The Warming War: How Climate Change is Creating Threats to International Peace and Security

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Abstract

The Cold War moved slowly over a period of forty-five years of indirect conflicts. Since this time, the planet has experienced metaphoric global wars, such as the War on Terror and the War on Drugs. This Article coins the term and claims that we are now in the era of the Warming War as the impacts of green-house emissions accelerate climate change, insidiously threatening the security of human life on earth. To date, this threat has been approached through diplomacy and negotiation as climate science continues to affirm the dangers of climate change and warns of its catastrophic impacts in the absence of urgent action. These political processes are too slow, particularly for some states, such as low-lying coastal islands, which may cease to exist in the near future. This Article discusses a potential legal basis for the United Nations Security Council (UNSC) to declare climate change as a threat to international peace and security, and for states to seek reparations through the International Court of Justice. Such actions have the potential to establish the Warming War as more than a metaphor. This Article investigates whether developing countries and Small Island Developing States (SIDS), which find their territorial integrity and sovereignty directly challenged, could enlist international law's ever-evolving definition of a 'threat' to declare the impacts of climate change as a threat to their peace, security, and sovereignty. In doing so, it could then be interpreted as breaching international laws prohibiting acts of aggression and extraterritoriality. Approaching climate change as a national and international security issue promises to create new

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opportunities for immediate and much needed action to limit the emissions of greenhouse gases and support the plight of vulnerable nations.

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INTRODUCTION

Scientific evidence has confirmed that the future viability of life on earth is threatened by climate change.[1] Life sustaining eco-systems are being disrupted and many may become unviable, rendering life on earth untenable. The impacts of climate change have situated the planet in an era of the *Warming War*, a term coined in this Article, that describes the planetary threats to global security posed by the warming climate which is the result of the impacts of climate change. The *Warming War* term encompasses how climate change is undermining global stability by influencing resource-driven conflict, loss of territory through sea-level rise, and mass-migration. The term has arisen as developed states and those

1. *See* RAJENDRA K. PACHAURAI & LEO MEYER, INTERGOVERNMENTAL PLATFORM ON CLIMATE CHANGE, CLIMATE CHANGE 2014: SYNTHESIS REPORT. CONTRIBUTION OF WORKING GROUPS I, II AND III TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE 1 (2015).

in transition have placed pressures on the environment through the emissions-intensive process of industrialization.[2] To combat this war, the international climate change regime emerged with voluntary actions, as many developed states were apprehensive to commit to legal obligations under international law that enforce limitations on greenhouse gas (GHG) emissions. The utility of current responses is hindered, as determining historical culpability for emissions through legal and policy responses is a difficult and politically charged issue. Disputes to date have focused on: (1) How can causation be established? (2) How can calculations be made to ascertain developed states' individual contributions to existing environmental issues?[3] And (3) If individual contributions can be calculated, how could the international community develop an objective standard that would account for economic and environmental disparities?[4]

There is no doubt of the need for immediate, compulsory reductions in GHG emissions to combat rising temperatures. This urgent need is creating unprecedented challenges to the law. The Kyoto Protocol, an agreement determining the emission reduction obligations of states, adopted certain provisions dictating that developing states were exempt from binding emissions targets for a period of time.[5] This position has contributed to the emissions of developing countries overtaking those of developed countries.[6] While others, such as Small Island Developing States (SIDS) in the South Pacific, contribute nominally to GHG emissions. Transitioning states, such as Brazil and India, are now in the top twenty contributors of GHGs, producing 1,017 and 2,909 metric tons respectively.[7] This is a stark contrast to other developing states such as Vanuatu, which annually produces less than 0.7 metric tons of GHG emissions.[8]

From this context, questions arise surrounding the accountability and responsibility of developed and developing nations as well as the efficacy of the climate change regime in reducing emissions.[9] The terms referring to sovereign states as 'developed' and 'developing' nations mask "huge disparities within the global community and these terms are used due to the absence of more accurate terms

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2. Rachel Boyte, *Common but Differentiated Responsibilities: Adjusting the "Developing"/"Developed" Dichotomy in International Environmental Law*, 14 N.Z. J. ENVTL. L. 63, 70 (2010).

3. *Id.*

4. *See generally* Axel Michaelowa & Katharina Michaelowa, *Do Rapidly Developing Countries Take Up New Responsibilities for Climate Change Mitigation,* 133 CLIMATIC CHANGE 499 (2015).

5. Jeffrey McGee & Jens Steffek, *The Copenhagen Turn in Global Climate Governance and the Contentious History of Differentiation in International Law*, 28 J. ENVTL. L. 37, 38 (2016).

6. Duncan Clark, *Poorer Countries Overtake Rich World's Consumption Carbon Footprint,* THE GUARDIAN (Dec. 6, 2011), https://www.theguardian.com/environment/blog/2011/dec/06/poorer-rich-consumption-carbon-footprint.

7. H. Damon Matthews et al., *National Contributions to Observed Global Warming* 9 ENVTL. RESEARCH LETTERS 1, 3 (2014); World Res. Inst., *Historical Emissions*, CAIT Climate Data Explorer (2013).

8. World Res. Inst., *supra* note 7.

9. Matthews et al., *supra* note 7, at 5.

which reflect current political and economic status and groupings."[10] Many 'developing states' have socio-economic issues of their own, which they have neither the capacity nor the resources and infrastructure to properly address.[11]

As international treaties struggle to rapidly respond to these unprecedented challenges, climate change continues to impact global security by compromising planetary environmental, economic, and social wellbeing. Sea-level rise is causing existential threats to states, and changes in climatic conditions are influencing droughts and severe weather events. These dangers are pressuring the displacement of populations, destabilization of societies, and the exacerbation of conflict. The risks climate change poses are so grave that individuals, coalitions of individuals, and developing states have taken matters into their own hands by initiating legal action in an attempt to hold state and non-state actors accountable for their emissions.[12]

This Article tracks the building legal momentum as judiciaries across the planet respond to the ineffectiveness of the climate change regime that is allowing for global temperatures to continually increase. It frames climate change as a security threat, encompassing development and human rights considerations, referred to as the metaphoric *Warming War*. Approaching climate change within a security framework extends upon the subsets often discussed in the context of climate change, such as bio-security, climate, food, water, and energy security. This Article proposes that the current legal regime is ineffective, allowing the impacts of climate change to continue in an increasingly intensifying manner, and threatening human life on earth and thus planetary security. This Article then considers the *Warming War*, beyond the metaphor, by framing climate change as a threat to international peace and security and an internationally wrongful act. It does so by investigating how novel avenues for urgent responses through the United Nations Security Council (UNSC) and the International Court of Justice (ICJ) may be engaged. As these threats often breach international legal principles, this Article proposes that stakeholders, such as SIDS, may bring future cases before the ICJ. Moreover, understanding climate change as a threat to international peace and security and as a driver for conflict may serve to accelerate a much needed, rapid response to address the dangers of climate change.

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10. Rowena Maguire, *The Role of Common but Differentiated Responsibility in the 2020 Climate Regime*, 7 CARBON & CLIMATE L. REV. 260, 261 (2013).

11. Duncan French, *Developing States and International Environmental Law: The Importance of Differentiated Responsibility*, 49 INT'L & COMP. L. Q. 35, 35 (2000).

12. *See* Statement by the Honorable Johnson Toribiong, President of the Republic of Palau to the 66th Regular Session of the U.N.G.A. (Sept. 22, 2011), https://gadebate.un.org/sites/default/files/gastatements/66/PW_en.pdf; Kristen French, *A Peruvian Farmer is Suing an Energy Giant Over Climate Change,* THE VERGE (Dec. 2, 2015), http://www.theverge.com/2015/12/2/9821758/climate-change-lawsuit-un-rwe-energy-vs-peru-farmer; *see also Urgenda Found. v. Neth.,* HA ZA 13-1396, 30 (Hague District Ct. 2015), https://elaw.org/system/files/urgenda_0.pdf.

