assessment (n 135) 399.
[142] IPCC Fourth Assessment (n 135) 295.

The IPCC's Fourth Assessment served as a call-to-action on adaptation, and just two years later significant, tangible advances were made. While news headlines declared the COP15 meetings in Copenhagen, in 2009, a failure,[143] the conference actually succeeded in moving closer to institutionalising the pillar of adaptation in climate change governance. The Copenhagen Accord specifically addressed funding for adaptation measures with Paragraph 8 reading, in part, 'funding for adaptation will be prioritized for the most vulnerable developing countries, such as the least developed countries, small island developing States and Africa.'[144] Notably, this included specific amounts of USD30 billion to be provided by the developed countries between 2010 and 2012, and rising to the level of USD100 billion per year by 2020. Further, the primary mechanism for providing funding was explicitly recognised as being the Copenhagen Green Climate Fund. It must be acknowledged that the Copenhagen Accord is a non-binding instrument, but it still marks a significant development in adaptation measures. First, in specifying amounts and mechanisms for distribution, Copenhagen represents marked improvement over earlier agreements that used vague and non-committal language. Second, by February of 2010, 'some 108 parties out of the 193 member countries of the UN [had] formally communicated their support for the Accord to the UNFCCC Secretariat (including all major emitting countries).'[145]

Following the initiative of the Copenhagen Accord on financing adaptation measures, the Cancun Agreement furthered efforts to solidify adaptation as a pillar of climate change governance. In addition to creating the Green Climate Fund (as called for at Copenhagen), the Cancun Agreement also included the creation of the Cancun Adaptation Framework. Importantly, the Cancun Agreement explicitly and specifically calls on States to undertake 'measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation,[146] where appropriate, at the national, regional and international levels'[147]. Like the Copenhagen Accord, the Cancun Agreements are not legally binding but are, instead, a non-binding COP decision. However, the reiteration of commitments made in Copenhagen, as well as the creation of the Adaptation Framework, should be seen as increasing recognition of the reality of the adverse effects of climate change, including displacement.

The Green Climate Fund (GCF) is an entity of the Financial Mechanism of the climate regime. Fifty percent of its projects are under the mitigation theme, and the other fifty percent is for adaptation.[148] Within the adaptation theme, one can see a further divide in funding for projects aimed at adapting the natural or built environment versus those addressing human society more directly. An example of the former can be seen in a USD67 million project in Mozambique aimed at improved coastal zone management to protect the environment in the

[143] Vidal, J, Stratton, A, and Goldenberg, S, 'Low Targets, Goals Dropped: Copenhagen Ends in Failure', *Guardian* (19 December 2009). <http://www.theguardian.com/environment/2009/dec/18/copenhagen-deal> accessed 1 March 2021
[144] Conference of the Parties to the United Nations Framework Convention on Climate Change, "The Copenhagen Accord" (18 December 2009) FCCC/CP/2009/11/Add.1.
[145] Schalatek, L, Bird, N, and Brown, J, 'Climate Finance Policy Brief No.1: Where's the Money? The Status of Climate Finance Post-Copenhagen' (Heinrich Boell Foundation and Overseas Development Institute, April 2010), 2. https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/5844.pdf> accessed 15 February 2021
[146] See section 2.2.1 for a discussion on displacement and planned relocations.
[147] Cancun Agreement (n 98) [14(f)]
[148] Green Climate Fund, 'Projects and Programmes: Areas of Work: Themes'. <https://www.greenclimate.fund/themes> accessed 1 March 2021

face of increasing frequency and severity of tropical cyclones.[149] An example of a project addressing society more directly can be found in Morocco. This irrigation development project aims to provide a sustainable irrigation system to address the needs of local farmers. The project summary describes that 'small-scale oasis farming has created a poverty trap that forces many to migrate in search of employment,' and a sustainable irrigation system will curb such displacements.[150] Still other programmes cut across themes by addressing both mitigation and adaptation measures. A good example of this is found in Mongolia where the Ulaanbaatar Green Affordable Housing and Resilient Urban Renewal Project (AHURP) is helping people displaced from rural to urban areas to create greener, more sustainable communities.[151] It is expected that this will help these communities reduce harmful emissions which will both improve the standard of health in the local area and reduce further rural-urban migration. While it is clear that some projects are contributing in some measure to the protection of climate-induced IDPs, the GCF is primarily funding projects that will reduce the number of displaced persons. Such a focus supports the view that adaptation measures should be seen as efforts to prevent, or at least reduce, displacement rather than directly providing protection for those already displaced or for the States that host them. It has been argued that by identifying 'measures to address climate displacement as a form of adaptation'...the Cancun Agreement's Article 14(f) can be seen as 'linking [displacement measures] to adaptation funds established under UNFCCC, such as the Green Climate Fund.'[152] This area requires further research to better understand the extent to which the GCF is funding projects to serve climate-induced IDPs or whether it is better suited to fund efforts to prevent displacement. The most relevant point of note to this paper is that GCF operates as a funding mechanism to which States can apply for aid. This is significantly different from reparations. First, only a small percentage of GCF funding is dedicated to adaptation in developing States, and there is none explicitly dedicated to displacement. Second, aid functions to maintain a power imbalance between the donor and recipient where the latter must ask and the former must approve of how the funds will be spent. By contrast, reparations are owed because the 'donor' has committed a wrongful act and the 'recipient' has suffered injury. Through reparations the latter need not ask the approval of the former, thus empowering the developing State to address the issue of climate-induced IDPs as it deems appropriate.

Cancun also saw the creation of the Adaptation Framework. The 'key institution mandated to promote coherence on adaptation,'[153] the Adaptation Committee (AC) was established as part of the framework. More specifically, the AC provides technical support, enhances information sharing, promotes synergies, advises the COP, and serves as a hub for 'information by Parties on monitoring and review of adaptation actions for possible needs and gaps'.[154] The AC

[149] Green Climate Fund, 'Projects and Programmes: FP122'. <https://www.greenclimate.fund/project/fp122> accessed 1 March 2021
[150] Green Climate Fund, 'Projects and Programmes: FP042'. <https://www.greenclimate.fund/project/fp042> accessed 1 March 2021
[151] Green Climate Fund, 'Projects and Programmes: FP077'. <https://www.greenclimate.fund/project/fp077> accessed 1 March 2021
[152] Thomas A, 'Human rights and climate displacement and migration' in Duyk S, Jodoin S, and Johl A (eds.) *Routledge Handbook of Human Rights and Climate Governance* (Routledge, 2018), 119.
[153] Hareling S, 'Climate change impacts: Human rights in climate change adaptation and loss and damage' n Duyk, S, Jodoin, S, and Johl, A (eds.) *Routledge Handbook of Human Rights and Climate Governance* (Routledge, 2018), 93. (hereafter Hareling)
[154] Hareling (n 153) 94.

serves as the central institution in the Adaptation Framework, coordinating the adaptation process.[155]

Another part of the Adaptation Framework is the system of National Adaptation Plans (NAPs). This is intended as a means of identifying 'medium- and long-term adaptation needs and developing and implementing strategies and programmes to address those needs.'[156] This development mirrors the 2001 creation of National Adaptation Programmes of Action (NAPAs) funded by the Least Developed Countries Fund (LDCF) to address more immediate priorities. The two processes essentially differ only in a temporal sense; how immediate is the action? Here, we can look at them collectively. In these processes domestic authorities are able to identify their own needs and make appropriate adaptation plans while benefiting from information, technical assistance, and coordination with the AC and the Least Developed Countries Expert Group (LEG). Further, States can request funding through GCF (for NAPs) or LDCF (for NAPAs) to finance their plans. In relation to climate-induced IDPs, these mechanisms appear more suitable to preventing future displacements, or coordinating and supporting planned displacements, but less well-positioned to either empower the injured State or recoup losses already suffered. Hareling has argued that 'these do not reflect aspects of specific importance in the human rights and adaptation context.'[157] However, a number of examples can be found to suggest otherwise.

One case of note is that the 'Vanuatu NAPA details an example of a successful internal relocation of an at-risk community in the northern part of the country, following an adaptation assessment and a public awareness campaign.'[158] Other States also included displacement in their respective NAP/NAPA. Kiribati 'notes that [relocations] led to 'conflicting claims over resettled land'.'[159] Chad saw similar drawbacks recognising 'migration as stimulating competition for the best land (potentially leading to conflict), putting pressure on urban services and potentially leading to public health problems.'[160] Additionally, while 'some SIDS, such as the Solomon Islands and São Tomé and Principe, are seeking planned relocation solutions for their citizens abroad',[161] 'Chad, Mauritania, Togo, Eritrea, Sudan and Burkina Faso' are most concerned with internal migration 'with most states seeing spontaneous migration as a negative outcome and something to be urgently managed.'[162] The conclusion must be drawn that while NAPs/NAPAs may diligently aim for the best outcomes, 'migrants may have little say as to where they are relocated, and may have to deal with inadequate compensation and services and changes in livelihoods, in addition to disruption to socio-cultural structures, and the loss of cultural ties and identity and connection to the land', and displacement, even if planned, may 'lead to new vulnerabilities, including exposing people to unfamiliar environmental risks and a lack of decent work.'[163] Two points are clear.

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[155] UNFCCC, 'What do adaptation to climate change and climate resilience mean?' https://unfccc.int/topics/adaptation-and-resilience/the-big-picture/what-do-adaptation-to-climate-change-and-climate-resilience-mean accessed 7 February 2021

[156] UNFCCC, 'National Adaptation Plans'. https://unfccc.int/topics/adaptation-and-resilience/workstreams/national-adaptation-plans accessed 18 January 2021

[157] Hareling (n 153) 97.

[158] Stapleton O, et al, 'Climate Change, Migration and Displacement: The Need for a Risk-Informed and Coherent Approach' (ODI, UNDP report of November 2017), 23. https://www.odi.org/publications/10977-climate-change-migration-and-displacement-need-risk-informed-and-coherent-approach accessed 18 January 2021 (hereafter Stapleton, et al)

[159] Stapleton, et al (n 158) 23.

[160] Stapleton, et al (n 158) 22.

[161] Stapleton, et al (n 158) 23.

[162] Stapleton, et al (n 158) 22.

[163] Stapleton, et al (n 158) 22.

The first is that NAPs/NAPAs have a significant human security component and should continue to be a focus for research related to climate-induced IDPs. Second, the evidence continues to suggest that adaptation is not the appropriate mechanism for addressing the needs of climate-induced IDPs but should be seen, instead, as a means to prevent or reduce future displacements, with NAPs/NAPAs serving a useful role in planning relocations as a last resort when adaptation has failed. Again, reparations would serve to empower the local State to address both spontaneous and planned relocations more appropriately than aid mechanisms, and the current adaptation strategies do not offer a remedy for losses suffered.

To summarise, the Cancun Agreement marks another important step in the evolution toward institutionalising the relationship between the climate regime and climate-induced IDPs. Broadly, it 'situates the UNFCCC as an appropriate forum for pursuing climate displacement, migration and planned relocation' discussions.[164] Because 'costs of climate migration will be borne by someone' it is important that the Cancun Agreement 'address[es] structural and governance problems of earlier funding mechanisms',[165] which it does with the creation of the GCF and the inclusion of Paragraph 14(f) linking displacement. On the other hand, the real weakness of the Cancun Agreement is that it falls short of a legally-binding treaty. 'Without a legal component, there is no true recognition'[166] of climate-induced displacement or other climate change migrants, and 'without recognition [the costs] will likely be borne by the most vulnerable countries.'[167] Further, displacements, even when planned, cannot be considered adaptations when they clearly represent failures in adaptation efforts. Instead they must be seen for what they are; demonstrable losses. Reparations based on State responsibility also help to overcome this shortcoming by offering a means to apply international law and legal mechanisms, to assign responsibility, to calculate injury, and to ensure that the costs are not unjustly borne by the most vulnerable countries.

It appears that loss and damage may be the most appropriate arena for addressing the needs of climate-induced IDPs, while adaptation aims to prevent the displacement from happening, but even that will be shown to fall short of a just remedy. With the demonstrable risks and vulnerabilities that displacement, even if planned, creates, it cannot be seen as a desirable means of adapting to the effects of climate change. This exploration of adaptation also reveals that these developments seen in the Cancun Agreement mark an important step in institutionalising the relationship between the climate regime and climate-induced IDPs, but still fails to fully achieve the legal positivist status that would be most desirable.

The emergence of loss and damage shows the climate regime evolving to increasingly face the realities of displacement as an adverse effect of climate change. One further development in the Cancun Agreement was the creation of a work program on loss and damage.[168] The concept of loss and damage as a principle of redress for the adverse effects of climate change can be traced all the way to the negotiations preceding the UNFCCC itself. According to Mace and Verheyen, the phrase first appeared in a proposal from the Alliance of Small Island States (AOSIS) for the inclusion of such a mechanism in the UNFCCC as a means to compensate them for sea level rise.[169] AOSIS has consistently pushed for inclusion of this

[164] Gibb C and Ford J, 'Should the United Nations Framework Convention on Climate Change Recognize Climate Migrants?' (1 December 2012) 7 Environmental Research Letters 4, 1. (hereafter Gibb and Ford)
[165] Gibb and Ford (n 164) 3.
[166] Gibb and Ford (n 164) 4.
[167] Gibb and Ford (n 164) 3.
[168] Persson (n 27) 5.
[169] Mace and Verheyen (n 29) 198.

concept, and in 2007 the principle moved toward a legal positivist institution when it was included in the Bali Action Plan as part of the Bali Roadmap. It must be noted that this did not create an instrument or accompanying mechanism for loss and damage but, rather, officially suggested that such developments should be pursued. Paragraph 1(c)(iii) calls for advanced action on adaptation, including 'Disaster reduction strategies and means to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change.'[170] It is clear that loss and damage was then seen as a constituent piece of the emerging adaptation framework, but it marks a progression in the evolution of the concept. At COP14, in 2008, the AOSIS again pushed for a formal mechanism on loss and damage by proposing that such a mechanism should include three separate components; insurance, compensation, and disaster risk management.[171] The AOSIS continued its push in proposing that the Copenhagen Accord include a 'mechanism [that] would have addressed people displaced by climate change, loss and damage from the adverse effects of climate change, risks associated with extreme weather events and compensation and rehabilitation for loss and damage resulting from climate-related slow onset events, including sea-level rise, increasing temperatures and ocean acidification.'[172] While these efforts failed to immediately yield results, they were eventually rewarded with the creation of the Warsaw International Mechanism (WIM).[173]

WIM was established at COP19, in Warsaw, in 2013. It was created with a mandate to primarily address three areas; enhancing knowledge, strengthening dialogue and coordination, and enhancing action on, *inter alia*, finance and capacity building.[174] While loss and damage has emerged as a third pillar in climate change governance, equal to mitigation and adaptation, it was initially unclear whether it was considered a stream within adaptation measures. For example, it was both noted as being created under the Cancun Adaptation Framework and in recognition 'that loss and damage associated with the adverse effects of climate change includes, and in some cases involves more than, that which can be reduced by adaptation'.[175] The distinction becomes clearer in subsequent developments, but it is worth noting that loss and damage emerges from the adaptation side of climate change governance. This and the later developments that bring loss and damage onto an equal footing represent an understanding, as noted in Persson, above, that mitigation is the first line of defence, followed by adaptation when mitigation is not enough and, thirdly, by loss and damage when adaptation measures fail. In relation to climate-induced IDPs, this understanding supports the position that adaptation should be seen as efforts to prevent displacement while loss and damage should be seen as the mechanism triggered after displacement occurs.

There can be no question that the effort to create WIM was a social constructivist one. With the AOSIS maintaining its support for such a mechanism over twenty years, they were able to build consensus and generate the political will necessary to advance their cause. The creation of WIM in 2013 represented the pinnacle of social constructivist efforts, and the only way to

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[170] Conference of the Parties to the United Nations Framework Convention on Climate Change, "The Bali Action Plan" (14 March 2008) FCCC/CP/2007/6/Add.1.
[171] Mace and Verheyen (n 29) 200.
[172] Mace and Verheyen (n 29) 200.
[173] UNFCCC, 'Warsaw international mechanism for loss and damage associated with climate change impacts' (31 January 2014) FCCC/CP/2013/10/Add.1. (hereafter Warsaw International Mechanism)
[174] UNFCCC, 'Topics: Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts (WIM)'. https://unfccc.int/topics/adaptation-and-resilience/workstreams/loss-and-damage-ld/warsaw-international-mechanism-for-loss-and-damage-associated-with-climate-change-impacts-wim accessed 18 January 2021
[175] Warsaw International Mechanism (n 173) Preamble.

advance beyond these non-binding COP decisions was to fully realise a legal positivist construction of a binding institution. This was achieved by the inclusion of Article 8 in the legally-binding Paris Agreement.[176] Here, the Parties explicitly included WIM as the mechanism to address loss and damage, making the principle an equal pillar in the climate regime and the mechanism a legal institution. Further, the Paris conference, COP21, also created the Task Force on Displacement (Task Force) under the WIM Executive Committee. This solidified the understanding that displacement is a significant adverse effect of climate change, that the climate regime must address the issue, and that WIM is the appropriate mechanism. The UNFCCC mandates WIM to address loss and damage, and WIM creates the Task Force to focus on displacement. The Task Force then makes recommendations to WIM who then reports back to the UNFCCC.[177]

The call for the creation of the Task Force came in Paragraph 49 of COP21's adoption of the Paris Agreement, and it is significant that the objective is given for the Task Force to seek ways to 'avert, minimize and address displacement'.[178] The language reflects an understanding of the temporal dimensions; namely that displacement should be averted whenever possible, minimized when it is unavoidable, and addressed after it occurs. This clearly indicates a recognition that displacement is occurring and will increasingly occur despite mitigation and adaptation measures. More importantly, it issues a mandate to WIM and its Task Force to address the issue at each temporal stage, which includes climate-induced IDPs. This view is clarified in the Technical Meeting of the WIM Executive Committee held in July 2016, in Casablanca. The report specifies that '[o]ne main objective...is to minimize loss and damage associated with unplanned migration and displacement, through measures that support the prevention of displacement, the provision of assistance to migrant and displaced communities and the facilitation of migration as one of the ways to support individuals and communities to cope with the adverse effects of climate change.'[179] This seems, too, to support the view that planned relocations should be considered a matter of loss and damage. This reiterates that WIM and its Task Force are mandated to 'avert, minimize and address' displacement. Of particular importance to this paper is the explicit reference to providing for those already displaced. What this exploration reveals is that there is an unquestionable mandate for the Task Force, WIM, and the climate regime more broadly to address the needs of climate-induced IDPs. What is also clear is that these institutions are designed to offer assistance, not reparations. As argued, reparations would better empower States hosting climate-induced IDPs to address the issue themselves while also assigning responsibility to those States most significantly contributing to climate change. It is not enough to continually develop aid agencies, outside agents, to serve as surrogates for providing for the needs of subjects within a State's jurisdiction. The State has the right and the obligation to do that for itself, and reparations will empower it to do so.

The section shows the development of a system intended, at least nominally, to address the issue of climate-induced displacement. It also shows that the systems and structures have failed to do so. Displacement, even in the form of planned relocations, cannot be considered

[176] Paris Agreement (n 129) Art. 8.
[177] UNFCCC, 'Task Force on Displacement'. https://unfccc.int/process/bodies/constituted-bodies/WIMExCom/TFD#eq-1 accessed 18 January 2021
[178] Paris Agreement (n 129).
[179] Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts, 'Technical Meeting: Action Area 6: Migration, Displacement and Human Mobility' (27-29 July 2016). https://unfccc.int/files/adaptation/groups_committees/loss_and_damage_executive_committee/application/pdf/excom_iom_technical_meeting_pillar_3.pdf accessed 19 January 2021

an adaptation strategy. The lack of dedicated funding or specific projects within the adaptation mechanisms shows that this is the case. It would appear, then, that loss and damage is the most appropriate domain for addressing climate-induced displacement, but even the WIM and its Task Force have failed to progress beyond the role of advisory bodies. It is these shortcomings that leave legal remedies through the application of State responsibility as the most appropriate paths to justly-deserved reparations for developing States suffering internal displacements due to the adverse effects of climate change.

As a postscript, it should be noted that some progress was made on developing loss and damage mechanisms at the Sharm el-Sheikh Climate Change Conference (COP 27), in November 2022.[180] A funding arrangement was agreed, and a Transitional Committee was established to operationalise the arrangement. This is clearly a positive move toward addressing loss and damage caused by climate change but, at the time of writing, it is not yet known how the new arrangement will work in practice, including what it will or will not fund, how such decisions are made, and to what extent commitments to funding will actually be met. Further research into the details of the agreement as well as monitoring the progress on putting it into practice will be important concerns for observers in the near future. In the context of this paper, it is important to note, first, that the arrangement continues to refer to funding as 'assistance' for the States suffering the adverse effects of climate change rather than reparations for injuries suffered.

2.3.2 Justiciability

This section explores the appropriateness of seeking justice through legal channels like the ICJ rather than through other options. As noted in the previous section, what seems to be the most appropriate system through which to address climate-induced displacement in all its forms, the climate regime, has failed to deliver anything more than unfulfilled assurances of intentions to act. It is clear that the global North has been fully aware of the causes of climate change, the dangers posed by a growing climate crisis, and the means by which to avoid these risks. Instead, they have collectively chosen to ignore their duty to prevent transboundary harm, thus knowingly causing injury to others. Still, there are challenges to establishing the justiciability of climate change and its adverse effects, as well as whether a contentious legal process is likely to produce the desired outcome. In the following subsections, it is argued that international environmental law helps establish the justiciability of this issue through general principles and custom,[181] and shows how environmental law plays an important role in pursuing legal remedies for climate-induced displacement. This refutes any claim that potentially responsible States might be shielded from obligations only created by specific instruments. Then, historical examples show that legal remedies for environmental damage and State responsibility are common practice, leaving little doubt that the same should apply to the adverse effects of climate change. Some potential challenges to this position on justiciability are then refuted. Specifically, it is argued that the lack of legal obligations in the climate regime is not an excuse for avoiding responsibility, and that the *lex specialis* principle does not apply.

The scope of this paper prevents a detailed discussion of the alternative role of international relations to potentially resolve tensions over climate change, but is worth a brief mention,

[180] UNFCCC, Funding arrangements for responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage, FCCC/CP/2022/10/Add.1, Decision 2/CP.27. accessed 6 April 2023 https://unfccc.int/sites/default/files/resource/decision%202%20CP%2027.pdf
[181] See Section 4.2 on customary law.

here. It is entirely possible that some or all States in the global South may not wish to challenge global North partners in the ICJ.[182] It is also possible that some or all States in the global North could try to deny the jurisdiction of the ICJ in the event that a case were brought based on the arguments in this paper. However, building a legal case against the global North can benefit the global South even if they prefer to avoid the contentious legal process, or if the potentially responsible States try to deny the court's jurisdiction. It is possible that a strong legal case could provide leverage for negotiating more funding or better outcomes in international negotiations. It is also possible that injured States may invoke countermeasures, which they are legally entitled to employ, in order to pressure States to accept the court's jurisdiction. It is also possible that a separate arbitration process could be established. All of these possibilities are worth exploring, but they are beyond the scope of this paper. What is asserted here is that the adverse effects of climate change are most appropriately addressed through courts due to the decades-long failures of responsible States, the customary nature of the relevant international obligations, and the manner in which environmental law has been practiced historically. In the end, even if States opt not to pursue a contentious decision in the ICJ, the development of the legal arguments, including these on justiciability, will provide a negotiating tool based in the very real threat of pursuing such action.

2.3.3 International Environmental Law

This section provides a broad understanding of the important role of international environmental law in seeking climate justice, including how one defines 'environment'. These understandings show that environmental law contributes to the argument in support of the justiciability of injuries caused by climate change, including climate-induced IDPs. Detailed discussions of specific principles of are found in Chapter 3, but it is worth noting here that principles like State sovereignty and the prevention of transboundary harm are general and not limited to specific treaties. The principle of due diligence as an obligation created by the no-harm principle is also central to this paper's assertion, and it is also a general principle emerging from environmental law. This section briefly explains the role of both hard and soft law in demonstrating how climate change is justiciable. This reveals that the relevant principles, both hard and soft, are firmly rooted and widely recognised in international law, that they provide a firm foundation for arguing the justiciability of injuries from climate change, and that legal channels offer the most appropriate opportunities for redress. Then, a definition for the 'environment' is provided that includes the elements most relevant to climate-induced displacement, like the place of human security, natural and built locations, and culture. Again, more detailed legal discussions are found in Chapter 3, but it is worth mentioning in this section how environmental law helps establish the justiciability of the issue, especially when considering the inclusive understanding of the environment included here.

International Environmental Law (IEL) is a collection of over 200 international treaties,[183] as well as the 'customary international legal principles governing the relations between nations.'[184] The sheer volume of treaties makes a lengthy discussion of each instrument impractical. Further complicating broad discussions of IEL as a coherent field of law is the tendency for treaties to address very narrowly defined issues. As Bodansky wrote, '[f]or each

[182] This was intimated to the author by a government official in Fiji who expressed concerns that bringing a legal challenge might jeopardize foreign aid. The official asked to remain anonymous.
[183] Yang T, and Percival RV, 'The Emergence of Global Environmental Law' (2009) 36 Ecology LQ 615, 645. (hereafter Yang and Percival)
[184] Yang and Percival (n 183) 617.

new environmental problem, a new treaty is negotiated: depletion of the stratospheric ozone layer, transboundary movements of hazardous wastes, climate change, the loss of biological diversity, desertification, and so on.'[185] And while 'most scholars consider treaties to be the preeminent method of international environmental lawmaking,'[186] the general principles that emerge from IEL are applicable devices in cases of human displacement. After all, 'many writers still consider custom an important source of international environmental law.'[187] Here we see how certain principles emerge from the totality of IEL and how these are understood as either binding customary law or as non-binding soft laws that 'may amend existing obligations...or authoritatively interpret treaty obligations'[188] if they are not. In this way one can see that States are legally bound to meet international obligations of a customary nature related to the environment, like preventing transboundary harm. Then those policies or suggestions that are non-binding, like much of the climate regime, function to support the interpretation and implementation of the legal instruments and mechanisms, like the commitment to provide technical assistance to the global South for adaptation.[189] This is evident in Sections 4.4.4 and 5.6.2 on due diligence in recognising that many of the 'soft' instruments in the climate regime help to establish what is the appropriate standard of care to be expected in order to meet the legally binding obligations of conduct.

IEL also offers a definition, or conceptualisation, of 'the environment'. This giant, amorphous term could include the entirety of land, air and water, the planet as a whole, or even the known universe. There is no universally accepted understanding of what is meant by 'the environment'. Few would argue the general inclusion of air and the atmosphere, as well as water, natural resources, and flora and fauna as widely accepted components. Germane to discussions of climate-induced IDPs is the inclusion in both the 1991 Espoo Convention[190] and the 1992 Transboundary Watercourse Convention[191] of human and societal components of the environment. Specifically, these instruments recognise human health and safety, as well as historical monuments as part of the environment.[192] This paper uses the term in its most inclusive sense, encompassing the atmosphere, climate, natural resources, human health and safety, social and economic systems, and places and monuments of cultural or historical importance. If any of these falls outside one's understanding of environment, then it becomes quite difficult to explain where they exist. This understanding strongly supports the argument that environmental protection includes human security and the interests of climate-induced IDPs. This is especially evident when considering that displacements caused by climate change pose a threat not only to the air, sea, and land, but also health and safety, and even social, economic and cultural rights.[193]

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[185] Bodansky D, 'Customary (and Not So Customary) International Environmental Law' (1995) 3 Ind J Global Legal Stud 105, 106. (hereafter Bodansky on Customary Law)
[186] Bodansky on Customary Law (n 185) 106.
[187] Bodansky on Customary Law (n 185) 106.
[188] Swanson T and Johnston S, *Global Environmental Problems and International Environmental Agreements* (Edward Elgar, Cheltenham, UK 1999) 210. (hereafter Swanson and Johnston)
[189] UNFCCC (n 24) Art. 4[5].
[190] UNECE, Convention on Environmental Impact Assessment in a Transboundary Context (adopted 25 February 1991, entered into force 10 September 1997) 1989 UNTS 309 (Espoo Convention).
[191] UNECE, Convention on the Protection and Use of Transboundary Watercourses and International Lakes (adopted 17 March 1992, entered into force 6 October 1996) 1936 UNTS 269.
[192] Swanson and Johnston (n 188) 209.
[193] See, for example UNHCR, 'Climate Change, Displacement and Human Rights' (March 2022). https://www.unhcr.org/6242ea7c4.pdf accessed 23 August 2022

Following from the foundation established above, Chapters 3 will demonstrate how these concepts from IEL relate to State responsibility, Chapter 4 offers a detailed discussion of transboundary harm, and Chapter 5 then applies all of these understandings to climate change and climate-induced IDPs. There is no debate that GHG emissions are the primary driver of anthropogenic climate change, and this seems to flow easily from discussions of IEL. Further, the demonstrable harm being experienced now, as well as the easily foreseeable harm yet to come, requires that States exercise the highest levels of due diligence in matters related to preventing transboundary harm caused by climate change. It is also clear that forced migration is an infringement on the sovereignty of affected States, giving rise to legal injury, as well as causing demonstrable harm that can amount to material injury. IEL provides important legal principles related to international obligations and insights into how environmental damage, including climate change, is justiciable.[194]

2.3.4 Jurisprudence

Following the recognition of the value of IEL principles in pursuing climate justice, this section provides evidence from the jurisprudence to show the historical practice of seeking justice in similar cases. By looking at how other topics have been viewed in the past, one sees that justice for the adverse effects of climate change is not a novel idea but, more accurately, reflects the traditional practice of holding States responsible for international obligations. Here, one case related to potential environmental harm is offered, and another related to the importance of States' meeting their international obligations. Neither could be described as an oddity. Instead, both reflect general practice in the pursuit of peaceful dispute settlement through legal means, thus supporting the position that this is the most appropriate avenue for climate justice.

The first example from the past helps to summarise the importance of pursuing legal remedies for climate change. There is a clear parallel between the concerns about radioactive fallout in the 1960s and the growing climate crisis as recognised in more recent decades. First, they both represent anthropogenic threats to the environment on an existential level. Second, the threats are not limited to the present tense, but they are also a risk to future generations. Third, they share the legal challenge of where actions and effects occur; both represent situations in which the source of the potentially harmful activity is often different than the location later harmed. Therefore, the manner in which State responsibility was addressed in the context of the harmful effects of atomic radiation can help to establish how transboundary harm is justiciable. The 1961 Scientific Committee report[195] on atomic radiation summed up perfectly the rationale for clarifying the matter of State responsibility for transboundary environmental harm in declaring '[i]t was unacceptable, by any standard for the conduct of international relations, that any State should by its action cause the population of other States, and their descendants, to be exposed to incalculable risks.'[196] This statement could very easily apply to the current climate crisis, and it is important for the future of the planet and the maintenance of peaceful relations between nations that legal remedies be realised.

