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**INTERNATIONAL COOPERATION AND  
RESPONSIBILITY SHARING TO COMBAT  
CLIMATE CHANGE: LESSONS FOR  
INTERNATIONAL REFUGEE LAW**

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# INTERNATIONAL COOPERATION AND RESPONSIBILITY SHARING TO COMBAT CLIMATE CHANGE: LESSONS FOR INTERNATIONAL REFUGEE LAW

REBECCA DOWD\* AND JANE MCADAM†

*By examining high level statements by states at the past four sessions of the Conferences of the Parties to the United Nations Framework Convention on Climate Change (2013–16) and the UN General Assembly over the past decade, this article seeks to provide insights into the meaning of responsibility sharing, international cooperation, and common but differentiated responsibilities and respective capabilities in international environmental law from the perspective of individual states. Its purpose is to elucidate more fully how these precepts might inform deliberations on responsibility sharing for international refugee protection. This article complements a recent piece by the same authors examining the concepts of ‘international cooperation’ and ‘responsibility sharing’ in international refugee law. Since these principles are at a more advanced stage in international environmental law (most notably through their inclusion in binding international agreements on climate change), the present article compares and contrasts how states understand and apply them in that context. While there are some fundamental differences between responsibility sharing in the two regimes, it is clear that no state alone can respond to the protection needs of the world’s refugees nor address the global impacts of climate change. The need for international cooperation and responsibility sharing in both cases is clear; indeed, it is a humanitarian imperative. Yet, the article shows that, ultimately, national interests tend to prevail when states determine how such global issues should be addressed.*

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## I INTRODUCTION

This article complements a recent piece by the same authors examining the concepts of 'international cooperation' and 'responsibility sharing' in international refugee law.<sup>1</sup> Despite multiple proposals, a mechanism to systematically, equitably and predictably allocate responsibilities among states at a global level has still not been agreed in that context. By analysing statements made by individual states at United Nations fora over the past decade, our earlier article considered the extent to which states perceive responsibility sharing to be a legal obligation, as opposed to a voluntary undertaking, and whether the principle of common but differentiated responsibilities, drawn from international environmental law, could usefully be applied in the international refugee law context.

Since these principles are at a more advanced stage in international environmental law (most notably through their inclusion in binding international agreements on climate change), the present article compares and contrasts how states understand and apply them in that context. Its purpose is to elucidate more fully how these precepts might inform deliberations on responsibility sharing for international refugee protection. For that reason, our primary audience is legal experts and policymakers in that area, rather than scholars or practitioners of international environmental law (who may nonetheless find the comparative analysis useful, we hope). The article begins by examining the key concepts of international cooperation, burden sharing and common but differentiated responsibilities and respective capabilities ('CBDRRC') in international environmental law (particularly the climate change regime), as well as equivalent concepts in international refugee law. The article then explores what international cooperation entails in each context. Analysis of the climate change regime is divided into two parts — mitigation and the provision of support to developing states — with a particular focus on the latter given its greater resonance with responsibility sharing in the refugee context.<sup>2</sup>

Despite some common elements, there are fundamental differences between responsibility sharing in international refugee law and the climate change regime in international environmental law. First, the climate change regime broadly reflects the idea that the 'widest possible cooperation by all countries is needed to combat climate change and the adverse effects', and 'differentiated responsibilities' implies that states have different commitments that take 'into account their diverse circumstances and capacities, their historical contributions

<sup>1</sup> Rebecca Dowd and Jane McAdam, 'International Cooperation and Responsibility-Sharing to Protect Refugees: What, Why and How?' (2017) 66 *International & Comparative Law Quarterly* 863.

<sup>2</sup> Individual states' adaptation measures are discussed in the section on the provision of support to developing states.

to CO<sub>2</sub> emissions and their specific development needs'.<sup>3</sup> By contrast, in the refugee regime, responsibility sharing is not linked to states' role in creating refugee movements, but rather on their capacity to provide protection and resources to alleviate the pressures on (mainly developing) states that host large numbers of refugees. Secondly, whereas in the climate change context international cooperation is part of virtually all aspects of states' efforts to combat global warming, in the refugee context, it generally entails the provision of financial and other assistance to host countries, as well as the admission of refugees (financial and physical responsibility sharing).<sup>4</sup> Thirdly, the benefits of responsibility sharing in the climate change context are more evidently global in nature, whereas the benefits of responsibility sharing for refugees are often (although are not always) more localised.

Given the breadth of the international cooperation principle in the climate change domain, this article does not exhaustively address all issues falling within its scope. For example, developing countries frequently call for greater solidarity and support with respect to loss and damage caused by the effects of climate

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<sup>3</sup> Pieter Pauw et al, 'Different Perspectives on Differentiated Responsibilities: A State-of-the-Art Review of the Notion of Common but Differentiated Responsibilities in International Negotiations' (Discussion Paper, German Development Institute, June 2014) 1 <[https://www.die-gdi.de/uploads/media/DP\\_6.2014..pdf](https://www.die-gdi.de/uploads/media/DP_6.2014..pdf)>, archived at <<https://perma.cc/3EQC-N9WB>>. The United States, for example, calls for a more nuanced interpretation of common but differentiated responsibilities and respective capabilities ('CBDRRC') and does not accept that it is a legally binding principle: at 27–28. See also Thomas Deleuil, 'The Common but Differentiated Responsibilities Principle: Changes in Continuity after the Durban Conference of the Parties' (2012) 21 *Review of European Community & International Environmental Law* 271; Lavanya Rajamani, 'The Changing Fortunes of Differential Treatment in the Evolution of International Environmental Law' (2012) 88 *International Affairs* 605 ('The Changing Fortunes of Differential Treatment'); Harald Winkler and Lavanya Rajamani, 'CBDR&RC in a Regime Applicable to All' (2014) 14 *Climate Policy* 102.

<sup>4</sup> In this respect, one of the closest parallels from the climate change regime is contained in art 4(7) of the *United Nations Framework Convention on Climate Change*, which provides that developed states' implementation of their commitments relating to financial resources and technology transfer will determine the extent to which developing countries can implement their own duties under that treaty: *United Nations Framework Convention on Climate Change*, opened for signature 20 June 1992, 1771 UNTS 107 (entered into force 21 March 1994) ('UNFCCC').

change,<sup>5</sup> and countries at varying stages of development have stated that international cooperation should include other actors and stakeholders, such as the private sector, civil society, local governments, businesses, the research community and economic entities.<sup>6</sup> Furthermore, the article's focus is on international cooperation at the global level; a number of states have also affirmed their commitment to strengthening bilateral and regional cooperation.<sup>7</sup>

It is now almost universally accepted that climate change is a common global concern and that all states 'have a common responsibility to take appropriate

<sup>5</sup> See, eg, Belize, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 22*' (Speech delivered at the 22<sup>nd</sup> Conference of the Parties ('COP') to the *UNFCCC*, Marrakesh, 16 November 2016) <[http://unfccc.int/files/meetings/marrakech\\_nov\\_2016/statements/application/pdf/belize\\_cop22cmp12cma1\\_hls.pdf](http://unfccc.int/files/meetings/marrakech_nov_2016/statements/application/pdf/belize_cop22cmp12cma1_hls.pdf)>, archived at <<http://perma.cc/66WZ-F3SQ>>; Cameroon, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 21*' (Speech delivered at the 21<sup>st</sup> Conference of the Parties to the *UNFCCC*, Paris, 8 December 2015) <[http://unfccc.int/files/meetings/paris\\_nov\\_2015/application/pdf/cop21cmp11\\_hls\\_speech\\_cameroun\\_fr.pdf](http://unfccc.int/files/meetings/paris_nov_2015/application/pdf/cop21cmp11_hls_speech_cameroun_fr.pdf)>, archived at <<https://perma.cc/6VDB-A4VM>>; The Philippines, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 21*' (Speech delivered at the 21<sup>st</sup> Conference of the Parties to the *UNFCCC*, Paris, 8 December 2015) <[http://unfccc.int/files/meetings/paris\\_nov\\_2015/application/pdf/cop21cmp11\\_hls\\_speech\\_philippines.pdf](http://unfccc.int/files/meetings/paris_nov_2015/application/pdf/cop21cmp11_hls_speech_philippines.pdf)>, archived at <<http://perma.cc/EX72-6TJ8>>; Suriname, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 21*' (Speech delivered at the 21<sup>st</sup> Conference of the Parties to the *UNFCCC*, Paris, 8 December 2015) <[http://unfccc.int/files/meetings/paris\\_nov\\_2015/application/pdf/cop21cmp11\\_hls\\_speech\\_suriname.pdf](http://unfccc.int/files/meetings/paris_nov_2015/application/pdf/cop21cmp11_hls_speech_suriname.pdf)>, archived at <<https://perma.cc/29B4-57AX>>.

<sup>6</sup> See, eg, Portugal, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 22*' (Speech delivered at the 22<sup>nd</sup> Conference of the Parties to the *UNFCCC*, Marrakesh, 15 November 2016) <[http://unfccc.int/files/meetings/marrakech\\_nov\\_2016/statements/application/pdf/portugal\\_cop22cmp12cma1\\_hls\\_po.pdf](http://unfccc.int/files/meetings/marrakech_nov_2016/statements/application/pdf/portugal_cop22cmp12cma1_hls_po.pdf)>, archived at <<https://perma.cc/8XFU-DAVH>>; Republic of Korea, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 21*' (Speech delivered at the 21<sup>st</sup> Conference of the Parties to the *UNFCCC*, Paris, 8 December 2015) <[http://unfccc.int/files/meetings/paris\\_nov\\_2015/application/pdf/cop21cmp11\\_hls\\_speech\\_rep\\_korea.pdf](http://unfccc.int/files/meetings/paris_nov_2015/application/pdf/cop21cmp11_hls_speech_rep_korea.pdf)>, archived at <<https://perma.cc/VDA5-9D3X>>; Republic of the Marshall Islands, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 20*' (Speech delivered at the 20<sup>th</sup> Conference of the Parties to the *UNFCCC*, Lima, Peru, 9 December 2014) <[http://unfccc.int/files/meetings/lima\\_dec\\_2014/statements/application/pdf/cop20\\_hls\\_marshall\\_islands.pdf](http://unfccc.int/files/meetings/lima_dec_2014/statements/application/pdf/cop20_hls_marshall_islands.pdf)>, archived at <<https://perma.cc/Z8AN-D2LD>>.

<sup>7</sup> See, eg, Israel, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 22*' (Speech delivered at the 22<sup>nd</sup> Conference of the Parties to the *UNFCCC*, Paris, November 2016) <[http://unfccc.int/files/meetings/marrakech\\_nov\\_2016/application/pdf/israel\\_cop22cmp12cma1\\_hls.pdf](http://unfccc.int/files/meetings/marrakech_nov_2016/application/pdf/israel_cop22cmp12cma1_hls.pdf)>, archived at <<https://perma.cc/U5C5-38GR>>; Mongolia, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 22*' (Speech delivered at the 22<sup>nd</sup> Conference of the Parties to the *UNFCCC*, Paris, 16 November 2016) <[http://unfccc.int/files/meetings/marrakech\\_nov\\_2016/statements/application/pdf/mongolia\\_cop22cmp12cma1\\_hls.pdf](http://unfccc.int/files/meetings/marrakech_nov_2016/statements/application/pdf/mongolia_cop22cmp12cma1_hls.pdf)>, archived at <<https://perma.cc/X4W8-6VNH>>; Costa Rica (on behalf of the Community of Latin American and Caribbean States), 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 22*' (Speech delivered at the 20<sup>th</sup> Conference of the Parties to the *UNFCCC*, Paris, December 2014) <[http://unfccc.int/files/meetings/lima\\_dec\\_2014/statements/application/pdf/cop20\\_hls\\_costa\\_rica\\_celac.pdf](http://unfccc.int/files/meetings/lima_dec_2014/statements/application/pdf/cop20_hls_costa_rica_celac.pdf)>, archived at <<https://perma.cc/DX5N-MB74>>.

measures to address the concern'.<sup>8</sup> What form these 'appropriate measures' should take, and how they should be allocated between states, has been less straightforward to define, however. Traditionally, a distinction has been drawn on the basis of states' varying contributions to global emissions and their respective capabilities to mitigate the harm caused. Indeed, the concept of 'differentiation' goes to the heart of the international climate change regime. It has changed shape markedly over the years,<sup>9</sup> culminating in the entry into force of the *Paris Agreement* in November 2016.<sup>10</sup> This binding treaty does away with the *United Nations Framework Convention on Climate Change* ('UNFCCC') annex-based differentiation between developing and developed countries,<sup>11</sup> instead 'tailoring differentiation to the specificities of each of the Durban pillars — mitigation, adaptation, finance, technology, capacity-building and transparency'.<sup>12</sup> By arguably 'transitioning differentiation from an ideological to a pragmatic basis',<sup>13</sup> it has been heralded as marking 'a new type of international cooperation where developed and developing countries are united in a common framework, and all are involved, engaged contributors'.<sup>14</sup>

The *Paris Agreement*, with its 'new logic of internationally coordinated national action',<sup>15</sup> has triggered a widespread sense of hope among states<sup>16</sup> and commentators alike.<sup>17</sup> It is based on a hybrid approach that combines 'bottom

<sup>8</sup> International Law Association ('ILA'), 'Legal Principles Relating to Climate Change' (Paper presented at the 76<sup>th</sup> Conference of the International Law Association, Washington, 2014) 7 [4]. The ILA's 'Legal Principles Relating to Climate' were agreed upon in *Resolution 2/2014* at the 76<sup>th</sup> Conference of the ILA.