I. THE REALITIES OF A WARMING EARTH

International concern surrounding global climate change is escalating. The Intergovernmental Panel on Climate Change (IPCC) in its Fifth Assessment Report, finalized in 2014, stated "[h]uman influence on the climate system is clear, and recent anthropogenic emissions of greenhouse gases are the highest in history. Recent climate changes have had widespread impacts on human and natural systems."[13] The report continued by warning that climate change will exacerbate existing risks and create new risks for both social and ecological systems.[14] Moreover, these risks will not be distributed evenly and will mostly affect developing states.[15] The Report determined that limiting global warming to below 2°C of baseline pre-industrial levels would require reductions of global anthropogenic GHG emissions in the range of forty to seventy percent by 2050.[16] Significantly, the report warned that the "risks of abrupt or irreversible changes increase as the magnitude of the warming increases"[17] and stressed the urgent need for "[e]ffective decision-making to limit climate change and its effects. . . ."[18]

More recently, scientists monitoring and projecting climate change trends have found that current mitigation measures are inadequate to limit a global temperature rise of 2°C.[19] If emissions continue to rise by 2020, the 2°C target will be unattainable, meaning mitigation must be greatly scaled-up.[20] The scientists are calling for urgent action to a critical problem requiring cross sector global responses, including from the legal fraternity.

Although climate change is considered a global threat, it is widely accepted that its consequences will disproportionately burden some states over others. In particular, SIDS have unique socio-economic and environmental vulnerabilities that are being exacerbated by a changing climate. Many of these small islands lack the infrastructure, institutional capacity, and economic resources to adapt to the impacts of climate change.[21] This is particularly distressing because SIDS are located in geographic zones, such as the Caribbean, Pacific, and Indian Oceans, that are especially vulnerable to extreme weather events.

Rising sea levels and extreme weather events, such as droughts and tropical cyclones, are examples of environmental change occurring across the South Pacific region. Incremental changes in the underlying climate impact day-to-day

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13. PACHAURI & MEYER, *supra* note 1, at 6.
14. *Id.* at 13.
15. *Id.* at 54.
16. *Id.* at 20.
17. *Id.* at 16.
18. *Id*. at 17.
19. IAN DUNLOP & DAVID SPRATT, DISASTER ALLEY: CLIMATE CHANGE CONFLICT & RISK 16 (2017), https://docs.wixstatic.com/ugd/148cb0_8c0b021047fe406dbfa2851ea131a146.pdf.
20. *See* Christiana Figueres et al., *Three Years to Safeguard our Climate*, 546 NATURE 593, 594 (2017).
21. Edith Brown Weiss, *Climate Change, Intergenerational Equity, and International Law*, 9 VT. J. ENVTL. L. 615, 616 (2008).

living for SIDS because they rely on agriculture and fishing industries for food and economic security. Additionally, many rural communities are totally or partially subsistence-based, relying on nature to provide for their livelihoods. Agriculture is a major industry for both domestic consumption and exportation to international markets.[22] Fisheries contribute to up to twenty percent of GDP regionally, and provide the main source of protein for households.[23] Climate change's impacts in the region, such as sea level rise, erosion, groundwater contamination, cyclones, heat stress, and drought place severe stress on agricultural production.[24] Coastal impacts, such as increased water temperatures, ocean acidification, changes in salinity and changing currents, and turbidity create stresses for marine ecosystems.[25] These impacts can push ecosystems such as reefs, estuaries, and mangroves past their tipping points, resulting in fundamental shifts in ecosystem health that are not sustainable for fishery populations.[26] Reductions in fish populations limit catch availabilities in a manner that threatens food and economic security.

Food scarcity and economic insecurity have led to an acceleration in urbanization as people living in rural and remote communities facing increased hardships seek employment opportunities in capital cities and urbanized areas.[27] As approximately fifty-nine percent of the South Pacific region's population lives in urban settlements, an increase in population growth exacerbates the existing pressures on housing, infrastructure, and service-delivery.[28] Heightened flows of internal migration from rural and remote areas is contributing to the expansion of peri-urban and urban settlements, often comprising housing that has not been designed to withstand extreme climatic events.[29] The combination of increased population density in urban centers and inadequate urban planning can have disastrous and long-lasting consequences. Coastal, urban settlements are at risk from more frequent and intensified storm surges, tsunamis, and cyclones due to changes in weather patterns, some of which can be attributed to the impacts of climate change.[30] This was demonstrated when Cyclone Pam struck Vanuatu in

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22. *See* Jon Barnett, *Dangerous Climate Change in the Pacific Islands: Food Production and Food Security*, 11 REGIONAL ENVTL. CHANGE S229, S231–32 (2011).

23. *See id*. at S232; Johann D. Bell et al., *Effects of Climate Change on Ocean Fisheries in the Tropical Pacific: Implications for Economic Development and Food Security*, 119 CLIMATIC CHANGE (SPECIAL ISSUE) 199, 201–02 (2013).

24. Barnett, *supra* note 22, at S232.

25. *See id.* at S233; *see also* Bell et al., *supra* note 23, at 202–04.

26. *See* Barnett, *supra* note 22, at S233; *see* Bell et al., *supra* note 23, at 202–04.

27. *See* MEG KEEN & JULIEN BARBARA, PACIFIC URBANISATION: CHANGING TIMES 1 (2016); ASIAN DEV. BANK, THE STATE OF PACIFIC TOWNS AND CITIES: URBANIZATION IN ADB'S PACIFIC DEVELOPING MEMBER COUNTRIES xiv (2012).

28. *See* UNITED NATIONS HUMAN SETTLEMENTS PROGRAMME, URBANIZATION AND CLIMATE CHANGE IN SMALL ISLAND DEVELOPING STATES 23 (Dominic O'Reilly ed., 2015).

29. *See* KEEN & BARBARA, *supra* note 27, at 1.

30. UNITED NATIONS HUMAN SETTLEMENTS PROGRAMME, *supra* note 28, at 17.

2015 and significantly damaged the capital city of Port Vila.[31]

The collective impact of climate change on pre-existing vulnerabilities is cumulative, affecting international peace and security and threatening the sovereignty and very existence of some states. For this reason, climate change is often regarded as a threat multiplier that can contribute as a driver of violent conflict,[32] thus undermining security in various ways. For example, the vulnerability of individuals and communities is increased through: compromised food and water security; threats to human health and wellbeing; and an increase in extreme weather events. These problems are exacerbated as development is impaired, creating instability. The loss of territory engendered by sea level rise creates existential issues, threatening sovereignty and territorial integrity. Migration levels will increase as a result, worsening competition over natural resources and undermining the capacity of state institutions to maintain security. For example, there may be up to 150 million climate change refugees this century in the Asia-region alone.[33] Dunlop & Spratt explained that the pressures on nature are predicted to escalate in the future, noting that "[g]lobal warming will drive increasingly severe humanitarian crises, forced migration, political instability and conflict . . . ."[34] The increased pressure and value in accessing shared and un-demarcated resources may then lead to both civil and international conflict, presenting unprecedented state and transboundary challenges.[35] Numerous states have made submissions to the UNSC regarding climate change's role as a threat multiplier. Samoa has asserted that climate change is "a threat to territorial integrity, security and sovereignty,"[36] while Malaysia has stated that "if left unchecked, climate change could . . . be the greatest threat multiplier endangering global security."[37]

II. THE METAPHORIC *WARMING WAR*

Various spheres of international security may be compromised as a result of climate change's impacts. The problems of addressing these threats are threefold: (1) Is a response to these impacts within the ambit of the current climate change treaty regime? (2) Can a response to climate change's security implica-

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31. *See* Catherine Wilson, *Cyclone Pam Worsens Hardship in Port Vila's Urban Settlements*, INTER PRESS SERV. (Apr. 13, 2015), http://www.ipsnews.net/2015/04/cyclone-pam-worsens-hardship-in-port-vilas-urban-settlements/ (discussing how urbanization worsened the impact of Cyclone Pam).

32. PATRICK HUNTJENS & KATHARINA NACHBAR, CLIMATE CHANGE AS A THREAT MULTIPLIER FOR HUMAN DISASTER AND CONFLICT 1 (2015); THOMAS HOMER-DIXON, ENVIRONMENT, SCARCITY AND VIOLENCE 134 (1999).

33. Dunlop, *supra* note 19, at 20.

34. *Id*. at 1.

35. *See* U.N. Secretary-General, *Climate Change and Its Possible Security Implications,* U.N. GAOR, 64th Sess., Provisional Agenda Item 144, U.N. Doc. A/64/350 (Sept. 11, 2009).

36. U.N. SCOR, 7499th mtg. at 5, U.N. Doc. S/PV.7499 (July 30, 2015), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_7499.pdf.

37. *Id*. at 1.

tions fall under the mandate of the UNSC? (3) Can states that have their sovereignty undermined by these threats to peace and security seek legal reparations through the ICJ?