[194] See Chapter 4 on Transboundary Harm.
[195] See further discussion on this topic in section 3.5.2 Future Generations.
[196] UNGA, 'Report of the United Nations Scientific Committee on the Effects of Atomic Radiation,' in Official Records of the Sixteenth Session, Special Political Committee, 262nd meeting (16 October 1961) A/4881, Corr.l. A/SPC/ L.68, L.69 and Add.l, [4]. (hereafter Atomic Radiation Report)

Another historical example comes from the case of the US hostages in Iran. In a quote that seems to echo the concerns of climate-induced IDPs, the US application to the ICJ insisted that: [197]

> Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights. But what has above al1 to be emphasized is the extent and seriousness of the conflict between the conduct of the Iranian State and its obligations under the whole corpus of the international rules of which diplomatic and consular law is comprised, rules the fundamental character of which the Court must here again strongly affirm.

In addition to recognising the hardships of victims and the behaviour that is incompatible with the UN Charter and the UDHR, this passage also references the need to apply State responsibility when conduct is at odds with 'the whole corpus' of international rules. Certainly, the continued failure of the global North is at odds with 'the whole corpus' of international rules, too. Finally, the US here implores that the ICJ must 'strongly affirm' international obligations, and there is no question that the same sentiment applies to the justiciability of climate change broadly or climate-induced IDPs specifically.
What these two examples show is a history of international practice of seeking peaceful solutions through legal channels. Section 2.3.1 established the failures of the climate regime to address the issue, and these cases show a practice of pursuing the application of State responsibility under similar circumstances. This is the most appropriate option for climate justice.

2.3.5 Challenges to Justiciability

This subsection focuses on legal arguments potentially raised in objection to the justiciability of the adverse effects of climate change. First, it must be rejected that the climate regime is self-contained. Here it is argued that general principles of law apply broadly to all fields unless a particular regime is expressly self-contained. The climate regime is not and, therefore, the general principles must apply. Second, any claim that the lack of obligations in the climate regime supersedes the general principle preventing transboundary harm based on *lex specialis* is also refuted on grounds that the climate regime cannot be reasonably judged to be intended to create exceptions to the general principles.

There can be no question that the principle of preventing transboundary harm is an important legal principle, as discussed in more detail in Chapter 4. However, some might argue one challenge to the potential for applying this principle to the matter of climate-induced IDPs is the myth that transboundary harm is limited to environmental protection or that the climate change regime exists as a 'self-contained regime'. It has been suggested that the 'existence of specialized treaty law could exclude the applicability of general customary law.'[198] However, it is significant that 'the international climate regime lacks secondary rules and thus cannot form a "self-contained regime".'[199] More broadly, it may be wrong to assert, or interpret, any of the various fields of international law as being self-contained. None, in fact, are when considering, for example, that 'denominations such as "trade law" or "environmental law"

[197] *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran) Judgement* [1980] ICJ Rep 3, 42[91]. (hereafter *US v. Iran*)
[198] Voigt on Damages (n 35) 3.
[199] Verheyen (n 34) 226.

have no clear boundaries.'[200] Only if one can clearly demonstrate that a principle is not applicable to the facts of a case should it be set aside, not on the basis of whether it draws from one field of law or another. The burden must be on the one asserting that a principle is narrowly applicable (*lex specialis*) to one field, and not on the one arguing its general applicability. In other words, the default assumption is that general legal principles apply to legal questions generally, and any attempt to challenge that assumption compels the challenger to defend their assertion. Disputes do not arise from neatly constructed, or fragmented, fields of law but rather from the circumstances of the situation, or the facts of the case. For example, inherent in the no-harm principle is the obligation of conduct requiring due diligence. IEL and the climate regime employ the due diligence principle within primary rules, but due diligence is found as a primary rule across all fields of international law, as well as existing as a secondary rule. In short, 'the notion that [climate change] treaties constitute closed systems needs to be rejected.'[201] The concept of harm is not limited to environmental damage but must be seen as any material or legal injury suffered by the injured State.

Another potential challenge to invoking State responsibility for any adverse effects of climate change is the argument that *lex specialis derogat legi generali* applies. This principle means that the particular rule (*lex specialis*) supersedes the general rule (*lex generalis*). In the context of climate change, it may at first appear reasonable to suggest that the specific rules developed within the regime supersede general rules such as the prevention of transboundary harm. If one accepted this argument, then States could not be held to be in breach of international obligations so long as they met their specific, binding commitments under the UNFCCC. However, this would be a cynical misinterpretation of the rule. *Lex specialis* only serves one of two functions. Either it clarifies a general rule, or it creates an exception. It would be an absurd proposition to assert that the climate regime was, in fact, intended to create exceptions to international responsibility, particularly those duties to prevent transboundary harm. This is evidenced by the fact that Fiji, Kiribati, Nauru, Papua New Guinea and Tuvalu 'declared (in almost identical terms) their understanding that signature and/or ratification of the Convention "shall in no way constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change, and that no provision in the Convention can be interpreted as derogating from the principles of general international law".'[202] The more accurate view is that the regime's rules aimed to clarify the general principle of no-harm. In Chapter 5, this paper argues that the UNFCCC did indeed serve to clarify the *lex generalis* of preventing transboundary harm by creating an internationally recognised standard of due diligence to be expected. Therefore, the general principle applies, and the specific regime clarifies the standard of care to be expected.

2.3.6 Appropriateness

This discussion of the appropriateness of the avenue of recourse argued in this paper has demonstrated that legal action is the most appropriate means to seek justice for climate change, especially for States hosting climate-induced IDPs. The failure of the climate regime to offer any meaningful solutions leaves injured States with no mechanism other than the courts to pursue a remedy. This discussion of the development of the climate regime also highlights the extent to which the global North knew of the danger it was causing, knew how

[200] Koskenniemi, 'Fragmentation of International Law', International Law Commission Study Group on Fragmentation, 3. https://legal.un.org/ilc/sessions/55/pdfs/fragmentation_outline.pdf accessed 20 August 2022
[201] Voigt on Damages (n 35) 3.
[202] Verheyen RKA, and Roderick P, 'Beyond Adaptation', WWF-UK Climate Change Programme discussion paper (November 2008), 17.

to avoid that danger, and still failed to act, thus establishing a clear failure of due diligence obligations related to transboundary harm.[203] IEL, both hard and soft law, help to establish the justiciability of climate change and its adverse effects by revealing the general principles that emerge from across the hundreds of specific treaties. Further, international law in practice offers evidence of circumstances sharing multiple elements with climate change being recognised as justiciable. Finally, any legal arguments based on the *lex specialis* must be immediately rejected as untenable. These sections have established that the issue of climate-induced IDPs is a matter best resolved by the ICJ through determining whether State responsibility should be affixed for causing the climate crisis. The following chapter will explore the principle of State responsibility before Chapter 4 identifies the particular wrongful act, transboundary harm, that constitutes a breach, and Chapter 5 will then apply all of these to the specific case of climate change and the displacements it forces.

[203] See Section 4.4.4 on Due Diligence.

Chapter 3 - State Responsibility

3.1 Introduction

The evolution of the climate regime has been significantly marked by the continual efforts of the Global North to avoid committing to specific, legally-binding obligations for reducing GHG emissions. However, this does not absolve these States from all accountability. The principle of State responsibility can be applied to any breach of an international obligation, and the absence of specific obligations within the climate regime should not be mistaken for an absence of any obligation. This chapter provides an overview of the principle of State responsibility, focusing on those elements of the principle that are most relevant to its application to climate change. It is structured to offer, first, a brief background on the emergence of the principle of State responsibility in practice using the history of the codification process as a narrative vehicle through which to highlight the ways State responsibility has been used in practice with a particular focus on those elements that are relevant to this paper. This shows how limits on State sovereignty have evolved over time, how States owe obligations to each other, the global commons, their own subjects, and even future generations. This exploration also provides an understanding for how the boundaries are conceptualised spatially (other States and the global commons) and temporally (future generations), which will be important for later discussions on the concept of transboundary harm. There are sections on wrongful acts being attributed to the State, what constitutes a wrongful act, and which States may claim injury. The final sections explain the consequences of fixing State responsibility, as well as the possible countermeasures available in pursuit of justice. By the end of this chapter readers should have a clear understanding of the principle of State responsibility before moving on to Chapter 4's identification of the wrongful act in question.

State responsibility is triggered when a State breaches an international obligation. In such cases, 'the offending State is known as the 'responsible State'; the wronged State is known as the 'injured State'.'[204] The International Law Commission's (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ARS), adopted in 2001, is the primary instrument addressing State responsibility. Article 2 of the ARS establishes two conditions for assigning responsibility. First, the wrongful act or omission must be attributable to the State[205] and, second, it must constitute a breach of an international obligation.[206] Further, 'once a State breaches its obligations, a series of consequences follows.'[207] Put simply, the concept of State responsibility is that States are accountable for committing breaches of international obligations, and such violations entail consequences. It should be noted here that this paper focuses primarily on the obligations States owe to each other. There are discussions and debates to be had on the relationship between the State and its subjects, but those are expressly outside the scope of this paper. In general, 'international obligations make a State incur responsibility against another State', and 'responsibility does not arise if a State breaches an obligation toward its own people.'[208] There are exceptions, particularly related to human rights obligations, but reference to those obligations is limited in this work. The ideas to be covered in this chapter are those addressing limitations on sovereignty, defining

[204] Abass A, *International Law: Text, Cases, and Materials* (2nd ed, Oxford University Press, Oxford, 2014) 440. (hereafter Abass)
[205] ILC ARS (n 11) Art. 2(a).
[206] ILC ARS (n 11) Art. 2(b).
[207] Abass (n 204) 441.
[208] Abass (n 204) 443.

boundaries, attributing acts to the State, identifying wrongful acts, identifying injured States, the consequences that flow from fixing responsibility, and the potential for countermeasures in pursuit of justice.

In addition to the ILC ARS, this chapter will look at how State responsibility emerged across various fields of law, and how that, along with existing case law, helps to illuminate various aspects of State responsibility. For example, in 1923, long before the ILC ARS, the *Phosphate in Morocco Case* held that a violation of international law would 'directly involve responsibility' and that when such a violation is 'attributable to the State', then 'international responsibility would be established immediately.'[209] The 1925 *Spanish Zone of Morocco Case* and the 1927 *Factory at Chorzów Case* both held that responsibility requires reparations.[210] The *Corfu Channel Case*, in 1949, and the *Dickson Car Wheel Company Case*, in 1931, then demonstrated that wrongful omission constitutes a breach just as a wrongful act does.[211] Clearly the ILC's codification marks the recognition of the principle's existence, not the beginning of it.

This section has provided an overview of State responsibility and the structure for exploring the topic in more detail in this chapter. State responsibility is affixed when a State violates an international obligation through a wrongful act or omission,[212] and when that act is attributable to the State. What the exploration of the evolution and codification process clarifies, among other things, is how to identify a wrongful act and which acts are attributable to States. It also informs one's understanding of who can claim injury and under what conditions, and what remedies are available or appropriate. This chapter concludes by revealing a framework for how State responsibility must be assigned to cases of climate justice.

3.2 Background and Emergence

Understanding the background and how the principle of State responsibility emerged helps to clarify how it has been used in practice and how it is understood in modern international law. International law developed and evolved over centuries of practice. It is important to distinguish between the emergence of principles, or their origins, and the documentation of law.[213] Perhaps the field began in earnest with Grotius in 1625.[214] Others might argue it began with the Treaty of Westphalia in 1648. But Abass rightly points out the challenges to this framing of international law. First, it ignores the existence of scholarship outside of Europe, likely predating the likes of Grotius. Second, it ignores the actual origins of principles of law that existed long before anyone wrote them down. There is the example of Herodotus describing North African tribes practising 'silent trading' which can only be understood as a primitive demonstration of the principle of good faith.[215] This illustrates the point that what would eventually be recognised as legal principles may have existed for more than a millennium in practice. For this paper, tracing the entirety of the history of international law is beyond the scope. Indeed, trying to thoroughly trace the origins of the practice of State

[209] Abass (n 204) 441.
[210] Abass (n 204) 442.
[211] Abass (n 204) 442.
[212] Recognising that the law equates wrongful acts and omissions, this work uses 'act' to refer to either acts or omissions in this context.
[213] Abass (n 204) 3.
[214] Grotius H and Loomis LR, *The Law of War and Peace (De jure belli ac pacis)*, (1949, New York: Published for the Classics Club by Walter J. Black).
[215] Abass (n 204) 4.

responsibility might be a worthy paper on its own, but it is certainly too grand for the context of this discussion. However, on a shorter scale, it is hoped that this section can highlight the way in which the principle of State responsibility has been understood by exploring the efforts of the ILC to codify it in the Twentieth Century. Building on Chapter 2's background, this chapter's exploration of the State responsibility's historical application in practice allows a theoretical framework to emerge for assigning State responsibility for the climate crisis.

It is very difficult to identify a precise moment when a principle can be said to exist, but this discussion might reasonably begin with the developments in the first half of the last century and intensifying with the ILC's codification process in the second half. By including not only the significant development of instruments and jurisprudence, but also the scholarly commentaries and *travaux préparatoires* behind these developments, it will become evident that State responsibility is directly and unquestionably applicable to the climate crisis and climate justice. In describing the way in which the principle has been understood and discussed in various fields of international law, one will see how these disparate fields all illustrate the principle's relevance to different elements necessary for applying it to climate justice. That includes the principle's relationship to sovereignty, jurisdiction, and attribution. This framework will allow subsequent chapters to make clear that State responsibility has been historically applied to conditions common to the climate crisis[216] and, therefore, must also be applied to questions of climate justice.

3.3 Documenting the Principle

To begin the exploration of the principle of State responsibility through a short history of the codification process provides a narrative that is both easy to follow and informative in offering insights into the intentions of the authors of the ILC ARS. The ILC decided in 1949 that State responsibility was a legal principle in need of codification. This meant that the principle already existed, having emerged organically through practice, and had now reached a level of development that suggested it should be articulated in a legal instrument. It seems clear from the record of discussions on the topic that the terminology had long been associated with, in particular, a State's duties to treat foreigners within their jurisdictions in a certain manner,[217] but that the ILC would approach it more broadly. For example, some noted the connection with the Nuremberg Charter asserting that State responsibility also extended to 'individuals acting in the name of the State,'[218] and this context clearly extended beyond the diplomatic protection of aliens. Earlier developments like the Montevideo Convention on the Rights and Duties of States[219] had codified, in 1933, the personhood of States in international law, thereby also codifying certain obligations States owed to each other.[220] In 1935, the hugely influential *Trail Smelter Case* affirmed that leading scholars had rightly argued, and jurisprudence had repeatedly held, that State responsibility is a general principle of

[216] See Section 2.3.2 on justiciability.
[217] ILC, 'Summary Records and Documents of the First Session including the report of the Commission to the General Assembly' (1949) *Yearbook of the International Law Commission*, A/CN.4/SR.5 [96]. (hereafter ILC Summaries 1949) accessed at https://legal.un.org/ilc/publications/yearbooks/english/ilc_1949_v1.pdf 22 May 2022
[218] ILC Summaries 1949 (n 217) A/CN.4/SR.6 [27].
[219] Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS. (hereafter Montevideo Convention)
[220] For a detailed discussion on personhood in international law, see Wendt A, 'The State as Person in International Theory' (2004) 30 Review of International Studies 289. accessed at https://www.proquest.com/docview/204945373/abstract/71F425FDC63343F6PQ/1 7 July 2022

international law.[221] If multilateral agreements like the Nuremberg Charter and the Montevideo Convention, as well as international environmental arbitrations like the *Trail Smelter Case*, recognised the principle as a general one, then it was difficult to assert that State responsibility belonged uniquely to diplomatic protections or, indeed, to any one field of law. Roberto Cordova suggested the ILC 'should not restrict itself to the question of State responsibility toward aliens, but should study all infringements of the duties incumbent on States.'[222] Despite the recognised difficulties in codifying such a broad and complex topic, the ILC included State responsibility in its initial list of topics for codification, a testament to the importance of the issue, as well as a recognition that the principle already existed in practice. Further, these early discussions indicate the recognition that State responsibility must be understood by the collection of its manifestations across various fields rather than simply as it relates to any specific field.

The many questions before the ILC in these early years pushed State responsibility down the agenda for a full decade. Finally, in 1959, State responsibility began to receive attention. It was also at this point that it was agreed that the approach to the topic should be one of a general scope, as Cordova had argued, rather than focusing on the treatment of aliens or any other specific field.[223] The ILC would endeavour to articulate the scope of State responsibility in general terms while setting aside specific questions or fields of law. In 1964, the ILC collected evidence of the principle of State responsibility across various fields of law (1964 Summaries).[224] As noted above, State responsibility had already been recognised as a point of discussion in the context of the Nuremberg Charter, and the 1964 Summaries expanded on that point by including evidence of its significance to the development of the Convention on the Prevention and Punishment of the Crime of Genocide.[225] State responsibility's relevance had also emerged in the context of service to the UN[226] and in the draft code of offences against peace.[227] There could be no mistake that the ILC had rightly acknowledged the significance of the principle to international law broadly and approached its codification in general terms rather than being limited by the historical association of the concept with diplomatic protection. Understanding the manner in which State responsibility was understood across these disparate fields informs how it now applies to contributions to environmental harm.

3.4 Limits on sovereignty

It might be argued that sovereignty is a defence against State responsibility. Acts carried out within a State's jurisdiction are subject to that State's laws, after all. Of course, no State could be held responsible if its sovereignty were boundless. One can see sovereignty and its limits as the border between a State's rights and its obligations. It will be shown in Section 5.3 how this principle manifests in environmental law specifically, but it is important to acknowledge

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[221] *Trail Smelter Arbitration* (*United States v. Canada*) (1938 and 1941) 3 RIAA 1905, 1963. (hereafter *Trail Smelter Case*)
[222] ILC Summaries 1949 (n 217) A/CN.4/SR.6 [28].
[223] ILC, 'Summary record of the 515th meeting' (1959) 1 *Yearbook of the International Law Commission* A/CN.4/SR.515. accessed https://digitallibrary.un.org/record/3937700 22 May 2022
[224] ILC, 'State Responsibility - Summary of the discussions in various United Nations organs and resulting decisions - Working paper prepared by the Secretariat' (1964) 2 *Yearbook of the International Law Commission* A/CN.4/165. (hereafter ILC Summaries 1964) accessed https://legal.un.org/ilc/documentation/english/a_cn4_165.pdf 20 May 2022
[225] ILC Summaries 1964 (n 224) [4 -11].
[226] ILC Summaries 1964 (n 224) [12 -18].
[227] ILC Summaries 1964 (n 224) [19].

at this stage that the understanding of sovereignty was evolving in the Twentieth Century in ways that made codifying State responsibility both possible and necessary. In recognising this change, the scholar James W. Garner articulated the emerging modern understanding in 1925:[228]

> [Sovereignty] is attacked by writers on international law, while affirming that sovereignty is a necessary attribute of the state, and that viewed as the manifestation of a purely internal power it is legally unlimited, maintain that in its external manifestations, that is, when the exercise of the power which flows from it affects the rights or interests of other states or their nationals, the traditional theory as commonly formulated by jurists and expounded by text-writers is an 'archaic,' 'unworkable,' 'misleading,' and even 'dangerous' political dogma - a 'baneful fiction' which no longer corresponds with the facts of international life or practice and is, indeed, incompatible with the existence of a society of states governed by a recognized and generally observed system of international law.

Garner rightly recognised that the 'archaic' view of unlimited State sovereignty was 'incompatible' with the international system that was emerging in the early Twentieth Century. It was certainly clear to scholars of the day that the understanding of sovereignty was evolving, and was discussed in relation to State responsibility in subsequent developments. In the Montevideo Convention, the Seventh International Conference of American States codified the principle that '[n]o state has the right to intervene in the internal or external affairs of another,'[229] which firmly establishes a limit on sovereignty at least at the point that State actions interfere with the affairs of another. As noted above, the Nuremberg Charter also offers a glimpse into this changing understanding by recognising the rights and responsibilities owed to humanity regardless of any State's assertion to the contrary. In this way, States were not free to violate people's basic human rights, nor could they shield officials, individuals, or even heads of State from international prosecution for such violations.[230] While the specific limits on sovereignty remained ill-defined, the Twentieth Century clearly saw an emerging view that limits must exist. This is significant in that the understanding of limitations imposed on States meant that sovereignty was no longer an excuse for actions that violated the equal sovereignty of other States or the human rights of individuals. This is directly applicable to the case of climate change driven by human GHG emissions. State sovereignty does not permit harmful emissions that interfere, or damage, other States.

It is important, too, to note that limits on sovereignty apply not only to acts that may cause harm to, or interfere with, other States, but also with those territories beyond the jurisdiction of any one State; the global commons. The UN Convention on the Law of the Seas (UNCLOS), adopted in 1982, offers perhaps the most explicit and detailed understanding of the conceptual boundary between territorial sovereignty and the global commons. Certainly the land within a State's political borders is sovereign territory, as are the waters within those boundaries. Coastal States also retain sovereignty over territorial waters extending twelve nautical miles from the land.[231] Moving seaward State's have slightly less sovereignty over the next twelve nautical miles, the contiguous zone, as they lose sovereignty over the airspace

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[228] Garner JW, 'Limitations on National Sovereignty in International Relations' (1925) 19 The American Political Science Review 1, 2. accessed https://www.jstor.org/stable/2938889 29 March 2021
[229] Montevideo Convention (n 219) Art. 8.
[230] ILC, 'Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal' [1950] *Yearbook of the International Law Commission* 2, [97].
[231] UN Convention on the Law of the Sea (adopted 10 December 1982, entered into force 1 November 1994) 1833 UNTS 397, Art. 3. (hereafter UNCLOS)

while maintaining it for the surface and floor of the sea.[232] Beyond the contiguous zone State sovereignty again declines as it is reduced to only the seafloor, no longer having sovereignty over the surface.[233] One then finds that no State has sovereignty over areas beyond these demarcations, or what is called the high seas. As explained by Leigh, 'The status of the high seas is usually explained as encapsulated in the concept of "res communis" which encompasses the notion that the high seas or parts thereof are: not owned by any one State; not able to be individually owned; and open to use by all.'[234] This geographical jurisdiction is perhaps the most easily conceptualised limitation on sovereignty, and one must be mindful that the effects of any act (not merely the act itself) must not extend beyond these boundaries if a State is to defend such acts as protected by sovereignty. If the effects are felt beyond the borders of the State, then it is interfering with the sovereignty of another and is, therefore, an international issue.

This cornerstone of international law manifests in significant ways particularly relevant to discussions of climate or environment. For example, States' rights to sustainable development and the exploitation of their own natural resources[235] are both rooted in the foundation of sovereignty while, on the other hand, the prohibition on transboundary harm reflects a respect for the sovereignty of other States (the right not to have harm done to it). This demonstrates the way in which sovereignty works only if it is reciprocal. States enjoy the right to govern themselves but are also obliged not to infringe on the rights of others. The modern realities of an increasingly interconnected world mean that 'the use by any one state of the natural resources within its territory will invariably have consequences for the use of natural resources and their environmental components in another state.'[236] Stockholm Principle 21[237] and Rio Principle 2[238] acknowledge the sovereign right of States to exploit their own natural resources and the responsibility not to cause harm to other States.[239] Further, as 'Principle 21 is widely recognized to reflect customary international law',[240] it is binding on all States. All of this reinforces the critical concept that while States enjoy sovereignty, it is not without limits. Those limits require States to consider how acts within their jurisdiction will affect areas beyond it. This is specifically relevant to all matters of transboundary harm, and that includes GHG emissions that lead to adverse effects in other States or the global commons.

Taken together, these examples clarify four explicit limits to sovereignty. First, the Montevideo Convention affirms the internationally recognised limitation that States shall not interfere with the internal affairs of others. For one State to knowingly require other States to adapt to the climate change it has caused is potentially a form of prohibited interference. Second, the Nuremberg Charter then acknowledges that State sovereignty is limited by the recognition that human rights must be respected even internally. Third, UNCLOS offers an example of the international recognition of a global commons, or common heritage of

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[232] UNCLOS (n 231) Art. 33.
[233] UNCLOS (n 231) Art. 76.
[234] Leigh K, 'Liability for Damage to the Global Commons' [1992] Australian Yearbook of International Law 2, 130-131. (hereafter Leigh)
[235] UNGA Res 1803 (XVII) (1962) 'Permanent Sovereignty over Natural Resources', *Human rights : a compilation of international instruments. Volume 1, 1st part, Universal instruments* ST/HR/1/Rev.6 (Vol.I/Part1, 2002), 81-83. https://digitallibrary.un.org/record/57681?ln=en accessed 29 March 2021
[236] Swanson and Johnston (n 188) 206.
[237] Stockholm Declaration (n 85).
[238] UNGA, Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (vol. I), 31 ILM 874 (1992).
[239] Swanson and Johnston (n 188) 233.
[240] Swanson and Johnston (n 188) 234.

humankind, and it is clear that State sovereignty is also limited to actions that do not cause harm to these shared resources. Fourth, the cumulative effect of international law creates a clear view that sovereignty reaches its limit at the point at which harm is caused to another. These concepts all contribute to the understanding that State responsibility applies to contributions to climate change. This includes recognising that violating transboundary harm in its most direct sense (neighbouring States) is a violation of an international obligation. It also includes a recognition that this 'boundary' must be understood both spatially to include the global commons and temporally to include future generations. While the particular case of transboundary harm will be discussed in Chapter 4, it is important that this chapter establishes that State sovereignty cannot be a defence against fixing State responsibility when the adverse effects extend across boundaries.

3.5 Common Heritage

The previous section establishes how limits on sovereignty mean States can be responsible for activities within their respective territories, especially when the effects are felt outside of said jurisdiction. This section explores the scope of State responsibility beyond their respective territories and how one conceptualises boundaries. Cases in which damages are caused directly to another State may not require detailed explanations, but they will be discussed in Chapter 4 relating to transboundary harm. This discussion of scope will explore how State responsibility applies to activities affecting those areas outside the jurisdiction of any one State, and those affecting future generations. Specifically, it will assert that State obligations exist in relation to the global commons (spatial) as well as to future generations (temporal). Collectively, these spatial and temporal dimensions beyond any State's jurisdiction might be called the common heritage of humankind. The term 'global commons' is understood to derive from the concept of the 'tragedy of the commons' in which each State acting in their own interest will negatively impact the global resource. By contrast, the term 'common heritage' derives from the understanding that some things belong to all humankind.[241] This may include geographical or tangible resources like the global commons, but it also includes intangibles like future generations. With this understanding, this paper uses the global commons in a narrower sense and uses common heritage as a broad term encompassing both the global commons and future generations. The relevance of State responsibility to each of these categories of the common heritage of humankind is crucial to applying the principle to climate change.

3.5.1 Global Commons

Geographical jurisdiction is perhaps the most easily conceptualised limitation on sovereignty. Even with the more nuanced reality of degrees of territorial sovereignty described in Section 3.4, it is still a relatively easy concept to grasp. It is assumed here that a shared national border is so easily understood as to not warrant further discussion. What this section aims to highlight is that 'boundaries' also exist between States and the global commons which equally require States to prevent transboundary harm. This territorial limitation on sovereignty leads us to an understanding of global commons that can be applied not only to the high seas, but also to outer space, Antarctica and, most importantly for this paper, the climate, as well as other concepts that are generally agreed to be shared by all. This understanding, and the recognition that the atmosphere and climate fit into this category, helps to understand State obligations owed to the international community as a whole.

[241] Ranganathan S, 'Global Commons' (August 2016) 27 *European Journal of International Law* 3.

The emergence of State responsibility also reflects obligations related to these global commons. What lies beyond the jurisdictional limits of sovereignty may be referred to as the global commons. Much has been written on the nuanced understandings of what constitutes the global commons.[242] A review of this literature illustrates the widespread understanding that the atmosphere and climate, *inter alia*, are part of the global commons. These types of natural resources that are shared by the entire planet must also be preserved for the enjoyment of future generations as part of the common heritage of humankind. If there is any debate to be found in this discussion it is whether cultural heritage is to be considered as part of the global commons. However, arguments in favour of excluding this category seem to be rare.[243] Most experts agree that cultural heritage fits the definition of common heritage in that it transcends national borders and must be preserved for future generations.[244] Setting aside the debate about certain nuanced understandings of the global commons and common heritage, it must be accepted that the atmosphere and the climate, along with outer space and the high seas, share the characteristics of lying beyond the jurisdiction of any one State, being shared by all, for both present and future generations, and can uncontroversially be called 'global commons' and the 'common heritage'. As such, this section aims to highlight how State responsibility has traditionally been understood in relation to these areas as this will illustrate how it must now be understood in relation to the climate crisis.

Outer space serves as a relevant example of State responsibility in areas outside any national jurisdiction, i.e., the global commons. In 1963, the Committee on the Peaceful Uses of Outer Space submitted a draft of legal principles specifically recognising that 'States bear international responsibility for national activities in outer space.'[245] This clearly articulates the view that State responsibility applies to activities affecting the global commons. These negotiations also identified a need to apply State responsibility for atmospheric pollution and the hindrance of the activities of other States,[246] two areas of great significance to the question of State responsibility for climate change. This evidence reinforces the position that the principle applies to impacts on the global commons and is not limited to adverse effects directly to the territories of other States.