<sup>9</sup> Rajamani, 'The Changing Fortunes of Differential Treatment', above n 3; Deleuil, above n 3.

<sup>10</sup> *Paris Agreement*, opened for signature 22 April 2016 [2016] ATS 24 (entered into force 4 November 2016); Lavanya Rajamani, 'Ambition and Differentiation in the 2015 *Paris Agreement*: Interpretative Possibilities and Underlying Politics' (2016) 65 *International & Comparative Law Quarterly* 493 ('Ambition and Differentiation in the 2015 *Paris Agreement*').

<sup>11</sup> See UNFCCC annexes I, II; *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998, 2303 UNTS 162 (entered into force 16 February 2005) ('*Kyoto Protocol*'). See overview in Pauw et al, above n 3, 17–20.

<sup>12</sup> Rajamani, 'Ambition and Differentiation in the 2015 *Paris Agreement*', above n 10, 509.

<sup>13</sup> *Ibid.*

<sup>14</sup> David Waskow and Jennifer Morgan, 'The *Paris Agreement*: Turning Point for a Climate Solution' on *World Resources Institute* (12 December 2015) <<http://www.wri.org/blog/2015/12/paris-agreement-turning-point-climate-solution>>, archived at <<https://perma.cc/SLM8-M6EZ>>.

<sup>15</sup> Robert Falkner, 'The *Paris Agreement* and the New Logic of International Climate Politics' (2016) 92 *International Affairs* 1107, 1113.

<sup>16</sup> For example, Ethiopia stated in 2016 that 'this new model of international cooperation might indeed be what we ought to have discovered all along': see Ethiopia, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 22*' (Speech delivered at the 22<sup>nd</sup> Conference of the Parties to the UNFCCC, Paris, November 2016) 2–3 <[http://unfccc.int/files/meetings/marrakech\\_nov\\_2016/application/pdf/ethiopia\\_cop22cmp1\\_2cma1\\_hls.pdf](http://unfccc.int/files/meetings/marrakech_nov_2016/application/pdf/ethiopia_cop22cmp1_2cma1_hls.pdf)>, archived at <<https://perma.cc/M9KN-8GZ6>>.

<sup>17</sup> While pointing out some remaining gaps and recognising that its impact will depend on its implementation, Annalisa Savaresi notes that 'there seems to be much worth celebrating about the *Paris Agreement*'. See Annalisa Savaresi, 'The *Paris Agreement*: A New Beginning?' (2016) 34 *Journal of Energy & Natural Resources Law* 16, 26. Although cautious about whether the *Paris Agreement* will meet its objectives, Robert Falkner recognises that it 'has been rightly welcomed as a major breakthrough in international climate diplomacy': Falkner, above n 15, 1124.

up' Nationally Determined Contributions ('NDCs') set by states, with a 'top down' framework for matters such as transparency, stocktaking, compliance and accountability.<sup>18</sup> Former UN Secretary-General Ban Ki-moon observed that the entry into force of the *Paris Agreement* reflected 'the urgency for action, and ... the consensus of governments that robust global cooperation is essential to meet the climate challenge'.<sup>19</sup> However, while states agreed on a text that calls for (and in some instances requires) international cooperation in various forms, this is not to say that all states share an identical view as to what this entails in practice and why.<sup>20</sup> In fact, even at a general level, the scope of this potentially far reaching concept has not been clearly articulated.

### A Methodology

Given the rich existing scholarship, this article does not set out to reanalyse the text of the *Paris Agreement* or the development of international environmental law in any detail,<sup>21</sup> nor add to the list of academic proposals as to how responsibility sharing in the climate change regime might be enhanced.<sup>22</sup> Since our particular interest lies in drawing lessons on responsibility sharing and international cooperation for the international refugee regime, our focus (on statements made by states in various international fora leading up to, and immediately following, the entry into force of the *Paris Agreement*<sup>23</sup>) serves a more instrumental purpose.

The research is based on an extensive review of states' statements for the High Level Segment at the past four sessions of the Conferences of the Parties ('COP') to the *UNFCCC* (2013–16); at the UN General Assembly over the past

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<sup>18</sup> See Rajamani, 'Ambition and Differentiation in the 2015 *Paris Agreement*', above n 10, 502–5. See also Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press, 2017) 214–5, 242–6.

<sup>19</sup> United Nations Secretary-General, *Statement by the Secretary-General on the Paris Agreement on Climate Change* (5 October 2016) <<https://www.un.org/sg/en/content/sg/statement/2016-10-05/statement-secretary-general-paris-agreement-climate-change>>, archived at <<https://perma.cc/JZD9-2SBT>>.

<sup>20</sup> Similarly, the ILA has noted with respect to the principle of equity — which goes to the core of international cooperation in this context — that '[i]n the FCCC process, although equity is frequently invoked as an appropriate basis for burden sharing, its constituent elements and the mechanics of its application are rarely articulated': ILA commentary on draft art 4: ILA, above n 8, 14 [1].

<sup>21</sup> See, eg, Falkner, above n 15; Daniel Bodansky, 'The *Paris Climate Change Agreement*: A New Hope?' (2016) 110 *American Journal of International Law* 288 ('The *Paris Climate Change Agreement*'); Sandrine Maljean-Dubois, 'The *Paris Agreement*: A New Step in the Gradual Evolution of Differential Treatment in the Climate Regime?' (2016) 25 *Review of European Community & International Environmental Law* 151; Robert O Keohane and Michael Oppenheimer, 'Paris: Beyond the Climate Dead End through Pledge and Review?' (2016) 4(3) *Politics and Governance* 142; Savaresi, above n 17.

<sup>22</sup> Steve Vanderheiden observes that 'most scholarly contributions to climate justice debates either expressly or implicitly recommend only policy measures that currently stand little or no chance of gaining requisite political support to actually govern the distribution of burdens or resources related to climate change or its mitigation': see Steve Vanderheiden, 'Climate Justice beyond International Burden Sharing' (2016) 40 *Midwest Studies in Philosophy* 27, 29. For an overview of different proposals by states and scholars to differentiate responsibilities, see the tabular summary in: Pauw et al, above n 3, 11–15.

<sup>23</sup> Statements available in English, Spanish, and French were analysed. Excerpts used throughout this article — other than those originally written in English — are unofficial translations and any errors are the responsibility of the authors. Statements in other languages were not read and analysed.

decade (where relevant); and at the Global Consultation of the Nansen Initiative on Disaster Induced Cross Border Displacement in October 2015.<sup>24</sup> This mirrors the methodology applied in our first article on international cooperation in the international refugee regime, which entailed a thorough review of states' interventions over the past decade at UN High Commissioner for Refugees ('UNHCR') Executive Committee meetings, before the Third Committee of the General Assembly,<sup>25</sup> and at the relevant roundtables of the 2016 New York Summit, as well as the pledges made by states at the 2011 Ministerial Meeting to mark the 60<sup>th</sup> anniversary of the 1951 *Convention Relating to the Status of Refugees* and the 50<sup>th</sup> anniversary of the 1961 *Convention on the Reduction of Statelessness*.

The purpose of this methodology is to shed light on states' individual positions with respect to international cooperation, particularly in relation to mitigation and the provision of support to developing states.<sup>26</sup> It seeks to provide a unique insight into the meaning of responsibility sharing and international cooperation from the perspective of individual states, which cannot be gleaned from collective statements or formal instruments. What do individual states understand 'international cooperation' to entail? On what basis do they engage in mitigation and call on others to do so? Do developed countries perceive that they have a legal obligation to support developing countries' adaptation and mitigation activities? And, at the other end of the equation, do developing countries understand their own national efforts as being dependent upon assistance from the international community?

There are, of course, certain limitations to this methodological approach. First, we recognise that by restricting our research to high-level statements and not submissions by states on the drafting text, for instance, we have captured only formal political statements (and not necessarily the full nuance of their views). In the refugee context, submissions are not a feature since no treaty text is being drafted. As explained above, the purpose of this restriction was to ensure a consistent methodology across both articles, and to keep the scope of the research manageable. Secondly, by focusing on individual states, we recognise that we may not have captured a sense of the coalition politics of particular groups of states operating as negotiating blocks. Where possible, we draw on the extensive scholarly literature to remedy these shortcomings.<sup>27</sup> Thirdly, states do not always detail their full position in formal settings such as international climate change conferences and UN General Assembly meetings. With respect to the legal nature of states' responsibilities, for example, developing countries may prefer to call politely for support from developed countries, rather than pointing

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<sup>24</sup> The article does not focus substantively on the impacts of climate change on human displacement itself, but states' remarks in this context are considered where relevant.

<sup>25</sup> We reviewed the summary records from every Third Committee meeting of the General Assembly over the past 10 years, during which states examined the UNHCR annual report.

<sup>26</sup> This article focuses broadly on 'developed' and 'developing' states, without drawing more specific distinctions between them. For an analysis of how emerging powers (specifically Brazil, South Africa, India and China) have responded to growing demands to share the burden of addressing climate change, see Kathryn Hochstetler and Manjana Milkoreit, 'Responsibilities in Transition: Emerging Powers in the Climate Change Negotiations' (2015) 21 *Global Governance* 205.

<sup>27</sup> A particularly useful compilation of states' views — both individually and as coalitions — is contained in Pauw et al, above n 3.

more forcefully to the latter's legal obligations. However, as this article demonstrates, this is not true for all states. Furthermore, states' views can be inferred not only from what their representatives say, but also what they refrain from saying. For example, developed states tend not to articulate the basis on which they provide support to developing countries, suggesting a reluctance to further crystallise their obligations.

## II KEY CONCEPTS: 'INTERNATIONAL COOPERATION', 'BURDEN SHARING' AND 'RESPONSIBILITY SHARING'

The duty of states to cooperate is a fundamental principle of international law. It is included in the *Charter of the United Nations* as one of the objectives of the UN;<sup>28</sup> is part of almost all environmental law agreements<sup>29</sup> (including as a fundamental feature of transboundary agreements<sup>30</sup>); is contained in some

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<sup>28</sup> *Charter of the United Nations* arts 1(3), 55, 56. See also *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, GA Res 2625, UN GAOR, 25<sup>th</sup> sess, Agenda Item 85, UN Doc A/RES/25/2625 (24 October 1970) annex Preamble.

<sup>29</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) arts 2(1), 11, 15(4), 22, 23 ('ICESCR'); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 11. See also Office of the High Commissioner for Human Rights, *General Comment No 2: International Technical Assistance Measures (Art. 22 of the Covenant)*, 4<sup>th</sup> sess, UN Doc E/1990/23 (2 February 1990); Office of the High Commissioner for Human Rights, *CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 5<sup>th</sup> sess, UN Doc E/1991/23 (14 December 1990); UN Committee on Economic, Social and Cultural Rights, *Report on the Sixteenth and Seventeenth Sessions*, UN ESCOR, Supp No 2, UN Docs E/1998/22 and E/C.12/1997/10 (28 April – 16 May 1997, 17 November – 5 December 1997) annex IV; UN Committee on Economic, Social and Cultural Rights, *General Comment No 14 (2000): The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN ESCOR, 22<sup>nd</sup> sess, Agenda Item 3, UN Doc E/C.12/2000/4 (11 August 2000); UN Committee on Economic, Social and Cultural Rights, *General Comment No. 15 (2002): The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN ESCOR, 29<sup>th</sup> sess, Agenda Item 3, UN Doc E/C.12/2002/11 (20 January 2003). See also *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights*, UN GAOR, 10<sup>th</sup> sess, Agenda Item 2, UN Doc A/HRC/10/61 (15 January 2009) ('OHCHR Report').

<sup>30</sup> For example, the *Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin* is a regional treaty between four states that establishes a framework for cooperation 'in all fields of sustainable development, utilization, management and conservation of the water and related resources of the Mekong River Basin ... in a manner to optimize the multiple-use and mutual benefits of all riparians and to minimize the harmful effects that might result from natural occurrences and man-made activities': 2069 UNTS 3 (signed and entered into force 5 April 1995) art 1.

human rights instruments;<sup>31</sup> and is a key element of the *Sendai Framework for Disaster Risk Reduction*.<sup>32</sup>

This section briefly introduces how core concepts are used in the climate change regime compared to the international refugee regime. In doing so, a fundamental distinction is noted between the objectives of cooperation in each regime: the former is based on the idea that reducing global emissions is a common and shared responsibility of states for the good of the world at large, whereas the focus in the refugee context is predominantly on alleviating pressure on particular states (hosting large numbers of refugees) and ensuring effective protection to refugees. Having said this, addressing the needs of refugees is a global humanitarian imperative that can have broader social, economic and security benefits beyond the states most directly affected.