Some scholars have assessed the legal basis for declaring climate change a security threat, and have begun drawing analogies between climate change and war. In 2009, scholar James R. Lee[38] compared climate change to the Cold War. He noted that the Cold War was a slow moving, forty-five-year war with indirect conflicts fought through proxies. Each side allocated enormous resources to gain military power and advantages in technology, culture, and science. Just as in the Cold War, climate change has the potential for armed conflict.[39] Thomas Homer-Dixon, an environment and security scholar, views the impacts of climate change that lead to resource scarcity and mass migration as a driver of conflict, as resource abundant territory is fought over and stable governments deteriorate.[40] The *Warming War* metaphor conveys how climate change acts as a driver of such conflict, as its impacts accumulate and multiply to threaten the security of human life on earth.

In 2016, the environmental journalist Bill McKibben[41] observed the metaphoric use of war, such as the wars on poverty, drugs, and cancer. He explained that its use is a rhetorical device that heightens awareness and action.[42] McKibben supports the view that according to how we measure war, climate change is war: seizing physical territory and destabilizing governments.[43]

The potential for climate change to be a driver of violent conflict has been recognized by the United States' military and the international community for many years. In 2009, Commander Mark P. Nevitt of the U.S. Navy highlighted that "the potential [climate] refugee crisis in the developing world may come to the US in the form of an immigration crisis."[44] The United States' military recognized climate change as a potential threat to national security in a 2014 report issued by the Department of Defense, titled *Climate Change Adaptation Roadmap*. According to this roadmap, climate change "will affect the Department of Defense's ability to defend the Nation and poses immediate risks to U.S. national security."[45] Moreover, the roadmap recognized that climate change

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38. JAMES R. LEE, CLIMATE CHANGE AND ARMED CONFLICT: HOT AND COLD WARS 1 (2009).

39. *Id*. at 2.

40. Thomas Homer-Dixon, *Terror in the Weather Forecast*, N.Y. TIMES (Apr. 24, 2007), http://www.nytimes.com/2007/04/24/opinion/24homer-dixon.html.

41. Bill McKibben, *A World at War*, NEW REPUBLIC (Aug. 15, 2016), https://newrepublic.com/article/135684/declare-war-climate-change-mobilize-wwii.

42. *Id*.

43. *Id*.

44. Mark P. Nevitt, *The Commander in Chief's Authority to Combat Climate Change*, 37 CARDOZO L. REV. 437, 475 (2015); Sonia Gupta, *Climate Change as a Threat to International Peace and Security*, 4 PERSP. GLOBAL ISSUES 1, 7–8 (2009).

45. U.S. DEP'T OF DEFENSE, 2014 CLIMATE CHANGE ADAPTATION ROADMAP (2014), http://www.acq.osd.mil/eie/Downloads/CCARprint_wForward_e.pdf.

could have indirect consequences on conflict, stating: "it can significantly add to the challenges of global instability, hunger, poverty, and conflict. Food and water shortages, pandemic disease, disputes over refugees and resources, more severe natural disasters—all place additional burdens on economics, societies, and institutions around the world."[46]

In 2017, following the G7 commissioned report '*A New Climate for Peace: Taking Action on Climate and Fragility Risks'*,[47] the G7 met in Japan to address the security implications of climate change. Member-states re-affirmed their commitment "to take preventative steps and integrate climate-fragility considerations into their planning."[48] Italy, holding both the current presidency of the G7 and a seat on the UNSC, re-affirmed its stance in combatting climate change's security implications.[49] These are promising developments for the use of the Security Council, as well as other UN organizations and the G7 to combat climate change in a broader manner.

However, a major challenge against framing climate change as a threat to international peace and security is the current U.S. Government's position on climate change.[50] As a permanent member of the Security Council, and a member-state of the G7, the U.S. is influential in dictating the direction of these organizations. The current U.S. Government's proposed funding cuts to various climate change treaties and multilateral organizations such as the UN and its subsidiary bodies, which play an important role in ensuring international peace and security, oppose the stance now taken by the broader international community.[51] These proposed funding cuts will reduce the capacity of the UN to deal with the security implications of climate change, contradicting the research commissioned by, and debated in, the G7 and the Security Council. This apparent change in paradigm within the new administration will impact individuals, communities, societies, and states that are already suffering at the hands of climate change.

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46. *Id*.

47. *See* Lukas Rüttinger et al., *A New Climate for Peace: Taking Action on Climate and Fragility Risks*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (2015), http://newsroom.unfccc.int/media/252731/newclimateforpeace.pdf.

48. Stella Schaller, *G7 Workshop on Climate Change, Fragility and International Security in Tokyo*, CTR. FOR CLIMATE AND SECURITY (Jan. 26, 2017), https://climateandsecurity.org/2017/01/26/g7-workshop-on-climate-change-fragility-and-international-security-in-tokyo/.

49. Italy in US, *Climate Change, the G7, and the UN Security Council,* MEDIUM: G7 2017 (Nov. 15, 2016), https://medium.com/g7inus/climate-change-the-g7-and-the-un-security-council-bf28bbc16697#.nbimsat50.

50. *See* Juliet Eilperin & Brady Dennis, *Trump Moves Decisively to Wipe Out Obama's Climate-Change Record*, WASH. POST (Mar. 27, 2017), https://www.washingtonpost.com/national/health-science/trump-moves-decisively-to-wipe-out-obamas-climate-change-record/2017/03/27/411043d4-132c-11e7-9e4f-09aa75d3ec57_story.html?utm_term=.177b120d5e02.

51. Max Fisher, *Trump Prepares Orders Aiming at Global Funding and Treaties*, N.Y. TIMES (Jan. 25, 2017), https://www.nytimes.com/2017/01/25/us/politics/united-nations-trump-administration.html?_r=0.

III. BUILDING LEGAL MOMENTUM

The response of the international community to climate change's potentially devastating impacts is discussed in the following sections. The development of the following legal principles and treaty regimes are important; however, these regimes are largely voluntary initiatives and their applicability is confined to issues such as capacity building, technology transfer, financing, mitigation, and adaptation within the climate change regime. Because these regimes and principles are limited in scope and are often not legally binding, this Article proposes that they cannot supplement efforts to combat the security implications and threats to sovereignty posed by climate change.

A. KEY PRINCIPLES

The Principle of Common but Differentiated Responsibilities and Respective Capabilities (CBDR) recognizes the disproportionate responsibilities for the causes of climate change and the variable capacity to address its impacts between developed and developing states.[52] The rationale for CBDR is that because developed, industrialized States have largely contributed to environmental degradation, they should be held responsible for remedying the situation.[53] To use the words of the United Nationals Sustainable Development Action Plan,[54] CBDR "take[s] into account the different situations and capabilities of countries."[55] At the heart of CBDR is the commonality of responsibility between States, which is generally referred to in an environmental law context as the "common concern of mankind." That is, the shared responsibility of member States to ensure a particular environmental issue is dealt with as an issue of "common concern."[56] CBDR does not hold fixed legal status in international law. There is some suggestion that CBDR is crystalizing into customary international law, but it has not yet reached this status.[57] While CBDR proves a useful principle for guiding climate financing, technology transfer, and capacity building, as well as recognizing elements of contribution and capacity, its application remains solely within

52. Lavanya Rajamani, *The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime*, 9 REV. EUR. COMP. & INT'L ENVTL. L. 120 (2000).

53. Nina E. Bafundo, *Compliance with the Ozone Treaty: Weak States and the Principle of Common but Differentiated Responsibility*, 21 AM. U. INT'L L. REV. 461, 467 (2006).

54. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, at 9, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex II (1992).

55. *Id.* ¶ 39.3(d).

56. United Nations Convention on the Law of the Sea, pmbl., Oct. 12, 1982, 21 I.L.M. 1261, 1833 U.N.T.S. 3; Convention on Biological Diversity, pmbl., June 5, 1992, 1760 U.N.T.S 143; United Nations Framework Convention on Climate Change, pmbl., May 9, 1992, 1771 U.N.T.S. 107.

57. *See* Rowena Maguire, *The Role of Common but Differentiated Responsibility in the 2020 Climate Regime*, 4 CARBON & CLIMATE L. REV. 260, 263 (2013).

the environmental sphere. This creates difficulty in using such a principle to address the security implications of climate change.