The high seas are also a part of the global commons, and UNCLOS offers further evidence of how State responsibility has been historically understood in this context. Article 136 bluntly declares that the ocean and 'its resources are the common heritage of mankind.'[247] Like outer space and the atmosphere, this firmly establishes the legal recognition of the seas as part of the global commons, so how State responsibility applies is relevant to understanding how it will apply to climate change considerations. UNCLOS Article 139 makes clear that 1) States

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[242] For detailed insights into academic discussions on the topic, see Baslar K, *The Concept of the Common Heritage of Mankind in International Law* (Kluwer Law International, The Hague, 1998) 280-282.
[243] Sand PH, 'UNCED and the Development of International Environmental Law' (1992) 3 Yearbook of International Environmental Law 3-17, 8. (hereafter Sand on IEL)
[244] Weiss EB, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (UN University, Tokyo, 1989); see also Caron D, 'The Law of the Environment: A Symbolic Step of Modest Value' (1989) 14 Yale Journal of International Law 528-541; see also Chayes A, Remarks on the 'Protection of Global Heritage' (1981) Proceedings of American Society of International Law 32-55; see also Borgese E, *Ocean Governance and the United Nations* (Dalhousie University, Halifax, 1995).
[245] UNGA, 'Agenda item 28: International cooperation in the peaceful uses of outer space' (1963) A/5549/Add.l [6]. accessed https://www.unoosa.org/pdf/gadocs/A_5549E_and_5549Add1E.pdf 28 May 2022
[246] ILC Summaries 1964 (n 224) [27].
[247] UNCLOS (n 231) Art. 135.

are responsible for abiding by international obligations in the global commons,[248] and 2) that States are liable for damages when they fail to do so.[249] This makes clear that State responsibility applies to a State's actions both within the global commons, and adversely affecting such areas.

Antarctica also makes up a part of the global commons. The Antarctic Treaty System (ATS), including the 1959 Antarctic Treaty and its subsequent Protocols and Annexes, makes clear that the region is to be used peacefully for the interests and progress of mankind.[250] Protocols to the Antarctic Treaty highlight the view that State responsibility applies here, too. In 1991, the Antarctic Treaty Consultative Meeting (ATCM) agreed the Protocol on Environmental Protection to the Antarctic Treaty (Madrid Protocol) that codified the obligation of all States operating in Antarctica to protect the environment.[251] Annex VI to the Madrid Protocol (Annex VI), then, addresses liability for environmental damage and, in so doing, raises points informing the general understanding of State responsibility. For example, Article 3 of Annex VI explicitly requires States to 'undertake reasonable preventative measures that are designed to reduce the risk of environmental' damage.[252] This creates a rule of due diligence governing State actions in the global commons. Additionally, Art. 10 of Annex VI references State liability directly in exempting them when due diligence has been performed.[253] In so doing, the annex has, by inference at least, then clarified that a failure of due diligence on the part of a State would constitute a breach of international obligation and, therefore, warrant the application of State responsibility.

If there is any debate to be found in this discussion it is whether cultural heritage is to be considered as part of the global commons. However, the exclusion of this category seems to be limited.[254] While there may not be an exact definition of what constitutes culture,[255] most experts agree that cultural heritage, in principle, fits the definition of global commons in that it transcends national borders and must be preserved for future generations.[256] Significantly, protection of cultural heritage has been increasingly a matter for international law since at least the late 19th Century.[257] In 1907 the Hague Convention Respecting the Laws and Customs of War on Land (1907 Hague Convention) reiterated earlier calls to protect 'institutions dedicated to religion, charity and education, the arts and sciences' and prohibiting the wilful destruction of 'institutions of this character, historic monuments, works of art and science.'[258] The 1954 Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention) firmly establishes the

[248] UNCLOS (n 231) Art. 139(1).
[249] UNCLOS (n 231) Art. 139(2).
[250] UNGA, Antarctic Treaty (adopted 1 December 1959, entered into force 23 June 1961) 402 UNTS 71, preamble. Accessed https://www.ats.aq/e/antarctictreaty.html accessed 4 August 2022
[251] ATCM, Protocol on Environmental Protection to the Antarctic Treaty (adopted 4 October 1991, entered into force 14 January 1998) 2941 UNTS. accessed https://treaties.un.org/doc/Publication/UNTS/Volume%202941/v2941.pdf 4 August 2022
[252] ATCM, Annex VI on Liability Arising From Environmental Emergencies to the Protocol on Environmental Protection to the Antarctic Treaty (14 June 2005), Art. 3. (hereafter Annex VI)
[253] Annex VI (n 252) Art. 10.
[254] Sand on IEL (n 243) 8.
[255] Shaheed F, 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development' (22 March 2010) A/HRC/14/36.
[256] For more details on this topic, see section 3.5.1 Global Commons.
[257] ICRC, 'The Brussels International Declaration of 1874 Concerning the Laws and Customs of War' (November 1974) 14 *International Review of the Red Cross* 164, Art. 8.
[258] International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, Art. 56.

place of culture in asserting that 'damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world.'[259] It then explicitly calls on States at war to maintain 'respect for the culture and cultural property of all peoples.'[260] Beyond these recognitions in humanitarian law, human rights law has also included the concept of cultural rights. The UDHR affirms that 'everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits,'[261] and this is codified in the ICESCR.[262] Taken together, one can see the long history of international law treating culture as part of the common heritage of humankind in the same way as it views other parts of the global commons. While individual States may have claims of injury due to their culture being violated, any State may invoke responsibility for legal injury on behalf of the common interests of the international community in protecting culture.

There are further insights in existing international case law to suggest that harm to the global commons is justiciable. The *Nuclear Tests Case* offers a good example. As the case related to the testing of nuclear weapons in the South Pacific, it involved actions outside of the territorial jurisdiction of the applicant (Australia). Despite France's challenge to the court's jurisdiction, the ICJ recognised 'that the provisions invoked by the Applicant with regard to the Court's jurisdiction appear, prima facie, to afford a basis on which that jurisdiction might be founded.'[263] Similarly, as discussed in the section on legal injury,[264] any State may invoke responsibility for breaches of obligations owed toward the global commons as those obligations are *erga omnes*.

With historical references to State responsibility so clearly establishing its relevance to the global commons, it was only logical that the ILC ARS codified this reality. In discussing what is meant by international obligations under Article 2's definition of the elements of an international breach, the ILC commentary provides that '[i]n international law the idea of breach of an obligation has often been equated with conduct contrary to the rights of others.'[265] As all States are equally entitled to access and enjoyment of shared resources, it must be seen that violations of a State obligation in relation to the global commons can lead to applications of State responsibility. Further support for this view is found in ILC ARS articles 46 (plurality of injured States) and 47 (plurality of responsible States).[266] By specifically articulating this allowance for pluralities, the ILC confirmed the understanding that there are certain obligations owed both by and to the international community. Obligations to the global commons should be understood within this context. The international community of States both owes and is owed obligations to respect the global commons as shared resources beyond any State's individual jurisdiction or control.

The atmosphere and environment are part of the global commons, along with outer space, the high seas, and Antarctica. One concept that is clear from looking at State responsibility as

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[259] UNESCO, (First) Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) 249 UNTS 215, Preamble. (hereafter 1954 Hague Convention)
[260] 1954 Hague Convention (n 259) Art. 7.
[261] UDHR (n 120) Art. 27.
[262] ICESCR (n 123) Art. 15.
[263] *Nuclear Test Case* (Australia v France) (Interim Protection Order Summary) [1973] ICJ Rep 99. <https://www.icj-cij.org/public/files/case-related/58/6051.pdf> accessed 3 April 2021 (hereafter *Nuclear Tests Case*)
[264] See section 3.8.2 Material and Legal Injuries.
[265] ILC ARS (n 11) 35.
[266] ILC ARS (n 11) Articles 46 and 47.

historically applied to the other areas of the global commons is that it is equally applicable to the climate generally, and not only to actions that directly affect specific States. The evidence shows that States have historically been viewed as responsible for their actions within the global commons, and their treatment of shared resources. However, understanding that States are legally responsible for their treatment of the atmosphere and climate is only the first step. One must then understand what acts or omissions can be attributed to States.

3.5.2 Future Generations

As noted in Section 3.5, the common heritage of mankind is used in this paper to denote what are often described as that which is in the common interest of humankind, which includes both the global commons and the interest of future generations. One must consider that humankind consists not only of those currently living, but all of the future generations who will one day inhabit the planet. Just as there is with reference to the global commons, there are numerous examples from various fields of law to support the position that State's owe obligations to future generations. Breaches of those obligations, like all international obligations, demand the application of State responsibility. As noted in Section 3.4, the Nuremberg Charter codified the notion that States were not free to violate the human rights even of their own subjects, so the obligations owed to future generations is an international obligation.

A particularly early example of jurisprudence reflecting recognition of respect for the rights of future generations is found in the *Pacific Fur Seal Arbitration*[267]. Even in denying the US claim of the right to protect seal populations, the arbitrators recognised the need for protecting natural resources, preserving them for future generations. This principle 'is also expressly or implicitly referred to in many of the early environmental treaties, including the 1946 International Whaling Convention, the 1968 African Nature Convention and the 1972 World Heritage Convention.'[268] In 1961, the United Nations Scientific Committee on the Effects of Atomic Radiation (Scientific Committee) noted 'The long-term effects of exposure were not yet clearly established and some might not appear for many years. Thus, generations yet unborn might also suffer, to an extent which could not yet be measured.'[269] This understanding, paralleled perfectly by the more recent discussions on the climate crisis, articulates the well-established principle of international law that the rights of future generations must be protected.

Rightly, the ILC recognised this long-held and increasingly explicit principle in its 1964 Summaries by including reference to the draft resolution submitted by the Scientific Committee which declared 'that both concern for the future of mankind and the fundamental principles of international law impose a responsibility on all States concerning action which might have harmful biological consequences for the existing and future generations of peoples.'[270] It is clear that respect for the rights of future generations creates international obligations in a range of legal fields, and breaching those obligations would trigger State responsibility. It is also clear that the ILC recognised acts affecting future generations as within the scope of State responsibility. Developments of this principle relevant to climate change are discussed in Chapter 4 relating to transboundary harm, so it is enough to note here

[267] *Pacific Fur Seal Arbitration* (*UK v US*) (1893) 28 RIAA 263.
[268] Sands P and Peel J, *Principles of International Environmental Law* (4th edn, CUP, 2018) 221. (hereafter Sands and Peel)
[269] Atomic Radiation Report (n 196) A/4881 [3].
[270] ILC Summaries 1964 (n 224) [40].

that consideration for future generations has been present in international law since at least the 1800s, that the ILC specifically recognised this reality, and that State responsibility applies to breaches of obligations owed to future generations.

Finally, Weiss has developed three general principles of intergenerational equity that this paper asserts are applicable to climate justice. The three principles to be preserved for future generations are options (diversity of natural resources), quality (a healthy environment handed down from one generation to the next), and access (the principle of non-discrimination in access to resources).[271] For the purposes of State responsibility, it is important to recognise that, in principle, legal injury for threatening the rights of future generations may be invoked by any State. Chapter 5 will show how Weiss' framework is applicable to breaches of this obligation owed to future generations in the context of climate change and climate-induced IDPs.

3.5.3 Conclusion of Common Heritage

There is clear evidence in the evolution of international law and the process of codifying State responsibility that the scope of the principle includes acts or omissions that affect the common heritage of humankind, including both the global commons and future generations. While the details of risks and harms are more fully explored in Chapter 4, transboundary harm, it is important to note at this stage that the 'boundary' referenced in the prohibition on transboundary harm includes the conceptual boundary between States and the common heritage of humankind. States are obligated to avoid risking or causing harm in other States, in the global commons, and to future generations. These spatial and temporal parameters of international obligations as understood by the ILC provide a foundation for discussing the meaning of 'transboundary' and, therefore, for understanding an important element in applying State responsibility to climate change.

3.6 Attribution to the State

Another element of State responsibility that informs its application to climate change is the requirement that wrongful acts or omissions be attributable to the State. Again, the history of the codification process helps illustrate the manner in which acts or omissions have been attributed to States. Expanding on the 1963 Committee on the Peaceful Uses of Outer Space quote in Section 3.5.1, the fuller text reads: [272]

> States bear international responsibility for national activities in outer space, *whether carried out by governmental agencies or by non-governmental entities*. (emphasis added)

This view was codified in Articles 6 and 7 of the Outer Space Treaty.[273] It reflects the position that States are responsible for regulating activities within their respective jurisdictions. Failure to regulate certain behaviours can trigger State responsibility. It is significant that the outer space negotiations determined that the launching State bore responsibility for damage caused, regardless of who owned or operated the vehicle. This offers a useful analogy for States being

[271] Weiss EB, 'Climate Change, Intergenerational Equity, and International Law' (2008) 9 Vermont Journal of Environmental Law 615, 616. (hereafter Weiss on Intergenerational Equity)
[272] UNGA, 'Agenda item 28: International cooperation in the peaceful uses of outer space', A/5549/Add.l [6]. accessed https://www.unoosa.org/pdf/gadocs/A_5549E_and_5549Add1E.pdf 28 May 2022
[273] UNGA, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (adopted 27 January 1967, entered into force 10 October 1967) 610 UNTS 205. (hereafter Outer Space Treaty)

responsible for GHG emissions originating within their jurisdiction, regardless of whether they are created by non-State actors. It is clear that the traditional understanding is that States are responsible for effectively regulating potential causes of transboundary harm that emanate from their jurisdiction.

The law of the high seas, again, offers further insight into the manner in which acts can be attributed to the State. UNCLOS Article 139 reiterates the view seen in the Outer Space Treaty that States are responsible for the actions not only of State actors, but of anyone under their jurisdictional control.[274] Art. 139 also creates a due diligence obligation, exempting States from liability 'if the State Party has taken all necessary and appropriate measures to secure effective compliance.'[275] By explicitly exempting certain circumstances, this article implicitly confirms the view that States are responsible for ensuring compliance with the applicable rules, at least in as much as one can define 'necessary and appropriate measures'. This clarifies that it is not only the act that directly creates risk or causes harm that constitutes a breach of obligation. The failure of the State to exercise due diligence in ensuring compliance by non-State actors under its jurisdiction also constitutes a breach, and it is this breach that is attributable to the State.

Like treaties concerning outer space and the high seas, the ATS provides evidence of how acts are attributable to the State. In establishing the rules of liability for activities in Antarctica, Annex VI Art. 2 defines the relevant terminology. Specifically, Art. 2(d) clarifies that States are responsible for operators originating in or organising from their territory, and that those States are responsible for authorising such activities.[276] This parallels the views expressed in the outer space and high seas rules, making clear that this position is uniform across these areas of global commons and, therefore, should also be applied to activities affecting the atmosphere and climate.

It is clear that wrongful acts or omissions must be attributable to the State in order to assign State responsibility, but it is also important to note that if the State 'fails to fulfil one of its *own* duties in connection with [a] non-attributable act, there will be responsibility under international law.'[277] Dixon provides, for example, that a murder commited by a private individual would not be attributable to the State, but failure 'to apprehend and punish those individuals' could be a breach of the State's primary responsibility.[278] Further examples illustrate that State failures to exercise effective control, or due diligence, can be wrongful acts or omissions even if a catalysing wrongful act is not attributable to the State. In the *Massey Case*, the US 'claim [was] grounded on an assertion of denial of justice growing out of the failure of Mexican authorities to take adequate measures to punish the slayer' of an American citizen.[279] This was a clear case in which the initial act, the murder, was never thought to be attributable to the State, but the failure of the State to adequately pursue justice violated the State's primary responsibility. Similarly, the *Stephens Case* saw the US claim that the killing of a US citizen in Mexico required attributing State responsibility 'for not protecting [the victim], not prosecuting [the killer], and not punishing' the official who allowed the killer to go free.[280] Again, this demonstrates that States have a primary

[274] UNCLOS (n 231) Art. 139.
[275] UNCLOS (n 231) Art. 139(2).
[276] Annex VI (n 252) Art. 2(d).
[277] Dixon M, *Textbook on International Law* (Oxford University Press, Oxford, 2013) 262-263. (hereafter Dixon)
[278] Dixon (n 277) 263.
[279] *Massey Case* (*United States v. Mexico*) [1927] 4 RIAA 155 [1].
[280] Abass (n 204) 455.

responsibility for exercising effective control of their jurisdiction and making reasonable efforts to achieve justice when non-State actors commit wrongful acts. This is an important aspect of attribution that proves highly relevant to discussions of the justiciability of climate change.

Not surprisingly, this understanding of acts attributable to the State had become so widely practised that it was codified in the ILC ARS. Chapter II of the ILC ARS deals specifically with attributing conduct to States with Art. 4 very broadly noting that all acts by organs of the State, 'whether the organ exercises legislative, executive, judicial or *any other functions*'[281] (emphasis added) are attributable to the State. Subsequent articles then define the nuanced understanding of what constitutes an organ of the State or who can be said to be acting as an organ of the State. Art. 8, for example, clarifies that acts by non-State actors 'under the direction or control of'[282] the State are attributable to the State. The published commentaries on the ILC ARS summarise that 'the different rules of attribution stated in chapter II have a cumulative effect, such that a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects.'[283]

What the development and codification of State responsibility show about attribution is that international breaches must be attributable to the State. The ILC ARS, drawing on the well-documented history of the principle in practice, codifies a broad and inclusive view of what can be attributed to States. In addition to organs of the State exercising any functions, the acts of non-State actors can be attributable to the State in certain cases. Further, and of particular relevance to the issue of climate change, the State is responsible for exercising due diligence over its territory and subjects. The treaties on outer space, the high seas, and Antarctica, as well as the established jurisprudence, all reflect the view that making reasonable efforts to control the activities of non-State actors is an act attributable to the State. Having clarified this understanding of what acts are attributable to States, one must next look at how to identify a wrongful act or omission.

3.7 Wrongful Acts

This section is quite limited in its theoretical discussion because, as noted, the ILC intentionally avoided any attempt to codify specific wrongful acts. The ILC ARS only codifies that a wrongful act is one in which an international obligation is breached, but it does identify the seemingly endless list of every possibility of such a breach. The entirety of Chapter 4 is dedicated to exploring the specific breach to be addressed in this paper, which is the prohibition on transboundary harm.

In this section, instead, a brief overview of some of the relevant theoretical points is included. The first point to note is that the orthodox view, and the one adopted in this paper, is that neither intent nor negligence need be proven to identify a wrongful act. After the explanation of this objective approach, this section offers a few comments on how wrongful acts can be evaluated by either absolute, strict, or due diligence standards. Both of these points are worth noting in this section as they establish that intent is not necessary for assigning State responsibility, and that any evaluation of a potentially wrongful act can include determining whether a standard of care, due diligence, was met. This paper does not argue negligence or intent, and this discussion makes clear it is not needed. Additionally, this paper argues that

[281] ILC ARS (n 11) Art. 4.
[282] ILC ARS (n 11) Art. 8.
[283] ILC ARS (n 11) 39.

due diligence is an international obligation, and this discussion establishes that violations of due diligence constitute breaches of international obligations.

In the context of State responsibility, the concepts of objective or subjective theory refer to differing interpretations of establishing fault. The objective view is that any breach of obligations is enough to trigger State responsibility. By contrast, the subjective view would require evidence that the State either intentionally or through negligence breached the violation.[284] Put another way, the difference is 'between fixing states with responsibility for all breaches that can be imputed to them, or requiring an additional element of fault, such as intent, recklessness or negligence.'[285] The objective view is widely accepted in IL, and the matter was discussed explicitly in the codification process. A 1962 draft proposal on liability for space-vehicle accidents suggested that State responsibility should be interpreted in the objective sense that no intention need be proven, arguing that 'to require proof of negligence would generally be tantamount to denying the possibility of compensation.'[286] Crawford asserts definitive support for a strictly objective approach when stating 'it should be stressed, state responsibility is predicated on a principle of 'objective' liability.'[287] He even notes that throughout the ILC's development of the ARS 'no government argued in favour of the specification of a general requirement of fault as a prerequisite to state responsibility.'[288] Further, the intentional absence of criminal liability from the ARS seems to preclude any application of a subjective approach.[289] Based on this account, it is clear that Crawford sees no room for subjectivity, or the requirement to establish fault or negligence, in fixing State responsibility. This is a clear defence of the objective position, that the breach of an obligation is enough to trigger State responsibility. It is widely agreed, and accepted for the purposes of this paper, that 'most arbitral tribunals and writers lean more favourably towards the principle of objective responsibility.[290]

If a breach of an obligation triggers State responsibility without any need for establishing intent or negligence, then the more useful application for any kind of subjective standards would be in discussing the substance of the obligation breached. 'Whether state responsibility is 'strict' or even 'absolute', or depends upon 'due diligence''[291] are substantive questions, and the answers may require an element of subjective assessment. An absolute obligation (peremptory norms such as the prohibition of the use of force, for example) may be judged purely on the fact that the obligation was breached, but obligations dependent on due diligence must employ, to some extent, a subjective evaluation of whether due diligence was exercised. Of course, this means allowing for a subjective approach to evaluating the substantive elements of the obligations rather than the breach itself. Abass offers the *Corfu Channel Case* as an example in which the International Court of Justice (ICJ) appears to apply a subjective approach to determining whether Albania failed 'to adopt a particular level of diligence.'[292] It is also worth remembering that as the level of risk of harm increases, so the degree of required due diligence increases, according to the Draft articles on Prevention of

[284] Dixon (n 277) 255.
[285] Dixon (n 277) 256.
[286] ILC Summaries 1964 (n 224) [25].
[287] Crawford J, *State Responsibility: The General Part* (Cambridge Studies in International and Comparative Law, Cambridge University Press, Cambridge, 2013) 61. (hereafter Crawford)
[288] Crawford (n 287) 60.
[289] Crawford (n 287) 61.
[290] Abass (n 204) 465.
[291] Crawford (n 287) 65.
[292] Abass (n 204) 467.

Transboundary Harm from Hazardous Activities (APTH).[293] This point is discussed in more detail in Chapter 5 on applying the principle to climate change, but it is important to establish here that the generally accepted interpretation of breaches does not require fault or intent (objective), but that there are points at which subjective evaluations are relevant (the substance of obligations).

In fact, Crawford was able to garner widespread international support for the codification of State responsibility through 'the deletion of 'primary rules' together with 'subjectivity' from the law of state responsibility.'[294] Few States were willing to support previous versions of the ARS that included primary rules and subjectivity. With a more objective approach focused on secondary rules, the generality of the final ILC ARS became more widely accepted. In this way, one sees that the consensus view of State responsibility has always been an objective one; any breach of an international obligation is a violation that requires fixing State responsibility, regardless of intent. If any subjectivity is to be found, it is only in evaluating the substance of a particular primary rule, not in the fixing of responsibility, which is a secondary rule. And this subjectivity is largely mitigated through detailed guidelines like those in the APTH describing how to ascertain the degree of due diligence, strict standards, or absolute prohibitions should be understood in any give case.

3.8 Injured Parties

3.8.1 Invoking Responsibility

Just as a wrongful act must be attributable to the State in order to assign responsibility, so the injury must be attributable to a State, generally, to claim injury. It is well-understood that 'international law was conceived originally as a system of rules governing the relations of states amongst themselves.'[295] As noted above, States have used various mechanisms of international law to assign State responsibility and exert protection over their subjects when addressing the treatment of those subjects by foreign agents. However, in the existing jurisprudence this approach is only seen when subjects are outside of their home State's jurisdiction. In 1901, Italy sued Peru on behalf of Italian nationals over their treatment by the Peruvian government in the *Canevaro Claim*.**[296]** Here the Italian State took the Peruvian State to arbitration over the latter's failure to pay a debt owed to the former. The important point to note is that Italy sued to exert protection over nationals living abroad. This was also true when Mexico put forward a claim against the United States on behalf of a Mexican consul, Fransisco Mallén, over his treatment by an American agent in *Mallén v. USA*.[297] Similarly, the ICJ has heard the *Jadhav Case* in which India sued Pakistan over the detention and trial of an Indian national.[298] Other examples show States acting on behalf of business interests in a similar manner. In the *Dickson Car Wheel Company Case*, the United States made a claim against Mexico on behalf of a private corporation over a contract dispute with the Mexican

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[293] ILC, 'Draft articles on Prevention of Transboundary Harm from Hazardous Activities with Commentaries' (10 August 2001) 2 Yearbook of the International Law Commission 2, 154[11]. (hereafter APTH)
[294] Aust H P, and Feihle P, *Due Diligence in the History of the Codification of the Law of State Responsibility*. *Due Diligence in the International Legal Order* (Oxford University Press, Oxford, 2020) 43. https://oxford-universitypressscholarship-com.othmer1.icu.ac.jp:2443/view/10.1093/oso/9780198869900.001.0001/oso-9780198869900-chapter-3 accessed 2 June 2021 (hereafter Aust and Feihle)
[295] Dixon (n 277) 117.
[296] *Claims of Italian Nationals Resident in Peru* [1901] 15 RIAA 395.
[297] *Mallén (United Mexican States) v. USA* [1927] 4 RIAA 173.
[298] *Jadhav Case* (*India v. Pakistan*) [2019] ICJ Rep 11.

government.[299] All of these cases demonstrate that States have historically sought international legal remedies on behalf of individuals and businesses only in cases involving subjects operating abroad. While there is no explicit prohibition on States making claims on behalf of individuals domestically, it is expected that individuals should exhaust all domestic measures before appealing to international mechanisms.

This paper does not explore further the role of diplomatic protections, but it is worth noting that even in these cases, it is still the State that must bring forward legal challenges in the ICJ.[300] Further, this is made explicit in the ILC ARS[301] when it defines which States may invoke responsibility. This was addressed in relation to climate change in the 2019 complaint filed by youth climate activists with the Committee on the Rights of the Child (CRC).[302] While the CRC acknowledged the potential for victims to argue they are 'under the jurisdiction of the State on whose territory the emissions originated'[303] under certain treaty obligations (primary rules), the case was still ruled 'inadmissible for failure to exhaust domestic remedies.'[304] This is significant in that it effectively rules out the possibility that individuals could bring complaints through mechanisms other than the ICJ, even if other mechanisms lack the explicit declaration of the ICJ as being only for cases between States. The ILC ARS is also explicit in that the 'articles do not deal with the possibility of the invocation of responsibility by persons or entities other than States, and paragraph 2 [of Art. 33] makes this clear.'[305] Again, it should be remembered that the ILC recognises the possibility for individuals to invoke responsibility under certain primary rules, but the ILC ARS only allows States to bring claims against other States, and the requirement that local remedies be exhausted means States can only assert extraterritorial protections on behalf of individuals after all such avenues have failed to yield a just result.

This principle of exhaustion of local remedies is another important procedural reason for arguing that the State is the entity suffering injury in terms of international law, State responsibility, and reparations. The ILC ARS is explicit in stating that State responsibility cannot be invoked if 'the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.'[306] A case demonstrating this principle can be found in the *Norwegian Loans Case* in which France sought to exert protections over its nationals who were holding Norwegian bonds. Norway argued not that the claim was invalid on its merits but that the bond holders had not exhausted the local remedies available through Norwegian courts.[307] This reinforces the view that the injured State, not individuals, is in position to sue the responsible State for reparations. This in no way detracts from the individuals' rights to pursue justice through municipal courts, but that is a separate issue outside the scope of this research.

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[299] *Dickson Car Wheel Company Case* (*USA v. Mexico*) [1931] RIAA 1.
[300] UNGA, Statute of the International Court of Justice (18 April 1946) 33 UNTS 993. (hereafter ICJ Statute)
[301] ILC ARS (n 11) Part III, Articles 42-48.
[302] UN Committee on the Rights of the Child, 'Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 107/2019' (adopted 22 September 2021) CRC/C/88/D/107/2019. (hereafter CRC Complaint 2019)
[303] CRC Complaint 2019 (n 302) [9.7].
[304] CRC Complaint 2019 (n 302) [9.20]; See also ILC ARS (n 11) Art. 48.
[305] ILC ARS (n 11) 95[4].
[306] ILC ARS (n 11) Art. 44(b).
[307] Dixon M, McCorquodale R, Williams S, *Cases and Materials on International Law* (Oxford University Press, Oxford, 2016) 444.

3.8.2 Material and Legal Injuries

Having established that it is the State that is the injured party in international law, the next question is which States can claim injuries. This discussion highlights two distinct types of cases; cases in which material damages can be established and those in which they cannot. On this subject, Crawford usefully divides damages into material and legal categories, which he names distinctly as 'damages' and 'injuries', respectively.[308] This allows not only States with material damages to sue, but also those who have suffered the legal injury of another State breaching an obligation. In this way, the 'State which has only a legal interest can...demand the cessation of the breach committed by another State', but 'it cannot seek reparation for the damage caused by the internationally wrongful act which has not directly affected it.' Further, there is no 'reason for it to substitute itself for the [materially] injured State in demanding the reparations owed to that State.'[309] This allows the international society to identify and address breaches causing legal injury without requiring that material injuries have been incurred. However, it also allows an injured State the additional opportunity (beyond demanding cessation of the wrongful act or omission) to seek reparations for material injuries. In other words, legal injuries are incurred by all relevant parties to the obligation that has been breached, but material injuries only arise when economic or other demonstrable losses are suffered. However, Crawford cautions that it 'may be that many primary rules do contain a requirement of damage, however defined', but this cannot be taken as a necessary requirement for State responsibility, generally.[310] It is foreseeable that States could employ such arguments against responsibility in some cases, but it would be incumbent on them to identify such requirements in relevant primary rules. As a secondary rule, the violation is enough to trigger responsibility. Dixon reiterates this view in noting that States not suffering material damages may act, or take collective action, to demand the cessation of serious wrongful acts based only on the legal injury.[311]

Importantly, the ILC ARS codifies this understanding of which States have standing, or the right to invoke, State responsibility against another State. Art. 31 states explicitly that 'injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.'[312] Art. 42 defines an injured State as one to which an obligation was owed either individually or collectively.[313] Art. 48 then allows any State to invoke responsibility if 'the obligation breached is owed to the international community as a whole' and may demand the cessation of the wrongful act or performance of the act of reparation on behalf of materially injured States.[314] Taken collectively, Articles 42 - 48[315] codify Crawford's view that any State may invoke the responsibility of another, but the form of reparations available will be affected by whether the invoking State has suffered material or legal injuries.[316] The published

[308] This paper adopts 'material injury' to refer to damages and 'legal injury' to refer to injuries. It is thought that these are more descriptive and distinguishable. These terms are drawn from the ILC's *travaux préparatoires* in, for example, ILC, Comments and observations of Governments on part 1 of the draft articles on State responsibility for internationally wrongful acts' (1988) 2 *Yearbook of the International Law Commission*, Part One, A/CN.4/414 [71].
[309] Crawford (n 287) 87.
[310] Crawford (n 287) 57.
[311] Dixon (n 277) 257.
[312] ILC ARS (n 11) Art. 31.
[313] ILC ARS (n 11) Art. 42.
[314] ILC ARS (n 11) Art. 48.
[315] ILC ARS (n 11) Art 42 – 48.
[316] ILC ARS (n 11) 116 – 128.

commentaries accompanying the ILC ARS discuss these distinctions at length, leaving no doubt this was the view of the authors.