According to the *Legal Principles relating to Climate Change*, an expert document developed by the International Law Association:

[i]nternational cooperation describes the effort of States to accomplish an objective by joint action, where the actions of a single State cannot achieve the same result. While the precise scope and status of the principle under customary law remain controversial it constitutes an underlying general legal principle of international law that provides normative direction to States.<sup>33</sup>

In the climate change context, international cooperation is used in a rather broad sense to encapsulate a wide range of activities — from developing the climate change regime, to undertaking mitigation activities to reduce global emissions, to providing support to developing countries to assist them in implementing their responsibilities. The *2030 Agenda for Sustainable Development* notes that:

[t]he global nature of climate change calls for the widest possible international cooperation aimed at accelerating the reduction of global greenhouse gas emissions and addressing adaptation to the adverse impacts of climate change.<sup>34</sup>

In the international refugee law context, the primary type of international cooperation called for is ‘burden sharing’ or ‘responsibility sharing’, the main goal of which is to alleviate pressure on states that are hosting large numbers of

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<sup>31</sup> *Report of the United Nations Conference on the Human Environment*, UN Doc A/CONF.48/14/Rev.1 (5–16 June 1972) ch I, principles 22, 24; *Report of the United Nations Conference on Environment and Development*, UN Doc A/CONF.151/26 (Vol. I) (12 August 1992) annex I, principles 5, 7, 13, 24, 27 (*‘Rio Declaration’*); UNFCCC arts 4(1)(c)–(e), (g)–(i), 5(c), 6(b); Articles 4, 14, and 16 of the International Law Commission’s (*‘ILC’*) *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities* published in, *Report of the International Law Commission on the Work of Its Fifty-Third Session*, UN GAOR, 56<sup>th</sup> sess, Supp No 10, UN Doc A/56/10 (2001) 370–7 [97]; *Paris Agreement* arts 7(6)–(7), 8(3)–(4), 10(2), 10(6), 11(3), 12, 14(3). We acknowledge the helpful overview of these instruments in the ILC’s *Draft Articles on the Protection of Persons in the Event of Disasters, with Commentary*, commentary on draft art 7 published in, *Report of the International Law Commission on the Work of Its Sixty-Eighth Session*, UN GAOR, 71<sup>st</sup> sess, Supp No 10, UN Doc A/71/10 (2016) 17–73 [49] (*‘Draft Articles on the Protection of Persons in the Event of Disasters: with Commentary’*).

<sup>32</sup> *Sendai Framework for Disaster Risk Reduction 2015–2030*, GA Res 69/283, UN GAOR, 69<sup>th</sup> sess, Agenda Item 19(c), UN Doc A/RES/69/283 (23 June 2015) annex II para 19.

<sup>33</sup> ILA commentary on draft art 8: ILA, above n 8, 40 (citations omitted).

<sup>34</sup> *Transforming Our World: The 2030 Agenda for Sustainable Development*, GA Res 70/1, UN GAOR, 70<sup>th</sup> sess, Agenda Items 15 and 116, UN Doc A/RES/70/1 (21 October 2015) para 31.

refugees.<sup>35</sup> This concept recognises that the resolution of displacement and the provision of protection are global responsibilities. The term ‘burden sharing’ (or ‘effort sharing’)<sup>36</sup> is also used in the climate change context, although with very different goals. States and commentators refer variously to ‘the burden to mitigate climate change’,<sup>37</sup> the ‘international emissions reduction burden’,<sup>38</sup> ‘the burden of addressing climate change’<sup>39</sup> or, from an alternative perspective, allocating the right to emit,<sup>40</sup> but the objective of international cooperation here is less to alleviate pressure on one or more states, and more to reduce global emissions for the benefit of the entire world. This recognises not only that all states must be involved in addressing climate change, but also that all have contributed to the problem, albeit to differing degrees. As noted above, there is much greater acceptance among states that reducing global emissions is a collective responsibility than there is acceptance of the same principle with respect to protecting refugees.

In the climate change context, some states — both developed and developing — have explicitly noted their willingness to take their ‘share’ of the burden in statements made at various COP meetings.<sup>41</sup> However, developing states are often wary of bearing a mitigation burden that is disproportionate to their contribution to the problem.<sup>42</sup> For example, at COP 19, Saudi Arabia urged against ‘shifting the burden of response measures to climate change to developing countries’<sup>43</sup> and Iran stated that ‘developed countries must stop any

<sup>35</sup> For further detail, see Dowd and McAdam, above n 1.

<sup>36</sup> Core Writing Team, Rajendra K Pachauri and Leo Meyer (eds), ‘Climate Change 2014: Synthesis Report’ (Report, Intergovernmental Panel on Climate Change, 2015) 86, 106.

<sup>37</sup> Savaresi, above n 17, 18.

<sup>38</sup> Keohane and Oppenheimer, above n 21, 146.

<sup>39</sup> Iran, ‘Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change* COP 19’ (Speech delivered at the 19<sup>th</sup> Conference of the Parties to the *UNFCCC*, Warsaw, 20–22 November 2013) 3 <[http://unfccc.int/files/meetings/warsaw\\_nov\\_2013/statements/application/pdf/cop19\\_hls\\_iran.pdf](http://unfccc.int/files/meetings/warsaw_nov_2013/statements/application/pdf/cop19_hls_iran.pdf)>, archived at <<https://perma.cc/GNS5-TKGV>>.

<sup>40</sup> See Alina Averchenkova, Nicholas Stern and Dimitri Zenghelis, ‘Taming the Beasts of “Burden-Sharing”: An Analysis of Equitable Mitigation Actions and Approaches to 2030 Mitigation Pledges’ (Policy Paper, Centre for Climate Change Economics and Policy, Grantham Research Institute on Climate Change and the Environment, December 2014).

<sup>41</sup> For example, after noting that developed countries must assume their historical responsibilities and provide financial and technological support to developing countries, Djibouti explained that that does not mean that developing countries should not take their share of the burden: see Djibouti, ‘Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change* COP 22’ (Speech delivered at the 22<sup>nd</sup> Conference of the Parties to the *UNFCCC*, Marrakesh, November 2016) 8 <[http://unfccc.int/files/meetings/marrakech\\_nov\\_2016/statements/application/pdf/djibouti\\_cop22cmp12cma1\\_fr.pdf](http://unfccc.int/files/meetings/marrakech_nov_2016/statements/application/pdf/djibouti_cop22cmp12cma1_fr.pdf)>, archived at <<https://perma.cc/QEV6-2MPE>>. Hungary stated that ‘[c]limate finance is a vital element of the *Paris Agreement* in which Hungary is taking her fair share of work’: Hungary, ‘Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change* COP 22’ (Speech delivered at the 22<sup>nd</sup> Conference of the Parties to the *UNFCCC*, Marrakesh, 15–16 November 2016) 1 <[http://unfccc.int/files/meetings/marrakech\\_nov\\_2016/statements/application/pdf/hungary\\_cop22cmp12cma1\\_hls.pdf](http://unfccc.int/files/meetings/marrakech_nov_2016/statements/application/pdf/hungary_cop22cmp12cma1_hls.pdf)>, archived at <<https://perma.cc/EL25-MHJ4>>.

<sup>42</sup> Rajamani, ‘The Changing Fortunes of Differential Treatment’, above n 3, 616.

<sup>43</sup> Saudi Arabia, ‘Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change* COP 19’ (Speech delivered at the 19<sup>th</sup> Conference of the Parties to the *UNFCCC*, Warsaw, 20 November 2013) 1 <[http://unfccc.int/files/meetings/warsaw\\_nov\\_2013/statements/application/pdf/cop19\\_hls\\_saudi\\_arabia\\_eng.pdf](http://unfccc.int/files/meetings/warsaw_nov_2013/statements/application/pdf/cop19_hls_saudi_arabia_eng.pdf)>, archived at <<https://perma.cc/5BLY-7YCH>>.

attempt [to] transfer the burden of addressing climate change to developing countries'.<sup>44</sup> The *UNFCCC* tries to address this by stating that '[t]he specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the *Convention*, should be given full consideration'.<sup>45</sup>

In the context of international refugee law, 'burden sharing' terminology has been criticised as portraying refugees in a negative light, with some states and commentators preferring the term 'responsibility sharing' instead.<sup>46</sup> Interestingly, Alina Averchenkova, Nicholas Stern and Dimitri Zenghelis also criticise the use of 'burden sharing' (and/or the converse concept of the right to emit)<sup>47</sup> with respect to reducing global emissions, explaining that they 'miss out a key insight, namely that all countries stand to gain some benefit from reducing greenhouse gas pollution'.<sup>48</sup> Instead, they propose a broader approach to equitable mitigation action which focuses on the right to sustainable development. Also, promoting a more positive change of mindset during global climate change negotiations, Yongsheng Zhang and He-Ling Shi call for '[t]he current framing of burden sharing [to be] abandoned in favour of opportunity sharing', emphasising that mitigation could promote local economic growth.<sup>49</sup>

### III COMMON BUT DIFFERENTIATED RESPONSIBILITIES AND RESPECTIVE CAPABILITIES: THE CORE OF THE CLIMATE CHANGE REGIME

The principle of CBDRRC lies at the heart of the climate change regime.<sup>50</sup> It is based on the notion that:

[s]ince States have differing historical, current and future contributions to climate change, differing technological, financial and infrastructural capabilities, as well

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<sup>44</sup> Iran, above n 39, 3.

<sup>45</sup> *UNFCCC* art 3(2). See also Swaziland, 'Submission by Swaziland on behalf of the African Group under Workstream I of the ADP', Submission to the Ad Hoc Working Group on the Durban Platform for Enhanced Action, 8 October 2013 <[https://unfccc.int/files/documentation/submissions\\_from\\_parties/adp/application/pdf/adp\\_african\\_group\\_workstream\\_1\\_20131008.pdf](https://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_african_group_workstream_1_20131008.pdf)>, archived at <<https://perma.cc/W33V-GDV2>>; Xolisa Ngwadla and Lavanya Rajamani, 'Operationalising an Equity Reference Framework in the Climate Change Regime: Legal and Technical Perspectives' (Research Paper, Issue 21, Migration Action Plans & Scenarios, 30 June 2014).

<sup>46</sup> Dowd and McAdam, above n 1.

<sup>47</sup> Averchenkova, Stern and Zenghelis, above n 40.

<sup>48</sup> *Ibid* 5.

<sup>49</sup> Yongsheng Zhang and He-Ling Shi, 'From Burden-Sharing to Opportunity-Sharing: Unlocking the Climate Negotiations' (2014) 14 *Climate Policy* 63, 63.

<sup>50</sup> For a thorough analysis of the evolution of the principle of differential treatment in international environmental law between 1972 and 2012, see Rajamani, 'The Changing Fortunes of Differential Treatment', above n 3; Bodansky, 'The *Paris Climate Change Agreement*', above n 21, 298–300. Christopher D Stone notes that differential demands appear at least as early as the *Treaty of Versailles* in 1919, and that the term 'common but differentiated responsibilities' simply 'puts a fresh label on a longstanding practice': see Christopher D Stone, 'Common but Differentiated Responsibilities in International Law' (2004) 98 *American Journal of International Law* 276, 278, 299. By contrast, its discussion by states in the refugee context has been much more recent, although it has been part of the academic literature for some time: see Dowd and McAdam, above n 1, 885–90.

as diverse economic fortunes and other national circumstances, States have differentiated responsibilities to address climate change and its adverse effects.<sup>51</sup>

While its legal status is ‘not entirely clear’,<sup>52</sup> it is grounded in the concept of equity<sup>53</sup> and has been described as ‘the bedrock of the burden sharing arrangements crafted in the new generation of environmental treaties’.<sup>54</sup> It is also has significant normative value in delineating *how* such responsibilities are to be allocated, and in making performance by developing states contingent on the provision of solidarity assistance by developed ones.<sup>55</sup>

Pursuant to art 3(1) of the *UNFCCC*, states party ‘should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities’. The provision accordingly calls on developed countries to ‘take the lead in combating climate change and the adverse effects thereof’.<sup>56</sup> The CBDRRC principle took shape in various ways in the *UNFCCC*, most notably by setting different obligations, compliance requirements, and eligibility for assistance among states according to where they

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<sup>51</sup> ILA, above n 8, 18 [3], referring to draft art 5(3). Note that some proposed approaches to burden sharing also take into account states’ vulnerability to climate change. For one such example, see Anubhab Pattanayak and K S Kavi Kumar, ‘Accounting for Impacts due to Climate Change in GHG Mitigation Burden Sharing’ (2015) 15 *Climate Policy* 724, which describes such proposed approaches as ‘rather rare’: at 725.

<sup>52</sup> It is debated ‘whether it is a fundamental principle of international environmental law, a bundle of some or all of the ... factors that lead to equitable decision-making, or itself a rule of equity’: Dinah Shelton, ‘Equity’ in Daniel Bodansky, Jutta Brunnée and Ellen Hey, *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007) 639, 657. Stone also explains that it ‘is not a single notion’: above n 50, 300. Pauw et al, observe that ‘the exact meaning of CBDR, let alone its implementation, remain complicated and, indeed, contentious’: above n 3, 50.

<sup>53</sup> According to Farhana Yamin and Joanna Depledge, the principle ‘is thus a mixture of different concepts, including “common concern” and acting for the benefit of present and future generations on the basis of equity. The principle of equity requires taking into account all relevant considerations in the setting of responsibilities, in particular the needs and circumstances of developing countries’: see Farhana Yamin and Joanna Depledge, *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures* (Cambridge University Press, 2004) 69 (citations omitted). Patrick Wall explains that ‘common but differentiated responsibilities thus links concerns about environmental protection with issues of equity between the developed and developing world by allowing for differentiated commitments between the two groups, often in the form of lesser obligations, longer timelines or the provision of technical or financial assistance to developing countries to aid compliance’: see Patrick Wall, ‘A New Link in the Chain: Could a Framework Convention for Refugee Responsibility Sharing Fulfil the Promise of the 1967 Protocol?’ (2017) 29 *International Journal of Refugee Law* 201, 225, citing Pierre-Marie Dupuy and Jorge E Viñuales, *International Environmental Law* (Cambridge University Press, 2015) 73–4. See also ILA commentary on draft art 2: ILA, above n 8, 7.