The Polluter Pays Principle (PPP) is an additional tool that supplements the CBDR. PPP is an economic rule of cost allocation: it proposes the cost of pollution should be accepted by those responsible for producing it. The Organization for Economic Co-operation and Development (OECD) first developed PPP and stated in their 1972 Guiding Principles that the costs of environmental measures should "be reflected in the costs of goods and services which cause pollution in production and/or consumption," thereby placing the burden of the control, prevention, and mitigation of environmental issues onto the private sector.[58]

Two decades later, the Rio Declaration, a foundational non-binding instrument for sustainable development,[59] employed the PPP in Principle 16, which holds national authorities responsible for "taking into account the approach that the polluter should, in principle, bear the cost of pollution."[60] Despite the application of PPP and its adoption into numerous environmental treaties, it is not yet considered part of general international law.[61] This was made explicit by the arbitral tribunal in the *Rhine Chlorides Case*.[62] While the case's Tribunal recognized that PPP is featured in bilateral and multilateral international instruments and accepted its "importance in treaty law," it stated that it did "not view this principle as being a part of general international law."[63] Ultimately, this means that PPP does not operate outside environmental treaties, having no utility for addressing the security implications and threats to sovereignty posed by climate change.

B. THE CONTEMPORARY CLIMATE CHANGE TREATY REGIME & EMISSIONS REDUCTIONS: THE UNFCCC & KYOTO PROTOCOL

The climate change treaty regime has emerged in response to growing concerns surrounding the impacts of GHG emissions and the overwhelming

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58. Organization for Economic Cooperation and Development, *Recommendation of the Council on Guiding Principles Concerning International Economic Aspects of Environmental Policies*, Annex, 14 I.L.M. 236 (May 26, 1972).

59. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Declaration of Principles (Aug. 12, 1992).

60. *Id*. at princ. 16.

61. *See, e.g*., Convention for the Protection of the Marine Environment of the North-East Atlantic, art. 2(2)(b), Sept. 22, 1992, 32 I.L.M. 1068; Convention on the Protection of the Alps, art. 2(1), Nov. 7, 1991, 1917 U.N.T.S. 135; Stockholm Convention on Persistent Organic Pollutants, pmbl., May 22, 2001, 40 I.L.M. 532.

62. *See Case Concerning the Auditing of Accounts Between the Kingdom of the Netherlands and the French Republic Pursuant to the Additional Protocol of 25 September 1991 to the Convention on the Protection of the Rhine Against Pollution by Chlorides of 3 December 1971* (Arbitral Award 2004) ILR No. 144; *November to 11 December 2011, — Addendum — Part 2: Action taken by the Conference of the Parties at its Seventeenth Session*, UN Doc FCCC/CP/2011/9/Add.1 (Mar. 15, 2012) 1/CP.17.

63. *Id*. ¶ 103.

scientific consensus recognizing climate change as a global threat. The *United Nations Framework Convention on Climate Change* (UNFCCC) marked the first international treaty to recognize the urgency for climate change mitigation by means of emissions-reductions.[64] As a framework convention, the UNFCCC set the course for developing the legal regime responsible for addressing climate change. The UNFCCC established the Conference of the Parties (COP) as the key decision-making organization of the international climate change regime.[65]

The UNFCCC,[66] and the protocol to the convention, the Kyoto Protocol,[67] established a framework of objectives and targets for climate change emission reductions. Under the Kyoto Protocol, developed states are obliged to meet emission reduction targets over a period of years. Both the Copenhagen Accord and the Paris Agreement were created through the negotiating and decision-making processes of the COP. The Copenhagen Accord produced commitments to top-down funding for mitigation to limit temperature rise to 2°C. Top-down funding refers to climate finance that flows from international mechanisms to states, with limited country ownership over decision-making. The Accord's ineffectiveness led to the Paris Agreement adopting a goal to limit planetary temperature rise to 1.5 °C, along with some rudimentary developments in recognizing liability for climate change. These legal instruments have a narrow scope, focusing primarily on mitigating emissions. Whilst they may serve as preventative measures, they do not have the capacity to address the security implications and threats to sovereignty posed by climate change.

C. THE PARIS AGREEMENT

In 2015, at the twenty-first session of the Conference of the Parties to the UNFCCC (COP21),[68] the Paris Agreement was accepted by all 196 State Parties and by 2017 (COP 23), 194 State Parties lodged their commitments to reducing GHG emissions.[69] It represents a major achievement for the international climate

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64. *See* United Nations Framework Convention on Climate Change, *supra* note 56, at pmbl.

65. Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol*, Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its eighth session, held in Doha from 26 November to 8 December 2012 — Addendum — Part 2: Action taken by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol at its eighth session,* U.N. Doc. FCCC/KP/CMP/2012/13/Add.1 (Feb. 28, 2013).

66. United Nations Framework Convention on Climate Change, *supra* note 56, at pmbl.

67. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22.

68. U.N. Framework Convention on Climate Change, *Report of the Conference of the Parties on its Twenty First Session, Held in Paris from 30 Nov. to 13 Dec. 2015— Addendum — Part 2: Action Taken by the Conference of the Parties at its Twenty First Session*, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016) [hereinafter Adoption of the Paris Agreement].

69. U.N. Framework Convention on Climate Change, *Report of the Conference of the Parties on its Twenty Third Session, Held in Bonn from 6 Nov. to 7 Nov. 2017— Draft Decision —Fiji Momentum for Implementation*, U.N. Doc. FCCC/CP/2017/L.13 (Nov. 18, 2017).

change regime and includes several noteworthy provisions. This agreement emphasizes the urgent need to address the gap between the climate change mitigation pledges made by the parties to the Convention and the current emission projections.[70]

It has been suggested that the "bottom-up" approach of the Paris Agreement, which allows states to determine their own emissions reductions through Intended Nationally Determined Contributions (INDCs), might ameliorate the pressures on the international climate change regime caused by the "top-down" approach illustrated in the Copenhagen Accord.[71] Implementation of the Agreement, in accordance with the provisions set out in Article 21, and moving forward to create stronger, legally binding climate related agreements building on the political balance found at the Paris COP21, is critical.

Perhaps the most noteworthy provision in the Paris Agreement is Article 8, which recognizes the concept of climate justice by establishing "loss and damage" as an independent pillar of the climate change regime.[72] It serves to extend the lifetime of the Warsaw International Mechanism, designed to address the loss and damage caused by climate change beyond 2016, and provides a legal basis for long-term action.

Although Article 8 sets out a facilitative approach towards mitigation and adaption measures, such as early warning systems, risk management strategies, insurance facilities, and non-economic loss, it is an "ambitious compromise" pushed by developed countries.[73] The article stipulates that it "does not involve or provide a basis for any liability or compensation."[74] The exclusion of liability means that in its current state, 'loss and damage' cannot help to overcome the issue of establishing legal causality in climate change actions. Nonetheless, while this exclusion of liability limits the mechanism's scope, it does not displace existing international laws, such as human rights law, world heritage law, and the law of the sea, nor does it displace general international law regarding state responsibility for breaches.

The challenge now is to maintain the sense of urgency that delivered the Agreement, and build on existing mandates and previous agendas to reach the balanced approach required.[75] An additional key challenge is the voluntary status of the Paris Agreement. While voluntary commitments are laudable and should be supported, they are politically vulnerable. This vulnerability is demonstrated by the U.S Government's 2017 withdrawal from both the Agreement and the

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70. *Id*. at 2.

71. Lord Carnwath, *Climate Change Adjudication after Paris: A Reflection*, 28 J. ENVTL. L. 5, 5 (2016).

72. Adoption of the Paris Agreement, *supra* note 68, at art. 8.

73. *Loss and Damage in the Paris Agreement*, CLIMATE FOCUS 1, 3 (Feb. 15, 2016).

74. Adoption of the Paris Agreement, *supra* note 68, at art. 8.

75. U.N. Climate Change Conference, *Taking the Paris Agreement Forward: Reflections Note by the President of the Twenty-First Session of the Conference of the Parties and the Incoming President of the Twenty-Second Session of the Conference of the Parties*, ¶ 9 (May 6, 2016).

fulfillment of the previous administrations commitments to emissions reductions.[76]

IV. BEYOND THE METAPHOR - LAW IN TRANSITION

Despite these progressions, the scope of these principles and mechanisms are still narrowly confined within the climate change regime. The creation of new international legal instruments or agreements that widen the scope of the climate change regime are needed to address the security implications and threats to sovereignty posed by climate change. The current regime's inability to redress the injuries caused by climate change is driving an increase of legal action through alternative means. More recently, individuals and developing states have begun pursuing legal action against state and non-state actors for their past and present emissions. For states already affected by climate change, whether those impacts are territorial threats posed by sea level rise or the destabilization of communities and the resulting potential for violent conflict over resources, avenues for solutions and reparations are limited.