A particularly influential case highlighting the recognition of two different types of injuries is the *Barcelona Traction Case*. The case saw Belgium suing Spain over injuries caused to Belgian nationals owning stock in the Barcelona Traction, Light and Power Company. In its ruling, the ICJ noted that there is a difference 'between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State,' that 'the former are the concern of all States,' and that due to the 'importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.'[317] (emphasis in the original). The ruling even gives examples of such rights as, *inter alia*, aggression, genocide, or human rights violations.[318] This was a clear recognition that both materially and legally injured States could invoke responsibility.

Other examples can be found in the jurisprudence to demonstrate the possibility of claiming either material or legal injury. In 1979, Canada claimed material damages from the Soviet Union when a Soviet satellite fell from orbit and crashed on Canadian territory.[319] This case, known as *Cosmos 954*, saw Canada make specific claims for material injuries of around $6 million, including its efforts 'to locate, recover, remove and test the radioactive debris and to clean up the affected areas.'[320] This was a clear case of demonstrable material injury that could be quantified and claimed by Canada, from the USSR, without controversy. Then one finds an example of legal injury in the *Nuclear Tests Case*, which was related to the testing of nuclear weapons in the South Pacific, and involved actions outside of the territorial jurisdiction of the applicant (Australia). Despite France's challenge to the court's jurisdiction, the ICJ recognised 'that the provisions invoked by the Applicant with regard to the Court's jurisdiction appear, prima facie, to afford a basis on which that jurisdiction might be founded.'[321] The claims by New Zealand even more directly addressed the topic of legal injury when New Zealand based its claim specifically on France violating 'the rights of all members of the international community.'[322] Here one sees that New Zealand's argument parallels the view asserted in the *Barcelona Traction Case* that certain obligations are *erga omnes*. These cases show just two examples that State responsibility can be applicable to either material or legal injuries, and that it is only for material injuries that monetary compensation can be sought.

3.8.3 Causal Linkage

States claiming material injury will have the added challenge of establishing causal linkages between climate change contributions and specific injuries. It is worth including a section here to mention how advances in climate change attribution studies are helping to establish causal links between failures in due diligence and material injuries. This is not an exhaustive report on the topic, but it offers some insight into how causal links can be established. Environmental factors unquestionably drive displacements. It is also beyond doubt that

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[317] *Barcelona Traction Case* (*Belgium v. Spain*) [1970] ICJ Rep 3, [33]. (hereafter *Barcelona Traction Case*) https://www.icj-cij.org/public/files/case-related/50/050-19700205-JUD-01-00-EN.pdf accessed 20 August 2022
[318] *Barcelona Traction Case* (n 317) [34].
[319] *Cosmos 954 Case (Canada v. USSR)* Settlement of Claim between Canada and the Union of Soviet Socialist Republics for Damage Caused by "Cosmos 954" (23 January 1979) 18 ILM 899-908.
[320] Sands and Peel (n 268) 763.
[321] *Nuclear Tests Case* (263).
[322] *Nuclear Tests Case* (*New Zealand v France*) (Interim Protection Order Summary) [1973] ICJ Rep 135, 139. (hereafter *Nuclear Tests Case* NZ Interim Protection Order)

climate change is impacting the environment in a variety of ways. Storms are becoming more frequent and severe. Heatwaves, droughts, floods, sea-level rise, and many other aspects of weather patterns and the natural environment are affected by climate change. It is also beyond any debate that human activities, and GHG emissions in particular, are largely responsible for climate change. However, there remains the challenge of establishing linkages between specific events that force displacements and climate change, and linkages between climate change and a particular source of emissions. The emergence of attribution science now offers scientific models for understanding these linkages and can be a valuable tool for determining responsibility. The IPCC defines attribution as 'the process of evaluating the relative contributions of multiple causal factors to a change or event with an assignment of statistical confidence.'[323] This section discussed how causal linkages can be established between GHG emissions, climate change, and climate-induced IDPs through the use of attribution studies.

Section 2.2 of this paper differentiated between immediate-onset (commonly thought of as natural disasters) and slow-onset events that drive displacement. Slow-onset events are more easily linked with climate change. It is already established that these 'observed physical impacts such as sea level rise, melting permafrost, and ocean acidification can be attributed to anthropogenic climate change with high confidence.'[324] One is unlikely to find any authority denying that sea-level rise is a direct result of climate change or that this poses risks for coastal communities. Emerging jurisprudence reflects an increasing awareness that environmental degradation from the likes of sea-level rise is causing displacement. Though not related to State responsibility, one example of recognising that slow-onset events lead to displacement is found in a case from New Zealand. Even in denying the applicants claim in *Teitiota*, the New Zealand Supreme Court wrote: [325]

> [W]e note that both the Tribunal and the High Court, emphasised their decisions did not mean that environmental degradation resulting from climate change or other natural disasters could never create a pathway into the Refugee Convention or protected person jurisdiction. Our decision in this case should not be taken as ruling out that possibility in an appropriate case.

The judges at all levels recognised the reality that rising sea-levels posed risks, and none based their decision on those material facts. Instead, they denied the applicant's claim based on a legal interpretation of 'persecution'. This is a good indication that courts are willing to recognise the links between climate change and displacement in response to slow-onset conditions, but connecting climate change with specific immediate-onset events is more complicated. Further, slow-onset events like sea-level rise are easily contrasted with pre-industrial conditions in a way that makes clear they are the result of anthropogenic climate change.

Natural disasters as understood in the context of immediate-onset events, have always occurred. They predate climate change and GHG emissions, the Industrial Revolution and even the earliest human settlements. They are, in fact, natural. What is known with certainty is that rising global temperatures caused by GHG emissions mean 'it is very likely that heat waves will occur more often and last longer, and that extreme precipitation events will

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[323] Stott P, Christidis N, Otto F, Sun Y, Vanderlinden J, van Oldenborgh GJ, Vautard R, et al, 'Attribution of Extreme Weather and Climate-Related Events' (2016) 7 WIREs Climate Change 1, 24. (hereafter Stott, et al)
[324] Burger M, Wentz J, and Horton R, Executive Summary of 'The Law and Science of Climate Change Attribution' (2020) 45 Columbia Journal of Environmental Law 1. (hereafter Burger, et al Summary)
[325] *Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment* [2013] NZHC 3125 [Teitiota (HC)] [13].

become more intense and frequent in many regions.'[326] However, increased frequency and intensity does not necessarily link particular events to climate change. It is here that attribution studies can contribute significantly.

Due to 'improved understanding of extreme events, improved modeling...lengthening observational datasets and reanalyses...and more robust remote sensing data sets' the linkages between extreme weather events and anthropogenic climate change are now quantifiable.[327] It is clear that, generally speaking, 'climate models show that an increased occurrence of extreme temperature and rainfall events worldwide can be attributed to anthropogenic forcings.'[328] Now climatologists are able to 'determine to what extent anthropogenic climate change has altered the probability or magnitude of particular events.'[329]

To delve too deeply into the science of attribution studies would exceed the scope of this paper. It is enough to say here that models can be run using data from the world as it exists (including GHGs, real-world temperatures, etc.) against data that reflects a world without anthropogenic influences (minus human-produced GHGs, using historical temperature norms, etc.) to predict the likelihood and magnitude of extreme weather events.[330] An example of an attribution study linking a specific event to climate change is helpful in understanding the application. A team of scientists studying the 2012 flooding of the Russian town of Krymsk were able to 'show that — exceptionally for such a localized event — it is possible to attribute this flood to climate change'...by presenting 'convection-resolving simulations that suggest that incremental warming of sea surface temperature (SST) in the Black Sea over the past few decades has led to an abrupt amplification of convective precipitation,' and that this was 'a virtually impossible event just 30 years ago.'[331] By running simulations based on the conditions at the time the flooding occurred as compared to the conditions prior to the documented warming of recent decades, the team could demonstrate that the anthropogenic impact on the planet made possible a disaster that had been virtually impossible. It is worth noting that of the studies published in The Bulletin of the American Meteorological Society (BAMS) since 2011 'approximately 70% have found that anthropogenic climate change was a significant driver of the event studied.'[332] This reflects the reality that not all extreme weather events can be attributed to climate change, but the scientific community is increasingly able to identify those that are.

There can be no doubt that human activity is changing the climate and that those changes are causing more frequent and severe extreme weather events, both immediate and slow-onset. In studies published in BAMS related to heat, '91% found that anthropogenic climate change had increased either the likelihood or the severity of the heat event..'[333] 92% of studies on droughts 'found clear evidence of anthropogenic influence on the severity or probability of the observed event.'[334] These scientific models that are now able to identify causal linkages

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[326] Pachauri RK and Meyer LA, et al (eds) *Intergovernmental Panel on Climate Change: Climate Change 2014: Assessment Report 5 Synthesis Report* [2.2].
[327] Burger, et al Summary (n 324) [ii].
[328] Stott, et al (n 323) 24.
[329] Stott, et al (n 323) 23.
[330] For a more detailed explanation of the various elements of attribution studies and how each can be understood in legal terms see Burger M, Wentz J, and Horton R, 'The Law and Science of Climate Change Attribution' (2020) 45 Columbia Journal of Environmental Law 1. (hereafter Burger, et al)
[331] Otto F, 'Climate Change: Attribution of Extreme Weather' (August 2015) 8 *Nature Geoscience* 8, 581.
[332] Burger, et al (n 330) 101.
[333] Burger, et al (n 330) 103.
[334] Burger, et al (n 330) 105.

between GHG emissions and specific events are helping to resolve one of the biggest challenges to assigning State responsibility for climate-induced IDPs; establishing causal links. While slow-onset events are often more easily linked to climate change, they are often more difficult to identify as primary drivers of migration. By contrast, immediate-onset events are more easily identifiable triggers for displacement, but they are more difficult to link directly to climate change. Because emissions are so carefully tracked to meet the requirements of the UNFCCC,[335] State contributions to climate change are well known. The emergence of attribution science now offers a scientific model for quantifying the extent to which climate change can be identified as the cause of displacement-inducing events. Legal proceedings can use these studies to support arguments linking GHG emissions, climate change, and forced migration. In this way, States suffering material injury in the form of internal displacements can establish that the displacements were caused by the wrongful act emanating from other States and, therefore, demand reparations.

There could be challenges from respondents regarding the accuracy and/or certainty of attribution studies. In the US, for example, the *Daubert* standard, first articulated by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*, is the contemporary standard for admissibility [of scientific reports] in federal courts and many states.'[336] This standard requires that the employed theory be testable, peer reviewed, generally accepted by experts, and asks whether there is a degree of error involved. If the ICJ adopted even a similar standard, the respondents might challenge attribution studies on the degree of error due to their expression of probabilities and likelihoods instead of certainties.[337] What variables are included or excluded from a given model could also lead to differing results (higher or lower probability that anthropogenic factors are responsible for specific events). Attribution science is an emerging discipline. One must accept that 'all attribution assessments are contingent on our current understanding and are therefore liable to be updated as scientific understanding develops.'[338] The specific arguments in support of or in opposition to the use of attribution studies must ultimately be reserved for the application to specific case studies. Only then can one evaluate the accuracy and reliability of the study and its implications for the particular event in question.

3.9 Remedies

As clarified in the previous section, the distinction between material and legal injury is of particular importance to the potential remedy. 'When a State causes an injury to another State, the responsible State is liable to make full reparation to the injured State' in the form of 'restitution, compensation, or satisfaction.'[339] This principle, and particularly the understanding of restitution and compensation, is explicitly recognised in 1927's *Factory at Chorzów Case*,[340] long before the ILC codified it. Restitution has been defined as 'restoration of a situation that existed before the wrongful act' but that shall not 'impose a greater burden on the responsible State than compensation'.[341] Compensation, then, is designed to recoup actual losses, and it is 'not designed to punish or serve as a deterrent.'[342] It should be noted

[335] UNFCCC (n 24) Art. 4.
[336] Burger, et al (n 330) 168-169.
[337] Stott, et al (n 323) 25.
[338] Stott, et al (n 323) 26.
[339] Abass (n 204) 481.
[340] *Factory at Chorzów Case* (*Germany v. Poland)* [1927] PCIJ Ser. A, No. 17, 47. (hereafter *Factory at Chorzów Case*)
[341] Abass (n 204) 482.
[342] Abass (n 204) 482.

that while 'the most common form of reparation is monetary compensation' for 'the actual value of the damage done or property lost', compensation may additionally include lost profits and interest.[343] Finally, satisfaction requires acknowledging the breach, expressing regret and, most importantly, cessation of the wrongful act, and is designed for cases 'where restitution and compensation is inadequate.'[344] Within this understanding of reparations, one can see that restitution and compensation would require proof of material injuries, but satisfaction could be sought by any State claiming legal injuries. In this section, jurisprudence is explored to show how the ILC developed the articles related to reparations.

3.9.1 Restitution

Restitution, or restoring a situation that existed before the wrongful act, may be difficult. It is often impossible to undo what has been done. However, the absence of a means of restitution could undesirably 'encourage the purchase of impunity by the payment of damages' purely in the form of compensation.[345] In its fortieth session, the ILC discussed several examples of restitution in the jurisprudence in order to arrive at the most widespread understanding of the principle.[346] It was noted that in the 1881 *Aloisi Case*, Chilean military authorities occupying Peru had seized property belonging to Italian nationals, and the conclusion had been a recognition that compensation 'could only be applied in the case of destroyed property, it being obvious that in the case of seized property restitution is always due.'[347] Supporting this view, the 1886 *Giaffarieh Case* in which an Egyptian warship seized several Italian vessels, was also noted as concluding with restitution in Egypt returning the ships and sailors to Italy.[348] A more recent case decided by the ICJ, the *Temple of Preah Vihear Case*,[349] was 'decided in favour of the Cambodian claim' to restore 'certain objects that had been removed from the area and the temple by Thai authorities.'[350] Finally, in the *Upper Savoy Case*,[351] a dispute over France charging customs in a Swiss free trade corridor, ended with a ruling that France must provide restitution in the form of ending this practice. In this way, restitution was made simply through cessation of the wrongful act.

These cases show the important role restitution can play, and the close relationship it has with cessation of wrongful acts, but it is only useful in very limited circumstances, and most is most often employed in relation to the return of property. It is notable that restitution comes first in the ILC ARS list of forms of reparations,[352] and its content is specified in Art. 35.[353] Whenever it is possible to restore the situation to that which existed before the wrongful act, that is the preferred remedy in cases of State responsibility. Of course, that is not always, or even often, possible, so compensation exists as a second option.

3.9.2 Compensation

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[343] Dixon (n 277) 263.
[344] Abass (n 204) 482.
[345] Brownlie I, *Brownlie's Principles of Public International Law* (Oxford University Press, 2012) 446.
[346] ILC, Comments and observations of Governments on part 1 of the draft articles on State responsibility for internationally wrongful acts' (1988) 2 *Yearbook of the International Law Commission*, Part One, A/CN.4/414. (hereafter ILC 1988)
[347] ILC 1988 (n 346) [74].
[348] ILC 1988 (n 346) [74].
[349] *Temple of Preah Vihear Case* (*Cambodia v. Thailand*) (1962) ICJ Reports 6.
[350] ILC 1988 (n 346) [74].
[351] *Case of Free Zones of Upper Savoy and the District of Gex* (*France v. Switzerland*) (1932) PCIJ Ser. A/B.
[352] ILC ARS (n 11) Art. 34.
[353] ILC ARS (n 11) Art. 35.

The *Factory at Chorzów Case* recognised the distinction between restitution and compensation in declaring that appropriate reparations would be 'restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear.'[354] And the ILC specifically notes the *Spanish Zone of Morocco Case*, and others, to establish that 'tribunals have considered compensation only after concluding that, for one reason or another, restitution could not be effected.'[355] Despite being the second best option, compensation is unquestionably the most common remedy, and there are numerous cases to show this. One clear example of compensation is seen in the *Rainbow Warrior Case*.[356] In this case, France sank a Greenpeace ship within New Zealand's jurisdiction. The sunken ship could not be restored, so France was ordered to pay compensation for the wrongful act. Another example is found in the *Gabcikovo-Nagymaros Case*.[357] The dispute arose over an agreed project to jointly build a dam, reservoir, power stations, and a bypass canal for the Danube River.[358] Hungary later abandoned its side of the project while Czechoslovakia (later Slovakia) continued, with the latter diverting the river. Both of these acts were judged to be wrongful in that they breached international obligations. However, the situation as it existed before the breaches could not be restored, so each party was ruled to owe compensation to the other. Both of these cases illustrate how it is often impossible to simply restore 'the situation that existed before the wrongful act,' and that compensation for actual losses may be required. Additionally, the *Trail Smelter Case* offers one example of compensation paid for lost profits as the tribunal considered the 'amount of reduction in the value of use or rental value of the land' in determining compensation owed.[359] From these examples one can see that this is a commonly applied form of reparations that can include monetary payment for actual losses as well as lost profits.

The concept of compensation is well summarised in the *Lusitania Case*, which describes this remedy as a 'judicially ascertained compensation for wrong' that 'should be commensurate with the loss, so that the injured party may be made whole.'[360] This understanding was enshrined in the ILC ARS where Art. 36 reads, in part, that compensation for damage is appropriate 'insofar as such damage is not made good by restitution'.[361] The article goes on to specify that compensation is only possible for 'financially assessable damage,'[362] therefore clarifying the view that it is only available to States demonstrating material injury, not legal injury. What is clear in both the historical use of compensation and the view subsequently established in the ILC ARS is that while this form of reparation is the most often sought, it is a secondary option only considered after restitution is determined impossible or inadequate. Additionally, while State responsibility can be invoked for legal injury, compensation may only be sought for material injury.

3.9.3 Satisfaction

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[354] *Factory at Chorzów Case* (n 340) 47.
[355] ILC ARS (n 11) 97 [3].
[356] *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair* (*New Zealand v. France*) (1990) 20 RIAA 215. (hereafter *Rainbow Warrior Case*)
[357] *Case Concerning the Gabcikovo-Nagumaros Project* (*Hungary v. Slovakia*) [1997] ICJ Rep 7.
[358] Sands and Peel (n 268) 345.
[359] *Trail Smelter Case* (n 221) 1925.
[360] *Lusitania Case* (*USA v. Germany*) (1923) 3 RIAA 32, 39.
[361] ILC ARS (n 11) Art. 36(1).
[362] ILC ARS (n 11) Art. 36(2).

The third form of reparations included in the ILC ARS is that of satisfaction. Satisfaction 'is the remedy for those injuries, not financially assessable, which amount to an affront to the State,' and arise 'from the very fact of the breach of the obligation, irrespective of its material consequences.'[363] Significantly, satisfaction is a forward-looking concept, as opposed to other forms of reparations which are, by nature, meant to address past transgressions.[364] This gives the principle of satisfaction important roles in providing a remedy to injuries. Perhaps most importantly, satisfaction requires cessation of the wrongful act even when no material damages can be demonstrated or assessed. Further, it allows States that have not suffered material injury to invoke State responsibility in order to bring other States into compliance with their obligations. It also provides that competent authorities can declare acts wrongful, therefore clarifying questions of law and preventing future breaches. Finally, it may include a formal apology which can help to repair relationships between States. For example, the *Rainbow Warrior Case* ended with France owing compensation to New Zealand, and also with France owing 'a formal and unqualified apology.'[365] Here, the apology helps to provide closure to the matter and repair the relationship. The *Corfu Channel Case* also included satisfaction in its judgement, though without the formal apology. In this case, the ICJ declaring an act was wrongful constituted satisfaction.[366] Here, the declaration from the ICJ clarified that Britain's minesweeping activities in Albania territory was wrongful, thus offering guidance to prevent future breaches and 'ensure respect for international law.'[367] These are just two examples that illustrate how satisfaction can be used as a remedy for legal injuries such as violations of sovereignty, regardless of any material injury. As stated in the *Rainbow Warrior Case*, 'there is a long established practice of States and international Courts and Tribunals of using satisfaction as a remedy or form of reparation' especially in cases 'of moral or legal damage.'[368]

While declarations and formal apologies can serve to repair relationships, cessation of the wrongful act is also necessary to end the dispute. It serves to improve conditions and relationships in the future. Of course, the examples above involve events that had already occurred, as opposed to wrongful acts that continue through time. For example, a continuing breach is found in the *Trail Smelter Case* where 'the obligation to prevent transboundary damage by air pollution'… 'was breached for as long as the pollution continued to be emitted.'[369] Additionally, other situations that could potentially constitute continuing breaches include 'the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting State, unlawful detention of a foreign official or unlawful occupation of embassy premises, maintenance by force of colonial domination, unlawful occupation of part of the territory of another State or stationing armed forces in another State without its consent.'[370] The issue of continuing breaches is so significant that it is enshrined in its own article of the ILC ARS.[371] However, it is included here because of its connection to satisfaction, which is a particularly important relationship in the context of climate justice. When the wrongful act is continuing, satisfaction (or any remedy) cannot be achieved without cessation of the wrongful act.

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[363] ILC ARS (n 11) 106[3].
[364] ILC ARS (n 11) 90[11].
[365] *Rainbow Warrior Case* (n 356) 224[1].
[366] *Corfu Channel Case* (*UK v Albania*) (Merits) [1949] ICJ Rep 4, 36. (hereafter *Corfu Channel Case*)
[367] *Corfu Channel Case* (n 366) 35.
[368] *Rainbow Warrior Case* (n 356) 272-273[122].
[369] ILC ARS (n 11) 62[14].
[370] ILC ARS (n 11) 60[3].
[371] ILC ARS (n 11) Art. 14.

One case involving a wrongful act continuing through time is in the case of US hostages in Tehran. In its judgement, the ICJ declared that 'the facts of the present case, viewed in the light of the applicable rules of law, thus speak loudly and clearly of successive and still continuing breaches by Iran of its obligations to the United States.'[372] In its judgement, the ICJ ordered Iran 'to immediately take al1 steps to redress the situation.'[373] While reparations in the form of compensation were also taken up by the court, it was determined at the time of the judgement that because 'Iran's breaches of its obligations are still continuing, the form and amount of such reparation cannot be determined at the present date.'[374] This example illustrates the value of satisfaction in calling for cessation of continuing breaches and as a means of remedy when material injuries either cannot be established or cannot be assessed.

There is also evidence of satisfaction's value to be drawn from the *Nuclear Tests Case*. As discussed in section 8.2, any State to whom an obligation is owed can claim legal injury, even if material injury cannot be established. It was under these conditions that New Zealand invoked France's responsibility on behalf of 'the rights of all members of the international community.'[375] Suffering only legal injury, New Zealand could not seek compensation, but satisfaction provided the potential remedy. It was clear that New Zealand would accept cessation as satisfaction when the prime minister declared, 'Until we have an assurance that nuclear testing of this kind is finished for good, the dispute between New Zealand and France persists.'[376] Explicitly, New Zealand sought only 'a halt to a hazardous and unlawful activity.'[377] Ultimately, France agreed to halt all atmospheric nuclear testing, so the ICJ did not need to rule on the questions at hand,[378] but the case offers a valuable example of how satisfaction allows legally injured States to invoke responsibility even when material injuries cannot be proven. It also provides further evidence that satisfaction may take the form of cessation of a wrongful, even without apology, and reinforces the forward-looking nature of satisfaction.

The ILC codified satisfaction in Articles 34 and 37. These make clear that satisfaction provides the opportunity to invoke State responsibility when no material injury exists, when such injuries cannot be proven, or when they cannot be financially assessed.[379] It is often engaged 'for insults to the symbols of the State,' or violations of 'territorial integrity,' or breaches of diplomatic rules from which no material injury was suffered.[380] However, germane to this paper, it also serves a crucial function in providing a means to demand cessation of wrongful acts, or recognition from a competent authority that an act is unlawful, without the added need to prove and assess material injuries. There is a long history of jurisprudence supporting these views. Finally, it is important to recall that while satisfaction is only appropriate when restitution and compensation fail to make the injured State whole, it can also be invoked in conjunction with one or both of these forms of reparations.

3.9.4 Conclusion of Remedies

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[372] *US v. Iran* (n 197) 37[80].
[373] *US v. Iran* (n 197) 44[95(3)a].
[374] *US v. Iran* (n 197) 42[90].
[375] *Nuclear Tests Case* NZ Interim Protection Order (n 322) 139.
[376] *Nuclear Tests Case* (*New Zealand v. France*), (Judgement) [1974] ICJ Rep 59, 466[28]. (hereafter *Nuclear Tests Case* NZ)
[377] *Nuclear Tests Case* NZ (n 376) 467[31].
[378] *Nuclear Tests Case* NZ (n 376) 475[54].
[379] ILC ARS (n 11) 106[3].
[380] ILC ARS (n 11) 106[4].

Importantly, the ILC ARS does not limit injured States to only one remedy. Art. 34 allows the three forms to be applied 'either singly or in combination',[381] as appropriate. The significance is in understanding that all three are potentially applicable in any given case. The conditions under which each form applies, respectively, are then discussed in subsequent articles. This collectively provides the ILC's view of how reparations had emerged in practice as a remedy for State responsibility. Remedies should first aim to restore the situation to that which existed before the breach of an international obligation occurred. When that is either impossible or out of proportion, compensation for material injury is appropriate. Then, in cases when neither restitution nor compensation are sufficient, or when the injury is of a legal nature, satisfaction may be appropriate. Finally, it is equally possible that some combination of remedies may be the most just remedy. As, for example, France wrote in a rejoinder to the *Rainbow Warrior Case*, 'the Secretary-General granted New Zealand double reparation for moral wrong, i.e., both satisfaction, in the form of an official apology from France, and reparations in the form of damages.'[382]

The judgement in the *Rainbow Warrior Case* also offers a summary of some key understandings of the differing types of reparations that can flow from fixing State responsibility in noting: [383]

> Finally, as to reparation in the form of an indemnity, New Zealand contends that, at least in cases of treaty breach, what a claimant State seeks is not pecuniary compensation but actual, specific compliance or performance of the treaty, adding that if the party in breach were not expected to comply with the treaty, but need only pay monetary compensation for the breach, States would in effect be able to buy the privilege of breaching a treaty and the norm *pacta sunt servanda* would cease to have any real meaning. It is for this reason, concludes New Zealand, that where responsibility arises from a fundamental breach of treaty, the remedy of restitution, in the sense of an order for specific performance, is the most appropriate remedy.

This judgement recognises the place of restitution as the most desirable remedy, the dangers of relying on a purely monetary system of compensation for breaches, and then alludes to the role of satisfaction in asserting the ultimate goal of respecting the principle of *pacta sunt servanda*.

3.10 Countermeasures

The focus of this paper is on applying State responsibility and understanding the consequences that flow from that, so only a brief note is provided here.[384] Countermeasures may be appropriate in cases where responsible States refused to accept dispute settlement or failed to comply with a judgement. Therefore, while the pursuit of countermeasures in relation to climate justice is beyond the scope of this paper, this note is offered to explain that injured States may engage countermeasures under certain circumstances, but only within prescribed limits. The significance is that injured States have options to respond to responsible States who seek to avoid accepting the consequences of their actions.

'Countermeasures are measures, otherwise unlawful, taken against another state in response to an unlawful act by that state and with a view to obtaining cessation and/or reparation.'[385] This

[381] ILC ARS (n 11) Art. 34.
[382] *Rainbow Warrior Case* (n 356) [115].
[383] *Rainbow Warrior Case* (n 356) [111].
[384] For a more detailed discussion of this topic, see Zoller E, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Dobbs Ferry, NY, Transnational, 1984).
[385] Crawford (n 287) 48.

would generally include sanctions against the responsible State or the temporary abandonment of the injured State's obligations. It is important to recognize that the 'ILC has affirmed that forcible countermeasures cannot be employed by way of enforcement.'[386] In addition to the prohibition on the use of force, there are other limits to countermeasures. In the ILC ARS 'article 50 reserves several categories of international obligations – that is, human rights, humanitarian and peremptory norms – from suspension by way of countermeasures and affirms that countermeasures do not relieve the suspending state from any obligation of dispute settlement with the target state.'[387] It is clear that injured States can employ countermeasures as a means of redress against responsible States, but that those countermeasures cannot include the use of force, the suspension of human rights obligations, neglecting humanitarian law, violating peremptory norms, or refusing to pursue dispute settlement. As noted, the circumstances under which States might engage countermeasures, or the means of doing so, are not germane to this paper, but it is worth noting that options exist to pressure States into accepting responsibility when appropriate.

3.11 Summary of State Responsibility

This chapter has sought to illustrate a variety of significant elements of State responsibility through exploring the emergence and codification of the principle in international law. In addition to the broad survey of the principle in practice, key concepts relevant to the discussion of the climate crisis and the potential to invoke State responsibility for contributions to climate change have become clear. Of particular importance to this paper are understanding the limits of sovereignty, how one conceptualises 'boundaries', what acts can be attributed to States and which ones are wrongful, which States can invoke State responsibility, what remedies are available to injured States and, finally, that countermeasures may be appropriate when States refuse to accept responsibility. The manner in which each of these elements is understood can now be applied to a particular wrongful act or omission to determine if fixing State responsibility is the appropriate means of seeking justice and, if the answer is affirmative, what consequences ought to flow from that.

While one may see the two essential elements of State responsibility being 1) an internationally wrongful act or omission, and 2) attributing that wrongful act or omission to the State, this exploration of the evolution and codification of State responsibility demonstrates how ideas like 'wrongful' and 'attributable' have been understood in practice, how scholars have interpreted these practices, and how the ILC formalised their understanding in the ARS. Of particular importance to discussing justice for the climate crisis, is that the spatial scope of State responsibility extends beyond activities that directly affect neighbouring States, also including activities within and affecting the global commons. It is also clear that international obligations are owed to future generations and that, therefore, wrongful acts or omissions negatively affecting the future can entail State responsibility. With this spatial and temporal scope defined, one can next look at what acts are attributable to States. The treaties and jurisprudence discussed in this chapter, the principle in practice, reflect a common view that States have an international obligation to exercise due diligence to ensure those non-State actors operating within their jurisdiction do not commit internationally wrongful acts. Failures to exercise due diligence can trigger State responsibility when the activities of non-State actors cause adverse effects. This framework establishes the scope of international obligations (the boundaries) and how breaches can be attributed to States (the obligation to prevent). Applying this to climate change then requires identifying a specific

[386] Crawford (n 287) 76.
[387] Crawford (n 287) 48.

breach (transboundary harm) and determining whether it is attributable to the State (due diligence). Then one can determine which States may invoke responsibility either for material injury or legal injury, and what consequences (reparations) ought to flow from that. The following chapter explores the international obligation of preventing transboundary harm and establishes that breaching this entails State responsibility. Following that, this framework of State responsibility and the specific obligation to prevent transboundary harm will be collectively applied to the case of climate change.