<sup>54</sup> ILA commentary on draft art 5: ILA, above n 8, 20, citing Lavanya Rajamani, *Differential Treatment in International Environmental Law* (Oxford University Press, 2006) 118–25.

<sup>55</sup> Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (Oxford University Press, 3<sup>rd</sup> ed, 2009) 133.

<sup>56</sup> *UNFCCC* art 3(1). That same year, the principle was also included in the *Rio Declaration*: ‘States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command’: UN Doc A/CONF.151/26, annex I, principle 7.

fit into predefined categories.<sup>57</sup> Significantly, it divided parties into annex I and non-annex I states, placing a heavier burden on developed countries. The *Kyoto Protocol to the United Nations Framework Convention on Climate Change* ('*Kyoto Protocol*') extended this approach to differentiation, setting internationally binding emissions reduction targets for developed country parties.<sup>58</sup>

CBDRRC remains a key principle of the *Paris Agreement*<sup>59</sup> and is reflected throughout its provisions explicitly, as well as in the way it distinguishes between the obligations of developed and developing countries<sup>60</sup> and the support available to them.<sup>61</sup> There are some new elements, however. First, the *Paris Agreement* does not include a predetermined annex structure, thus moving away from the *Kyoto Protocol's* 'categorical approach to differentiation'.<sup>62</sup> In fact, this shift had already started to take place earlier — most notably with the adoption of the *Copenhagen Accord* — but given the legally binding nature of the *Paris Agreement* (and the fact that it is the most recent addition to the climate change framework), it remains the focus of this article.<sup>63</sup> Secondly, with respect to mitigation, the *Paris Agreement* enables states to engage in a form of bounded self-differentiation by formulating their NDCs 'in the light of different national circumstances'.<sup>64</sup> This new qualification introduces 'a dynamic element' to the interpretation of CBDRRC,<sup>65</sup> since states' responsibilities will evolve as national circumstances evolve (and will arguably affect the principle's interpretation).<sup>66</sup> According to Pieter Pauw et al, this addition is 'paramount to enable parties to differentiate responsibilities in a way that better reflects the diversification of

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<sup>57</sup> See also draft art 5(3)(b) in ILA, above n 8, 18, which explains that '[d]eveloping States, in particular the least developed among them, small island developing States, and other vulnerable States shall be subject to less stringent mitigation commitments, and benefit from, *inter alia*, delayed compliance schedules and financial, technological and other assistance'.

<sup>58</sup> *Kyoto Protocol* annex B. For a more detailed discussion of the 'three phases' of the climate change regime surrounding the adoption of the *UNFCCC*, the *Kyoto Protocol*, and the *Paris Agreement*, see Bodansky, 'The *Paris Climate Change Agreement*', above n 21.

<sup>59</sup> The Preamble to the *Paris Agreement* states that it is guided by the principles of the *UNFCCC*, including 'the principle of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances': *Paris Agreement* Preamble. Article 2(2) also states that '[t]his *Agreement* will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances'.

<sup>60</sup> See, eg, *Paris Agreement* art 4(4).

<sup>61</sup> See *ibid* art 4(5); Rajamani, 'Ambition and Differentiation in the 2015 *Paris Agreement*', above n 10; Bodansky, Brunnée and Rajamani, above n 18, 219–26, 240–2.

<sup>62</sup> Bodansky, 'The *Paris Climate Change Agreement*', above n 21, 300.

<sup>63</sup> The *Copenhagen Accord* brought about a 'fundamental reorientation of the climate change regime ... toward a more bottom-up, global approach': *ibid* 292 (citations omitted). Rajamani explains further that in fact, a shift away from differentiation in favour of developing countries can be seen not only in the *Copenhagen Accord*, but also the *Cancún Agreements* and *Durban LCA Decision*: Rajamani, 'The Changing Fortunes of Differential Treatment', above n 3, 617.

<sup>64</sup> For example, art 4(3) of the *Paris Agreement* states that '[e]ach Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances'.

<sup>65</sup> Rajamani, 'Ambition and Differentiation in the 2015 *Paris Agreement*', above n 10, 508.

<sup>66</sup> See *ibid*.

state groups and country coalitions that negotiate under the *UNFCCC*, notably among developing countries'.<sup>67</sup>

### A *The Views of States*

The topic of differentiation has featured prominently in states' discussions in recent years, particularly in the context of the *Paris Agreement*. Prior to its entry into force, a number of developing states reiterated that it should be based on the principles elucidated in the *UNFCCC*, particularly that of CBDRRC.<sup>68</sup> Algeria, for example, noted that the difference between developed and developing countries lies at the heart of the *UNFCCC*,<sup>69</sup> while Turkey described differentiation as 'vitaly important for the new agreement'.<sup>70</sup> Argentina argued that common but differentiated responsibilities was one of three principles that can not be waived when designing a new agreement (the others being historical responsibility and equity).<sup>71</sup> China, a central player in the climate change negotiations and a leader among developing countries, was firm in advocating for the principle of CBDRRC. In a submission to the Ad Hoc Working Group on the Durban Platform for Enhanced Action (that is, prior to the adoption of the *Paris Agreement*), China emphasised that the outcome needed to reflect developed countries' historical responsibilities, stressing that differentiation was 'the very foundation of the *Convention* regime'.<sup>72</sup>

In elaborating the 'common responsibility' aspect of the principle, developing states have explained that all states must act because climate change is a global

<sup>67</sup> Pauw et al, above n 3, 28.

<sup>68</sup> See, eg, Mauritius, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 21*' (Speech delivered at the 21<sup>st</sup> Conference of the Parties to the *UNFCCC*, Paris, 7 December 2015) 1 <[http://unfccc.int/files/meetings/paris\\_nov\\_2015/application/pdf/cop21cmp11\\_hls\\_speech\\_mauritius.pdf](http://unfccc.int/files/meetings/paris_nov_2015/application/pdf/cop21cmp11_hls_speech_mauritius.pdf)>, archived at <<https://perma.cc/H6K2-M5M8>>; South Sudan, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 21*' (Speech delivered at the 21<sup>st</sup> Conference of the Parties to the *UNFCCC*, Paris, 8 December 2015) <[http://unfccc.int/files/meetings/paris\\_nov\\_2015/application/pdf/cop21cmp11\\_hls\\_speech\\_south\\_sudan.pdf](http://unfccc.int/files/meetings/paris_nov_2015/application/pdf/cop21cmp11_hls_speech_south_sudan.pdf)>, archived at <<https://perma.cc/94AS-BE9Z>>.

<sup>69</sup> Algeria, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 20*' (Speech delivered at the 20<sup>th</sup> Conference of the Parties to the *UNFCCC*, Lima, 9 December 2014) 6 <[http://unfccc.int/files/meetings/lima\\_dec\\_2014/statements/application/pdf/cop20\\_hls\\_algeria\\_french.pdf](http://unfccc.int/files/meetings/lima_dec_2014/statements/application/pdf/cop20_hls_algeria_french.pdf)>, archived at <<https://perma.cc/5A28-5X39>>.

<sup>70</sup> Turkey, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 21*' (Speech delivered at the 21<sup>st</sup> Conference of the Parties to the *UNFCCC*, Paris, 7 December 2015) 2 <[http://unfccc.int/files/meetings/paris\\_nov\\_2015/application/pdf/cop21cmp11\\_hls\\_speech\\_turkey.pdf](http://unfccc.int/files/meetings/paris_nov_2015/application/pdf/cop21cmp11_hls_speech_turkey.pdf)>, archived at <<https://perma.cc/X5TB-VBNR>>.

<sup>71</sup> Argentine Republic, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 20*' (Speech delivered at the 20<sup>th</sup> Conference of the Parties to the *UNFCCC*, Lima, December 2014) <[http://unfccc.int/files/meetings/lima\\_dec\\_2014/statements/application/pdf/cop20\\_hls\\_argentina\\_spanish.pdf](http://unfccc.int/files/meetings/lima_dec_2014/statements/application/pdf/cop20_hls_argentina_spanish.pdf)>, archived at <<https://perma.cc/LM8B-9K9N>>.

<sup>72</sup> People's Republic of China, 'China's Submission on the Work of the Ad Hoc Working Group on Durban Platform for Enhanced Action', Submission to the Ad Hoc Working Group on Durban Platform for Enhanced Action, 5 March 2013, 1[2] <[http://unfccc.int/files/documentation/submissions\\_from\\_parties/adp/application/pdf/adp\\_china\\_workstream\\_1\\_20130305.pdf](http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_china_workstream_1_20130305.pdf)>, archived at <<https://perma.cc/QAZ5-NMPD>>. See Pauw et al, above n 3, 24.

problem.<sup>73</sup> Many accept that they all have a duty,<sup>74</sup> obligation,<sup>75</sup> or at least a moral responsibility<sup>76</sup> to respond. Several have mentioned the need to assume their ‘share of the responsibility’,<sup>77</sup> with Lesotho acknowledging that ‘climate change may not be our collective fault, but it is surely our collective responsibility’.<sup>78</sup> The Marshall Islands has emphasised that ‘[e]very country in this room — and I mean every country — must play it’s [sic] part by reaching for the top end of national mitigation potential’.<sup>79</sup> In 2014, El Salvador specifically called on all developing countries to undertake mitigation efforts in this cause that belongs to everyone.<sup>80</sup>

While reiterating their commitments, however, a number of developing countries have set out certain qualifications (in line with the *UNFCCC* and the *Paris Agreement*)<sup>81</sup> emphasising the need for support from developed countries. For example, with respect to mitigation, Namibia stated in 2013 that it was ‘ready to increase its mitigation efforts provided that sufficient financial and

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<sup>73</sup> ‘[S]ince climate change is a global problem, we have to find global solution collectively’: People’s Republic of Bangladesh, ‘Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change* COP 21’ (Speech delivered at the 21<sup>st</sup> Conference of the Parties to the *UNFCCC*, Paris, 7–8 November 2015) 2 <[http://unfccc.int/files/meetings/paris\\_nov\\_2015/application/pdf/cop21cmp11\\_hls\\_speech\\_bangladesh.pdf](http://unfccc.int/files/meetings/paris_nov_2015/application/pdf/cop21cmp11_hls_speech_bangladesh.pdf)>, archived at <<https://perma.cc/3H5M-DENH>>.

<sup>74</sup> ‘In climate change, our world faces a challenge that is potentially damaging to all of humanity and collectively, it is our duty and responsibility to bring all the resources at our disposal to address the problems’: Commonwealth of Dominica, ‘Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change* COP 21’ (Speech delivered at the 21<sup>st</sup> Conference of the Parties to the *UNFCCC*, Paris, December 2015) 2 <[http://unfccc.int/files/meetings/paris\\_nov\\_2015/application/pdf/cop21cmp11\\_hls\\_speech\\_dominica.pdf](http://unfccc.int/files/meetings/paris_nov_2015/application/pdf/cop21cmp11_hls_speech_dominica.pdf)>, archived at <<https://perma.cc/X3VQ-TYFG>>.

<sup>75</sup> ‘[A]ll peoples and governments have an obligation to act responsibly to protect the global commons and our common humanity’: Saint Vincent and the Grenadines, ‘Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change* COP 22’ (Speech delivered at the 22<sup>nd</sup> Conference of the Parties to the *UNFCCC*, Marrakesh, 15 November 2016) <[http://unfccc.int/files/meetings/marrakech\\_nov\\_2016/application/pdf/saintvincentandthegr\\_enadines\\_cop22cmp12cma1\\_hls.pdf](http://unfccc.int/files/meetings/marrakech_nov_2016/application/pdf/saintvincentandthegr_enadines_cop22cmp12cma1_hls.pdf)>, archived at <<https://perma.cc/AQ6B-4K7G>>.

<sup>76</sup> ‘[N]o one country has the moral justification to opt out of the global efforts to protect our earth’: Republic of Malawi, ‘Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change* COP 21’ (Speech delivered at the 21<sup>st</sup> Conference of the Parties to the *UNFCCC*, Paris, 7 December 2015) <[http://unfccc.int/files/meetings/paris\\_nov\\_2015/application/pdf/cop21cmp11\\_hls\\_speech\\_malawi.pdf](http://unfccc.int/files/meetings/paris_nov_2015/application/pdf/cop21cmp11_hls_speech_malawi.pdf)>, archived at <<https://perma.cc/3R29-KW52>>.

<sup>77</sup> See, eg, People’s Republic of China, ‘Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change* COP 22’ (Speech delivered at the 22<sup>nd</sup> Conference of the Parties to the *UNFCCC*, Marrakesh, 16 November 2016) <[http://unfccc.int/files/meetings/marrakech\\_nov\\_2016/statements/application/pdf/china\\_cop22cmp12cma1\\_hls.pdf](http://unfccc.int/files/meetings/marrakech_nov_2016/statements/application/pdf/china_cop22cmp12cma1_hls.pdf)>, archived at <<https://perma.cc/92J2-PQ34>>.

<sup>78</sup> UN GAOR, 64<sup>th</sup> sess, 9<sup>th</sup> plen mtg, Agenda Item 8, UN Doc A/64/PV.9 (26 September 2009) 29.

<sup>79</sup> Republic of the Marshall Islands, above n 6, 2 (emphasis omitted).

<sup>80</sup> El Salvador, ‘Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change* COP 20’ (Speech delivered at the 20<sup>th</sup> Conference of the Parties to the *UNFCCC*, Lima, 10 December 2014) <[http://unfccc.int/files/meetings/lima\\_dec\\_2014/statements/application/pdf/cop20\\_hls\\_el\\_salvador\\_spanish.pdf](http://unfccc.int/files/meetings/lima_dec_2014/statements/application/pdf/cop20_hls_el_salvador_spanish.pdf)>, archived at <<https://perma.cc/UG2R-9WGE>>.