The gap created by treaty regimes means that novel approaches to pursuing legal action are now required. One such approach involves re-framing the impact of climate change as a threat to peace and security, which will enable climate change to fall within the ambit of the ICJ and the Security Council. It can be argued that the security threats posed by climate change breach the principles of general international law, such as the 'no-harm' principle. This re-framing may also enable the issue to fall within the mandate of the Security Council, opening new avenues to addressing climate change's security implications.

A. EVOLVING DEFINITION OF 'THREAT TO INTERNATIONAL PEACE AND SECURITY'

The *Warming War* is moving beyond its metaphoric conception. Could a nation state claim the security threats presented by global warming are threatening their sovereignty, either as an "act of war" or an internationally "wrongful act"? There is no clear definition of an "act of war" under international law, which has become increasingly unclear over time. Article 2 of the 1933 League of Nations *Convention for the Definition of Aggression,* recognized as customary international law,[77] defined an "act of aggression" as:

(1) Declaration of war upon another State;
(2) Invasion by its armed forces, with or without a declaration of war, of the territory of another State;

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76. Johannes Urpelainen, *Trump's Withdraw from the Paris Agreement Means Other Countries Will Spend Less to Fight Climate Change*, WASH. POST (Nov. 21, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/11/21/trumps-noncooperation-threatens-climate-finance-under-the-paris-agreement/?utm_term=.842b8742c606.

77. *C.f.* SERGEY SAYAPIN, THE CRIME OF AGGRESSION IN INTERNATIONAL CRIMINAL LAW 75–100 (2014).

> (3) Attack by its land, naval or air forces, with or without a declaration of war, on the territory, vessels or aircraft of another State;
> (4) Naval blockade of the coasts or ports of another State;
> (5) Provision of support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State, to take, in its own territory, all the measures in its power to deprive those bands of all assistance or protection.[78]

Following World War II, Principle VI of The Nuremberg Principles defined "crimes against peace" as:

> i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;
> ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).[79]

The United Nations Charter uses the Nuremberg definition of "crimes against peace" and holds the UNSC responsible:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.[80]

Today the idea of a 'threat to the peace' has advanced beyond interstate armed conflict, to include non-state actors and a widening array of threats. Critically, the UNSC has acknowledged that environmental and social issues can be interpreted as threats to peace and security.[81] In September 2003 former U.N. Secretary General Kofi Annan convened the High Level Panel on Threats, Challenges, and Change. The panel report defined a threat to international peace and security as: "any event or process that leads to large-scale death or lessening of life chances and undermines States as the basic unit of the international system."[82] These include economic and social threats (or "soft threats") such as infectious disease, poverty, and environmental degradation.[83]

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78. Convention for the Definition of Aggression, art. 2, July 1933, 147 L.N.T.S. 52.
79. *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, *with commentaries,* II Y.B. INT'L L. COMM'N, Introduction (1950).
80. U.N. Charter art. 39.
81. U.N. SCOR, 3046th mtg., at 143, U.N. Doc S/PV.3046 (Jan. 31, 1992).
82. U.N. GAOR, 59th Sess. at 12, U.N. Doc. A/59/565 (Dec. 2, 2004).
83. *Id*.

B. UNSC: CLASSIFYING CLIMATE CHANGE AS A THREAT

Scholars have noted that a new category of soft threats provides a viable legal basis for the impacts of climate change to be declared a threat to international peace and security.[84] This position has been further supported by former United Nations Secretary-General Ban Ki-moon who stated: "the scarcity of food and water [will] transform peaceful competition into violence . . . and droughts [will] spark massive human migrations, polarizing societies and weakening the ability of countries to resolve conflicts peacefully."[85]

Arguments for classifying climate change as a threat multiplier activating conflict are further justified by the outbreak of civil war in Syria in 2011. The severe drought experienced by the region in the lead up to conflict was "more than twice as likely as a consequence of human interference in the climate system."[86] The climatic impacts of the drought exacerbated numerous triggers that led to conflict. For example, water and agricultural insecurity worsened, creating large economic losses for rural populations leading to large-scale migration into semi-urban areas.[87] In a country with poor institutional capacity and governance, this led to immense political pressure and ultimately civil war.

Climate change's role in exacerbating the factors leading to civil war in Syria indicates a potential shift to classify climate change as a threat to international peace and security. Such a classification may provide a pathway to triggering UNSC involvement. Potentially characterizing the impacts of climate change as a security threat would enable proactive action, such as humanitarian assistance under the Security Councils' Chapter VII powers, which grants authority to respond to threats and breaches to peace and acts of aggression. The traditional conception of what constitutes 'a threat' has arguably been broadened by recent Security Council practice,[88] and in this respect the 'use of force' by a state is no longer a requisite element.[89]

Two recent Security Council initiatives illustrate the emergence of an institutional practice that could enable climate change impacts to fall within the UNSC's mandate. The first was a 2005 debate, where the UNSC recognized food insecurity as a potential threat to international peace and security.[90] The second

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84. Nevitt, *supra* note 44.

85. Press Release, Security Council, Security Council Holds First-Ever Debate on Impact of Climate Change on Peace, Security, Hearing Over 50 Speakers, U.N. Press Release SC/9000 (Apr. 17, 2007).

86. Colin P. Kelley et al., *Climate Change in the Fertile Crescent and Implications of the Recent Syrian Drought*, 112 NAT'L ACAD. SCI. 3241, 3241 (2015).

87. *Id.*

88. Christine Gray, *The Use of Force and the International Legal Order, in* INTERNATIONAL LAW 589, 606 (2nd ed. 2006).

89. *See* Shirley Scott, *Climate Change and Peak Oil as Threats to International Peace and Security: Is It Time for the Security Council to Legislate?*, 9 MELB. J. INT'L L. 495, 502 (2008); *see also* S.C. Res. 2253, ¶ 17 (Dec. 17, 2015); S.C. Res. 2349, pmbl. (Mar. 31, 2017).

90. U.N. SCOR, 60th Sess., 5220th mtg. at 7, U.N. Doc. S/PV.5220 (June 30, 2005).

was a 2014 resolution passed in response to the outbreak of Ebola.[91] As the Ebola crisis had no link to armed conflict or the use of force, the resolution represents the furthest expansion in the scope of what may constitute a threat to international peace and security.

This Article proposes that impacts of climate change, as a threat multiplier, are incontrovertibly linked to peace and security. Regardless of the complexities associated with the underlying causes of climate change, its impacts have significant implications to the directives of the UNSC, namely: governance, peace and security. This view is in line with the progressive mainstreaming of human security into the mandate of the Security Council and is promising for the potential of mobilizing future mitigation and adaptation actions.[92]

If the UNSC declares the impacts of climate change an international threat, measures under Article 41 or Article 42 of the UN Charter, which sanctions military and non-military interventions respectively, could be invoked. These measures could include the deployment of peacekeeping forces and increased humanitarian assistance surrounding direct and indirect climate induced crises. Chapter VI, Article 34 of the UN Charter (Pacific Settlement of Disputes) authorizes the Security Council to "investigate any dispute, or any situation which might lead to international friction or give rise to a dispute."[93] Article 35 states that "any UN member may request an investigation."[94] Under this framework, SIDS may push for the Security Council to formally recognize the security threats of climate change in order to enable urgent and rapid mitigation and adaptation responses.

C. INTERNATIONAL COURT OF JUSTICE

The ICJ is the primary judicial mechanism in which international disputes and the interpretation of international law is settled. Further action, by which the impacts of climate change could be addressed, is to bring a suit before the ICJ. As the main judicial organization of the United Nations, every UN member-state is a party to the *Statue of the International Court of Justice*, which is the foundational document of the ICJ. [95] The issue of ICJ jurisdiction is considered in two types of cases: contentious cases, which requires both states to consent to the court's jurisdiction, or advisory opinions, which limit jurisdiction to certain UN organs.

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91. S.C. Res. 2177, pmbl. (Sept. 18, 2014).

92. Hitoshi Nasu, *The Place of Human Security in Collective Security*, 18 J. CONFLICT SECURITY L. 95, 95 (2012).

93. U.N. Charter art. 34.

94. *Id*. at art 35.