Chapter 4 Prohibition of Transboundary Harm

4.1 Introduction

In order to apply State responsibility, there must be a breach of an international obligation that constitutes a wrongful act.[388] It is reasonable to argue any number of obligations have been breached by contributions to climate change. These might include breaches of human rights obligations,[389] failure to prevent transboundary air pollution,[390] violations of the law of the sea,[391] or any number of primary rules agreed to either bilaterally or multilaterally. This paper identifies the obligation to prevent transboundary harm (the no-harm principle) as one particular rule that has been breached. Chapter 5 explores how this applies specifically to the climate crisis and climate justice, but one must first define transboundary harm and the duty to prevent as binding obligations in international law, any breach of which constitutes a wrongful act for which State responsibility can be assigned. This chapter aims to do that.

To begin, one must recognise the duty to prevent transboundary harm as a part of 'an emerging set of guiding principles and minimum standards of acceptable behaviour'[392] in matters of environmental protection. Just as the ILC codified the existing principle of State responsibility in the ILC ARS, so they took up the cause of codifying the long-practised principle of preventing transboundary harm in the APTH.[393] An exploration of the emergence and development of these articles, along with a survey of international treaties, existing case law, and scholarly literature will illuminate some of the key elements of the duty to prevent transboundary harm, as well as confirm that this is a widely recognised and scarcely challenged principle of international law. This chapter begins with an explanation of customary law to establish that it is binding on all States. This is followed by connecting the previous discussion of global commons with the specific context of transboundary harm.[394] The two subsequent sections distinguish between obligations of conduct and obligations of result and how they relate to either legal or material injuries, respectively. At the end of this chapter, it is hoped that readers will understand the specific wrongful act asserted in the context of climate change and climate-induced IDPs before delving into the application of these principles in Chapter 5.

4.2 A Matter of Customary Law

Transboundary harm is prohibited as a matter of customary international law and, therefore, is binding on all States. To support the view, a brief comment on customary law may be appropriate. Bodansky explains that 'claims about customary law are empirical claims about the ways that states (and other international actors) regularly behave.'[395] To paraphrase, D'Amato argues that an observer completely ignorant of the law could recognise some sort of systemic process and then follow inductive reasoning to grasp what laws might account for

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[388] See Section 3.7 on wrongful acts.
[389] See, for example, Wewerinke-Singh (n 51); and Quirico O, 'Climate Change and State Responsibility for Human Rights Violations: Causation and Imputation' (2018) 65 Netherlands International Law Review 185.
[390] See, for example, Okowa P, *State Responsibility for Transboundary Air Pollution in International Law.* (Oxford, Oxford University Press, 2000).
[391] See, for example, Redgwell C, 'UNCLOS and Climate Change' (2012) 106 *Confronting Complexity; Proceedings of the Annual Meeting (American Society of International Law)*, 406-409.
[392] Swanson and Johnston (n 188) 233.
[393] APTH (n 293).
[394] See Section 3.5.1 on global commons.
[395] Bodansky on Customary Law (n 185) 108.

the regularities. *Opinio juris* is a second step that requires the observer to confirm that States accept these regular practices as laws. In Bodansky's words, '[c]ustomary norms depend not only on state practice (that is, on observable regularities of behavior), but also on acceptance of these regularities as law by states.'[396] However, a common mistake is to argue that the regularity with which States violate the prohibition against transboundary harm undermines the assertion that this principle is a matter of customary law. In contrast, one should note that violations of the law do not necessarily reflect a lack of *opinio juris*. In fact, violations often reveal *opinio juris* when States defend themselves against accusations on grounds other than the absence of legal obligation. If they wished to contend that no such obligation existed, they could argue accordingly. In many cases, as demonstrated in the next paragraph, the State is implicitly accepting that the law is applicable, thereby confirming *opinio juris*. It is asserted here, rather uncontroversially, that the prohibition on transboundary harm is customary international law, albeit with the caveat that the substance of the obligations it creates may be debatable. This can be established by recognising the relationship between the principle and the prevailing understanding of sovereignty and its limits, by looking at how it manifests in practice, and by reference to scholarly works.

'There is agreement in international law that, in general, transfrontier damage is prohibited,'[397] and that this prohibition 'has been developed under customary international law.'[398] [399] As noted above, the value of customary international law 'lies in the fact that as a general matter it establishes obligations for all states...except those which have persistently objected.'[400] This is evident in the jurisprudence, for example, in the *Trail Smelter Case*.[401] When accused by the United States of causing (or allowing) transboundary harm, the Canadian defence was that harm had not been caused. If Canada sought to deny that the prohibition on transboundary harm was customary law, an argument could have been made accordingly by asserting Canada's sovereign right to exploit its own resources. The fact that Canada, in its own defence, failed to deny this principle serves to underscore the place of the principle in customary international law. *Opinio juris* is supported by the violating State acting as though it were bound by the prohibition against transboundary harm. The ruling, then, with its 'use of sources of law, with invocation of both domestic and international law, indicates that the tribunal considered the obligation it formulated to be a general principle of law.'[402]

Other cases have further solidified the principle of no-harm as customary international law. In the 1949 *Corfu Channel Case*, the ICJ acknowledged 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.'[403] In the same way as the arbitrators of the *Trail Smelter Case* did, 'the Court did not base the statement on treaty law, but referred to "certain general and well-recognized principles".'[404] The arbitrators of the *Lake Lanoux Case* also acknowledged that 'there is a principle which prohibits the upstream State from altering the waters of a river in such a fashion as seriously to prejudice

[396] Bodansky on Customary Law (n 185) 109.
[397] Bodansky on Customary Law (n 185) 106.
[398] Wolfrum R, 'Purposes and Principles of International Environmental Law' (1990) 33 German YB Int'l L 308, 309.
[399] Bodansky on Customary Law (n 185) 107.
[400] Swanson and Johnston (n 188) 211.
[401] *Trail Smelter Case* (n 221) 1905.
[402] Jervan (n 36) 22.
[403] *Corfu Channel Case* (n 366) 22.
[404] Jervan (n 36) 23.

the downstream State.'[405] The upstream State was permitted to proceed because no harm would come to the downstream State and not because of the absence of a rule, so the no-harm principle was recognised and considered.

These cases support the assertion that transboundary harm is prohibited as a matter of customary international law. It is significant that scholars reference this jurisprudence along with international treaties and soft law instruments to reinforce the position that the principle should be considered customary. The no-harm principle is repeatedly invoked across different fields of law, 'including conventions such as the 1967 Outer Space Treaty, court decisions such as the Corfu Channel case, arbitral decisions such as the Trail Smelter award and United Nations declarations such as the 1972 Stockholm Declaration on the Human Environment (particularly Articles 21, 22 and 23),'[406] and this cumulative body of references makes clear that the principle is a matter of settled law and its position as customary law makes it binding on all States. This means the global North cannot hide behind the lack of specific binding obligations in the climate regime, or by not signing any particular treaty. All States are bound by this customary law.

4.3 Global Commons

As mentioned in the chapter on State responsibility,[407] the concept of 'transboundary' is not limited to borders between States, but also includes the global commons. In this way, one sees that the no-harm principle also applies to activities both within and affecting the global commons. The prevention of transboundary harm is 'the primary purpose of most modern environmental treaties, including the Ozone Convention, the MARPOL Convention, the London Dumping Convention, the POPS Convention and others dealing with land-based pollution, desertification, or climate change.'[408] It is significant that each of these conventions addresses needs related to protecting the global commons. This puts restrictions on State sovereignty insofar as State's must act cooperatively to protect resources that are shared without regard to geopolitical boundaries. 'The same approach is found in Article 2(1) of the 1991 Convention on Transboundary Environmental Impact Assessment, and in Article 3 of the 2001 [APTH].'[409] What is clear from this cumulative body of references is that States owe a legal obligation to prevent activities emanating from within their spatial jurisdiction from causing transboundary harm not only to neighbouring States, but also with respect to their impact on the global commons. The existence of this obligation is widely accepted, but there remains the challenge in defining the substance of the obligation.

It is important to emphasise this notion that transboundary harm applies to harm to the global commons, not just to a specific State. The *River Oder Case* offers evidence of the justiciability of issues related to shared resources. In reference to shared waterways, the Permanent Court of International Justice (PCIJ) held that the 'community of interest in a navigable river becomes the basis of a common legal right'.[410] The community of interest in a shared resource obligates States to prevent harm to that resource. Further, specific treaties

[405] *Lac Lanoux* (*Spain v. France*) (1957) 12 RIAA 281 [12].
[406] Mcgraw DB, 'Transboundary Harm: The International Law Commission's Study of "International Liability"' (1986) 80 The American Journal of International Law 2, 308-309.
[407] See section 3.5.1 on global commons.
[408] Birnie, et al (n 25) 147.
[409] Birnie, et al (n 25) 147.
[410] *Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder* (*U.K. v. Pol.*) (1929) PCIJ Rep Series A No 23.

offer examples of justiciable grounds as, for example, Meher notes that the London Dumping Convention states its 'objective is to promote the effective control of all sources of marine pollution, and this obligation extends to common areas'.[411] This inclusion of common areas will prove important in applying the principle to claims related to the climate crisis. What is important to note here is the acknowledgement that any shared resource creates an obligation to prevent transboundary harm affecting that resource, and that the practice of including the global commons in the concept of transboundary harm is widespread without controversy.

4.4 Obligation of Conduct

An exploration of the role of obligations of conduct will illustrate how any State can invoke responsibility based on a legal injury even if there is no demonstrable material injury. The principle of prevention of transboundary harm creates an obligation of conduct born out of the duty to prevent. In this context, the concept of conduct refers to a certain standard of expected care which can be called due diligence. The importance of the basis of this obligation is that the primary goal is preventing harm, not addressing it after the fact. A significant effect of this understanding of the principle is that it allows States to invoke responsibility for legal injuries before material injuries are suffered. In the context of climate change, i5t is this obligation of conduct, of prevention, that responsible States can first be said to breach. Obligations of result, or material injuries, are secondary and only determined on an ad hoc basis.

4.4.1 Primary or Secondary Rule

Due diligence[412] has been broadly defined as 'taking prudent, well-informed steps to avoid a bad outcome.'[413] It must also be recognised that 'the due diligence rule clearly emerges from international practice.'[414] However, the place of due diligence in international law generally is widely debated, far from settled, and open to a broad range of interpretations. One widely-held view supports the position associated with Crawford and his time as Special Rapporteur to the ILC that due diligence is a primary rule. Others see it as a source of law forming the foundation of the precautionary principle. Still others find it possible to assign an objective definition to due diligence and place it firmly, as a secondary rule, within the objective interpretation of State responsibility. It is worth discussing these views on the position of due diligence in international law and how it relates to State responsibility in order to later demonstrate its applicability to the climate crisis.[415] This section explains that due diligence is not limited to either the realm of primary or secondary rules but is instead found in both. It will also be asserted that while subjectivity may be unavoidable in evaluating due diligence, it is clear that there should be correlation between the level of risk and the degree of diligence expected.[416] By discussing some of the prominent arguments in the existing literature, readers will better understand how the author arrives at this view of due diligence.

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[411] Meher N, 'Environmental Liability and Global Commons: A Critical Study' (2018) 60 *International Journal of Law and Management* 2 (2018).
[412] See Sections 4.4.4 on due diligence.
[413] McDonald N, 'The Role of Due Diligence in International Law' (October 2019) 68 *International & Comparative Law Quarterly* 4, 1041.
[414] Pisillo-Mazzeschi R, 'The Due Diligence Rule and the Nature of the International Responsibility of States' (1992) 35 German YB Int'l L 9, 21. (hereafter Pisillo-Mazzeschi)
[415] See Section 5.6.2 on due diligence.
[416] See Section 5.2.

Chapter 3 discusses at length the codification process of State responsibility and the significant influence of Crawford on the development of the ILC ARS. It was noted that he removed notions of both primary rules and subjectivity from the codification of State responsibility.[417] Crawford 'clearly assigns due diligence to the level of primary rules and excludes it thereby explicitly from the codification process.'[418] This position may find support as it reflects the efforts of the authors and architects behind the ILC ARS, but it is not a unanimously accepted view.

One finds evidence from the *Corfu Channel Case* where 'the ICJ pointed out that due diligence is the source of the customary precautionary principle in international law.'[419] Contrary to the Crawford position, this view asserts that due diligence cannot be a purely subjective, or merely primary, rule if it is actually the source of a legal principle. The argument follows that 'due diligence constitutes an independent obligation to undertake all necessary measures to meet the international obligation of a state, the assessment of whose completion however is relative to the social and economic situation of the state falling short of its required international conduct.'[420] In this way, one can argue that international legal principles differ from rules in that they are 'not composed of specific rules of behavior, but rather of general directives underpinning the normative system.'[421] The generality of the ILC ARS more appropriately fits within this understanding. At least, the contradiction of these views may be overcome by the fact that the 'ILC most commonly referred to due diligence as a "standard," yet when discussing the precautionary principle, it emphasized the stable role of the due diligence principle in treaty-based international environmental law.'[422] Here, one can see Crawford's influence on the ILC in efforts to remove primary rules from the ARS while also acknowledging the importance of the 'standard' of due diligence within the primary rules of IEL.

The discussion in Section 3.7 recognises the possibility that subjective elements may creep into evaluations of the substance of a particular due diligence claim. Some see this as supporting the view 'that due diligence migrated from the realm of secondary rules to the level of primary rules'.[423] However, that assertion assumes that a principle cannot exist in both realms. It is more accurate to say that due diligence exists as a secondary rule at the foundation of all international agreements and as a primary rule in specific agreements.

In this view, one can see that 'due diligence is a notion which sits in-between the level of primary and secondary rules of international law.'[424] Even after Crawford's efforts to remove both primary and subjective rules from the ARS, the accompanying commentary still reflects significant references to due diligence. For example, 'a failure to take necessary measures of prevention', 'breaches extending in time', and 'breaches consisting of a composite act, recall considerations of due diligence.'[425] It may be more accurate to say that due diligence is not completely removed from the ARS, despite the explicit intention that it be an instrument of

[417] See section 3.7 Wrongful Acts for more details.
[418] Aust and Feihle (n 294) 50.
[419] Kulesza J, 'Due Diligence in International Internet Law' (May 2014) 17 *Journal of Internet Law* 11, 27. http://www.proquest.com/docview/1530640981/abstract/EAAB39E6BE6842E4PQ/1 accessed 6 June 2021 (hereafter Kulesza)
[420] Kulesza (n 419) 28.
[421] Kulesza (n 419) 26.
[422] Kulesza (n 419) 27.
[423] Aust and Feihle (n 294) 44.
[424] Aust and Feihle (n 294) 43.
[425] Aust and Feihle (n 294) 53.

secondary rules. Therefore, due diligence must itself exist as a secondary rule. This idea is reflected in the view that 'in the second half of the 20th century, due diligence was recognized as an element of the principle of good faith in good neighborly relations.'[426] This does not mean that due diligence does not also exist as a primary rule, but it must be understood as existing in both realms.

4.4.2 An Objective Standard

In addition to understanding that due diligence is more than a primary rule, one must also grasp that due diligence need not be a subjective obligation. In the same way as State responsibility was described in Chapter 3 as being fixed based on an objective approach, due diligence is similarly determined by an objective standard. It can be said that 'responsibility can arise also from an objective breach of the due diligence standard by the State system as a whole.'[427] It is enough to establish, 'for purposes of responsibility, a general insufficiency of "governmental action" or a general lack of diligence on the part of the State authorities considered as a whole.'[428] This does not require any evidence of fault and 'confirms the objective nature of the obligation of due diligence.'[429] What becomes clear is that the obligation to perform due diligence is more objective than one might initially realise. This section discusses how due diligence can be judged in an objective manner. The more objective this process is, the less likely for States to raise defences based on dubious claims about making best efforts.

On this point, it should be noted that there is a relationship between due diligence and CBDR in that developing States, the global South, are given consideration regarding their economic and technological means.[430] This is not, however, a carte blanche invitation for environmental recklessness. Even developing States would not be permitted to operate, for example, 'substandard oil tankers or nuclear power plants,'[431] but their economic and technological capacities must be considered as factors relevant to their obligations. This does not detract from the objective nature of the obligation, but it clarifies one element of the objective evaluation (effective control) as discussed in the following section on framework. It is enough here to note that a State's capacity to perform diligence is a factor in determining whether the obligation has been met. Understanding how this element is ascertained helps to illustrate the objective nature of the determination. It is established that the State must possess 'a legal and administrative apparatus normally able to guarantee respect for the international norm on prevention' and also employ 'such apparatus with the diligence that the circumstances require.'[432] Evidence of this in practice can be seen in the *US v. Iran Case* when the ICJ considered 'that Iran had the means to prevent the actions of the Islamic militants, but failed in its duty to use such means.'[433] This supports the view that a State's capacity to act must be a consideration in determining the standard of care, or due diligence, that should be expected, but also that the objective approach is appropriate. There is no consideration for whether the responsible State intended to violate its obligation, only whether it had the means to meet the obligation and whether it employed those means. In other words, 'what matters is not the

[426] Kulesza (n 419) 27.
[427] Pisillo-Mazzeschi (n 414) 42.
[428] Pisillo-Mazzeschi (n 414) 43; see also, Kulesza (n 419) 28.
[429] Kulesza (n 419) 28.
[430] Birnie, et al (n 25) 149.
[431] Birnie, et al (n 25) 149.
[432] Pisillo-Mazzeschi (n 414) 26.
[433] Pisillo-Mazzeschi (n 414) 27.

subjective attitude of the individual acting as state authority, but rather the actual violation of an objective standard of conduct required of a state, perceived as a whole, composed of its power and competence.'[434]

4.4.3 Framework for Applying the Principle

Having established that due diligence is more than a primary rule, that it is based on an objective standard, and that the State's capacity must be considered, one can begin to develop a framework for applying the principle in practice. Kulesza[435] offers a useful framework based on three objective criteria: 1) the effectiveness of State control over its jurisdiction, 2) the 'significance of the interests that the [State] was obliged to protect' and, 3) the extent to which harm was foreseeable.[436] On the first point, a failure to act is a breach of the obligation 'to make every effort to minimize the risk of harm,'[437] and overarching the first and second point, we can note that 'the technical and economic abilities of the State controlling the activity must be balanced against the interests of the potentially harmed State to be protected against injury.'[438] On the point regarding foreseeability, it is 'considered sufficient that a State is able to envision the general consequences of an act or omission' without the need to establish that they knew the precise consequences.[439] In this way he first encompasses considerations for the State's capacity (effectiveness). The second importantly recognises the relationship between the level of risk, the level of harm, and the level of due diligence.[440] The third allows for denying responsibility in cases involving, for example, *force majeure*. Here, in evaluating the substance of due diligence obligations, ascertaining conditions of effectiveness, risk, and foreseeable harm may involve some elements of subjective evaluation, but this does not challenge the position that the obligation itself is an objective one.

Despite Kulesza's attempt at defining objective criteria, it is clear that due diligence requires a more subjective interpretation than some other legal questions. It is also clear that despite Crawford's best efforts, due diligence remains a matter of international legal principle that fits within secondary rules even though it is often invoked in primary rules. The relationship between due diligence as it exists in the ILC ARS and as it exists in the primary rules of specific obligations may best be described as *lex specialis derogat legi generali*. Due diligence is more clearly and specifically defined in the substantive rules of specific treaties (primary rules), but that does not exclude its more general codification in secondary rules such as the ILC ARS. Perhaps a more accurate argument says that while the specificity of primary rules may supersede the generality of secondary rules in certain cases, the recognition of due diligence as a legal principle ensures it can be appropriately invoked when the primary rule fails to clearly articulate an obligation. This should not be a controversial position. Indeed, due diligence can be argued as both grounds for State responsibility and defence against State responsibility. The ILC 'adds that when assessing the level of due diligence required of a state its economic and social development must be taken into account, although not as crucial elements of determining the responsibility for state's failure to meet its international obligation of conduct.'[441] Due diligence should be seen as a principle of law

[434] Kulesza (n 419) 28.
[435] For a similar framework, see Voigt on Damages (n 35) 3.
[436] Kulesza (n 419) 28.
[437] Voigt on Damages (n 35) 11.
[438] Voigt on Damages (n 35) 12.
[439] Voigt on Damages (n 35) 12.
[440] Birnie, et al (n 25) 148.
[441] Kulesza (n 419) 28.

requiring that States make their best effort to meet obligations. The extent of those efforts should correlate with the State's capacity to act, the level of risk associated with the underlying obligation, and the extent to which harm can be foreseen. The greater the potential harm, and the more predictable that harm, the greater the level of diligence to be expected. Further, in discussing the potential for State responsibility to be triggered even when the act is not attributable, one sees that 'the notion of due diligence then serve[s] as a transmission device between the external conduct as such not attributed to the state and the ensuing responsibility of the state for the breach of an obligation of prevention.'[442] This framework incorporates the idea that due diligence is a principle of international law, found in both secondary and primary rules, and that it plays an important role in determining State responsibility.

Finally, drawing on elements from both Kulesza and Voight in their frameworks for determining whether due diligence obligations have been met, one can establish a slightly altered version that allows application to both determining a wrongful act and attributing that act to the State. In this way, the obligation of conduct (due diligence) is breached if the State has the opportunity to act, the significance and likelihood of the potential harm is not disproportionate to the preventative act, and the potential harm is foreseeable. Then, the wrongful act is attributable to the State if the State has effective control of the jurisdiction and possesses the technical and economic capacity to act, as well as knowledge of the potential for harm. This framework is applied to the case of climate change and climate-induced IDPs in Chapter 5's discussion on application.

4.4.4 Due Diligence in Transboundary Harm

It is important to note that while due diligence exists in various forms throughout international law, as both a primary and secondary rule, the substance of that obligation will differ depending on the specific obligation in question. Here, the concept of due diligence related to the obligation to prevent transboundary harm is discussed. While theoretical debates continue about some of the finer points of due diligence in international law, there should be little doubt that States are obligated to exercise appropriate care, or due diligence. One could not logically argue that accepting a primary obligation is devoid of any expectation to make reasonable efforts to fulfil that obligation. That is, simply, acting in good faith, which is clearly present in the secondary rules of international law. This principle is often stated as *pacta sunt servanda*, and it features authoritatively in the Vienna Convention on the Law of Treaties (Vienna Convention). Article 26 states that '[e]very treaty in force is binding upon the parties to it and must be *performed by them in good faith*.'[443] (emphasis added) Article 31 further requires that treaties be 'interpreted in good faith'.[444] Interestingly, Article 32 then clarifies that supplementary means of interpretation are expected when Art. 31 'leads to a result which is manifestly absurd or unreasonable.'[445] What could be more absurd or unreasonable than asserting that a State was not expected to exercise any degree of diligence? Further, Article 48 reinforces the position of due diligence as a secondary rule in allowing the invalidation of treaties if they are agreed based significantly on errors of fact or situation unless 'the State in question contributed by its own conduct to the error.'[446] This clearly reflects the State's obligation to exercise due diligence in agreeing to treaties. The expectation

[442] Aust and Feihle (n 294) 49.
[443] Vienna Convention (n 22).
[444] Vienna Convention (n 22) Art. 31(1).
[445] Vienna Convention (n 22) Art. 32(b).
[446] Vienna Convention (n 22) Art. 48(2).

that States act in good faith is also referenced in Articles 46[447] and 69[448]. The conclusion to be drawn is that the secondary rules established in the Vienna Convention clearly and unmistakably create an obligation on States entering into international treaties to act in good faith, and that good faith is for all intents and purposes a synonym for due diligence. The precise substance of that obligation is not revealed in the secondary rules, but the expectation is. A more detailed understanding of what is meant by due diligence may be found in specific primary rules.

Due diligence in IEL can be understood as best practices, and these can be ascertained through comparisons with other States or through rules or guidelines established by international agreement. As noted above, the care taken should correspond with the extent of the potential harm.[449] It is clear that due diligence can be found in certain primary rules, and that it simultaneously exists within secondary rules as a principle of international law. It has also been established that there exists an objective obligation for States to act with due diligence. And because '[t]he proposition that State responsibility flows from breaches of international obligations has been accepted and developed by tribunals since the beginning of the 20th century,'[450] then it follows that State responsibility flows from breaches of due diligence obligations. Even as many examples, including the *Corfu Channel Case*, the *Trail Smelter Case*, and the *Genocide* case, 'made it clear that the due diligence obligation is one of conduct and not one of result,'[451] it is still an obligation flowing from the duty to prevent transboundary harm. Further, one must also take into consideration the obligation of the precautionary principle, which is rooted in due diligence and states that uncertainty cannot be an excuse for inaction. In other words, 'what would be considered a reasonable standard of care or due diligence may change with time,'[452] but any uncertainty must be faced with an err on the side of caution.

As this is a rule of conduct, not result, the implications for this are, first, that any State can seek to assign State responsibility for legal injury without the need to show material injury and, second, that injured States need only establish that the responsible State(s) failed to act with due diligence. This failure of due diligence can be ascertained through the framework discussed above; establishing that the responsible State had effective control, determining whether the level of diligence expected was commensurate with the significance of the potential harm, and whether the harm was foreseeable. Then, the expected standard of care can be determined objectively. There is no requirement to prove material injuries as the conduct, the wrongful act or omission, is enough to constitute a violation. The ILC ARS establishes that '[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.'[453] Importantly, the ILC ARS does 'not require actual damages for responsibility to be triggered, but rather [relies] on the notion that the breach of the international legal duty constitutes sufficient damage.'[454] Of course, legal injuries may entail satisfaction and only require the responsible State to cease the wrongful act or omission without requiring any

[447] Vienna Convention (n 22) Art. 46(2).
[448] Vienna Convention (n 22) Art. 69(2)b.
[449] Birnie, et al (n 25) 148.
[450] Verheyen (n 34) 225.
[451] Takano A, 'Due Diligence Obligations and Transboundary Environmental Harm: Cybersecurity Applications' (1 October 2018) 7 *Laws* 4, 3.
[452] Birnie, et al (n 25) 148.
[453] ILC ARS (n 11) Art. 12.
[454] Fidler DP, *International Law and Infectious Diseases* (Oxford University Press, 1999) 217, 258. (hereafter Fidler*)*

monetary reparations such as restitution or compensation. Regardless of the type of injury claimed or the form of remedy that may result, the obligation of a standard of conduct, due diligence, is the first matter to establish in arguing State responsibility for climate change generally.

With this understanding, one can apply this principle to the conduct of the global North to determine if there has been a failure of due diligence and, therefore, a breach of the international obligation to prevent transboundary harm. Chapter 5 aims to determine whether the global North had effective control, could have acted proportionately to the risk of harm, and whether the harm was foreseeable. If so, any State may claim legal injury, invoke the responsibility of those committing the wrongful act, and expect that consequences must follow.

4.4.5 Conclusion of Obligation of Conduct

The element of prevention in the no-harm principle clearly reflects an obligation of conduct referred to as due diligence. The obligation of conduct can be understood as an objective standard of care, a level of due diligence, to be expected by States in particular contexts. It is an obligation of both primary and secondary rules, existing in both realms. It is a 'general directive underpinning the normative system.' It is also established that a State's capacity to act must be considered in determining the objective standard of due diligence owed. The most appropriate framework for evaluating whether this standard has been met is to ask whether the State had effective control, what was the level and likelihood of potential harm compared to the State's capacity to act, and whether the harm was foreseeable. In this way, effective control relates to the requirement for State responsibility that acts be attributable to the State. The understanding of potential harm then informs the level of diligence that should have been expected. Third, allowing for unforeseeable circumstances offers a defence in cases of *force majeure*, or other reasonably unexpected circumstances. This principle also allows States suffering legal but not material injury to invoke State responsibility for breaches of the obligation of conduct, regardless of the result.

4.5 Obligation of Result

Just as the obligation of conduct relates to legal injury, so the obligation of result is connected to material injury. In contrast to the failure to perform due diligence, which is a violation of conduct, the prohibition on transboundary harm also includes an obligation of result for which violations can only be established if an injured State demonstrates harm. It is likely that a State deemed responsible for violating the no-harm principle's obligation of conduct has also violated the due diligence obligation, but it would not always follow that violating due diligence caused transboundary harm. In other words, only States that can show material injury can sue for State responsibility based on this principle, but these States may well include both claims against the responsible State. Like all obligations of preventing transboundary harm, the obligation of result rests on the understanding that while States enjoy sovereignty over their own territory, they are obligated to prevent harm to other States and the global commons. Also, as all matters of State responsibility entail consequences, if responsibility is affixed to a State for violating the no-harm rule, then reparations in the form of either restitution, compensation, satisfaction, or some combination of these should be expected. In this section, the issue of injury as a violation of the obligation of result will be discussed. Section 2.2.2 established that it is the State that should claim injury in international law, not the individual. This focus is not meant to imply that there are no circumstances under

which a State might assert diplomatic protections over its subjects but is merely a reflection of the scope of this paper. The focus here is on injuries to the State. As establishing violations under this principle can only be done on an ad hoc basis, this section offers only a limited overview of some relevant points related to obligations of result. These include recognising that harm is not prohibited absolutely,
The discussion will include a look at harm in terms of economic and non-economic losses.

4.5.1 Harm is not Absolutely Prohibited

One important note on the obligation of result is that, unlike the obligation of conduct which requires States to meet a standard of behaviour, the actual prohibition on transboundary harm is not absolute. A closer look at the reasoning behind the *Trail Smelter* decision, which has been cited as evidence of the no-harm principle in practice, also includes insights into this understanding. The 'no-harm principle' was recognised by the Tribunal based on a 'great number of such general pronouncements by leading authorities concerning the duty of a State', 'international decisions...based on the same general principle', and the fact that the existence of the principle 'has not been questioned by Canada.'[455] There seems no doubt that the no-harm principle was well-recognised as customary law.

It is also clear, though, that this principle does not represent an absolute obligation. On this issue the Tribunal paid particular attention to the expectation that the sovereignty of the responsible State to exploit its own natural resources must be weighed against the sovereignty of the injured State to protect its own jurisdiction. The decision offers this explanation: [456]

> ...the Tribunal should endeavor to adjust the conflicting interests by some 'just solution' which would allow the continuance of the operation of the Trail Smelter but under such restrictions and limitations as would, as far as foreseeable, prevent damage in the United States, and as would enable indemnity to be obtained, if in spite of such restrictions and limitations, damage should occur in the future in the United States.