<sup>81</sup> *UNFCCC* art 4(7); *Paris Agreement* art 3.

technical support [was] provided'.<sup>82</sup> Similarly, Belize emphasised its need for 'enhanced cooperation and support'<sup>83</sup> to access the resources required to meet the limit of a one and a half degree global temperature increase. Urging developed countries to take the lead on mitigation,<sup>84</sup> and calling more broadly for reform of the international economic system, Iran explained that 'developing countries need to develop economically to be empowered in the first place if they are to address climate change'.<sup>85</sup>

Turning to developed countries, Lavanya Rajamani explains that when the process of developing the *Paris Agreement* was launched in Durban in 2011, they were 'unanimous in their insistence that any reference to "common but differentiated responsibilities" must be qualified with a statement that this principle must be interpreted in the light of "contemporary economic realities"'. They were also insistent that the future regime must be "applicable to all".<sup>86</sup> Indeed, this was reflected in a number of their public statements.<sup>87</sup> For example, Australia argued that the *Paris Agreement* 'must establish a common playing field, moving past the developed-developing country divide that puts a brake on

<sup>82</sup> Republic of Namibia, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 19*' (Speech delivered at the 19<sup>th</sup> Conference of the Parties to the *UNFCCC*, Warsaw, November 2013) <[http://unfccc.int/files/meetings/warsaw\\_nov\\_2013/statements/application/pdf/cop19\\_hls\\_namibia.pdf](http://unfccc.int/files/meetings/warsaw_nov_2013/statements/application/pdf/cop19_hls_namibia.pdf)>, archived at <<https://perma.cc/XB9J-2MWH>>. According to Djibouti's statement at COP 20, developing countries are already contributing and will continue to contribute to this mitigation effort according to their respective national circumstances and capacities provided that the means of implementing this policy are guaranteed to them in the future *Paris Agreement*: see Djibouti, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 20*' (Speech delivered at the 20<sup>th</sup> Conference of the Parties to the *UNFCCC*, Lima, December 2014) <[http://unfccc.int/files/meetings/lima\\_dec\\_2014/statements/application/pdf/cop20\\_hls\\_djibouti.pdf](http://unfccc.int/files/meetings/lima_dec_2014/statements/application/pdf/cop20_hls_djibouti.pdf)>, archived at <<https://perma.cc/BFZ7-9QR3>>.

<sup>83</sup> Belize, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 21*' (Speech delivered at the 21<sup>st</sup> Conference of the Parties to the *UNFCCC*, Paris, December 2015) 5 <[http://unfccc.int/files/meetings/paris\\_nov\\_2015/application/pdf/cop21cmp11\\_hls\\_speech\\_belize.pdf](http://unfccc.int/files/meetings/paris_nov_2015/application/pdf/cop21cmp11_hls_speech_belize.pdf)>, archived at <<https://perma.cc/28QG-UC5A>>.

<sup>84</sup> Similarly, in 2015, Cuba stated that developed countries should take the lead on the principle of common but differentiated responsibilities: Republic of Cuba, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 21*' (Speech delivered at the 21<sup>st</sup> Conference of the Parties to the *UNFCCC*, Paris, December 2015) 2 <[http://unfccc.int/files/meetings/paris\\_nov\\_2015/application/pdf/cop21cmp11\\_hls\\_speech\\_cuba.pdf](http://unfccc.int/files/meetings/paris_nov_2015/application/pdf/cop21cmp11_hls_speech_cuba.pdf)>, archived at <<https://perma.cc/3Y87-BPBL>>.

<sup>85</sup> Iran, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 20*' (Speech delivered at the 20<sup>th</sup> Conference of Parties to the *UNFCCC*, Lima, December 2014) 2 <[http://unfccc.int/files/meetings/lima\\_dec\\_2014/statements/application/pdf/cop20\\_hls\\_iran.pdf](http://unfccc.int/files/meetings/lima_dec_2014/statements/application/pdf/cop20_hls_iran.pdf)>, archived at <<https://perma.cc/TGK3-LGLX>>.

<sup>86</sup> Rajamani, 'The Changing Fortunes of Differential Treatment', above n 3, 618.

<sup>87</sup> In 2016, Ukraine reminded COP Parties that 'one of the core principles of the *UN Framework Convention on Climate Change* – Common but Differentiated Responsibility is not only about differentiation, but also calls upon common responsibility of ALL Parties': Ukraine, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 22*' (Speech delivered at the 22<sup>nd</sup> Conference of Parties to the *UNFCCC*, Marrakesh, November 2016) 2 (emphasis omitted) <[http://unfccc.int/files/meetings/marrakech\\_nov\\_2016/application/pdf/ukraine\\_cop22cmp12\\_cma1\\_hls.pdf](http://unfccc.int/files/meetings/marrakech_nov_2016/application/pdf/ukraine_cop22cmp12_cma1_hls.pdf)>, archived at <<https://perma.cc/J7JN-S847>>.

real action'.<sup>88</sup> The Republic of Latvia similarly described 'the old binary division of countries' as being 'outdated',<sup>89</sup> and Canada called for an agreement that was 'fair, effective and include[d] meaningful and transparent commitments from all major emitters'.<sup>90</sup>

Alluding to the 'free rider' concern of some developed countries, Germany noted that the agreement would only be effective if it were legally binding on all states, explaining that 'Parties will only take on commitments if they know that other states are doing the same according to their respective capabilities'.<sup>91</sup> Significantly (given its status as a major emitter and its refusal to sign the *Kyoto Protocol*), the United States stated firmly in 2013 that a structure 'based on a spectrum of mitigation commitments, self-differentiated across the broad range of evolving national circumstances and capabilities ... is the only kind that we can see producing the ambitious, inclusive agreement we need'.<sup>92</sup>

Although developed countries have frequently been eager to shift away from internationally negotiated and prescribed emissions reduction targets, they have still acknowledged the need for differentiation. In preparation for discussions with the Ad Hoc Working Group on the Durban Platform for Enhanced Action in 2013, for example, the European Union made clear that the 2015 agreement (which became the *Paris Agreement*) should fully respect the principle of CBDRRC, but noted that each party should make commitments to limit or reduce its emissions.<sup>93</sup> That same year, at COP 19, the Netherlands explained

<sup>88</sup> Australia, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 20*' (Speech delivered at the 20<sup>th</sup> Conference of Parties to the *UNFCCC*, Lima, December 2014) 2 <[http://unfccc.int/files/meetings/lima\\_dec\\_2014/statements/application/pdf/cop20\\_hls\\_australia.pdf](http://unfccc.int/files/meetings/lima_dec_2014/statements/application/pdf/cop20_hls_australia.pdf)>, archived at <<https://perma.cc/P96C-CZHJ>>.

<sup>89</sup> Republic of Latvia, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 21*' (Speech delivered at the 21<sup>st</sup> Conference of the Parties to the *UNFCCC*, Paris, 8 December 2015) <[http://unfccc.int/files/meetings/paris\\_nov\\_2015/application/pdf/cop21cmp11\\_hls\\_speech\\_latvia.pdf](http://unfccc.int/files/meetings/paris_nov_2015/application/pdf/cop21cmp11_hls_speech_latvia.pdf)>, archived at <<https://perma.cc/Q5CM-BEBK>>.

<sup>90</sup> Canada, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 20*' (Speech delivered at the 20<sup>th</sup> Conference of Parties to the *UNFCCC*, Lima, 9 December 2014) 1 <[http://unfccc.int/files/meetings/lima\\_dec\\_2014/statements/application/pdf/cop20\\_hls\\_canada\\_english.pdf](http://unfccc.int/files/meetings/lima_dec_2014/statements/application/pdf/cop20_hls_canada_english.pdf)>, archived at <<https://perma.cc/ZA7V-L545>>.

<sup>91</sup> Germany, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 19*' (Speech delivered at the 19<sup>th</sup> Conference of the Parties to the *UNFCCC*, Warsaw, November 2013) 2 <[http://unfccc.int/files/meetings/warsaw\\_nov\\_2013/statements/application/pdf/cop19\\_hls\\_germany.pdf](http://unfccc.int/files/meetings/warsaw_nov_2013/statements/application/pdf/cop19_hls_germany.pdf)>, archived at <<https://perma.cc/8LB9-6NGN>>.

<sup>92</sup> United States of America, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 19*' (Speech delivered at the 19<sup>th</sup> Conference of the Parties to the *UNFCCC*, Warsaw, 21 November 2013) 2 <[http://unfccc.int/files/meetings/warsaw\\_nov\\_2013/statements/application/pdf/cop19\\_hls\\_usa.pdf](http://unfccc.int/files/meetings/warsaw_nov_2013/statements/application/pdf/cop19_hls_usa.pdf)>, archived at <<https://perma.cc/2CJS-ZD4E>>.

<sup>93</sup> 'Each Party should ensure that their proposed commitment is a fair, adequate and ambitious contribution towards our collective below 2°C objective, in accordance with its responsibilities and capabilities as well as development needs': Lithuania and the European Commission, 'Submission by Lithuania and the European Commission on behalf of the European Union and Its Member States', Submission to the United Nations Climate Change Conference, 16 September 2013, [19] <[http://unfccc.int/files/documentation/submissions\\_from\\_parties/adp/application/pdf/adp\\_eu\\_workstream\\_1\\_mitigation\\_20130916.pdf](http://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_eu_workstream_1_mitigation_20130916.pdf)>, archived at <<https://perma.cc/MX3L-PDY6>>. See Pauw et al, above n 3, 25.

that as the ‘foremost aim of any new climate agreement should be to get all countries to take climate action ... it must allow room for different national approaches and aspirations’.<sup>94</sup> Some also have acknowledged that there are even differing levels of capacity among developed countries. For example, the Republic of Latvia noted in 2015 that ‘[d]ifferent countries have different circumstances and different possibilities’, which was ‘relevant with regard to all situations – also for developed countries as some of them have less possibilities than some developing countries’.<sup>95</sup>

#### IV COMMON BUT DIFFERENTIATED RESPONSIBILITIES AND THE INTERNATIONAL REFUGEE LAW REGIME

Among international refugee law scholars, the CBDRRC principle has been considered as a possible tool with which to allocate protection and assistance responsibilities between states for at least the past 20 years.<sup>96</sup> However, it was only in 2016 that states themselves discussed elements of the principle — albeit in slightly different terms — in the UN.<sup>97</sup>

In September 2016, states adopted the *New York Declaration on Refugees and Migrants* (*New York Declaration*) in which they committed ‘to a more equitable sharing of the burden and responsibility for hosting and supporting the world’s refugees, *while taking account of existing contributions and the different*

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<sup>94</sup> Netherlands, ‘Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 19*’ (Speech delivered at the 19<sup>th</sup> Conference of the Parties to the *UNFCCC*, Warsaw, November 2013) 2 (emphasis omitted) <[http://unfccc.int/files/meetings/warsaw\\_nov\\_2013/statements/application/pdf/cop19\\_hls\\_netherlands.pdf](http://unfccc.int/files/meetings/warsaw_nov_2013/statements/application/pdf/cop19_hls_netherlands.pdf)>, archived at <<https://perma.cc/4T9U-596E>>.

<sup>95</sup> Republic of Latvia, above n 89.

<sup>96</sup> See also Dowd and McAdam, above n 1. See also James C Hathaway and R Alexander Neve, ‘Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection’ (1997) 10 *Harvard Human Rights Journal* 115; Peter H Schuck, ‘Refugee Burden-Sharing: A Modest Proposal’ (1997) 22 *Yale Journal of International Law* 243; Tally Kritzman-Amir, ‘Not in My Backyard: On the Morality of Responsibility Sharing in Refugee Law’ (2009) 34 *Brooklyn Journal of International Law* 355. For a critical analysis, see Penelope Mathew and Tristan Harley, *Refugees, Regionalism and Responsibility* (Edward Elgar, 2016) 130–34. Some international environmental law scholars caution that adapting the CBDRRC principle to other areas of law is not necessarily helpful, since there is ‘no agreement’ on ‘what it means’ or ‘when it applies’. See Susan Biniaz, ‘Common but Differentiated Responsibility: Remarks’ (2002) 96 *Proceedings of the Annual Meeting of the American Society of International Law* 359, 361; See also Stone, above n 50, 281.

<sup>97</sup> However, as noted above, developing countries have sometimes called on developed or ‘rich’ countries to step up their efforts to share the burden, implying that they have greater responsibilities owing to their wealth. For example, South Africa stated that ‘[t]he poor regions of the world, in particular Africa, continued to bear the heaviest refugee protection burden. The rich countries must do more to support countries in those regions and equitably share the responsibility to provide protection according to the ability of each nation’: UN GAOR, 3<sup>rd</sup> Comm, 64<sup>th</sup> sess, 39<sup>th</sup> mtg, Agenda Item 41, UN Doc A/C.3/64/SR.39 (26 January 2010) 10 [76].