95. United Nations, Statute of the I.C.J. (1946).

1. Contentious Cases

In contentious cases, which are adversarial proceedings, the ICJ produces a legally binding ruling between states that consent to the Court settling their dispute. Contentious case jurisdiction is based on the consent of state parties, meaning no one state can be compelled to submit to ICJ jurisdiction.[96] However, a state can express their consent in various ways. This consent may be expressed by means of unilateral declarations, treaties, special agreements, and through *forum prorogatum*,[97] which is perhaps the most flexible form of consent.[98] Under *forum prorogatum*, states issue an invitation to the other state to accept the jurisdiction of the court.[99]

This Article proposes that SIDS wishing to seek the consent of another state use *forum prorogatum* as a means of eliciting ICJ jurisdiction. A key advantage for SIDS is that this can operate as a political tool to bring attention to the issue of climate change's security implications. It can also demonstrate SIDS communicating their belief in their legal position on this issue. However, the key barrier to this approach would be finding a state willing to accept an invitation.

Assuming hypothetically that two states have submitted to ICJ jurisdiction, the Court then adjudicates the legal questions and provides a binding opinion. According to the no-harm principle, causation and the breach of a certain level of prevention must be established in order to breach the principle. Damages must be established as "significant",[100] showing that the severity of harm is not insignificant or minor.[101] The requisite standard of care is for a state to act with due diligence in implementing measures to prevent trans-boundary harm.[102] The International Law Commission's *Draft Articles on Responsibility of States for Internationally Wrongful Acts*[103] provides that states bear primary responsibility

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96. *See* Case of the Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States), Preliminary Question, ICJ Reports 1954, 19, 32 (stating "the Court can only exercise jurisdiction over a State with its consent"); *see also* Case Concerning East Timor (Portugal v. Australia), Judgment, ICJ Reports 1995, 87, 101, ¶ 26.

97. U.N. Secretariat, Handbook on Accepting the Jurisdiction of the International Court of Justice: Model Clauses and Templates (Jul. 2014), http://legal.un.org/avl/pdf/rs/other_resources/Manual%20sobre%20la%20aceptacion%20jurisdiccion%20CIJ-ingles.pdf.

98. See SIENHO YEE, *FORUM PROROGATUM* RETURNS TO THE INTERNATIONAL COURT OF JUSTICE 703 (2013).

99. *Id.*

100. Pulp Mills on the River Uruguay (Arg. v. Uru.), 2006 I.C.J. Rep. 113, at 101 (July 13).

101. Int'l Law Comm'n, Rep., Doc A/56/10, 388 [4]; *Prevention of Transboundary Harm from Hazardous Activities,* U.N.G.A., 53rd Sess., U.N. Doc. A/56/10 (2001) art. 2 [hereinafter *Prevention of Transboundary Harm*].

102. *See id.* at art. 3.

103. *See, e.g.*, Difference Between New Zealand and France Concerning Interpretation or Application of Two Agreements, Concluded on 9 July 1986 between Two States and Which Related to the Problems Arising from the Rainbow Warrior Affair (N.Z. v. Fr.), Award, 1990 I.C.J. Rep. 215, ¶ 75 (Apr. 30); Concerning Gabčikovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. Rep. 7, ¶ 140 (Sept. 25); The Factory At Chorzow (Claim for Indemnity) (The Merits) (Ger. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A) No. 17, ¶¶ 76, 78 (Sept. 13).

for breaches of rules where the violating conduct can be attributed to that state.[104] Conduct attributable to a state can be either an act or omission.[105] The *Draft Articles* further assert that the responsible state is obligated to cease the actions constituting the breach and offer appropriate assurance of non-repetition.[106] Furthermore, the responsible state is obligated to provide full reparations for injuries caused by its breach of duty.[107]

Application of this principle means that states allowing GHG emissions to occur on their territory breach certain rules of international law. In theory, the responsibility for violating these principles rests with states that are allowing GHGs to enter the atmosphere and contribute to climate change. Legal breaches are prospectively the no-harm principle, encapsulated by extraterritoriality and transboundary harm. Through this framework, SIDS could claim that developed states have breached the principle of no-harm.[108]

The no-harm principle holds that a state cannot exercise its sovereignty in a manner that interferes with the territory of another state.[109] As a source of customary international law, a state that is in breach is responsible for any extraterritorial damage suffered by other states.[110] The no-harm principle encompasses trans-boundary environmental harm, seen through both the *Stockholm Declaration* and the *Rio Declaration's* recognition of this principle. These soft law sources have declared that: "states have the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States." This understanding means that it is not the act of emitting GHGs, but rather the fact that these emissions constitute a use of a state's territory that impinges on both the territory and environment of another state.[111]

By premising a case not only on transboundary environmental harm, but on extraterritoriality more broadly, the damage to sovereignty and international peace and security posed by climate change could be contested. Asserting that emissions released from developed states are impinging on the territory of other states through impacts such as sea-level rise and extreme weather events follows this approach. The harm suffered is not just to the environment of other states, but to its territorial integrity and sovereignty, as sea-level rise and resource-driven

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104. G.A. Res. 56/10, at 63–68 (Apr. 23-June 1, July 2-Aug. 10, 2001).

105. *Id.* at 68–74.

106. *Id.* at 216–22.

107. *Id.* at 223–31.

108. *See, e.g.*, Trail Smelter (U.S. v. Can.), Award, 1941 R.I.A.A. 1905 (Mar. 11); Corfu Channel (Merits) (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 2, 22 (Apr. 9); Nuclear Tests (N.Z. v. Fr.), Judgment, 1974 I.C.J. Rep. 457, 489 (Dec. 20).

109. *See Prevention of Transboundary Harm, supra* note 101, at art. 31.

110. Island of Palmas (U.S. v Neth.), Award, 2 R.I.A.A. 829, 839 (1928).

111. See *Trail Smelter, supra* note 108.

conflict destabilizes the security of a state. Developed states are thus using their territory to emit GHGs in a manner that injures other states, thus breaching the principle of extraterritoriality. This breach entails that developed states are under a secondary obligation to cease and assure non-repetition of the injurious act, and provide full reparations for the injuries caused.

Establishing the element of causation is a major hurdle for this approach. Causation refers to establishing that a breach of a principle of international law has caused the claimed damage.[112] It is likely the ICJ will require "clear and convincing" evidence of the link between GHG emissions and climate change induced impacts such as sea-level rise and extreme weather events. The non-linear causation of attributing the emissions of a specific state to the damages caused by climate change, does not sit well with the general principles of international law.[113] However, this difficulty can be overcome by establishing causation on a contributory basis, determined by apportioning responsibility as a percentage of a state's GHG emissions against total global emissions.[114] Furthermore, proving direct injury may be difficult. Nevertheless, Roda Verheyen has found that "the existence of concurrent causes that are not the result of internationally wrongful acts do not limit an injured State's entitlement to recover compensation from another state."[115]

2. Advisory Opinion

As an alternative to seeking jurisdiction for a contentious case, SIDS may wish to seek an advisory opinion from the ICJ. The *UN Charter* provides that only the General Assembly and the Security Council can request an advisory opinion from the Court.[116] Subsidiary bodies may also request opinions with the authorization of the General Assembly on questions of law arising within the scope of their activities.[117] It is up to the discretion of the Court to accept such a request. States are precluded from individually seeking an advisory opinion from the court. Rather, states must petition the organizations to request an advisory opinion in their place. SIDS may seek to pass a resolution in the General Assembly by requesting the Court to provide an advisory opinion on the responsibility of the security implications and threats to sovereignty created by the GHG emissions-induced impacts of climate change. This would be a highly politicized process

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112. Int'l Law Comm'n, Rep. on the Work of its Fifty-Third Session, U.N. Doc. A/56/10, at 52 (2001).

113. *See generally* Christina Voigt, *State Responsibility for Climate Change Damages*, 77 NORDIC J. OF INT'L L. 2 (2008).

114. *See* Hannah Stallard, *Turning Up the Heat on Tuvalu: An Assessment of Potential Compensation for Climate Change Damage in Accordance with State Responsibility under International Law,* 15 CANTERBURY L. REV. 163, 184 (2009).

115. RODA VERHEYEN, CLIMATE CHANGE DAMAGE AND INTERNATIONAL LAW: PREVENTION DUTIES AND STATE RESPONSIBILITY 264 (2005).

116. U.N. Charter art. 96.

117. *Id.* at art. 96(2).

requiring a majority vote of the General Assembly. Furthermore, the utility of an advisory opinion is limited in that it will not provide redress or reparations for SIDS.