What is clear is that the Tribunal considered the importance of the 'continuance of operation' of the smelter, despite the recognised potential for harm, and required only that the pollution be limited to the prevention of 'foreseeable' damage. This explicitly establishes that the 'no-harm' principle is not set up as an absolute prohibition on all risks of harm. From these references to due diligence obligations, one can then see the shift toward the obligation of result when the Tribunal noted the extent of actual harm that might be permissible. A communique between Canadian and US officials noted that the complaint could only be made if and when the pollution was of 'such frequency, duration and intensity as to cause injury.'[457] This reflects a view that simply causing some degree of pollution did not constitute a breach of obligation, and that a breach occurred only when the result was actual damages. This is further supported by the Tribunal's view that 'the threatened invasion of rights must be of serious magnitude.'[458] Another means of demonstrating the absence of an absolute prohibition is found in the Tribunal's view that injurious levels of pollution must be stopped 'within a reasonable time limit,'[459] as opposed to the immediacy one would expect with an absolute prohibition. Perhaps the most explicit acknowledgement of the limits of the obligation of result is found in the Tribunal's reference to a case of inter-cantonal dispute from Swiss law

[455] *Trail Smelter Case* (n 221) 1963.
[456] *Trail Smelter Case* (n 221) 1939.
[457] *Trail Smelter Case* (n 221) 1963.
[458] *Trail Smelter Case* (n 221) 1964.
[459] *Trail Smelter Case* (n 221) 1964.

(*Solothurn v. Aargau*) in which the court noted the expectation 'that all endangerment be absolutely abolished apparently goes too far.'[460] So it can be seen that the Tribunal somewhat articulates the parameters of the prohibition on transboundary harm by prioritising the 'continuance of operation', only prohibiting demonstrable injury of 'serious magnitude', allowing a 'reasonable time limit' for corrections, and recognising that an absolute prohibition 'goes too far'. Ultimately, the Tribunal asserted that 'these conclusions are decisions in equity.'[461]

Understanding whether or to what extent the prohibition on transboundary is absolute becomes even more complicated when considering questions of attributability. As noted in the section on framework, attributing wrongful acts to the State, in certain cases, will require examining whether the State has effective control over the relevant jurisdiction. If it does, then it can be held responsible for the manner in which its territory is used by non-State actors. In the context of transboundary harm, the international obligation of conduct requires 'performance consistent with a standard of due diligence requiring States to exercise due diligence in respect of activities both by public and by private actors.'[462] This does not mean that all wrongful acts by non-State actors are attributable to the State. Instead, it is understood that 'the State is not obligated to absolutely prevent activities of private persons that are harmful'... 'but is bound only to exercise due diligence in order to prevent such activities.'[463]

4.5.2 Conclusion of Obligation of Result

The primary elements in determining whether State responsibility for violating the no-harm principle's obligation of result can be assigned will be, first, whether actual harm has occurred and, second, whether those harms can be causally linked to activities within the jurisdiction of the respondent. It is clear that the no-harm principle does not prohibit harm absolutely, so injured States will have to show that preventative measures could have been taken while respecting the responsible State's right to continue operations, that the risk was of a 'serious magnitude', and there was a reasonable time afforded to act. These three points may be established once based on the conduct of the global North, but demonstrating harm will be determined on a case by case basis, depending on the facts of each case. The important point to note here is that material injuries must be established and linked back to the responsible State in order to claim breaches of the obligation of result. However, if injuries can be established, if those injuries are of a serious magnitude, and if they can be attributed to the State, then State responsibility will apply. When State responsibility applies and the injuries are of a material nature, then reparations must follow.

4.6 Summary of Transboundary Harm

The *Pulp Mills Case* offers a useful example to help summarise some key elements of State obligations related to the no-harm principle. Namely, it addresses questions of shared resources relevant to global commons, understanding obligations owed in the context of the global commons, the obligation of conduct inherent in the principle's aim of prevention, recognition that legal injury is grounds for invoking State responsibility, and the need to consider a State's capacity in assessing the level of diligence expected. It offers an example of

[460] *Trail Smelter Case* (n 221) 1963.
[461] *Trail Smelter Case* (n 221) 1965.
[462] Foster CE, 'Due Diligence and Compliance with the Protocol on Environmental Protection to the Antarctic Treaty' (22 January 2021), 3. https://papers.ssrn.com/abstract=3873054 accessed 5 August 2022
[463] Pisillo-Mazzeschi (n 414) 26.

the confluence of the concepts of a State's right to exploit its own natural resources, the prohibition of transboundary harm, the requirement for due diligence, and the treatment of the global commons. In response to construction in Uruguay of a pulp mill along a shared river, Argentina argued that Uruguay failed to meet several obligations under international law. These obligations included, *inter alia*, failure to conduct an environmental impact assessment, failure to take appropriate measures to protect the environment and prevent pollution, and failure to cooperate in the protection of biodiversity and fisheries.[464] Argentina asked the ICJ to rule 'that Uruguay shall make full reparation for the injury caused by its breach of the obligations incumbent upon it.'[465] Uruguay defended its actions by asserting that no damage had been caused to the river or the broader environment, and that appropriate measures were in place to prevent any harm in the future. It is worth noting that Uruguay never denied being bound by obligations to protect the environment and the shared resource (the river), or that of preventing pollution. The dispute was ultimately over whether Uruguay had, in fact, met its obligations.

The ICJ judgement provides insights into the application of various IEL principles in practice related to transboundary harm. In ruling in Uruguay's favour, the court affirmed a State's right to exploit its own resources while also acknowledging the limits on that sovereignty. One limit is that the use of resources in one's own territorial jurisdiction must avoid causing harm to the environment of another. The judgement reaffirmed the obligations of conduct and result inherent in the no-harm principle by noting a State is 'obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State.'[466] The ruling also cites the *Nuclear Tests Case* in reaffirming that the prohibition on transboundary harm is a matter of customary international law.[467] On due diligence, the ruling establishes that it is 'an obligation of conduct rather than one of result,'[468] clearly evidenced by the inclusion of the qualification 'all means at its disposal,' which mirrors the earlier reference to 'all means at its disposal.' This concept is also important in its recognition of the ILC view that there is no requirement to prove 'actual damages for responsibility to be triggered, but rather [State responsibility relies] on the notion that the breach of the international legal duty constitutes sufficient damage.'[469] It is this understanding that allows States to invoke responsibility for legal injuries. And the court draws attention to the treatment of shared resources when it 'stresses the obligation of each party to protect the river environment and its flora and fauna.'[470] This example of respecting shared resources is analogous to the understanding of State obligations owed to the global commons. Interestingly, the ruling also recognises the 'interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development.[471] This final point reflects the view that proportionality and capacity must be considerations in determining a State's obligation. Taken as a whole, this case offers significant insights into the prevailing interpretations of various aspects of State obligations to prevent transboundary harm, including the obligation of conduct understood as due diligence, obligations of result in the context of material injuries, obligations owed to the global

[464] *Pulp Mills Case* (Argentina v Uruguay) [2006] ICJ Rep 113. (hereafter *Pulp Mills Case*)
[465] *Pulp Mills Case* (n 464) [22(4)].
[466] *Pulp Mills Case* (n 464) [101].
[467] *Pulp Mills Case* (n 464) [101].
[468] Boyle A, 'Pulp Mills Case: A Commentary' (2010), 3. https://www.biicl.org/files/5167_pulp_mills_case.pdf accessed 20 March 2021 (hereafter Boyle on *Pulp Mills*)
[469] Fidler (n 454) 258.
[470] Boyle on *Pulp Mills* (n 468) 4.
[471] *Pulp Mills Case* (n 464) [177].

commons by way of the analogy of shared resources, and considerations of a State's capacity. The obligation to prevent transboundary harm and the obligations of both conduct and result are the obligations breached by the global North's continued contributions to creating a climate crisis. The following chapter aims to tie climate change to transboundary harm and identify the latter as a wrongful act requiring the fixing of State responsibility.

Chapter 5 State Responsibility for Climate Change Displacement

5.1 Introduction

The Preamble to the UNFCCC offers a signed and dated recognition of the dangers and causes of climate change. This is clear in the acknowledgments 'that change in the Earth's climate and its adverse effects are a common concern of humankind,' that it is caused by human activity and 'may adversely affect natural ecosystems and humankind', and that 'the largest share of historical and current global emissions of greenhouse gases has originated in developed countries.'[472] Even without specific legally binding obligations in the UNFCCC, the document provides a globally endorsed recognition of the potential for harm from climate change, as well as an acknowledgement that developing countries are to blame. The specific list of developed countries is then provided in Annex II.[473] To argue that the UNFCCC does not impose legally binding obligations per se is to ignore the customary legal principle prohibiting transboundary harm and its inherent obligation to perform due diligence. This section will apply these principles to climate change and climate-induced IDPs to demonstrate that violations have occurred, State responsibility must be assigned, and remedies must be provided.

5.2 Objective Approach

If there is any subjective element of establishing State responsibility it is in terms of the risk of damage, and the extent of potential damage, which is seen in IEL related to due diligence where, in general, the care taken should correspond with the extent of the potential harm.[474] In other words, the greater the risk the more strict the obligation and, therefore, the more objective the standard should be. This is discussed in more detail in Sections 3.8.2 and 4.4. For example, an action that risks human life and would be likely to result in the loss of life might require a near absolute level of diligence. By contrast, an action that has only a low probability of causing some minor inconvenience might be seen to have a very limited expectation of diligence. This reflects the influence the level of risk has over the extent to which due diligence is required. In the context of the climate crisis, the risks are not only life and death but the very existence of life on earth. An existential threat on a global scale poses the highest possible risk and demands the highest standard of care. Not only have these risks been known for decades, but the global North has acknowledged the threats and their own culpability in creating these threats through the evolution of the climate regime. There can be no question that there exists an objective due diligence obligation.

5.3 Sovereignty

The chapter on State responsibility has already covered much of the importance of sovereignty to the discussion.[475] With a firm understanding of the importance of sovereignty and the right to develop, including the limits on both, some attention must then be paid to State obligations. These obligations can be divided into two broad categories. There are external obligations, or those owed to other States, such as the prohibition on transboundary harm and its obligations of due diligence. Then there are internal obligations, or those owed to persons within the States jurisdiction, such as ensuring human rights. In this way, one sees

[472] UNFCCC (n 24) Preamble.
[473] UNFCCC (n 24) Annex II.
[474] Birnie, et al (n 25) 148.
[475] See Section 3.4 on Sovereignty.

that while States enjoy the right to be free of harm from others, they are obligated to behave in a manner that does not cause harm to others. Similarly, States have the obligation to provide for their subjects and the right not to have their ability to do so infringed by others. Further, the obligations between States are not absolutely equal as the principle of CBDR makes clear that some States owe 'differentiated' obligations to others. Ultimately, the justiciability of climate change rests on an understanding of this relationship between States, sovereignty and its limits, and the differentiated responsibilities between developed and developing countries. Material facts such as demonstrating nexus between climate change and injuries or determining whether due diligence has been exercised can only be explored after understanding this theoretical background.

The principle of State sovereignty, then, is relevant to all other principles of international law in a variety of ways. Of particular relevance to this paper, it is the foundation for understanding the role of international law in what could be seen as a domestic matter; internal displacement. But it is infringements on this sovereignty that form the foundation of justiciability. For example, the State operating in its sovereign capacity has not only the right but the obligation to protect its subjects, its territory, and its interests in the global commons, so any affront to those efforts must be deemed a justiciable injury. Other examples can be seen when 'countries all over the world, including South Africa, India, Turkey, and Brazil, have enshrined the right to a clean environment in their constitutions,'[476] thus reinforcing the idea that damage to the environment constitutes an injury in need of justice. States also have the duty, in their sovereign capacity, to ensure that activities within their territory, or under their jurisdiction, do not cause harm to others. As previously noted, the State is the link between its subjects and the international legal regime, making it the 'person' in international law positioned to invoke the responsibility of others when injured or be held responsible when they cause harm.

This recognition is of particular importance when addressing the relationship between international law and internal displacement caused by climate change. By definition, internal displacement involves persons who have not crossed an international frontier and, it could be argued, is a matter for domestic policy. Though, the UN High Commission for Refugees has asserted that there is a role for the international community.[477] Armed conflict or systemic human rights violations might be addressed through applicable law or even taken up by the UN Security Council.[478] This shows that international law is by no means indifferent to internal displacement. In cases of displacement caused by climate change, it is clear that the damaging activity is taking place in one State and the adverse effects are, quite often, suffered in a separate State. In other words, one sovereign State is causing harm to another sovereign State, giving rise to the need for international law to determine the duty bearers and rights holders, and to facilitate some form of settlement. The recognition of the principle of State sovereignty is the foundation for understanding the role of international rather than domestic law, and for identifying the State as the responsible party. Domestic law has a role to play in the relationship between States and their subjects, to be sure, but international law is the most appropriate arena for determining injuries and responsibility between States.

5.4 Common Heritage

[476] Yang and Percival (n 183) 661-662.
[477] van Asselt and Zelli (n 41) 34.
[478] UNGA, Charter of the United Nations (1945) 1 UNTS XVI, Art. 24(2). http://www.un.org/en/sections/un-charter/un-charter-full-text/ accessed 4 April 2021

As noted in Section 3.5, this paper uses common heritage to refer to both the global commons and future generations. Therefore, this section discusses the application of the legal arguments established in Chapters 3 and 4 to the particular case of climate change as it relates to both.

5.4.1 Global Commons

In order to apply the principle of State responsibility to actions impacting the global commons, one must look at the relationships between the commons and sovereignty broadly, and the place of the atmosphere and climate more specifically. There is no question that the climate is a global concern, and the actions that affect the climate cannot be limited by political frontiers. Therefore, any damage to the climate is an act of transboundary harm. It is worth clarifying here the difference between the climate and the atmosphere. Climate refers to long-term weather patterns, which can be understood as a behaviour. The atmosphere, on the other hand, is the physical collection of gases that surround the planet. When discussing climate change, one is really discussing behaviour that has changed because of anthropogenic changes to the atmosphere. GHG emissions change the composition of the atmosphere (increasing carbon dioxide, for example), and those changes alter the climate. While these terms are often used interchangeably, the distinction is important in discussing sovereignty in relation to climate change, because the real focus is on sovereignty and rights related to the atmosphere. So, what is the place of the atmosphere in the discussion of sovereignty? This raises the important relationship between sovereignty and the global commons: [479]

> unlike land territory, the atmosphere within the airspace above a State is not capable of being physically separated from that above another State or that above the high seas by State boundaries. Nor, in contrast to the marine environment, is damage to it likely to be limited to a particular region. Rather, damage to the atmosphere spreads throughout the globe. The atmosphere is thus in this sense shared by all States and is akin to a shared resource.

The recognition of outer space,[480] international airspace, and international waters[481] as being part of the global commons reinforces the assertion that the atmosphere and climate should also be included in this category. The atmosphere transcends borders and is impacted by human activity collectively, which leads to changes in the climate.

These areas beyond the jurisdictional limits of sovereignty then may be referred to as the global commons, or *res communis*.[482] There is widespread understanding that the atmosphere, *inter alia*, is part of the global commons.[483] These types of natural resources that are shared by the entire planet must be preserved for the enjoyment of all, and there is case law supporting the position that States can be held responsible for their treatment of the global commons. In relation to the US nuclear tests in the Marshall Islands, Japan claimed damages to its fishing industry caused by radiation pollution to the global commons, and the US paid compensation.[484]

In addition to damage to the atmosphere, culture may also be threatened by climate change. In fact, the link between environment and culture cannot be denied. Culture can include movable

[479] Leigh (n 234) 134.
[480] Outer Space Treaty (n 273).
[481] UNCLOS (n 231).
[482] See Section 3.5 Common Heritage.
[483] For extensive literature review see Baslar K, *The Concept of the Common Heritage of Mankind in International Law* (Kluwer Law International, The Hague, 1998) 280-282.
[484] Leigh (n 234) 136.

and immovable objects, and intangibles, including environmental features.[485] In many instances one finds that environment and culture overlap, which reinforces the necessity of recognising both culture and environment as part of the global commons. There is no question, for example, that Japan's Mt. Fuji is both a part of the natural environment and a significant monument in Japanese culture. Because culture and environment are so intimately intertwined, it follows that we must categorise culture in a manner consistent with the categorisations of other aspects of the environment; the global commons. In this way we can see that the climate and culture both lie within the global commons and must be treated accordingly in addressing legal questions. It must be recognised that climate change is damaging the global commons, including the atmosphere and cultural monuments. It is also leading to displacement and the loss of cultural heritage and, therefore, actions contributing to climate change and its adverse effects must be treated as actions impacting the global commons. Any instances of these material injuries may be claimed by injured States, and those hosting climate-induced IDPs must consider the loss of cultural heritage in calculating reparations.

5.4.2 Future Generations

Applying Weiss' principles of intergenerational equity offers a framework for understanding how contributions to climate change constitute a breach of the prevention of transboundary harm when the boundary is perceived in temporal terms (intergenerational). First, the principle of options is threatened by the loss of resources. This might include the fact that future generations will not be able to enjoy the benefits of fossil fuels because current and past generations have abused their use. Likewise, losses of biodiversity and habitable lands all infringe on the rights of future generations to enjoy the same options of resource exploitation as those who came before. Second, the principle of quality is directly threatened or even violated by rising temperatures. Droughts, heatwaves, and the increased severity and frequency of severe weather events all indicate a lesser quality environment for future generations. This lesser quality may lead to 'significant societal impacts, such as population migrations and economic dislocations' at global, regional, and local levels.[486] Finally, equitable access refers to the reality that the climate crisis is disproportionately harsh in less developed States due to increased vulnerabilities and lesser capacities to adapt.[487] That means that the harm being created now (disproportionately by the global North) will be suffered unequally in the future (most adversely in the global South).

Of course, these considerations for future generations must be balanced against the needs of present generations. It would be unreasonable to 'expect people to fulfil obligations to future generations if they are not able to satisfy their basic needs.'[488] This raises the issue of justiciability for harms to future generations. As discussed elsewhere, legal injury may be invoked by any State on behalf of future generations. This would not require establishing material injuries, a feat that might be challenging in this context. In these cases, the failure of a State to perform its due diligence, as established by a clear international standard of expected behaviour, would be enough to fix responsibility. Satisfaction in the form of

[485] Francioni F, 'Cultural Heritage' in A Peters and R Wolfrum (eds) *Max Planck Encyclopedias of International Law* (Oxford Public International Law, Online, 2020). https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1392 accessed 30 August 2021

[486] Weiss on Intergenerational Equity (n 271) 621.

[487] Weiss on Intergenerational Equity (n 271) 618.

[488] Weiss on Intergenerational Equity (n 271) 618.

cessation of the wrongful act and an authoritative declaration of the wrongfulness of the act would be appropriate remedies to ensure that no further harm was caused.

Establishing material injuries for future damages is likely to be unfeasible in most cases. However, it may be possible for specific States to identify irreversible adverse effects of climate change that will unquestionably infringe the rights of future generations and, therefore, sue for restitution of compensation. Though, if restitution is possible, then it is likely the adverse impact on future generations is not so certain as to constitute a material injury in the present. The important point to note here is that any State may invoke responsibility in order to protect future generations by insisting on the cessation of the wrongful act, and there is no legal reason why a State could not claim material injury, though proving it would be challenging.

5.5 Attribution to the State

An important element of determining State responsibility is whether a wrongful act can be attributed to the State. The vast majority of GHG emissions are generated by private entities.[489] Therefore, if it is not the State that is directly emitting GHGs, how can the wrongful act be attributable to the State? Answering this requires first recalling that the ILC ARS allows 'that a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects.'[490] This refers to failures to exercise effective control, or due diligence, which are breaches of a primary responsibility. If the State has failed in its primary obligation of controlling total emissions from within its jurisdiction, then the obligation to prevent transboundary harm has been breached. This section looks at a specific example, the United States, to illustrate how this can be applied in practice.

Looking to the United States as one example of a State in the global North that appears to be in breach of its obligation illustrates the point. Following the creation of the UNFCCC in 1992, President Bill Clinton pledged that the US would reduce GHG emissions to 1990 levels by the year 2000.[491] In this situation the government clearly asserted its responsibility for controlling the overall level of emissions generated within its jurisdiction. Rather than reducing emissions as promised, by 2000 the US had actually increased GHG emissions by 14.2 percent above 1990 levels.[492] In the Kyoto Protocol's first commitment period, from 2008 - 2012, the US agreed to reduce GHG emissions to 7% below 1990 levels.[493] By 2012 emissions were still 5% above 1990 levels.[494] As part of the Paris Agreement, the US announced its first nationally

[489] See, for example, US EPA, 'Sources of Greenhouse Gas Emissions' (2022). https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions accessed 21 August 2022
[490] ILC ARS (n 11) 39; see also section 3.6 on attribution.
[491] Shanahan J, 'Clinton's "Voluntary" Global Warming Plan: Expensive, Ineffective, and Unnecessary' (3 August 1994) The Heritage Foundation.
[492] US EPA, 'Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2000' (5 February 2016) Executive Summary, 2. https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks-1990-2000 accessed 21 August 2022
[493] UNFCCC, Processes and Meetings - Kyoto Protocol - Targets for the first commitment period. https://unfccc.int/process-and-meetings/the-kyoto-protocol/what-is-the-kyoto-protocol/kyoto-protocol-targets-for-the-first-commitment-period accessed 21 August 2022
[494] US EPA, 'Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2012' (5 February 2016) Executive Summary, 4. https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks-1990-2012 accessed 21 August 2022

determined contributions (NDCs) in 2021, including a reduction in emissions to 50% below 2005 levels by 2030.[495] By 2019 US emissions were still 2% above 1990 levels.[496] This pattern illustrates that the US government has continually confirmed its role of controlling overall emissions from the US. This both supports the argument that the US government has effective control over its jurisdiction and confirms that the wrongful act, the breach of the obligation to prevent transboundary harm, is attributable to the State. While this is only one example, it demonstrates how the activities of private entities are rightly attributable to the State in the context of climate change and, therefore, why State responsibility is applicable.

5.6 Wrongful Acts

5.6.1 Contributions to Climate Change as Transboundary Harm

Section 5.5 establishes how acts can be attributable to the State. The second element central to applying State responsibility, a wrongful act, is discussed here. Based on the theoretical understanding of transboundary harm established in Chapter 4, this section will show how contributions to climate change constitute breaches of obligations of conduct and, in certain circumstances, breaches of obligations of result. Because the prevention of transboundary harm is a matter of customary law, the absence of legally-binding obligations in the UNFCCC, for example, does not excuse State behaviour. There is a legally-binding prohibition on transboundary harm that all States are obligated to honour. By establishing that States had effective control and, therefore the opportunity to act, that they could foresee the harm their emissions would cause, and that the level and likelihood of harm was of such significance that their obligation was to exercise a particular level of diligence, one can determine whether the international obligations were breached. By failing to act with due diligence, a breach occurred at least of a legal nature and, arguably, of a material nature in many cases. These wrongful acts require assigning State responsibility.

5.6.2 Breaching Obligations of Conduct

It is well-established that transboundary harm, impacting another State or the global commons, is a justiciable issue in IEL. Section 4.4 has explained that inherent in the obligation to prevent transboundary harm is the obligation of conduct, that is, to exercise due diligence. Therefore, the exercise of due diligence in the prevention of transboundary harm is an international obligation, the breach of which would entail State responsibility. The question, then, is whether States can be said to be in breach of this obligation. Two important points to consider from the start are that, first, the standard must be understood as an international one and, second, that the evolution of the climate regime offers a detailed and irrefutable international standard of due diligence that should have been expected. On the first point, by 'analyzing the relevant case law and inferring from there a customary standard,' it becomes clear that 'the international standard of due diligence does not refer to the internal practice of an individual state.'[497] The second point then provides that international standard. It is recognised that international agreements and treaties have emerged from IEL and climate change governance to clearly establish best practices, and failure to follow these would be a

[495] UNFCCC, 'United States NDC Final' (21 April 2021) NDC Registry, 6.
[496] US EPA, 'Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2019' (3 February 2021) Executive Summary (hereafter US EPA 1990-2019). https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks-1990-2019 accessed 21 August 2022
[497] Kulesza (n 419) 28.

failure of due diligence. For example, in the Kyoto Protocol's Article 3, as quoted in Section 2.3.1, it is agreed that States must 'ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts.'[498] States who agreed to these protocols, regardless of the legally-binding nature of the agreements themselves, and regardless of whether States later withdrew from these agreements, unmistakably agreed that remaining below this level of emissions represented best practices. There were no scientific findings to later dispute this, and there is no evidence any State later argued this was not a reasonable standard. Therefore, any State who failed to meet this standard of care, having agreed with the scientific evaluations determining this to be an appropriate standard of behaviour, was in breach of an international obligation of conduct to prevent transboundary harm. If a State fails to apply due diligence based on best practices, then that State has clearly violated the no-harm principle.

The significance of the obligation of conduct is that it is forward looking, aimed at preventing harm rather than remedying it, and that no material injury needs to exist to establish a breach has occurred. While there are widely varied views about the extent to which GHG emissions are permissible, or what degree of reduction is required, it will suffice to say here that a breach of the obligation to exercise due diligence is established when a State fails to meet not only its binding obligations under international treaty, but also when it fails to meet widely-accepted standards. A growing body of jurisprudence demonstrates this in practice, including in domestic case law as found in the *Urgenda Case*, in the Netherlands. Dutch citizens charged that the government was in breach of human rights law by its failure to act more aggressively to address climate change. Specifically, the plaintiffs argued that the Dutch government must reduce GHG emissions at least to the level of 25% below 1990 levels by the end of 2020.[499] Though it represents a domestic case and, therefore, offers limited value in establishing precedence beyond The Netherlands, it is important to note that the court 'considered United Nations and European Union climate agreements, along with international law principles and climate science, to define the scope of the state's duty of care with respect to climate change.'[500] This case contributes significantly to the growing body of evidence to reflect the scientific understanding of best practices and could help support arguments on whether a State has exercised due diligence. The failure of the State to exercise due diligence is an internationally wrongful act, and the standard of care to be expected has been well-established by the scientific community, the climate change regime, and by a growing body of jurisprudence confirming these standards. The due diligence principle can be applied 'as a test to evaluate the conduct that is required.'[501] In this way, one can see due diligence as a 'framework concept' that helps define 'the conduct that can be expected of a good government.'[502]

The framework established in Chapter 4, on transboundary harm, included three points to evaluate in determining whether due diligence was being met: State control, the significance of the potential harm, and the foreseeability of the harm. Using these criteria for determining whether a State's obligation has been met, one can look first at whether the global North had

[498] Kyoto Protocol (n 136) Art. 3.
[499] *Urgenda Foundation v The Netherlands* [2015] District Court of The Hague HAZA C/09/00456689. English translation at https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf accessed 1 April 2021
[500] — Environmental Law Alliance Worldwide Summary of Urgenda v The Netherlands. <https://elaw.org/nl.urgenda.15> accessed 1 April 2021
[501] Voigt on Damages (n 35) 9.
[502] Voigt on Damages (n 35) 10.

the opportunity to act. There are two points to consider. The opportunity to act comes from being aware of the need to act and having the capacity to act. As noted in the introduction to this paper, one can reasonably argue that the scientific community has been warning of the dangers of climate change since at least the early Twentieth Century. Even setting aside the earliest examples as not constituting scientific consensus, it was certainly of growing concern by the 1960s as the international community began planning its first conference specifically focused on the environment. Even allowing for the limits of scientific understanding of climate change by the time of the 1972 Stockholm Convention, there can be absolutely no debate that the reality of climate change and the risk of harm was universally recognised by the end of the 1980s. It was articulated to political leaders by the unified voice of the scientific community in the IPCC's First Assessment Report in 1990. The authors wrote that '[a] *consensus* exists among the world's leading scientists that a continuation of the current rate of increase in concentrations of greenhouse gases (GHG) in the atmosphere will cause a significant increase in global average annual temperatures.'[503] (emphasis added) The effect being, the report continues, 'that in a warmer climate the earth can be expected to experience more variable weather than now, with a likelihood of more floods and drought, more intense hurricanes or typhoons, and more heatwaves.'[504] It is clear that the level of potential risk was known, and that the opportunity to act existed. The global North also had the capacity to act. Knowing that GHG emissions were the primary drivers of climate change, States had the opportunity to employ wind, solar, hydro, or nuclear power, for example, to drastically reduce emissions.[505] This failure to fully engage these options demonstrates beyond any reasonable debate that the States of the global North understood the risks and how to avoid them, but States made the decision not to take appropriate measures. This is clearly a violation of the international obligation to exercise due diligence in the prevention of transboundary harm.

The extent to which the harm was foreseeable, coupled with the extreme nature of the harm predicted, makes failure to act with a minimum standard of care all the more egregious. As noted above, the adverse effects of climate change were well-known and presented to world leaders in clear terms in 1990. Not only were the scientific implications for rising temperatures and increasingly volatile weather patterns understood, but the potential for climate-induced IDPs was recognised in the same IPCC report. The authors acknowledged that '[a] rise of only 25 cm or more in relative sea-level would displace many residents of the delta regions of the Nile, the Ganges and the Yangtze from their homes and livelihoods and could render uninhabitable island nations such as the Maldives in the Indian Ocean, and Kiribati, Tuvalu and the Marshall Islands in the Pacific,' and 'projected that a rise of 1 m in sea-level could seriously affect nearly a hundred million people along the coasts of China,' and another nine million in Japan, and that 'even a modest sea-level rise could pose a major threat to the economy and political infrastructure of Africa.'[506] Desertification in Africa had already begun to impact human settlements with '150 million people threatened by starvation or malnutrition and an estimated 4 million refugees and returnees and an untold number of displaced persons.'[507] It was also noted that 'agriculture is quite vulnerable to climatic variability, and much of the present hunger and malnutrition in Africa may already be

[503] IPCC FAR WGII (n 91) 5-1.
[504] IPCC FAR WGII (n 91) 5-1.
[505] Bernthal F, (ed) *Intergovernmental Panel on Climate Change Working Group 3: First Assessment Report: The IPCC Response Strategies* (1990), 2.3.2.3. available at <https://www.ipcc.ch/report/ar1/wg3/> accessed 30 August 2021 (hereafter IPCC FAR WGIII)
[506] IPCC FAR WGII (n 91) 5-2.
[507] IPCC FAR WGII (n 91) 5-3.

attributable to drought-induced famine.'[508] The report continues to list specific areas of concern around the globe, but the foreseeability of harm may be best summarised by this passage: [509]

> 'Environmental refugees,' people displaced by degradation of land, flooding or drought, are becoming a much larger factor in many developing countries (Jacobsen, 1989; Tickell, 1989; Debrah, 1989). Even a modest rise in global sea-levels could produce tens of millions of such refugees. Population movements from blighted agricultural regions could result in areas where crop productivity may be cut by prolonged drought or temperature stress on vulnerable crops.