*capacities and resources among States*'.<sup>98</sup> This wording reveals that the principle takes a somewhat different shape here than in the climate change context. Indeed, while this perfunctory statement has been assumed by refugee lawyers to reflect the CBDRRC concept, it may in fact misattribute it: differentiation based on capacity has long been part of international environmental law more generally.<sup>99</sup>

As discussed above, in climate change law, the principle of CBDRRC is firmly grounded in equity, with a core emphasis on responsibility for historical contributions (or the 'root causes' of anthropogenic climate change). That aspect is far less relevant (or helpful) in the refugee context, where responsibility sharing is based not on the role of states in causing refugee movements, but rather on their varying capacities and resources to provide assistance.<sup>100</sup>

Related to this is the extent to which states' responsibilities in refugee law are, in fact, 'common'. Given that all states contribute to anthropogenic climate change to some extent, it is clear that they share a common responsibility to mitigate it (even if to varying degrees). Calls for responsibility sharing with respect to refugee protection, however, are mostly targeted at developed countries with the capacity to assist less well-resourced states which host the majority of the world's refugees.<sup>101</sup> Although not explicitly stated, there is less of an expectation that all states will take part. Extreme caution would also need to be taken that any differentiation in responsibilities related purely to assistance measures, and not to core legal obligations, such as the principle of *non refoulement* (non-removal). In other words, poorer states could not disregard their legal obligations (or make their fulfilment dependent on the receipt of support from other states) on the basis that they lacked sufficient resources to care for refugees, but their need for assistance would provide a powerful rationale for wealthier states to contribute (which could take the form of resettlement or other admission pathways, as well as the provision of material assistance).

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<sup>98</sup> *New York Declaration for Refugees and Migrants*, GA Res 71/1, UN GAOR, 71<sup>st</sup> sess, Agenda Items 13 and 117, UN Doc A/RES/71/1 (3 October 2016) para 68 ('*New York Declaration*') (emphasis added). See also *Draft of the Global Compact on Responsibility Sharing for Refugees*, attachment to a letter from the co-facilitators of the UN summit, Her Excellency Dina Kavar, Permanent Representative of the Hashemite Kingdom of Jordan to the United Nations and His Excellency David Donoghue, Permanent Representative of Ireland to the United Nations to all Permanent Representatives and Permanent Observers to the United Nations (30 June 2016) [12] <[http://www.unhcr.org/events/conferences/578369114/zero\\_draft\\_global\\_compact\\_responsibility\\_sharing\\_refugees.html](http://www.unhcr.org/events/conferences/578369114/zero_draft_global_compact_responsibility_sharing_refugees.html)>.

<sup>99</sup> For analysis of some different contexts in which differentiation is used, see Pauw et al, above n 3, 30–50.

<sup>100</sup> That said, Guy Goodwin-Gill and Selim Can Sazak have proposed an interesting idea, namely that '[w]here refugees flee persecution, the state of origin could be held financially liable for support costs, and subjected to sanctions': see Guy S Goodwin-Gill and Selim Can Sazak, 'Footing the Bill: Refugee-Creating States' Responsibility to Pay', *Foreign Affairs* (online), 29 July 2015 <<https://www.foreignaffairs.com/articles/africa/2015-07-29/footing-bill>>. On differentiation and harm caused (in the international environmental law context), see Stone, above n 50, 291–2.

<sup>101</sup> In the most recent global statistics compiled by the UNHCR, developing states were host to 86 per cent of the world's refugees. See UNHCR, 'Global Trends: Forced Displacement in 2015' (Report, 20 June 2016) 2.

Finally, the nature of the problem that responsibility sharing in the refugee context is trying to resolve is also different. Since climate change is a truly global concern, every state will be affected to some degree. Even though the need for refugee protection is recognised as a global humanitarian issue, the impact of hosting and caring for refugees falls most heavily on a limited number of (predominantly developing) states. A useful feature of the climate change regime that might be adapted here is that certain duties of developing states are conditional on their receipt of assistance from developed ones, thus enabling the former to put pressure on the latter.<sup>102</sup>

It is fair to say that the concept of CBDRRC is far more nuanced than some international refugee lawyers may appreciate, and its intricacies have not yet been explored in the protection context. Indeed, it tends to be invoked in a very rudimentary and literal way — namely, that because states' capacities vary, so, too, should their contributions to global refugee protection. Precisely what this might look like, and how it would (or would not) reflect the much more sophisticated iterations of the principle in the climate change context, is a long way from being debated, let alone determined.

#### V WHAT DOES INTERNATIONAL COOPERATION ENTAIL IN THE DISPLACEMENT CONTEXT?

Displacement is at its highest level since the aftermath of the Second World War,<sup>103</sup> yet the global distribution of refugees continues to reveal a stark imbalance, with the vast majority hosted by low and middle income countries in developing regions.<sup>104</sup> Although states that receive refugees have certain legal obligations to protect them, whether or not other states have a duty to step in and assist is less clear cut.<sup>105</sup> The question of how to distribute responsibility for refugee protection more equitably among states has preoccupied governments, policymakers, academics, refugee law experts and UNHCR for decades.

As explored in a recent article by the present authors,<sup>106</sup> the international community still has a long way to go before equitable responsibility sharing becomes a reality — notwithstanding states' repeated rhetorical commitments to the principle. For instance, the most recent formal articulation of states' collective commitment to responsibility sharing in the 2016 *New York Declaration* reveals no concrete commitments to provide financial assistance to host countries or to increase the provision of resettlement places and other

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<sup>102</sup> 'From this perspective it becomes irrelevant whether developed states have a legal duty to provide assistance: if they want developing states to participate actively in securing the goals of each agreement they must honour the expectation that the necessary resources will be provided': Birnie, Boyle and Redgwell, above n 55, 135 (citations omitted).

<sup>103</sup> The UNHCR made this observation with respect to 2015 figures: see UNHCR, above n 101, 5. The number of people of concern to UNHCR increased to 65.6 million in 2016 (which does not include people displaced by the impacts of disasters or climate change, for example): UNHCR, 'Global Trends: Forced Displacement in 2016' (Report, 19 June 2017) 2.

<sup>104</sup> Eighty-four per cent of refugees were hosted in the developing world in 2016: *ibid.*

<sup>105</sup> Khalid Koser, 'Australia and the 1951 *Refugee Convention*' (Analysis Paper, Lowy Institute for International Policy, April 2015) 6; Hathaway and Neve, above n 96, 141; E Tendayi Achiume, 'Syria, Cost-Sharing, and the Responsibility to Protect Refugees' (2015) 100 *Minnesota Law Review* 687, 690–1.

<sup>106</sup> Dowd and McAdam, above n 1.

admission pathways.<sup>107</sup> The *Global Compact on Refugees*, to be adopted by the General Assembly in October 2018, has the potential to better define such responsibilities and set out practical forms of cooperation, although experience to date suggests that enhanced legal commitments are unlikely.

As noted above, in the refugee law context, it is comparatively straightforward to set out what international cooperation entails. It can be broadly broken down into physical and financial responsibility sharing.<sup>108</sup> When it comes to displacement linked to the impacts of climate change and disasters, since there is no clear international legal framework setting out states' responsibilities, states envisage a broader range of cooperative measures at the bilateral, regional and international levels. These include boosting the resilience of states that are at risk of natural hazards;<sup>109</sup> taking measures to facilitate the entry of people who have been displaced across an international border,<sup>110</sup> as well as their safe and dignified return;<sup>111</sup> exchanging good practices;<sup>112</sup> and building the capacity of states hosting people who have been displaced internally<sup>113</sup> or across international borders.<sup>114</sup> In this context, it is important to note the 'catalytic role'<sup>115</sup> of para 14(f) of the *Cancún Adaptation Framework*, which encouraged states to take '[m]easures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels'.<sup>116</sup>

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<sup>107</sup> *New York Declaration*, UN Doc A/RES/71/1.

<sup>108</sup> See also Dowd and McAdam, above n 1.

<sup>109</sup> 'States have the primary responsibility in risk management, but developing countries should be able to rely on international cooperation to tackle this challenge': The Nansen Initiative, 'Global Consultation Conference Report: Geneva, 12–13 October' (Conference Report, December 2015) 82 (Brazil) <<https://www.nanseninitiative.org/wp-content/uploads/2015/02/GLOBAL-CONSULTATION-REPORT.pdf>>, archived at <<https://perma.cc/LK9R-HPCX>>.

<sup>110</sup> For example, Ecuador reported two concrete steps taken in the framework of cooperation and solidarity with countries of the region, namely the issuance of humanitarian visas to Haitian citizens who moved to Ecuador after the 2010 earthquake and legislation that would allow the transfer of Colombians affected by the potential eruption of an earthquake near the border: see *ibid* 104 (Ecuador).

<sup>111</sup> *Ibid* 184 (Thailand).

<sup>112</sup> See, eg, *ibid* 150 (Morocco).

<sup>113</sup> See, eg, *ibid* 146 (Madagascar).

<sup>114</sup> As recognised by Lesotho, 'there is no doubt that ensuring that displaced persons access protection in another country demands international collaboration and cooperation': *ibid* 140 (Lesotho).

<sup>115</sup> Koko Warner, 'Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations' (Background Paper No PPLA/2011/02, UNHCR, May 2011) 3 <<http://www.unhcr.org/4df9cc309.html>>.

<sup>116</sup> Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Sixteenth Session, Held in Cancun from 29 November to 10 December 2010 — Addendum — Part 2: Action Taken by the Conference of the Parties at Its Sixteenth Session*, UN Doc FCCC/CP/2010/7/Add.1 (15 March 2011) Decision 1/CP.16 [14(f)] ('*Cancún Adaptation Framework*'). For a detailed discussion of this and subsequent developments in the context of climate change and displacement, see Jane McAdam, 'From the Nansen Initiative to the Platform on Disaster Displacement: Shaping International Approaches to Climate Change, Disasters and Displacement' (2016) 39 *University of New South Wales Law Journal* 1518; Jane McAdam, 'Creating New Norms on Climate Change, Natural Disasters and Displacement: International Developments, 2010–2013' (2014) 29(2) *Refuge* 11.

The International Law Commission's *Draft Articles on the Protection of Persons in the Event of Disasters* are also relevant, although they do not focus exclusively on displacement.<sup>117</sup> Recognising that '[e]ffective international cooperation is indispensable for the protection of persons in the event of disasters',<sup>118</sup> draft art 7 provides that: 'States shall, as appropriate, cooperate among themselves, with the United Nations, with the components of the Red Cross and Red Crescent Movement, and with other assisting actors.'<sup>119</sup> Draft art 8 then sets out the 'forms of cooperation' envisaged to protect persons in the aftermath of disasters, which may include (but are not limited to): 'humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, equipment and goods, and scientific, medical and technical resources'.<sup>120</sup> The commentary notes that these are not intended to create new legal obligations.<sup>121</sup>

The protection of human rights is necessarily at the forefront of humanitarian responses to displacement. The Office of the High Commissioner for Human Rights ('OHCHR') has specifically noted that in the context of climate change, 'international cooperation is not only expedient but also a human rights obligation and that its central objective is the realization of human rights'.<sup>122</sup> Marc Limon has argued that this specific link between the duty to cooperate and the realisation of human rights in the context of climate change suggests that:

all states that are party to the ICESCR [*International Covenant on Economic, Social and Cultural Rights*] have a legal obligation through international cooperation (i.e., the UNFCCC process) to reduce emissions to levels consistent with the full enjoyment of human rights (i.e., safe levels) in all other countries (especially vulnerable countries), to fund adaptation measures in vulnerable countries (depending on the availability of resources), and to ensure that the international climate change agreement ... is consistent with those human rights obligations and, at the very least, does not adversely impact human rights.<sup>123</sup>

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<sup>117</sup> See *Draft Articles on the Protection of Persons in the Event of Disasters: with Commentary*, UN Doc A/71/10, 13–17 [48].

<sup>118</sup> *Ibid* 36.

<sup>119</sup> *Ibid*.

<sup>120</sup> *Ibid* 15. The ILC commentary on draft art 8 notes that cooperation might also include such things as, 'financial support; technology transfer covering, among others, technology relating to satellite imagery; training; information-sharing; joint simulation exercises and planning; and undertaking needs assessments and situation overview': *ibid* 41.

<sup>121</sup> *Ibid* 40.

<sup>122</sup> *OHCHR Report*, UN Doc A/HRC/10/61, 30 [99].

<sup>123</sup> Marc Limon, 'Human Rights and Climate Change: Constructing a Case for Political Action' (2009) 33 *Harvard Environmental Law Review* 439, 455.

A number of developed states would resist that interpretation, in the same way that they rejected the OHCHR's characterisation of international cooperation as a human rights obligation, instead only accepting that it was 'important'.<sup>124</sup>

Nevertheless, under the *ICESCR*, each state party

undertakes to take steps, individually *and through international assistance and co-operation*, especially economic and technical, 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.<sup>125</sup>

In relation to this provision, the UN Committee on Economic, Social and Cultural Rights has explained that '[w]here a State party is clearly lacking in the financial resources and/or expertise required to "work out and adopt" a detailed plan, the international community has a clear obligation to assist'.<sup>126</sup> Philip Alston and Gerard Quinn state that it is 'difficult, if not impossible' to characterise states' commitment to international cooperation in the *ICESCR* as 'a legally binding obligation upon any particular state to provide any particular form of assistance', although they note it may be possible to identify mandatory cooperation measures in the context of specific rights.<sup>127</sup> Indeed, with the development of cooperative commitments in other areas of international law, such as the climate change regime, these may become easier to ascertain.