V. THE CASE FOR THE WARMING WAR

The *Warming War* term highlights how the effects of climate change are undermining global stability and facilitating global recognition of the dangers of climate change, both of which are much broader than potential environmental implications. This recognizes that such threats implicate sovereignty and territorial integrity, and in turn may breach certain principles of international law. Novel avenues via the ICJ and Security Council for addressing climate change's impacts are opened by this approach. This is particularly pertinent given the immediacy of the problem and the need to pursue legally binding avenues, together with the current "voluntary" legal regime in mitigating climate change.

The *Warming War* term positions GHG emissions and the impacts of climate change within a security based framework. This framework may create a viable legal basis for SIDS, and other developing States to claim climate impacts as a threat to their national peace, security, and sovereignty. The *Warming War* framework encompasses both the direct and indirect threats to vulnerable developing nations and SIDS. In a direct sense, the very existence of some SIDS, and the legal demarcation of their sea borders, is threatened as low lying coastal areas begin to flood and sink.[118] Shifting borders may lead to extra-regional entities exploiting their resources, for example mining and fisheries.[119] In an indirect sense, climate change's prevention of the fulfilment of basic human needs will threaten the socioeconomic stability of SIDS and other developing States. As the impacts of climate change continue to reduce livelihood opportunities, decrease food and water security, increase the severity and frequency of extreme weather events and decrease economic opportunities due to loss of agriculture and tourism, the likelihood of social fragmentation and conflict increase, ultimately posing a threat to national stability.[120] In this context, SIDS and other developing states may pursue redress before the ICJ, claiming that a state of insecurity has been perpetrated by the developed world, another State or a non-state actor, and thus constitutes an internationally wrongful act.

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118. *See* Rosemary Rayfuse & Emily Crawford, *Climate Change, Sovereignty and Statehood,* Legal Studies Research Paper No.11/59 at 1–2 (Sept. 2011), http://ssrn.com/abstract=1931466; G.A. Res. 63/281, at 5 (June 11, 2009).

119. Alexander Carius, Achim Maas & Janina Barkemeyer, *Climate Change and Security: Two Scenarios for the Indian-Pacific Ocean Island States, Report for the Directorate-General External Relations of the European Commission,* 12 (2009).

120. *Id*.

VI. APPLYING THE WARMING WAR TO CONTEMPORARY CASES

Using the *Warming War* as a security based approach to understanding how climate change is undermining global stability can strengthen the approaches that have been taken by individuals, NGOs, and States in contesting liability for damages caused by climate change. The following cases have been brought before courts in response to the lengthy legal and policy developments of the climate change regime. These cases are analyzed by applying the *Warming War's* security-based framing of climate change as a breach of the no-harm principle and as a threat to global stability.

A. THE URGENDA CASE: POTENTIAL FOR OVERCOMING THE CAUSATION HURDLE

In the Netherlands, The Hague District Court's decision in *Urgenda Foundation v. The State of the Netherlands* set a historic precedent for climate change litigation.[121] As the Urgenda Foundation's case was premised on tort law, the elements of a breach of duty of care, harm, and causation were required to be satisfied by the Court. Urgenda claimed the State owed a duty of care to Urgenda, and the Dutch society in general, to mitigate climate change by reducing its GHG emissions.[122] Urgenda argued that the Dutch government breached a duty of care because it "did not pursue an adequate climate policy."[123] Ultimately, the Court held that the government acted negligently and ordered the State to limit emissions by at least twenty-five percent by 2020.[124] The Court's reasoning was premised on domestic law, European Union obligations, and principles of international environmental law.

Besides the obvious victory for climate change litigation, the holding also provides guidance for overcoming the obstacle of causation in future cases, both domestically and before the ICJ. The Court's finding was that a sufficient causal link between Dutch GHG emissions and increased impacts of climate change "can be assumed to exist,"[125] substantiating the merits of seeking liability for developed states' emissions before the ICJ. The Court rejected the position that Dutch emissions were too minimal to be relevant on a global scale. Indeed, the Court held: "[t]he fact that the amount of the Dutch emissions is small compared to other countries does not affect the obligations to take precautionary measures in view of the State's obligation to exercise care. Emissions reduction therefore

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121. *Urgenda Foundation v. Neth, supra* note 12, at 30. The Urgenda Foundation is a NGO working towards a transition to renewable energy in the Netherlands. *Id.*

122. Roger Cox, *A Climate Change Litigation Precedent: Urgenda Foundation v. The State of the Netherlands*, 34 J. ENERGY & NAT. RES. L. 143, 144 (2016); *Urgenda Found. v. Neth.,* HA ZA 13-1396, 30, ¶ 4.1 (Hague District Ct. 2015), https://elaw.org/system/files/urgenda_0.pdf.

123. *Urgenda Found. v. Neth.*, HA ZA 13-1396 ¶ 4.93.

124. *Id.* ¶ 5.1.

125. *Id.* ¶ 4.90.

concerns both a joint and individual responsibility of the signatories to the [UNFCCC]."[126]

The Court stated "it is an established fact" that damages from climate change are occurring, and that without mitigation, "hazardous climate change will probably occur."[127] This was sufficient to establish damages for Urgenda. A causal link between Dutch emissions and global climate change was assumed to exist, regardless of the fact that Dutch emissions are "limited on a global scale."[128] In light of the hazards associated with climate change, the Court held "that the State has a duty of care to mitigate," and is in breach of this duty by failing to do so.[129] The Court's finding supports the notion that collective responsibility for GHG emissions should not negate a state's individual responsibility. By recognizing climate change as a "common concern of humankind" that requires global accountability, the individual liability of a state should logically follow where it fails to individually take action to prevent the impacts of climate change.

The Court's judgment regarding causation supports the idea that when climate change places the stability and existence of states (such as SIDS) in danger, individual responsibility for the root causes cannot be ignored. A further relevant argument relied upon by Urgenda, albeit dismissed by the Court, was the application of the 'no-harm' principle. The Court recognized that "no state has the right to use its territory, or have it used, to cause significant damage to other states," but ultimately held that domestic law does not recognize this principle.[130] Although this argument was not successful in an action bound by the obligations of a citizen-state relationship, this principle could apply in an action premised in state-state relationships. One could posit that GHG emissions emanating from the territory of a developed state breaches the 'no-harm' principle by causing damage to the territory of another state through impacts such as sea-level rise and exacerbated extreme weather events. As the Court opined, individual responsibility should not be negated by the existence of collective responsibility. Such an argument is pertinent to SIDS that are currently experiencing these impacts, and are faced with limited and difficult legal avenues for relief.

B. PALAU SEEKS ADVISORY OPINION ON CLIMATE CHANGE

In September 2011, the former President of Palau, Johnson Toribiong, announced plans on behalf of Palau and the Republic of the Marshall Islands to sponsor a U.N. General Assembly (UNGA) resolution for an advisory opinion

126. *Id.* ¶ 4.79.
127. *Id.* ¶ 4.89.
128. *Id.* ¶ 4.90.
129. *Id.* ¶ 4.73.
130. *Id.* ¶ 4.42.

from the ICJ to determine whether states have obligations under international law to ensure activities in their territory do not harm other states.[131] Toribiong sought a non-binding advisory opinion on two grounds. First, customary law had already obliged states undertaking activities within their jurisdiction to ensure that they respect the environment of other states.[132] Second, Article 194(2) of the United Nations Convention on the Law of the Sea declared that: "States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment . . ."[133] This matter is ongoing, and as of yet has not reached the ICJ.

The merits of such an argument rely on a finding that emissions caused by industrialization originating from the territory of developed countries cause extraterritorial harm to third-party states. This harm can be both economic and environmental, and GHGs can then be argued to breach the territorial integrity of affected states on two grounds: loss of territory caused by sea level rise, and intervention into the domestic affairs of affected states through the social, environmental, and economic impacts of developed states' emissions-induced climatic impacts. These acts contravene a developed state's obligation not to use its territory in a manner that is harmful to other states.

Further, by also incorporating security implications into its argument, a State may have another avenue for claiming extraterritorial harm has occurred. An advisory opinion affirming this argument could strengthen the merit of SIDS and developing nations seeking reparations for such injuries before the ICJ. If climate change was found to impact the security of a State, this would open an avenue for the UNSC to provide humanitarian assistance, pursuant to its Chapter VII powers, to alleviate the threat and damage.