As previously discussed,[510] the due diligence principle is one of conduct, so proving the realisation of these anticipated harms is unnecessary. Any demonstrable harm realised would fall under the category of material injuries and would constitute a breach of the obligation of conduct, which is discussed in Section 4.4. What is clear is that at least by 1990 there was an explicit understanding that continued contributions to climate change risked creating millions of climate-induced IDPs around the world, and that this risk was known by the decision makers of the global North. The harm was unquestionably foreseeable.

Another point to consider in determining if a breach has occurred is proportionality, which is potentially the most subjective element in establishing due diligence. However, it is difficult to argue any balance of interests against potentially endangering millions of lives and livelihoods as warned in the IPCC's First Assessment Report. While the interests of the responsible State must be considered,[511] as well as their economic and technological capacity, surely there can be no reasonable assertion that moderate, incremental reductions in GHG emissions, achieved through the use of existing technologies, could be proportionate to floods, droughts, rising sea-levels, millions of displaced persons, and all of the foreseen risks of climate change. Considering first the economic impact of emission reductions, one must recall that collective action by all developed countries meant no one economy could be singled out for disadvantage. Further, the IPCC report included multiple models for costs that included a decline in the cost of renewable energy over time, as well as the potential to introduce carbon fees in increasing increments as renewables became more widespread.[512] There seems no room for arguing that economic concerns of short-term, moderate price increases could be considered proportionate to the level and certainty of potential harm. Finally, the 1997 Kyoto Protocol ultimately drew 192 parties calling for reduction of GHG emissions to 5% below 1990 levels by 2012. While specific commitments may not legally bind States Party, the fact that it was agreed reflects an understanding of an appropriate standard of care and, therefore, a legally-binding obligation on States to exercise at least this level of due diligence. A refusal to accept that obligation on the grounds of proportionality should have triggered objections to the feasibility of obtaining those goals due to lack of capacity. As there is no evidence such objections were made by the global North, then their absence indicates an acceptance of the obligation of conduct.

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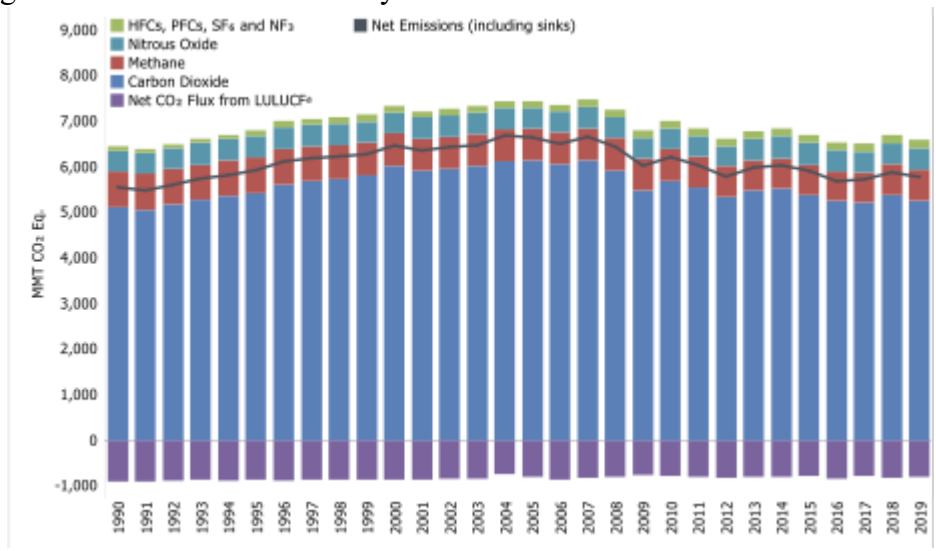
[508] IPCC FAR WGII (n 91) 5-6.
[509] IPCC FAR WGII (n 91) 5-10.
[510] See Section 4.4 on Due Diligence.
[511] See Section 4.4.3 Framework for Applying the Principle.
[512] IPCC FAR WGIII (n 505) [2.3, 2.4, 2.5].

Further recognition of the global North's acknowledgement of the risk of harm is found in the US Supreme Court's comments on the role of the Environmental Protection Agency (EPA). In *Massachusetts v. EPA* the court ruled that the EPA was responsible for regulating GHG emissions because they qualified as air pollutants under the US's Clean Air Act.[513] This is clear evidence that the US recognised GHGs as harmful, but still failed to reduce emissions in the manner widely understood to be required in order to substantially reduce the risk of harm. As illustrated in Figure 3, the US example shows a State that contributed to the scientific research of the IPCC, signed both the UNFCCC and the Kyoto Protocol, enacted domestic legislation through the Clean Air Act, and then not only failed to reduce GHG emissions but instead continued to increase its contribution to climate change. There can be no doubt that the level and likelihood of harm was known, that it was significant, and that there existed a clear standard of care to be expected. Instead of meeting this standard, the US and other members of the global North, continued to increase rather than reduce emissions while simultaneously acknowledging but ignoring the potential of harm to others.

Figure 3: US GHG Emissions by Gas[514]



Other support for the argument that the global North has failed to act with due diligence is found in the growing body of jurisprudence emerging from domestic courts. One example, the *Urgenda Case*, has already been introduced in this section. Other examples of domestic courts finding that their own States have failed to act with due diligence on climate change come for the German Constitutional Court[515] and in the Belgian Civil Court.[516] These cases reflect an understanding that the behaviour of the global North is not consistent with the principle of due diligence. Even in the absence of demonstrable material injury, the violations of due diligence are breaches

[513] *Massachusetts v. EPA*, 549 U.S. 497 (2007).
[514] US EPA 1990-2019 (n 496).
[515] *BVerfG*, Order of the First Senate of 24 March 2021 - 1 BvR 2656/18 -. English translation available at <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html> accessed 1 April 2021
[516] *VZW Klimaatzaak v. Kingdom of Belgium*. English translation available at <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210617_2660_judgment-1.pdf> accessed 28 August 2021

of international obligations (wrongful acts) under the principle of State responsibility and consequences must follow.

Of course, there are potential counterarguments to consider, too. The arguments in favour of assigning State responsibility for failures in due diligence are founded on the presupposition that the global North has not made efforts to reduce GHG emissions. However, it would be inaccurate to assert that they have made *no* efforts. The counterargument, then, would be to emphasise the subjective nature of the assertions made by the applicant. The three elements of the framework discussed (opportunity to act, foreseeability, and proportionality), one could argue, are all based on subjective evaluations. A defence against responsibility might be built around challenging each of these. However, as noted above, the persistent and near-unanimous warnings from the scientific community in the form of the IPCC assessment reports make it very difficult to argue that the harm was not foreseeable. Likewise, the repeated signing of international agreements within the UNFCCC, even those not legally binding, shows unquestionably the degree to which States recognised and accepted certain levels of diligence as reasonable international standards before then failing to meet those standards. Proportionality is the most debatable element but, as discussed above, it is unclear how one would argue that the costs associated with reducing GHG emissions is disproportionate to the displacement of millions of people, the loss of livelihoods for millions more, endangering the global food supply, and knowingly increasing the intensity and regularity of life-threatening weather events.

In regard to the opportunity to act, one might argue that the global North has taken the chance to act. Following the warnings of potential risks in the IPCC's First Assessment Report, the nations of the world, including the global North, signed on to the UNFCCC establishing the first foundations of an international climate change regime. Through the annual meeting of the UNFCCC's COP the global North has continued to participate fully in the effort to address climate change. The Kyoto Protocol, for example, included binding targets for the reduction of GHG emissions.[517] The Paris Agreement, too, demonstrated an effort on the part of the international community, including the global North, to further address the climate crisis. However, the shortcomings of these efforts have been argued throughout this paper, including and even emphasising the global North's repeated acknowledgements of what measures need to be taken followed by failures to adopt those measures. This should be seen as confirming that an objective standard of due diligence has been established, and that the global North is breaching its obligations by failing to meet this standard.

Further, as identifying potential harm is naturally forward looking and predictions about the future can never be certain, there is an argument that the extent to which harm is foreseeable may be debatable. While the IPCC made broad statements about potential impacts from climate change, there was no direct link between any particular source of emissions, climate change, and any specific harm. The First Assessment Report noted that 'there are substantial scientific uncertainties about the nature and magnitude of climatic changes that might result' from increased levels of GHGs.[518] While the possibility of harm was foreseeable, the certainty of that harm being realised was questionable. This issue raises particular questions about the causal links between certain weather events and climate change. For example, the increased intensity and frequency of typhoons may be predictable, but scientists cannot link any particular storm to climate change. This leaves open some space to question whether all of the

[517] Kyoto Protocol (n 136) Art. 3.
[518] IPCC FAR WGII (n 91) 5-1.

potential harm can be attributed to climate change and, therefore, to emissions from the global North. However, as noted above, the global North joined the rest of the world in taking steps to address the potential risks without challenging that GHG emissions were the cause of climate change and these changes posed significant risks of causing transboundary harm.

Proportionality is arguably the most subjective element of this discussion of due diligence. Being that States enjoy sovereignty over the exploitation of their own resources, the expectation of reasonable timeframes to adjust processes, and that the existing jurisprudence repeatedly prioritises economic interests, the global North could not have been expected to immediately eliminate all GHG emissions. That would have been unreasonable and disproportionate. Instead, they have participated collectively in the development of a climate change regime, made incremental steps to reduce emissions while continuing to encourage economic development, and offered assistance to developing countries to mitigate any risks of harm. Further, the recognition of the CBDR principle reinforces the argument that the global North is committed to acting in a proportional manner to address climate change. However, the UNFCCC is now more than thirty years old, and the global North continues to fail to meet its early commitments. Surely these decades constitute a reasonable amount of time to adjust.

What this section highlights is that the global North has violated its obligations to act with due diligence in preventing transboundary harm in the context of climate change. There existed an opportunity to act as the global scientific community explicitly defined the causes and consequences of climate change and identified precise courses of action to mitigate those adverse effects. That same community of experts made unmistakably clear the grave threat that climate change posed to human security and the near certainty that such harm would manifest. Finally, the global North repeatedly failed to object to calls for action on the grounds that acting would be out of proportion to the potential harm. That constitutes tacit acknowledgement that the risk of harm far outweighed any argument against action. Counterarguments built on the premise of subjectivity would require one to ignore the repeated failures of the global North to meet the very targets to which they agreed, to assume that threats to life and health were not of a serious magnitude, and that the economic growth of the world's wealthiest countries was a proportional concern to the basic human rights of the world's poorest. Domestic courts in some of the wealthiest States are already acknowledging the reality that the global North has failed to act with due diligence, and State responsibility must be assigned accordingly.

5.6.3 Breaching Obligations of Result

In addition to the obligation of conduct, the principle of prevention of transboundary harm also includes an obligation of result. This refers to demonstrable material injuries as opposed to legal injuries. Further, as noted in Chapter 3 on State responsibility, damages must be financially assessable in order to seek monetary reparations. This means that fixing State responsibility for breaching this obligation requires establishing material harm, establishing a causal link between the harm and the wrongful act and, if reparations are sought, being able to actually assign a monetary value to the injuries. One significant difference in determining breaches of this obligation is that they can only be established on a case-by-case basis. Legal injury requires only that a breach of conduct has occurred, meaning any State may invoke responsibility for the wrongful act of another without waiting for a result. The obligation of result, by contrast, requires that a breach of conduct has occurred, that the State claiming material injury can establish the existence of those injuries, and that a causal linkage exists between the failure of conduct and the resulting injury.

Because determining breaches in this way is dependent on the facts of each case independently, it is not possible to explore all of the possible scenarios in which State responsibility might apply. In addition to the legal injury suffered simply by the encroachment on sovereignty, States might argue material injuries from infringements on economic growth or sustainable development, for loss of biodiversity, for the loss of land or other natural resources, or any number of foreseeable harms linked to the adverse effects of climate change. Even if only limiting the discussion to failures in due diligence that lead to the internal displacement of persons in other States, it is not feasible to discuss all of the existing situations around the world now, much less every potentiality for displacement in the future. For the purposes of scope, this paper offers just one example to demonstrate how climate-induced IDPs may constitute a form of material injury from transboundary harm caused by climate change and, therefore, how State responsibility could apply to similar situations.

The no-harm principle is applicable to cases of climate-induced IDPs in that displacement is a material injury. The violation occurs both as damage to the global commons and as damage to the territorial jurisdiction of other sovereign States. As explored in detail in Chapter 4, the prohibition on transboundary harm requires that no State cause harm beyond its jurisdiction, and that jurisdiction can be spatial or temporal.[519] In applying this principle to climate change and its adverse effects, there must be a failure by the offending State to exercise due diligence and for that behaviour to lead to demonstrable harm. This section explores the way in which transboundary harm is resulting in material injury in the form of displacements in the global South.

The argument has been stated in a previous section that the climate is a part of the global commons, and that damage to the global commons constitutes a form of transboundary harm.[520] This position is well-supported by developments in global climate change governance. The fact that the Kyoto Protocol enjoyed the support of 192 parties should be seen as a near-universal recognition of the climate as a shared resource beyond the jurisdiction of any one State and, therefore, a part of the global commons. It is also well-established that the emission of GHGs is the primary cause of climate change. Of course, this is an oversimplified statement and there exists no expectation that States will entirely refrain from emitting GHGs. However, as discussed in relation to due diligence in Section 5.6.2, the scientific and policy history of the IPCC, the UNFCCC, and the Kyoto Protocols establish an easily defensible baseline for what was known about the causes of climate change and the potential harm, as well as the most reasonable standard of care to be expected.

A clear level of acceptable GHG emissions was enshrined in the Kyoto Protocol. Article 3(7) establishes that each State in the global North shall limit or reduce to 1990 levels its 'aggregate anthropogenic carbon dioxide equivalent emissions' of GHGs.[521] Further, Article 3 also acknowledges that these goals are created 'with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels.'[522] These are clear and measurable indicators of whether a State has knowingly allowed actions that cause harm. If a State has failed to reduce emissions to safe levels, then it has caused, or allowed to be caused, harm beyond its jurisdiction. Even considering States that did not accept binding targets, the near-unanimous voice of the scientific community on the dangers of climate change suggests

[519] See Section 2.2.2 on spatial and temporal jurisdiction.
[520] See Section 3.5.1 on Global Commons.
[521] Kyoto Protocol (n 136) Art. 3(7).
[522] Kyoto Protocol (n 136) Art. 3(1).

that the potential harm is irrefutable. As evidence of this widespread recognition, in the lead up to the Kyoto Protocol more than 100 Nobel Laureates were joined by more than 1,500 scientists from more than 60 countries in signing a statement to 'demonstrate that the world's senior scientific community believes that global warming is a serious threat.'[523]

Having established that the cause of harm originates in the global North as the primary contributors to climate change, one must demonstrate an actual harm in order to claim material injury. The displacement of persons within a State by the actions of a foreign State must constitute a material injury. The most important rights to consider, and those on which all others essentially hang, are the rights to life and health. The previously cited 1990 IPCC report acknowledges that forced displacements in developing countries are prone to numerous injuries related to human health; 'insufficient capacity of health services and lack of physical or economic access to them; [s]anitary facilities and housing could become quickly overburdened in the receiving area, enhancing the spread of communicable diseases; [b]oth residents and newcomers may be exposed and susceptible to new diseases (introduced by new arrivals or inversely); [m]ore directly, resettlement is known to be the cause of psychological strains (loss of connection with the original land and traditions) further inducing health problems.'[524] As the right to health is a fundamental human right, and the State is the entity responsible for ensuring those rights, forced displacements that impede the State's ability to protect the rights and provide for the welfare of its subjects are injuries. The extent to which these injuries can be proven will be down to case studies as each situation will likely require unique evidence. While it is not possible to establish provable injuries in general terms, the case study in Section 5.6.4 will ask whether any of these injuries have been realised.

Again noting that the State is responsible for ensuring the human rights of its subjects, and noting in particular the rights associated with progressive realisation, case studies should focus on investigating the impact of displacement on the provision of services and the protection of rights. It should be inquired whether and to what extent civil and political rights were ensured before displacement and if/how that has changed; whether and to what extent the State provided social and economic rights before, during, and after displacement; and whether and to what extent displacement has adversely affected group rights such as cultural heritage, development, and a healthy environment. By investigating changes in the State's ability to ensure rights and provide services, States will be able to demonstrate harm and claim injury for violations of the prohibition of transboundary harm. Showing specifics will require investigations into particular events and circumstances, but this section has shown how climate-induced IDPs might constitute injuries stemming from violations of the no-harm principle.

What one can see from the litany of potential examples of harm is that some take the form of economic losses, while others must be calculated in different ways, as non-economic losses. There is jurisprudence supporting the position that damage to physical property should result in compensation to the State in both the *Cosmos 954 Case* and the *Patmos Case*.[525] In the case of climate-induced IDPs, loss of habitable land or other tangible assets might also be calculable as economic losses. Cultural heritage, on the other hand, might be categorised as a non-economic loss. Again, while specifics can only be identified through evaluating

[523] — 'World Scientists' Call for Action at the Kyoto Climate Summit | Union of Concerned Scientists'. <https://www.ucsusa.org/resources/world-scientists-call-action-kyoto-climate-summit> accessed 3 April 2021
[524] IPCC FAR WGII (n 91) 5-10.
[525] Leigh (n 234) 141.

individual cases, the point to note is that there has been academic research and policy advancement on calculating both types of losses in relation to climate change.[526]

5.6.4 Case Study in Material Injury - Fiji

Fiji is a country experiencing all types of migration related to climate change. There are displaced persons entering Fiji from abroad, Fijians looking for refuge in foreign countries, and increasing numbers of climate-induced IDPs. In other words, 'Fiji is a source, destination and transit country for migration.'[527] There are significant questions to ask about all of these forms of migration, and there is room for research and discussion within and across all of them. However, this paper focuses on internal displacements as a demonstrable material injury for which State responsibility applies, and this case study particularly highlights planned relocations.

As a first point, it must be noted that a relocation being 'planned' does not necessarily mean it is not forced. The luxury of time to plan and execute a community's relocation is a reflection of the immediacy of the displacement, not the extent to which it is voluntary. Being displaced by a sudden-onset event, like a tropical cyclone, often requires immediate movement without time to plan. However, the well-documented reality of rising sea levels and the increasing frequency and intensity of cyclones leaves no doubt that severe weather will again visit the coastal communities of Fiji and it is prudent to plan and relocate pre-emptively. The warnings in the IPCC's FAR, in 1990, made clear that continued GHG emissions would lead to increasingly dangerous weather events.[528] The report warned specifically of 'more variable weather'... 'more floods and drought, more intense hurricanes or typhoons', and more heatwaves,'[529] all of which impact Fiji. With more than thirty years of warnings, it is understandable that States like Fiji would proactively relocate vulnerable populations, but one cannot use this planning to diminish the sense that the displacement is forced. As sea levels rise and risks continue to mount, it would be foolish not to plan.

The internal displacement occurring in Fiji also highlights the fallacy of viewing migration as merely an adaptation strategy. Doing so implies a too generously positive view that forced migrants and the States feeling the worst effects of the climate crisis are simply accepting the inevitability of climate change and making adjustments accordingly. This sense can be seen clearly in the motto heard around the Pacific Islands; 'We are not drowning, we are fighting!'[530] More accurately, displacement should be seen as the point at which adaptation has failed and loss and damage has been suffered. As noted in Section 2.3.1, in the UNFCCC '"mitigation" was established as the first pillar of international climate change law, with "adaptation" as its second.'[531] A third pillar, loss and damage, emerged in the Paris Agreement.[532] It is clear that the climate regime and, in particular, the loss and damage

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[526] UNFCCC, 'Non-economic Losses' in Processes and Meetings. available at <https://unfccc.int/wim-excom/areas-of-work/non-economic-losses#:~:text=UNFCCC%20Sites%20and%20platforms&text=Non%2Deconomic%20losses%20refer%20to,not%20commonly%20traded%20in%20markets> accessed 2 June 2021

[527] IOM, 'Migration in the Republic of Fiji: A Country Profile 2020' (Report) (8 March 2021) PUB2020/087/L, 5. https://publications.iom.int/books/migration-republic-fiji-country-profile-2020 accessed 9 March 2022

[528] IPCC FAR WGII (n 91).

[529] IPCC FAR WGII (n 91) 5-1.

[530] It is not clear who first used the phrase, but it has been embraced by the Pacific Climate Warriors of 350.org, among many others, and is now a common refrain among activists throughout the Pacific Islands.

[531] Broberg (n 26) 528.

[532] Paris Agreement (n 129).

mechanism, has failed to provide remedies for States suffering material injury. The onus of responsibility for mitigating the causes of climate change is squarely assigned to the global North as it accounts for the vast majority of GHG emissions. Adaptation, too, focuses responsibility heavily on the global North. In addition to altering their own behaviour to mitigate climate change, the global North is tasked with providing financial and technological support to 'assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects.'[533] Loss and damage then represents the final opportunity for redress, for 'those situations where adaptation is insufficient.'[534] Importantly, this understanding demands that displacement cannot be seen simply as an adaptation strategy. Any form of forced displacement must be seen as a failure of adaptation measures and should trigger responses under the loss and damage framework. Unfortunately, this framework has not developed beyond good intentions and encouraging words and into the practical applications so desperately needed.

It is at this failure to develop tangible applications of the concept of loss and damage that Fiji, and other countries faced with relocating members of their own populations, are suffering material injuries that require a remedy. The failure to mitigate the causes of climate change over the more than three decades since the IPCC FAR first warned of the dire consequences of climate change have left many coastal communities vulnerable to rising sea levels and increasingly frequent and intense severe weather events. Failures by the global North to exercise an appropriate standard of care in preventing transboundary harm have led to material injuries in Fiji. Yet, despite these failures and the climate regime purporting to offer a means of redress, the mechanisms for loss and damage are stuck in the discussion stages without developing into practical, applicable solutions.[535]

Because Fiji is on the front lines of the climate crisis, it may not be surprising that it has a highly-developed response to the adverse effects of climate change, including the planned relocation of vulnerable villages. The State, with support from Deutsche Gesellschaft für Internationale Zusammenarbeit GmbH (GIZ), has developed the 'Planned Relocation Guidelines: a framework to undertake climate change related relocation' (Relocation Guidelines).[536] These Relocation Guidelines include an important statement situating planned relocations at the point at which adaptation has failed:[537]

> Recognising it has the primary duty and responsibility to provide minimum standard protection and assistance to people at risk of, or affected by disasters and environmental change, the Fijian Government intends to initiate planned relocation actions only when all other adaptation options, as provided by the National Adaptation Plan (NAP), are exhausted and only with the full, free, and informed consent and cooperation of the communities at risk, experiencing the process of relocation.

This understanding reflects, also, that even planned relocations can be understood to be forced in the sense that all other options to remain in place have been exhausted. The ILA's Sydney Declaration defines planned relocation as 'a planned process in which persons voluntarily

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[533] UNFCCC (n 24) Art 4(4).
[534] Broberg (n 26) 528.
[535] See section 2.3.1 Shortcomings of the Climate Change Regime.
[536] Ministry of Economy (Fiji), 'Planned Relocation Guidelines: a framework to undertake climate change related relocation' (2018). (hereafter Relocation Guidelines) https://cop23.com.fj/wp-content/uploads/2018/12/CC-PRG-BOOKLET-22-1.pdf accessed 8 March 2022
[537] Relocation Guidelines (n 536) 5.

move *or are forced to move* away from their homes' (emphasis added).[538] There should be no doubt that forced displacement because there are no more alternatives is reflective of loss and damage more than simply adapting to changing conditions. Further, this recognition should also make clear that material injuries are suffered when the State must relocate its own population due to transboundary harm emanating from another State.

At the time of writing (2022), Fiji has already carried out the planned relocations of six villages. In interviews with the Climate Change and International Cooperation Division,[539] it was revealed that there are several internal lists of villages identified as needing relocation, ranging from the most inclusive at over 800, to the much more focused list of those in the most immediate danger.[540] From a list of around eighty villages that need to move in the near future, twenty villages have been noted as being in the most immediate need (five in each of Fiji's four districts, excluding Rotuma). From those twenty, the Climate Change and International Cooperation Division, with support from NGOs and the UN, is tasked with evaluating which are the most critical.[541] According to interviews conducted by the author, Fiji only has enough funding to conduct three planned relocations in the coming year. As noted above, this reality reflects the failure of mitigation that has allowed the adverse effects of climate change to reach this level of crisis, the failure of adaptation that has left many villages with no other option than to entirely relocate, and the failure of loss and damage mechanisms to provide adequate support to move all of the villages in need of relocation. It is these failures that demand another remedy be sought, and State responsibility offers such an option.

While Fiji's relocation processes are State-led, that does not mean the State can completely fund relocations. As noted in one report, 'the Vunidogoloa relocation is estimated to have cost FJD$980,000 (AUD$630,000) of which the government contributed FJD$740,000 (AUD$476,000) and the community provided FJD$240,000 (AUD$154,000) worth of timber as building materials.'[542] At almost FJD$1 million for a small village of only about thirty homes, one can extrapolate that moving even the twenty most urgent villages will cost more than FJD$20 million, or roughly USD$10 million. Further, such a financial reckoning ignores the reality that '[t]hese relocations will not only come with economic costs of materials and construction' but they are also 'culturally, emotionally, and spiritually difficult for those affected.'[543] Strictly referring to economic costs, one must acknowledge a failure of the international climate regime when the global North admittedly bears responsibility for the causes of climate change, but funding their survival is left to the Fijian State and the villagers suffering the most adverse effects. As another author reported from the relocated village of Narikoso, 'villagers raised approximately FJD15,000 through extended family networks to build a spring-fed water system for the new village "to show donors that we are willing to relocate, that we have done some of the work already ourselves . . . that way donors will be

[538] Sydney Declaration (n 99) Annex, Definitions (f).
[539] Fiji's approach to village relocations is robust and involves numerous stakeholders, including multiple government agencies. Situated within the Ministry of Economy, the Climate Change and International Cooperation Division is the lead office on planned relocations.
[540] Ministry of Economy (Fiji), '5-Year & 20-Year National Development Plan: Transforming Fiji' (November 2017).
[541] Information provided by officers in the Climate Change and International Cooperation Division during interviews with the author in February 2022. At the time of writing, the evaluations are ongoing, and no results are yet available.
[542] Greenpeace Australia, 'Te Mana o te Moana: The state of the climate in the Pacific 2021 Report' (Sydney 2021), 11. (hereafter Te Mana o te Moana)
[543] Te Mana o te Moana (n 542) 11

willing to support".'[544] These are financially assessable damages suffered because of climate change. According to the principle of State responsibility, Fiji is entitled to reparations in the form of compensation for, at a bare minimum, these direct economic losses.

In addition to the more obvious and quantifiable financial costs, non-economic losses reported by other villages not yet relocated include periodically gathering the bones of their ancestors as the rising sea exposes cemeteries.[545] One of the villages in which the author conducted research sits on an isolated island. The houses completely encompass the island, leaving no room to relocate without moving to a new island. Fortunately, this village is not in immediate danger as an ever-higher seawall thus far keeps back the tide. However, storm surges and king tides are gradually eroding the defences, and there is likely to come a time when building it higher will no longer suffice. It is certain to be a significant loss, and not an adaptation, if/when the people are forced from their ancestral home. Some losses may not be financially assessable and, therefore, would only entitle the State to seek satisfaction. However, satisfaction in the form of cessation of the wrongful act would still be significant, especially in providing justice for the injured States of the global South.

Another village in which research was conducted, Nggelekuro, is in more immediate need of relocation. A seawall constructed roughly forty years ago lies in disrepair. While waiting for a new, properly constructed sea wall, the villagers spent their own money to construct a rudimentary wall of earth and old tires. Under the best of circumstances this was only ever a temporary fix, but the eruption of the Hunga Tonga–Hunga Ha'apai volcano on 15 January 2022 sent a minor tsunami to the Fijian coast that left large holes in the new wall. Villagers there showed where the high tides are now reaching the foundations of houses, taking away fertile agricultural areas, and eroding culturally significant aspects of the village like the cemetery. Nggelekuro is on the main island of Viti Levu and, in theory, could be safe if they only moved a few hundred metres uphill. But this requires the consent of the people who would undoubtedly feel a significant cultural loss. It also means adjusting to changing rhythms of life, like living farther from the sea, finding a new cemetery, and replanting new agricultural fields. Only the villagers themselves could truly explain what leaving their home would mean, but even outside observers can see there is a significant financial burden. Is the Fijian State to pay for the relocations? Who will pay for the lost territory or compensate the villagers for their losses? These are clearly material injuries that can be easily established, financially assessed, and compensated by responsible States.

This is only one case study conducted in a limited number of villages. However, it provides a glimpse of how material injuries in the form of displacement can be demonstrated. Each case would require examining the unique facts of the case, but this study shows how justice must require responsible States to pay reparations to materially injured States.

5.6.5 Challenges

[544] McMichael, C, Katonivualiku, M, and Powell, T, 'Planned Relocation and Everyday Agency in Low-Lying Coastal Villages in Fiji' 185 *The Geographical Journal* 3 (2019) 15. https://rgs-ibg.onlinelibrary.wiley.com/doi/10.1111/geoj.12312 accessed 8 March 2022

[545] This was reported to the author in interviews, and subsequently numerous stories were found in the news media. See, for example, WWF, 'Climate Witness: Kini Dunn, Togoru, Fiji' (30 November 2004); see also Chambers, N, 'Viseisei Village burial ground under siege by rise in sea level' *Fiji Sun* (Suva 16 January 2021) Climate Watch 9.

It is important to note that the obligation of result in the context of transboundary harm is not an absolute one. Determining that the respondent is responsible for breaching its obligation of result first requires determining a breach of due diligence to show that a wrongful act has occurred. Even then, as discussed in the *Trail Smelter Case*, for example, the harm must be of a significant degree, and the rights of the potentially responsible State to economic development and exploitation of its own resources must be balanced against the harm.

Additionally, the counterarguments discussed in relation to due diligence[546] could also be made against States who would claim material injuries. States do enjoy the right to exploit their own natural resources, and even the jurisprudence cited prioritises their right to continue operations and acknowledges an absolute prohibition on transboundary harm is not reasonable. That States should be granted a reasonable time to adjust their processes to reduce risks is also consistent with developments in the climate change regime. Art. 2 of the UNFCCC notes that reductions in emissions 'should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.'[547] There is no expectation that all risks should be eliminated immediately, and there is a clear recognition of the priority of economic development.