## VI WHAT DOES INTERNATIONAL COOPERATION ENTAIL IN THE CLIMATE CHANGE CONTEXT?

In the climate change context, the principle of cooperation 'underpins almost all aspects of State efforts to deal with a common concern of humankind'.<sup>128</sup> Indeed, the domestic mitigation activities undertaken by individual states are just as much a form of international cooperation as the support provided by developed states to their developing counterparts to implement their responsibilities. However, given that this article aims to inform international refugee law, it focuses less on those aspects of international cooperation that strive to achieve a global goal through individual state action (namely,

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<sup>124</sup> Marc Limon, 'Human Rights Obligations and Accountability in the Face of Climate Change' (2010) 38 *Georgia Journal of International and Comparative Law* 543, 565–6, citing UN Human Rights Council, HRC Res 10/4, 10<sup>th</sup> sess, 41<sup>st</sup> mtg, UN Doc A/HRC/RES/10/4 (25 March 2009) Preamble: '*Recognizing also* that climate change is a global problem requiring a global solution, and that effective international cooperation to enable the full, effective and sustained implementation of the *United Nations Framework Convention on Climate Change* in accordance with the provisions and principles of the *Convention* is important in order to support national efforts for the realization of human rights implicated by climate change-related impacts'.

<sup>125</sup> *ICESCR* art 2(1) (emphasis added).

<sup>126</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No 11 (1999): Plans of Action for Primary Education (Article 14 of the International Covenant on Economic, Social and Cultural Rights)*, UN ESCOR, 20<sup>th</sup> sess, Agenda Item 7, UN Doc E/C.12/1999/4 (10 May 1999) [9].

<sup>127</sup> Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the *International Covenant on Economic, Social and Cultural Rights*' (1987) 9 *Human Rights Quarterly* 156, 191.

<sup>128</sup> ILA commentary on draft art 8: ILA, above n 8, 40.

mitigation), and more on cooperative action to support and assist developing countries.

### A Mitigation

In the refugee context, protection and assistance activities undertaken by individual states within their territories have not traditionally been considered as forms of international cooperation, even though some states have suggested that host countries provide protection on behalf of the international community,<sup>129</sup> implying that hosting refugees is itself an act of international cooperation. By contrast, measures taken by individual states to mitigate climate change are a key element of international cooperation in that context, as this is the primary way in which states can contribute to addressing this global concern.

#### 1 What this Entails

The global goal of climate change mitigation, and indeed the overarching objective of the *UNFCCC*, is to achieve ‘stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system’.<sup>130</sup> More specifically, the *Paris Agreement* aims to strengthen the global response by keeping the global average temperature well below two degrees Celsius above pre-industrial levels, with the goal of limiting this to 1.5 degrees Celsius.<sup>131</sup> It also aims to reach a global peaking of greenhouse gas emissions as soon as possible,<sup>132</sup> which fundamentally requires states to reduce their greenhouse gas emissions. In this light, states have reported on a wide range of mitigation related activities over the years, from developing national plans and strategies, to undertaking reforestation projects, to expanding sources of renewable energy. Responsibility for mitigating climate change falls on both developed and developing countries (with certain differences, discussed below), with commentators noting that climate change is ‘one of the first burden-sharing arenas that involves explicit demands by the North for a subset of actors in the South to share the costs of providing a global public good’.<sup>133</sup>

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<sup>129</sup> In 2007, Zambia stated before the General Assembly that ‘[r]efugees and internally displaced persons were the responsibility of the international community and countries of asylum were carrying a burden on its behalf’: see *Report of the United Nations High Commissioner for Refugees, Questions Relating to Refugees, Returnees and Displaced Persons and Humanitarian Questions*, UN GAOR, 3<sup>rd</sup> Comm, 62<sup>nd</sup> sess, 41<sup>st</sup> mtg, Agenda Item 42, UN Doc A/C.3/62/SR.41 (14 December 2007) 5 [25]. According to UNHCR, ‘[c]ompliance with international refugee law represents a form of responsibility-sharing, through which States honour their commitments to each other, as expressed in the *1951 Convention* and other refugee law instruments’. See Executive Committee of the High Commissioner’s Programme, *Note on International Protection: Report of the High Commissioner*, 67<sup>th</sup> sess, UN Doc A/AC.96/1156 (12 July 2016) 5 [10]. See also Dowd and McAdam, above n 1, 884–5.

<sup>130</sup> *UNFCCC* art 2.

<sup>131</sup> *Paris Agreement* art 2(1)(a).

<sup>132</sup> *Ibid* art 4(1).

<sup>133</sup> Hochstetler and Milkoreit, above 26, 206.

## 2 *The Nature of States' Responsibilities in Law*

The legal nature of states' mitigation obligations has traditionally been grounded in the principle of CBDRRC. While all states party to the *UNFCCC* assumed an obligation to '[f]ormulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change',<sup>134</sup> none were initially subject to legally binding emissions reductions targets. This changed with the adoption of the *Kyoto Protocol* in 1997 which set binding targets for a cohort of developed country signatories in defined commitment periods.<sup>135</sup> This has been described as 'a particular, and contested, interpretation of the principle of common but differentiated responsibilities'.<sup>136</sup>

More recently, the climate change regime has stepped away from this rigid approach to differentiation, characterised by a predetermined, top down allocation of emissions targets.<sup>137</sup> Instead, the *Paris Agreement* adopts 'a more flexible, calibrated approach'<sup>138</sup> whereby all countries — irrespective of their level of development — make voluntary and increasingly ambitious NDCs in light of their particular circumstances.<sup>139</sup> While the *Paris Agreement* does place certain obligations upon states with respect to mitigation, these are mostly procedural (albeit legally binding).<sup>140</sup>

Significantly, states party are not under a legal obligation to actually achieve their NDCs, although have an obligation to pursue them. Rather, art 4(2) of the *Paris Agreement* provides that '[p]arties shall pursue domestic mitigation measures, with the aim of achieving the objectives' of their NDCs.<sup>141</sup> Although framed as a legal obligation, the requirement that states merely 'aim' to achieve 'the objectives' of their NDCs dilutes its level of ambition. Likewise, most of the other substantive provisions relating to mitigation in the *Paris Agreement* are formulated as recommendations or expectations, rather than as legal

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<sup>134</sup> *UNFCCC* art 4(1)(b).

<sup>135</sup> These countries, and their quantified emission limitation or reduction commitments, are set out in Annex B to the *Kyoto Protocol*. The first commitment period ran from 2008 to 2012. The second commitment period commenced on 1 January 2013 and is set to expire in 2020.

<sup>136</sup> Rajamani, 'The Changing Fortunes of Differential Treatment', above n 3, 612.

<sup>137</sup> As explained by Falkner, the *Paris Agreement* removes two of the major structural barriers to international cooperation that limited the impact of the *Kyoto Protocol*: the disinclination of developed countries to accept rigid emissions reductions targets, and the 'distributional conflict' inherent in setting such predetermined targets: Falkner, above n 15, 1119.

<sup>138</sup> Bodansky, 'The *Paris Climate Change Agreement*', above n 21, 290.

<sup>139</sup> For a detailed analysis of the legal form of the *Paris Agreement* and the legal character of states' Nationally Determined Contributions ('NDCs'), see Daniel Bodansky, 'The Legal Character of the *Paris Agreement*' (2016) 25 *Review of European Community & International Environmental Law* 142 ('The Legal Character of the *Paris Agreement*').

<sup>140</sup> The *Paris Agreement* requires each party to prepare, communicate and maintain successive NDCs that it intends to achieve: at art 4(2); provide the information necessary for clarity, transparency, and understanding, when communicating their NDCs: at art 4(8); communicate a successive NDC every five years, which will represent a progression beyond the Party's current NDC: at arts 4(3), 4(9); account for its NDC so as to promote environmental integrity and avoid double counting: at art 4(13); and regularly provide a national greenhouse gas inventory and the information necessary to track progress in implementing and achieving its NDC: at art 13(7). This list was sourced from Bodansky, 'The Legal Character of the *Paris Agreement*', above n 139, 146. See also Bodansky, Brunnée and Rajamani, above n 18, 231–6.

<sup>141</sup> *Paris Agreement* art 4(2).

obligations.<sup>142</sup> For example, art 4(4) recommends that developed country parties ‘should continue taking the lead by undertaking economy-wide absolute emission reduction targets’ and developing countries ‘should continue enhancing their mitigation efforts’, encouraging them to move over time towards economy wide targets.<sup>143</sup>

### 3 States’ Understandings of their Responsibilities

Developing states take the view that the primary responsibility for mitigation falls squarely upon those countries that have contributed the most to global emissions, based on the principle of equity. Some emphasise developed countries’ historical responsibilities<sup>144</sup> or label them as ‘historical polluters’,<sup>145</sup> recalling that states that benefited the most from the industrial period also contributed the most to greenhouse gas emissions.<sup>146</sup> For example, the Central African Republic emphasised at COP 22 that the principles of sense of responsibility, justice and equity demand that the major contributors to the fragility of the environment pay the right price for repair and adaptation before the damage becomes irreversible.<sup>147</sup> Similarly, Namibia described climate change as ‘an issue of intergenerational justice’,<sup>148</sup> while Algeria based its call for action on the principles of balance and equity.<sup>149</sup> According to some states, the contributions of developed countries to climate change give rise to a ‘moral

<sup>142</sup> See Bodansky, ‘The Legal Character of the *Paris Agreement*’, above n 139, 146–7; Lavanya Rajamani, ‘The 2015 *Paris Agreement*: Interplay between Hard, Soft and Non-Obligations’ (2016) 28 *Journal of Environmental Law* 337.

<sup>143</sup> *Paris Agreement* art 4(4).

<sup>144</sup> See, eg, Republic of Cuba, ‘Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 19*’ (Speech delivered at the 19th Conference of the Parties to the *UNFCCC*, Warsaw, November 2013) <[http://unfccc.int/files/meetings/warsaw\\_nov\\_2013/statements/application/pdf/cop19\\_hls\\_cuba\\_esp.pdf](http://unfccc.int/files/meetings/warsaw_nov_2013/statements/application/pdf/cop19_hls_cuba_esp.pdf)>, archived at <<https://perma.cc/MS57-D8Q7>>.

<sup>145</sup> See, eg, Co-Operative Republic of Guyana, ‘Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 20*’ (Speech delivered at the 20<sup>th</sup> Conference of the Parties to the *UNFCCC*, Lima, December 2014) <[http://unfccc.int/files/meetings/lima\\_dec\\_2014/statements/application/pdf/cop20\\_hls\\_guyana.pdf](http://unfccc.int/files/meetings/lima_dec_2014/statements/application/pdf/cop20_hls_guyana.pdf)>, archived at <<https://perma.cc/FL52-SWVK>>.

<sup>146</sup> Commonwealth of Dominica, ‘Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 22*’ (Speech delivered at the 22<sup>nd</sup> Conference of the Parties to the *UNFCCC*, Marrakesh, 15 November 2016) <[http://unfccc.int/files/meetings/marrakech\\_nov\\_2016/statements/application/pdf/dominica\\_cop22cmp12cma1\\_hls.pdf](http://unfccc.int/files/meetings/marrakech_nov_2016/statements/application/pdf/dominica_cop22cmp12cma1_hls.pdf)>, archived at <<https://perma.cc/H7SX-J5U2>>.

<sup>147</sup> Central African Republic, ‘Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 22*’ (Speech delivered at the 22<sup>nd</sup> Conference of the Parties to the *UNFCCC*, Marrakesh, 16 November 2016) 3 <[http://unfccc.int/files/meetings/marrakech\\_nov\\_2016/application/pdf/centralafricanrepublic\\_cop22cmp12cma1\\_hls\\_fr.pdf](http://unfccc.int/files/meetings/marrakech_nov_2016/application/pdf/centralafricanrepublic_cop22cmp12cma1_hls_fr.pdf)>, archived at <<https://perma.cc/N4PW-WXLB>>.

<sup>148</sup> Republic of Namibia, ‘Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 22*’ (Speech delivered at the 22<sup>nd</sup> Conference of the Parties to the *UNFCCC*, Marrakesh, 16 November 2016) 3 <[http://unfccc.int/files/meetings/marrakech\\_nov\\_2016/application/pdf/namibia\\_cop22cmp12cma1\\_hls.pdf](http://unfccc.int/files/meetings/marrakech_nov_2016/application/pdf/namibia_cop22cmp12cma1_hls.pdf)>, archived at <<https://perma.cc/UN38-NVT5>>.

<sup>149</sup> Algeria, ‘Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 20*’ (Speech delivered at the 20<sup>th</sup> Conference of the Parties to the *UNFCCC*, Lima, 9 December 2014) 5 <[http://unfccc.int/files/meetings/lima\\_dec\\_2014/statements/application/pdf/cop20\\_hls\\_algeria\\_french.pdf](http://unfccc.int/files/meetings/lima_dec_2014/statements/application/pdf/cop20_hls_algeria_french.pdf)>, archived at <<https://perma.cc/RX3J-57QW>>.

obligation' to take the lead and raise their level of ambition.<sup>150</sup> The Gambia linked this moral obligation to the fact that it was drastically reducing greenhouse gas emissions itself, despite its limited capabilities and minimal responsibility for the problem.<sup>151</sup>

Although no state has questioned that the majority of emissions have emanated from developed countries, some developing states have avoided attributing blame. For example, in 2015, Dominica stated firmly that 'the time for pointing fingers and playing the blame game on the causes of climate change has passed'.<sup>152</sup> Six years earlier, Samoa had commented that '[p]laying the blame-and-shame game, or waiting to be led but not being willing to lead, are no longer options. For no single nation, no single group of nations and no single organization can win the war against climate change on its own'.<sup>153</sup>

Developed countries have rarely articulated the basis on which they undertake mitigation activities, despite acknowledging that climate change is a common concern requiring action by all (with some referring to their 'obligation' to do their fair share).<sup>154</sup> This is not surprising given that they 'were strongly opposed to any reference to their historical emissions' being included in the *UNFCCC*.<sup>155</sup> Steering well away from acknowledging a legal responsibility, and focusing instead on the voluntary nature of the NDCs, Poland stated in 2016 that 'the

<sup>150</sup> See, eg, Federated States of Micronesia, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change* COP 20' (Speech delivered at the 20<sup>th</sup> Conference of the Parties to the *UNFCCC*, Lima, 11 December 2014) 2 <[http://unfccc.int/files/meetings/lima\\_dec\\_2014/statements/application/pdf/cop20\\_hls\\_micronesia.pdf](http://unfccc.int/files/meetings/lima_dec_2014/statements/application/pdf/cop20_hls_micronesia.pdf)>, archived at <<https://perma.cc/X34N-YVD3>>; Republic of the Gambia, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change* COP 21' (Speech delivered at the 21<sup>st</sup> Conference of the Parties to the *UNFCCC*, Paris, December 2015) <[http://unfccc.int/files/meetings/paris\\_nov\\_2015/application/pdf/cop21cmp11\\_hls\\_speech\\_gambia.pdf](http://unfccc.int/files/meetings/paris_nov_2015/application/pdf/cop21cmp11_hls_speech_gambia.pdf)>, archived at <<https://perma.cc/M5AT-8QN5>>.