C. SAÚL LUCIANO LLIUYA V. RWE

Saúl Luciano Lliuya, a Peruvian farmer and mountain guide, filed a lawsuit against the German energy utility Rheinisch-Westfälisches Elektrizitätswerk (RWE) at the Regional Court in Essen, Germany on December 5, 2015. The suit was brought on the basis of RWE's past emissions, which Lliuya argued have contributed to glacial melting and increased the risk for flooding, which now poses a direct threat to Lliuya's livelihood, business, and home city of Huaraz. On June 3, 2016 RWE filed a response to the suit, denying all responsibility in relation to the claim, and questioning not only the admissibility of the case, but also the scope of liability under German civil law for historical emissions.

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131. Statement by the Honorable Johnson Toribiong, *supra* note 12.

132. *Id.*

133. United Nations Convention on the Law of the Sea, *supra* note 56, at art. 194(2).

Despite recognizing the existence of scientific causality, the Court held that the causal link between RWE's emissions and glacial melting in Huarez was not properly established and ultimately dismissed the case.[134] The Court stated that "the applicant himself would have had to state the share of [RWE's emissions] in the global greenhouse emissions"[135] and "in a complex natural process, there is no linear causation chain between the source of the greenhouse gases and the emissions."[136] In January 2017, Lliuya filed for an appeal against the dismissal on the grounds that the decision failed to account for facts brought forward in establishing causality, and that the contribution of emissions by a host of sources does not negate individual liability.[137]

D. PHILIPPINES INVESTIGATION

In the wake of Typhoon Yolanda, the Philippines Commission on Human Rights (PCHR) announced an investigation that has the potential to hold the main fifty fossil fuel companies globally, referred to as the "Carbon Majors," responsible for the impacts of climate change on ocean acidification.[138] The investigation's objective is to determine whether the rights of the Filipino people have been violated, or threatened with violation, by the Carbon Majors. These rights include: rights to life, to the highest attainable standard of physical and mental health, to food, water, sanitation, adequate housing, and to self-determination.[139]

At the time of writing, the PCHR set December 11, 2017 as the date for a preliminary conference to address procedural aspects of the hearing.[140] The importance of this investigation lies in its examination of collective liability, linking the Carbon Majors' GHG emissions to the typhoon and its impacts. Establishing a principle of "collective liability" may provide more demonstrable evidence of legal causation, overcoming the limitations faced by the applicant in *Saúl Luciano Lliuya v RWE*.

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134. Stefan Küper, *Regional Court Dismisses Climate Lawsuit Against RWE—Claimant Likely to Appeal*, GERMANWATCH (Dec. 15, 2016), https://germanwatch.org/en/13234.

135. Second Chamber of the Landgericht Essen, *Lliuya ./. RWE AG: Action for Alleged Property Impairment Due to CO2 Emissions*, JUSTIZPORTAL NORDRHEIN-WESTFALEN (Dec. 15, 2016), http://www.lg-essen.nrw.de/behoerde/presse/Presseerklaerungen/Archiv-2016/Lliuya-___-RWE-AG_/index.php.

136. *Id.*

137. Klaus Milke et al., *Climate Suit Against RWE: Peruvian Mountain Guide Will Appeal*, GERMANWATCH, (Jan. 26, 2017), https://germanwatch.org/en/13438.

138. Greenpeace Southeast Asia & Philippine Rural Reconstruction Movement, *Petition to the Commission on Human Rights of the Philippines Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change* 1, 5, 17 (Sept. 22, 2015), http://www.greenpeace.org/seasia/ph/PageFiles/105904/Climate-Change-and-Human-Rights-Complaint.pdf.

139. *Id*. at 5, 29.

140. Commissioner Roberta Eugenio T. Cadiz, Philippines Commission on Human Rights, *In Re: National Inquiry on the Impact of Climate Change on the Human Rights of the Filipino People and the Responsibility Therefor, if any, of the "Carbon Majors"* (Oct. 18, 2017), http://www.greenpeace.org/seasia/ph/PageFiles/735291/Notice_on_preliminary_conference_of_parties/Notice.pdf.

Again, the difficulty in this approach is establishing causation. There are complexities associated with determining that the emissions of each Carbon Major contributed to causing the typhoon, as well as the existence of other influences on the cause of the typhoon, such as general weather patterns. However, despite the existence of concurrent causes of damage attributable to the typhoon, the Philippines may still be entitled to recover compensation from an individual company.[141] Based on the logic applied by the Court in *Urgenda*, the individual liability of a company, or the Carbon Majors as a group, need not be negated by the existence of the collective responsibility of States and other companies for global climate change.

E. ATMOSPHERIC TRUST LITIGATION

In September 2015, in the case of *Juliana v. United States*, twenty-one individuals, all aged nineteen or younger, filed a lawsuit asserting that the federal government is "violating the youngest generation's constitutional rights and [is failing] to protect essential natural resources in the public trust by promoting the development of fossil fuels."[142] This case is premised on the Atmospheric Trust Litigation approach which holds that it is a sovereign duty to protect the atmosphere for future generations.[143] In April 2016, the District Court denied the U.S. Government's motion to dismiss, holding that Plaintiffs could pursue constitutional claims to compel federal climate action. The U.S. Government quickly appealed the decision, which was denied, and the case proceeded to trial on February 5, 2018.[144]

As a contemporary response to the limitations of the climate change regime, *Juliana* is indicative of the utility of novel, innovative approaches for holding states responsible for mitigating emissions. Its broader applicability could hold states responsible as the "sovereign co-trustees of the atmosphere" that "owe a primary fiduciary obligation toward their citizen beneficiaries" to mitigate emissions and address the impacts of climate change.[145]

F. CLIMATE THREATS TO INTERNATIONAL PEACE AND SECURITY

All of these cases point to the increasing ability of individuals and developing countries to utilize the rapidly changing landscape of international law to hold state and non-state actors accountable for the damage their emissions have

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141. *See* RODA VERHEYEN, *supra* note 115, at 264.

142. Juliana v. United States, 217 F. Supp. 3d 1224, 1233–34 (D. Ore., 2016); Mary Wood & Charles Woodward, *Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last*, 6 WASH. J. ENVTL. L. & POL'Y 634, 646–47 (2016).

143. Wood, *supra* note 142, at 644.

144. *Juliana*, 217 F. Supp. 3d at 1233–34.

145. Wood, *supra* note 142, at 645.

caused. In all cases, climate change induced damages have challenged the sovereignty and integrity of individuals and states. The next phase is re-framing these damages as existential and security threats, as well as breaches of sovereignty. By doing so, new avenues for legal remedies are opened.

A key problem in framing these cases as security threats and breaches of sovereignty, and seeking redress via the ICJ, is the element of causation. A direct causal link must be established between the action of emitting GHGs by developed states and the specific harm experienced by affected states. Establishing causation in this respect is beyond the scope of this Article. However, this does not negate the possibility of a state or individual claiming climate change is a security threat and a breach of sovereignty.

VII. CONCLUSION

The *Warming War* approach has the potential to strengthen community understanding and action in response to the urgency of the impending climate change crisis. By reframing climate change as a threat to international peace and security, tangible impacts such as conflict, destabilization, and mass migration are brought to the center of attention. This security-based approach should be considered in tandem with voluntary commitments, as together they may critically deliver a faster reduction of GHG emissions. Although the current political process of diplomacy and negotiation in the international climate change regime is making meaningful progress, it is unlikely that this will be enough to rapidly respond to decreasing GHG emissions below 2°C.

This Article has introduced the term the *Warming War*. We use the term 'war' in the context of climate change because war implies a critical threat requiring urgent responses, an analogy that is accurate when applied to global warming as supported by climate science and scientific predictions. Adoption of the *Warming War* as a term of art will assist in building momentum for understanding the unprecedented global security threats presented by global warming. In its current state, the law does not recognize the damages caused by emissions from developed states that are experience by vulnerable states, such as SIDS. Extending this metaphor to fit within a legal security framework, the *Warming War* seeks to recognize the links between emitting GHGs and the threats posed to international peace and security, including breaches of sovereignty. Such a positioning may provide urgent avenues for redress.

The opposite of war is peace, which may be maintained by avoiding threats to security. The *Warming War* concept creates more opportunities for action and the protection of nature by reframing climate change as a national and international security issue, expounding upon existing human rights approaches.[146] This may

146. Gupta, *supra* note 44, at 14.

provide the justification for pre-emptive action from developed nations that recognize the potential of the *Warming War* to destabilize geo-political regions and national security. The capacity of wartime rhetoric has, throughout history, drawn people together against a common enemy and encouraged them to act.