One could argue that the global North cannot be legally responsible for transboundary harm caused by climate change because they are allowed to exploit their own resources and promote their own development, they must be given reasonable time to adjust when changes are required, and because the risks must be of a serious magnitude. The limitations on the rights of the State are not always clear and, it can be argued, are met by the participation of the global North in the development of climate change governance. The evolution of that regime from the UNFCCC to Kyoto to Paris reflects that States are making changes, arguably, within a reasonable time, as recognised by international actors' continued agreement on developing the climate regime. And the serious threat to rights potentially posed by climate change is being mitigated by the financial and technological assistance the global North provides to developing States through mechanisms like WIM and the GCF. None of these appear to be strong arguments as more than three decades of alternating between agreeing to new standards and then ignoring those standards has led to breaches extending through time and injuries only increasing without justice. Further, it has been established that the UNFCCC and its loss and damage mechanism has failed to provide remedies for injured States.

Challenging causal linkages is likely the best argument against State responsibility. It may be possible to cast doubt over causation simply by highlighting the nexus dynamics that are often associated with forced migration. Successfully assigning State responsibility will require applicants to establish clear, firm connections between GHG emissions, climate change, and the event that triggered displacement. For example, the significance of climate change as a threat multiplier is recognised in Fiji's Relocation Guidelines when it acknowledges the exacerbation of 'preexisting pressures such as overcrowding, unemployment, poor infrastructure, pollution and environmental fragility.'[548] Potentially the most reasonable counterargument to State responsibility is questioning whether a particular relocation or displacement-inducing event can be linked to climate change. Even on this it seems unlikely

[546] See Section 5.6.5 on counterarguments to due diligence.
[547] UNFCCC (n 24) Art. 2.
[548] Relocation Guidelines (n 536) 7.

to succeed as science continues to make advancements in understanding these causal links and to develop attribution studies.[549]

5.7 Injured States

This section answers the question 'who can invoke State responsibility for the adverse effects of climate change, particularly injuries related to internal displacement?' The section on wrongful acts[550] establishes what acts may be assigned responsibility; the no-harm principle's obligations of conduct or result. It has also been noted that any State may invoke responsibility for legal injuries, but only States who can establish tangible, financially assessable damages can claim material injuries.[551] While legal injuries are rooted in the wrongful act, not the result, examples of some material injuries associated with climate-induced IDPs will be useful for understanding which States can claim such injuries. In doing so, this section explains two important points about who is the injured party. First, it establishes that it is the State, not the individual, who can claim injury in this context. Second, it offers insights into some of the material injuries that might be suffered by States hosting climate-induce IDPs. Material injuries must be established on a case-by-case basis, so an exhaustive list of every potentiality is not possible. Also, while the focus of this research is on the State as the injured party positioned to invoke the responsibility of another state, it is possible that States may bring cases before the ICJ as a means of asserting diplomatic protection over their subjects. However, it is asserted here that those subjects should pursue domestic remedies while States should engage the international mechanisms to remedy breaches between States in the context of climate justice.

For climate-induced IDPs, one would expect the avenues for local remedies to vary widely from country to country. At the very least, local remedies should include mechanisms through which individuals apply through or make claims against their home State. In the case of climate change, most claimants in developing countries would be addressing grievances to a State that is not responsible for the GHG emissions that drove climate change and forced their displacement. At best, an individual may hope to demonstrate that the home State has failed them in some way. However, even if the injuries associated with the displacement can be established for that individual, it is still the duty of the host State to provide a remedy. It is widely agreed that States have the primary responsibility for those internally displaced within their territory, and this was confirmed in the UN's 2021 High Level Panel on Internal Displacement.[552] It was also specifically confirmed in relation to sea level rise in the Sydney Declaration.[553] It is possible for the State to then include the costs of this in claims of material injury against a potentially responsible State, but the current view in international law is that the host State is the duty bearer, regardless of the driver of migration.[554] The appropriate process is for the host State to apply to the ICJ to invoke the responsibility of those States most responsible for climate change while, as a separate procedure, individuals engage the local mechanisms available to them. In international law, it is the responsible States that owe reparations to the injured States. The injured States bear the duty of protecting their subjects, but any interference with their ability to do so is an injury to the State. The role of domestic

[549] See Section 3.8.3 on Causal Linkages.
[550] See Section 3.7 on Wrongful Acts.
[551] See Section 3.8.2 on Material and Legal Injuries.
[552] UNSG, 'Shining a Light on Internal Displacement A Vision for the Future', Report of the UN Secretary-General's High-Level Panel on Internal Displacement (September 2021).
[553] Sydney Declaration (n 99) Principle 1.
[554] For a detailed discussion of this issue see, for example, Aycock, et al (n 111).

processes is also emphasised in the ILC ARS, as discussed in detail in the chapter 1, when it codified the condition that State responsibility could not be applied in cases where the principle of exhausting local remedies existed. The key procedural argument, of course, is that the ICJ is specifically designed to address disputes between States. It does not hear cases arising between individuals, as explicitly stated in Art. 34(1).[555]

Having established the procedural arguments for claiming State injury as opposed to individual damages, one can turn to the substantive reasons. First, one must recognise that '[i]t is State institutions that are charged by the constitution or fundamental law of every country to protect the fundamental human rights of people.'[556] This should not be controversial, but it is worth asserting the universal recognition that it is the State that is responsible for ensuring the rights of those within its territorial jurisdiction and, in turn, serving as the link between the individual and the realm of international law. It is a virtually uncontested principle that 'States are the arch-custodians of human rights.'[557] It is true that certain circumstances require international protection, but there are narrow parameters for this. For example, 'it is common for a violation of a socio-economic right—for example, violation of the right to an adequate standard of living—to be re-characterized as a form of inhuman treatment, which is a right giving rise to international protection.'[558] However, it should not be assumed, *prima facie*, that this applies to States hosting climate-induced IDPs. It should be assumed, in the absence of evidence to the contrary, that the host State is willing and making best efforts to provide for its subjects, that the condition of displacement is caused by outside actors, and that reparations would allow the injured State to either return to the conditions that existed before the injury (restitution) or to be compensated for what was lost. In framing this issue in terms of human rights, one might reasonably divide those rights into the three generations of political, economic, and group rights. While it is clear that the State has the duty to ensure the rights of its subjects, it may be less clear how the State can claim injury for infringements on the individual political rights that may be threatened by displacement. That makes the first-generation human rights a good place to begin the discussion of substantive reasons for asserting State injury rather than individual claims.

McAdam offers a useful introduction to how climate change displacement threatens rights:[559]

> It is a trite observation that climate change will impact upon people's enjoyment of human rights. Climate processes, such as shoreline erosion, coastal flooding and rising sea levels, as well as more frequent and intense severe weather events, such as storms and cyclones, will affect agriculture, infrastructure, services, and the continued habitability of certain parts of the world. This, in turn, may threaten rights such as the right to life, health, property, culture, means of subsistence, and, in extreme cases, self-determination. The worst effects of climate change are likely to be felt in communities where human rights are already precarious, given that the most drastic impacts of climate change will be felt in the poorest parts of the world where human rights protection is often weak.

Ní Ghráinne then offers a succinct note on the most immediate threats to the first-generation rights of climate-induced IDPs:[560]

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[555] ICJ Statute (n 300).
[556] Abass (n 204) 692.
[557] Abass (n 204) 692.
[558] McAdam on Climate Change Displacement (n 69) 17.
[559] McAdam on Climate Change Displacement (n 69) 16.
[560] Ní Ghráinne (n 78) [D(1)i].

> Article 12 of the →International Covenant on Civil and Political Rights (1966) (ICCPR), for example, protects freedom of movement and thus forced displacement is prima facie unacceptable under the ICCPR. Similarly, Art. 26 of the same instrument sets forth the principles of equality and non-discrimination, while the right to liberty and security of the person is protected by Art. 9. In addition, Art. 17 provides that no-one shall be subjected to arbitrary or unlawful interference with, *inter alia*, his home, and the →Human Rights Committee has found that forced evictions can result in a violation of this provision.

Other political rights could be added in certain circumstances. For example, one's right to vote or participate in political life[561] would at least be threatened, if not violated, as a result of displacement. And while not included in the ICCPR, the right to own property and to not be arbitrarily deprived of one's property are rights set forth in the UDHR.[562] While it may seem that these threats to human rights are building toward an argument for claims by individuals, it is the State that is responsible for ensuring these rights to the persons in its jurisdiction. If those subjects who are not displaced are enjoying these rights, and the act of displacement threatens or violates these rights, then it follows that the State's ability to fulfil its obligations has been impeded. Put another way, the State's right to fulfil its obligations is violated by the foreign States who have driven climate change and forced the displacement of the injured State's subjects. As noted above, the individual should have access to domestic remedies, but the role of international law is to address the injury suffered by the State in hampering its ability to protect the rights of its subjects. These are potentially demonstrable material injuries in cases where the State can show that despite its best efforts, its capacity to provide for its subjects has been infringed.

Second-generation rights, in many cases, take the form of more calculable, tangible rights than the sometimes more abstract political rights of the first generation. These economic and cultural rights are often directly threatened and/or violated by displacement. ICESCR Art. 11 enshrines 'the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.'[563] And the text continues by reaffirming that it is the State that owes these rights to its subjects by insisting 'States Parties will take appropriate steps to ensure the realization of this right.'[564] In order to achieve this adequate standard of living, everyone has the right to work.[565] When displacement leads to the loss of jobs or economic opportunity, an injury has been suffered. States are also expected to provide social insurance,[566] and it may be that displacement inhibits this endeavour or increases the costs. Also included in second generations rights is the right to education,[567] the provision of which is made more financially and administratively difficult in cases of displacement. Certainly the right to the highest level of health[568] is threatened, and often violated, for climate-induced IDPs. Again, any threat to these rights may amount to an injury suffered by individuals, but the role of international law in this context is to assign State responsibility and demand reparations to injured States. Impeding the State's ability to ensure second generation rights is, again, an injury to the State, and reparations could be appropriate if the injury can be financially assessed.

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[561] ICCPR (n 122) Art. 25.
[562] UDHR (n 121) Art. 17.
[563] ICESCR (n 123) Art. 11.
[564] ICESCR (n 123) Art. 11.
[565] ICESCR (n 123) Art. 6.
[566] ICESCR (n 123) Art. 9.
[567] ICESCR (n 123) Art. 13.
[568] ICESCR (n 123) Art. 12.

Both first- and second-generation rights are owed to individuals. However, they are owed to individuals by the State. ICCPR Art. 2(1) requires the State 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.'[569] Art. 2(1) of the ICESCR requires that the State 'undertakes to take steps...to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'[570] The 'progressive realisation' clause in the ICESCR could allow States to claim injury even when they are able to provide the rights to some degree, but it would have to be explored based on the facts of each case to determine if the State would or could have better provided for these rights if not for displacements driven by climate change. In such situations, it may be that 'the government remains willing to protect its citizens, although the extent of its ability to do so over time is unclear.'[571] Significant to emphasise here is that the individual is the rights holder, and the State is the duty bearer in the context of human rights, but infringement upon the State's ability to fulfil its duty constitutes State injury. In international law, then, the injured State would be the rights holder and the responsible State would be the duty bearer. Therefore, the individual should pursue local remedies under domestic rules while the injured State should seek reparations from responsible States for infringing on its ability to fulfil its obligations to its own subjects. Only when the injured State is unwilling or unable to provide protection should the individual seek international protection. If the State is unwilling, then the individual could assert that all local remedies had been exhausted and request international protection through human rights organs. If the State is unable to provide protection for climate-induced IDPs, then it remains a matter of State injury as the responsible State has created a situation that prevents the injured State from meeting its obligations. Any expectation that an outside entity should infringe on the State's sovereignty to offer surrogate protection when the State is only unable due to outside interference would be counter to the foundational principle of State sovereignty.

Violations of third-generation rights, or collective rights, might be more easily recognised as injuries to the State. Perhaps the most relevant to this discussion are the rights to self-determination, sustainable development, to exploit one's natural resources, a healthy environment, cultural heritage, and intergenerational equity. All of these rights are threatened by displacement, and violations of them would constitute injury to the State. All of these are protected under State sovereignty, so harm in the form of infringements on these rights is more appropriately and clearly understood to be State injury than individual damage.

One way in which States suffer harm is in the infringement on their right to sustainable development. The principle of sustainable development 'now appears with great regularity in international instruments of an environmental, economic and social character and has been invoked by various international courts and tribunals, and it is now established as an international legal concept.'[572] It encompasses both a right to develop and an obligation to do so sustainably. As Sands explains, it includes 'the concept of "needs", in particular the essential needs of the world's poor' and 'the idea of limitations imposed...on the

[569] ICCPR (n 122) Art. 2(1).
[570] ICESCR (n 123) Art. 2(1).
[571] McAdam on Climate Change Displacement (n 69) 13.
[572] Sands P, *Principles of International Environmental Law* (2nd edition, Cambridge University Press, Cambridge, 2003) 252. (hereafter Sands)

environment's ability to meet present and future needs.'[573] The elements of the principle of sustainable development include intergenerational equity, sustainable use of resources, equity of use between States, and the reciprocal considerations to be given between environmental protection needs and development needs.[574] There is a clear connection between these elements and the other principles discussed above. The right to develop is tied to State sovereignty and the right of States to exploit their own natural resources. The obligation to do so sustainably is tied to the limits of sovereignty and the principle prohibiting transboundary harm. In this sense, one can see the boundary as a conceptual one obligating States to preserve the environment, including natural resources, for use by future generations. This conceptual boundary can be seen as a temporal one, and States are required to develop in a manner that prevents transboundary harm through time. States that continually fail to reduce GHG emissions despite explicit warnings about the harm being caused and the future potential for harm are violating the prohibition on transboundary harm.

The UNFCCC's Article 3(4) is one source for the right to develop and uses language that 'makes it particularly clear that economic and social development and protection of the Earth's climate system should be considered as mutually reinforcing objectives within the framework of the [UNFCCC].'[575] The adverse effects of climate change are unquestionably detrimental to the pursuit of development including the associated loss of habitable or arable lands and natural resources, social and economic losses, and access to energy. These effects are only magnified when considering the impact on future generations. It is enough to recognise here that climate change has a negative impact on a State's right to develop, particularly in the least developed States. In addition to violations related to transboundary harm, any hindrance to development furthers the argument that contributions to climate change can be seen as a breach of international obligations.

Self-determination is not likely to be a material injury in many cases, but it should not be ignored as a possibility in extreme circumstances. It is not unreasonable to assert that some States may become entirely uninhabitable in the future, leaving the State without a geographic territory. Will those populations then be stateless, or will those States merely be landless? What are the consequences for their self-determination? For climate-induced IDPs, what is the risk of losing representation in local, regional, or national political offices? These questions are outside the scope of this paper, but it is important to recognise that the collective right to self-determination could be threatened by climate change, especially for those displaced.

All of these threats to or violations of human rights, whether first, second, or third generation rights, should be understood initially as injuries to the State. States have the obligation to ensure those rights, and if acts by another State prevent or impede that ability, then that constitutes a form of transboundary harm and an injury to the State. Additionally, as the ILC ARS insists that State responsibility is excluded if local remedies have not been exhausted. This creates a reality in which individuals must pursue justice through domestic mechanisms while States can invoke responsibility against each other.

The Fiji case, discussed in the section above, offers an example of this understanding in practice. Significantly, in discussing State responsibility, Fiji recognised that it is

[573] Sands (n 572) 253.
[574] Sands (n 572) 253.
[575] Wewerinke-Singh (n 51) 77.

the duty of the State to provide for its subjects, thus supporting the position that it is the State suffering injury and in a position to seek justice through international law. It may seem as though cases like the villages of Vunidogola and Narikoso, where locals contributed financially to their own relocation, support the argument for reparations to individuals. However, that would be inaccurate on two points. First, the local population should pursue remedies for such injuries through domestic processes. This would be keeping with the ILC ARS's principle of exhausting local remedies. This assertion in no way implies that they are not entitled to such remedies but rather that the appropriate forum for individual claims is through the domestic laws of their own State. A detailed discussion of legal remedies for individuals is beyond the scope of this paper.[576] Second, it is possible the injured State may invoke State responsibility on behalf of its subjects but that, too, is beyond the scope of this research. The position asserted here as the focus of this research is that State responsibility applies to climate change and that displacement constitutes a specific material harm to the injured State.

5.8 Remedies

Certain adverse effects of climate change result in demonstrable material injuries for which reparations in the form of compensation or restitution may be appropriate. However, the risk of transboundary harm, and the failure to exercise a level of due diligence commensurate with preventing transboundary harm, constitute breaches of obligations owed to the entire international community for which satisfaction may be the only appropriate remedy. This section provides a brief look at how each remedy might be utilised if State responsibility is fixed for contributions to climate change.

5.8.1 Restitution

It seems likely that full restitution for climate change is unlikely as it would ultimately 'involve, at least, removing phenomenal quantities of GHG from the atmosphere.'[577] In addition to being impractical in terms of available technology, such an order of restitution could be reasonably denied as being either 'materially impossible' or 'wholly disproportionate'.[578] Restitution may also be inappropriate for climate-induced IDPs if 'the property in question has been destroyed or fundamentally changed in character.'[579] It is hard to describe conditions that drove long-term displacement in any other terms, making this an unreasonable remedy.

The only potentially realistic form of restitution would be juridical restitution which required the 'modification of a legal situation' to remedy the wrongful act.[580] In the case of the global North failing in obligations of due diligence, the wrongful act is more accurately described as an omission (of the State's legislative duty to enforce emission control measures). Therefore, an order requiring the implementation of legal measures to bring behaviour into compliance with obligations could be appropriate. However, this would only be a partial restitution as it

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[576] For case studies on domestic systems see, for example, Scott and Salamanca (n 81).
[577] Mayer B, 'Climate Change Reparations and the Law and Practice of State Responsibility' (2017) 7 Asian Journal of International Law 185, 187. (hereafter Mayer on Reparations) <http://www.cambridge.org/core/journals/asian-journal-of-international-law/article/climate-change-reparations-and-the-law-and-practice-of-state-responsibility/59BEEB3F2AE39E8A2DA15815B25D3270> accessed 10 June 2021
[578] ILC ARS (n 11) 98[7].
[579] ILC ARS (n 11) 97[4].
[580] ILC ARS (n 11) 97[5].

restores the legal order to the situation that existed before the responsible State violated its obligation but falls short of making the injured State whole. In this way, juridical restitution could serve as a part of the remedy but would not be sufficient on its own.

5.8.2 Compensation

There are significant challenges to demanding compensation for 'climate change' because it is not, in and of itself, a financially assessable material injury. It is the adverse effects that may constitute material injuries for which compensation is owed. In practice, this could reasonably include, for example, the costs of relocating villages in Fiji. The cause of the injury can linked to climate change, the injury is financially assessable, and the amount of compensation is not out of proportion to the breach that caused it. Further, restitution is not plausible in cases where the sea level has risen to the point that an area has become uninhabitable. These would amount to 'expenditures reasonably incurred to remedy or mitigate damage flowing from an internationally wrongful act.'[581] Under these circumstances, compensation may be the most appropriate remedy.

Determining compensation, though, is not strictly a matter of evaluating the damage and determining a financial total. It is more accurately understood as a negotiated process with the goal of reaching 'an equitable and acceptable outcome.'[582] Indeed, vehement demands for 'full reparations could encourage claims that are morally excessive or politically unrealistic,' which could 'lead to severe international tensions between nations and hinder international negotiations.'[583] Even if a breach of due diligence is determined to have occurred, negotiating compensation could involve an evaluation of the extent to which 'the liable state had taken appropriate prevention measures and measures to minimize the harm, including through providing assistance to the affected states.'[584] If the global North were determined to be failing in its obligations of due diligence, it would still be inaccurate to say that no level of diligence had been exercised. Likewise, it is reasonable to assert that aid from the global North should be considered in determining what compensation is owed. Finally, there must also be a 'recognition of the capacity of responsible states to pay', as even the 'capacity of industrial states is not unlimited.'[585] Considerations of this nature should influence decisions regarding the level of compensation.

It is clear that there are particular circumstances under which compensation is the most appropriate remedy to transboundary harm in the context of climate change. These must be financially assessable material injuries, they must be proportionate to the responsible State's ability to pay, and they must be arrived at in an equitable and acceptable manner. As these are only available in claims of material injury, the facts of each case will determine whether and to what extent compensation is the most appropriate remedy.

5.8.3 Satisfaction

In cases of legal injury, satisfaction is generally the only remedy available to the injured State. The ILC explains that 'satisfaction is concerned with non-material injury, specifically non-material injury to the State, on which a monetary value can be put only in a highly

[581] ILC ARS (n 11) 99[5].
[582] ILC ARS (n 11) 100[7].
[583] Mayer on Reparations (n 577) 214.
[584] Mayer on Reparations (n 577) 207.
[585] Mayer on Reparations (n 577) 203.

approximate and notional way.'[586] However, the absence of monetary payment does not diminish the value of satisfaction in the context of remedying the wrongful acts associated with transboundary harm and climate change. The forward-looking nature of satisfaction, particularly in its role of demanding 'cessation and guarantees of non-repetition' makes it a particularly pragmatic remedy for protecting against future harm.[587] In this way 'the instrumental function is by far the most urgent: from a pragmatic perspective, it is more crucial to prevent further harm than to advocate for compensation for the harm already caused.'[588]

Satisfaction allows any State to invoke responsibility for wrongful acts, regardless of whether actual harm has occurred. This reinforces the notion that it is a forward-looking remedy (addressing obligations of conduct before obligations of result are breached), and avoids any difficulties in determining specific material injuries. For a legally injured State to seek satisfaction only requires establishing that the responsible State has breached its obligation, so it is not necessary to establish actual harm, for example creating climate-induced IDPs. Though it is not necessary in order to seek satisfaction, States suffering internal displacements might pursue this remedy in order to protect future interests, to avoid arguments over financial assessments or causal links, or out of political considerations that might make demanding reparations less palatable.[589] For all of these reasons, satisfaction remains the most pragmatic and widely available form of remedy available in the pursuit of climate justice.

5.9 Countermeasures

Injured States have the right to 'resort to all means of redress' within the legal parameters of the ILC ARS.[590] This includes specific countermeasures they may employ in pursuit of justice. This paper focuses on the legal remedies available, and countermeasures should be seen as a step beyond; a mechanism to engage when legal remedies fail. Significant to obligations related to climate change, is the understanding that 'there is no requirement that States taking countermeasures should be limited to suspension of performance of the same or a closely related obligations.'[591] This means countermeasures against wrongful acts related to transboundary harm do not (and indeed should not) take the form of reciprocal acts causing transboundary harm. It is also important that countermeasures should target the responsible States which, in pursuit of climate justice, would be the global North. Countermeasures may be employed by any State as even those claiming legal injury may make efforts 'to ensure cessation of the breach.'[592] A more detailed discussion of countermeasures in response to climate change displacement is beyond the scope of this paper. It is enough to include here that States invoking responsibility may engage countermeasures in pursuit of justice, but with the limitation that they 'are kept within generally acceptable bounds.'[593]

5.10 Summary of Chapter 5

[586] ILC ARS (n 11) 99[4].
[587] Mayer on Reparations (n 577) 198.
[588] Mayer on Reparations (n 577) 213.
[589] See Mayer on Reparations (n 577) 212 noting 'the responsible states tend also to be the strongest diplomatic powers, while the states most affected are among the weakest nations.'
[590] ILC ARS (n 11) 117[3].
[591] ILC ARS (n 11) 129[5].
[592] ILC ARS (n 11) 129[8].
[593] ILC ARS (n 11) 128[2].

All States are bound by the principle of prevention of transboundary harm as a matter of customary international law. This no-harm principle creates two separate obligations; one of conduct and one of result. Any breach of these obligations should rightfully trigger State responsibility which, in turn, should result in reparations in some form. There is no need to demonstrate any harm has been suffered in determining whether obligations of conduct have been breached, but obligations of result can only be established if material injuries can be demonstrated. Likewise, any State may claim legal injury by virtue of the fact a breach has occurred, but those claiming breaches of the obligation of conduct must show both that there has been a failure of due diligence and that material injury has been suffered. Then, legally injured States may seek satisfaction, and materially injured States may additionally pursue monetary reparations in the form of restitution or compensation.

In the context of climate change, one quickly recognises that legal injury is the only possible claim against the broad concept of 'contributions to climate change'. As this only requires evaluation of the behaviour of the responsible State, there is no need to establish any actual damage has occurred. This evaluation should be objective and based on the conditions that the State had the opportunity to act, that the significance and likelihood of the potential harm is not disproportionate to the preventative act, that the potential harm was foreseeable, and that the wrongful act is attributable to the State if that State had effective control of the jurisdiction and possessed the technical and economic capacity to act. If these questions can be answered in the affirmative, then a breach of conduct has occurred. There is little question that the global North has failed to meet its obligation of conduct in terms of contributions to climate change. Scientific warnings have consistently warned of the significance and likelihood of harm, leaving no question that the harm would be of the most significant nature and that was entirely foreseeable. The repeated efforts within the climate regime to demand action reflect multiple opportunities to act, but also failures to do so. Further, the progressive development of the climate regime itself reflects a clear, internationally recognised minimum standard of behaviour that the global North has failed to meet. It is also not debated that the due diligence required in terms of regulating overall emissions is an act attributable to the State, nor is it challenged that the States of the global North had both effective control over their respective jurisdictions and the capacity to meet the expected standard of due diligence. Based on these facts, the global North is in breach of its obligations of conduct, due diligence, and any other State may invoke responsibility and demand satisfaction, at least by way of cessation of the wrongful act and assurances of future compliance.

It is impractical to address all of the potential harms that may result from these failures of due diligence. Each one must be evaluated individually to determine whether and to what extent State responsibility applies and what remedies might be most appropriate. In this paper, one particular injury has been addressed; internal displacements caused by climate change. In addition to the legal injury stemming from the breach of conduct already described, States hosting climate-induced IDPs may also invoke responsibility for the material injuries associated with the forced displacements of their populations. It has been shown that, first, it is the State who has standing to make these claims in international law except in cases where the host State is unwilling to provide for its subjects. It has also been shown how the State is injured in the impediment to its fulfilment of its own obligations, including ensuring the human rights of its subjects and providing for their general welfare, the infringement on the State's right to sustainable development, and the economic costs, to name but a few. The facts of each case will determine the precise injuries, and it is impossible to include every eventuality from every circumstance involving climate-induced IDPs. Instead, the case of Fiji was offered as a specific example of a case in which internal displacements can be

characterised as material injuries. This case highlighted the reality that States in the global South are burdened with addressing the harms created by the global North and are entitled to compensation. While the precise amount of compensation might be negotiated, the specific case of planned relocation in the village of Vunidogoloa offers at least one example of how some of the material injury can be easily quantified. This could serve as a baseline for considering compensation for similar relocations, but these decisions should also take into consideration the non-economic losses such as culture and rights infringements in determining total compensation. Likewise, it is fair to consider assistance from the global North in tempering compensation agreements so that they end in equitable terms that are acceptable to all parties.

What is clear is that the most desirable outcome from applying State responsibility in any case is the cessation of the wrongful act, the prevention of future harm, and the maintenance of peaceful relations between nations. The magnitude of the climate crisis demands such action for the sake of human security and, indeed, the very survival of life on earth. A passage from the *US v. Iran Case* might just as easily apply to those suffering from the adverse effects of climate change: [594]

> ln the volatile circumstances existing in Tehran, the hostages are, to an anguishing degree, in continuing jeopardy; their situation could sharply deteriorate at any moment. In the absence of effective measures of' protection, a tragedy of an irreparable kind could result.

From the same case, the importance of finding legal remedy to preserving peaceful relations was raised when the US urged the ICJ to act swiftly because 'each day that this condition continues causes irreparable damage to principles of international law.'[595] Surely each day that the wealthiest, most industrialised States of the global North continue to wilfully contribute to transboundary harm that adversely affects the global South is causing irreparable harm to the rule of law.

[594] *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* (29 November 1979) Request for the indication of Provisional Measures of protection submitted by the Government of the United States of America [3]. (hereafter Provisional Measures) https://www.icj-cij.org/en/case/64 accessed 24 August 2022

[595] Provisional Measures (n 594) [4].

Conclusion

This paper aimed to identify the role of international law, namely, State responsibility, in providing justice for States in the global South hosting climate-induced IDPs. Tens of millions of people are being displaced by the adverse effects of climate change each year, and the projections for future displacements are deeply troubling. It is essential that the world address this issue through international solidarity. It is not acceptable to insist that the States of the global South must bear the burden of providing for and protecting IDPs while the global North continues to drive their displacement. This paper asked whether the theoretical framework of State responsibility might be applicable to seeking justice for the global South in the face of the climate regime's shortcomings. It then asked if the theoretical framework of the obligations stemming from the prohibition on transboundary harm might be applicable as the internationally wrongful act for which State responsibility must be assigned. Finally, the theoretical framework developed from the explorations of the principles of State responsibility and the 'no-harm rule' were applied to the climate crisis and the climate-induced IDPs in the global South.

The warnings for more than three decades about the dangers of climate change, as well as repeated acknowledgements by the global North of its role in creating the climate crisis, has created a clear standard of due diligence to prevent transboundary harm that has not been met. This constitutes a breach of an international obligation and, therefore, requires assigning State responsibility. Consequences must follow in the form of reparations. Any State may claim legal injuries and demand cessation of the wrongful act, but those suffering the material injury of displaced persons are entitled to compensation. Reparations for these injuries represents justice in a way that aid, or charity, cannot. A just remedy applies responsibility to the States in breach of their obligations while also empowering those that are injured.

Ultimately, the choice to pursue legal remedies such as the one argued in this paper belongs to the injured States of the global South. It is hoped that these arguments will encourage States like Fiji, either individually or collectively, to take actions through the ICJ to demand the justice they are owed. Even if political considerations discourage such options, these arguments may prove useful in strengthening the negotiating position of the global South. They may, for example, agree not to sue in exchange for more favourable trade agreements or increased aid. From the perspective of the global North, it is hoped that developing these arguments may encourage them to accept responsibility willingly. For example, as China and the United States seek to assert their influence over the South Pacific, the regions developing States may be more inclined to ally themselves with powers that offer justice. Making the case for justice offers a direct means to seek it in the ICJ or an indirect way to seek it through diplomacy. Perhaps it will even help to change behaviours simply by clarifying the wrongfulness of an act. The most important goal is to ensure peaceful opportunities for justice are available so that violent options do not arise.

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