<sup>151</sup> Republic of the Gambia, above n 150.

<sup>152</sup> Commonwealth of Dominica, above n 74, 2.

<sup>153</sup> UN GAOR, 64<sup>th</sup> sess, 9<sup>th</sup> plen mtg, Agenda Item 8, UN Doc A/64/PV.9 (26 September 2009) 19 (Samoa).

<sup>154</sup> For example, in 2014, Liechtenstein stated that '[o]ur annual emissions are around 230,000 tons of CO<sub>2</sub> equivalents. However, these relatively small figures shall not release us from our obligation to deliver our fair share to support a zero emission world by 2100'. Liechtenstein, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change* COP 20' (Speech delivered at the 20<sup>th</sup> Conference of the Parties to the *UNFCCC*, Lima, December 2014) 2 <[http://unfccc.int/files/meetings/lima\\_dec\\_2014/statements/application/pdf/cop20\\_hls\\_liechtenstein.pdf](http://unfccc.int/files/meetings/lima_dec_2014/statements/application/pdf/cop20_hls_liechtenstein.pdf)>, archived at <<https://perma.cc/NMR7-6XMM>>. In 2016, Greece noted that '[w]e all need to do our share, since global problems need worldwide reaction': Greece, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change* COP 22' (Speech delivered at the 22<sup>nd</sup> Conference of the Parties to the *UNFCCC*, Marrakesh, November 2016) 2 <[http://unfccc.int/files/meetings/marrakech\\_nov\\_2016/application/pdf/greece\\_cop22cmp12c\\_ma1\\_hls.pdf](http://unfccc.int/files/meetings/marrakech_nov_2016/application/pdf/greece_cop22cmp12c_ma1_hls.pdf)>, archived at <<https://perma.cc/QRP2-E7LY>>. Similarly, the Czech Republic stated in 2015 that '[t]o tackle climate change effectively we need to act jointly and all Parties must contribute by their fair share in securing our future and be part of the new agreement': Czech Republic, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change* COP 21' (Speech delivered at the 21<sup>st</sup> Conference of the Parties to the *UNFCCC*, Paris, 7 December 2015) 2 <[http://unfccc.int/files/meetings/paris\\_nov\\_2015/application/pdf/cop21cmp11\\_hls\\_speech\\_czech\\_republic.pdf](http://unfccc.int/files/meetings/paris_nov_2015/application/pdf/cop21cmp11_hls_speech_czech_republic.pdf)>, archived at <<https://perma.cc/HSX4-D84B>>.

<sup>155</sup> Deleuil, above n 3, 272.

*Paris Agreement* assumes that to face these threats, all states should take part in the process, voluntarily and with respect for its own economic specificity'.<sup>156</sup>

Indeed, in terms of their own contributions, developing countries tend to refer to a 'moral obligation'<sup>157</sup> or 'responsibility'<sup>158</sup> to protect the planet, noting that they 'owe it to [themselves] and to future generations'.<sup>159</sup> This approach appears to draw on one of the key principles of the *UNFCCC*, namely that while developed countries should take the lead, all parties 'should protect the climate system for the benefit of present and future generations of humankind'.<sup>160</sup> Some developing countries have also argued that mitigation is less of a priority for them than adaptation.<sup>161</sup>

Developing countries have rarely implied that they have a legal obligation to undertake mitigation, although some have used language such as 'must' when referring to playing their part.<sup>162</sup> The strongest such statement was delivered by the Philippines in 2013, which noted that 'we are, most of all, guided not only because it is moral to do so, but because it is our obligation to do so'.<sup>163</sup> Generally, they imply that their efforts are acts of goodwill, especially given that for many, their contribution to climate change has been minimal. For example, in 2014, Sri Lanka stated that '[e]ven though our per capita emission is still less than one ton, and it is insignificant in the global sense, Sri Lanka also has contributed and will contribute to global mitigation efforts'.<sup>164</sup> Similarly, Singapore stated that '[t]he SIDS (Small Island Developing States), of which Singapore is a member, contribute very little to global emissions but we will play

<sup>156</sup> Poland, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 22*' (Speech delivered at the 22<sup>nd</sup> Conference of the Parties to the *UNFCCC*, Marrakesh, November 2016) <[http://unfccc.int/files/meetings/marrakech\\_nov\\_2016/statements/application/pdf/poland\\_cop22cmp12cma1\\_hls.pdf](http://unfccc.int/files/meetings/marrakech_nov_2016/statements/application/pdf/poland_cop22cmp12cma1_hls.pdf)>, archived at <<https://perma.cc/XBL3-NMAT>>.

<sup>157</sup> Vanuatu, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 22*' (Speech delivered at the 22<sup>nd</sup> Conference of the Parties to the *UNFCCC*, Marrakesh, 15 November 2016) 3 <[http://unfccc.int/files/meetings/marrakech\\_nov\\_2016/statements/application/pdf/vanuatu\\_cop22cmp12cma1\\_hls.pdf](http://unfccc.int/files/meetings/marrakech_nov_2016/statements/application/pdf/vanuatu_cop22cmp12cma1_hls.pdf)>, archived at <<https://perma.cc/C5FW-YVJE>>.

<sup>158</sup> Brunei Darussalam, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 19*' (Speech delivered at the 19<sup>th</sup> Conference of the Parties to the *UNFCCC*, Warsaw, 20 November 2013) 4 <[http://unfccc.int/files/meetings/warsaw\\_nov\\_2013/statements/application/pdf/cop19\\_hls\\_brunei\\_darussalam.pdf](http://unfccc.int/files/meetings/warsaw_nov_2013/statements/application/pdf/cop19_hls_brunei_darussalam.pdf)>, archived at <<https://perma.cc/T35H-YAZU>>.

<sup>159</sup> Commonwealth of Dominica, above n 146, 4.

<sup>160</sup> *UNFCCC* art 3(1).

<sup>161</sup> Belize stated in 2015 that '[f]or us ... the overriding challenge is not how we mitigate the emissions of greenhouse gases, it is how we adapt to the devastating impacts of climate change': Belize, above n 83, 3.

<sup>162</sup> See, eg, Republic of the Marshall Islands, above n 6, 2.

<sup>163</sup> The Philippines, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 19*' (Speech delivered at the 19<sup>th</sup> Conference of Parties to the *UNFCCC*, Warsaw, November 2013) 3 <[http://unfccc.int/files/meetings/warsaw\\_nov\\_2013/statements/application/pdf/cop19\\_hls\\_philippines.pdf](http://unfccc.int/files/meetings/warsaw_nov_2013/statements/application/pdf/cop19_hls_philippines.pdf)>, archived at <<https://perma.cc/9NTM-4JAN>>.

<sup>164</sup> Sri Lanka, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 20*' (Speech delivered at the 20<sup>th</sup> Conference of Parties to the *UNFCCC*, Lima, December 2014) 3 <[http://unfccc.int/files/meetings/lima\\_dec\\_2014/statements/application/pdf/cop20\\_hls\\_sri\\_lanka.pdf](http://unfccc.int/files/meetings/lima_dec_2014/statements/application/pdf/cop20_hls_sri_lanka.pdf)>, archived at <<https://perma.cc/8JC2-UQQE>>.

our part'.<sup>165</sup> Ethiopia explained that 'however small our contribution to the atmospheric content of greenhouse gases is and however small our capacity is, we need to do the best we can to mitigate climate change, and not only to adapt to it'.<sup>166</sup>

### B The Provision of Support to Developing States

One significant objective of international cooperation in the climate change context is to boost the ability of developing countries to implement their adaptation and mitigation responsibilities, thereby more effectively contributing to a reduction in global emissions. It is this aspect of international cooperation that most closely mirrors responsibility sharing in refugee law, as it involves developed countries assisting those with lesser capacity to address a shared problem. This has been described by Malaysia as one of 'the central tenets of the *Convention*',<sup>167</sup> with the *Paris Agreement* explaining that enhanced support for developing country parties will allow for higher ambition in their actions.<sup>168</sup> While subject to differing interpretations,<sup>169</sup> the *UNFCCC* explicitly recognises that '[t]he extent to which developing country Parties will effectively implement their commitments under the *Convention* will depend on the effective implementation by developed country Parties of their commitments under the *Convention* related to financial resources and transfer of technology'.<sup>170</sup> In international refugee law, by contrast, the implementation of developing states' obligations is not — and must not become — dependent on the provision of support by developed countries.

<sup>165</sup> Singapore, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 20*' (Speech delivered at the 20<sup>th</sup> Conference of Parties to the *UNFCCC*, Lima, 9 December 2014) 2 [5] <[http://unfccc.int/files/meetings/lima\\_dec\\_2014/statements/application/pdf/cop20\\_hls\\_singapore.pdf](http://unfccc.int/files/meetings/lima_dec_2014/statements/application/pdf/cop20_hls_singapore.pdf)>, archived at <<https://perma.cc/C59L-C2SU>>.

<sup>166</sup> Ethiopia, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 20*' (Speech delivered at the 20<sup>th</sup> Conference of Parties to the *UNFCCC*, Lima, December 2014) 1 <[http://unfccc.int/files/meetings/lima\\_dec\\_2014/statements/application/pdf/cop20\\_hls\\_ethopia.pdf](http://unfccc.int/files/meetings/lima_dec_2014/statements/application/pdf/cop20_hls_ethopia.pdf)>, archived at <<https://perma.cc/R737-BVS2>>.

<sup>167</sup> Malaysia, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 22*' (Speech delivered at the 22<sup>nd</sup> Conference of Parties to the *UNFCCC*, Marrakesh, November 2016) 2 <[http://unfccc.int/files/meetings/marrakech\\_nov\\_2016/statements/application/pdf/malaysia\\_cop22cmp12cma1\\_hls.pdf](http://unfccc.int/files/meetings/marrakech_nov_2016/statements/application/pdf/malaysia_cop22cmp12cma1_hls.pdf)>, archived at <<https://perma.cc/C2LL-R3LY>>.

<sup>168</sup> *Paris Agreement* art 4(5). Further, art 3 acknowledges that '[t]he efforts of all Parties will represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of this *Agreement*'.

<sup>169</sup> Lavanya Rajamani, 'The Nature, Promise, and Limits of Differential Treatment in the Climate Regime' (2005) 16 *Yearbook of International Environmental Law* 81, 81–2 (citations omitted): 'Differential treatment, broadly conceived, is deeply embedded in the fabric of the new generation international environmental agreements and is, indeed, the essence of the compact between industrial and developing countries with respect to international environmental protection'.

<sup>170</sup> *UNFCCC* art 4(7). *Cooperation and Support* (2014) United Nations Convention on Climate Change <[http://unfccc.int/cooperation\\_and\\_support/items/2664.php](http://unfccc.int/cooperation_and_support/items/2664.php)>, archived at <<https://perma.cc/XHG2-TN9M>> provides information on various forms of financial, technical and other support available for developing countries to assist them with adaptation and mitigation.

## 1 What this Entails

The latest report of the Intergovernmental Panel on Climate Change recognises that '[w]hile adaptation focuses primarily on local to national scale outcomes, its effectiveness can be enhanced through coordination across governance scales, including international cooperation'.<sup>171</sup> Such cooperation can include support with the development of adaptation strategies, plans and actions at the national, sub-national and local levels.<sup>172</sup> Unlike mitigation, there is more incentive for individual states to engage in adaptation and, simultaneously, a reduced incentive for the international community to assist them as the global benefits are less obvious.<sup>173</sup> A parallel can be drawn here with responsibility sharing in the refugee context, where the benefits for states outside the affected region are not always apparent.

With respect to adaptation, developing countries predominantly call on their developed counterparts for financial assistance, technology transfer and capacity building, echoing the terms of the *UNFCCC* and the *Paris Agreement*. A typical example is the statement of Belize in 2016, which explained that '[p]redictable finance, balanced between mitigation and adaptation, capacity building and transfer of technology are crucial for the full and effective implementation of the *Paris Agreement*'.<sup>174</sup> Of course, priorities differ between states, with some emphasising the heightened needs of Least Developed Countries and the Small Island Developing States,<sup>175</sup> and others focusing on their own particular needs,

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<sup>171</sup> Core Writing Team, Pachauri and Meyer, above n 36, 102.

<sup>172</sup> Ibid 106. The Republic of Ireland explained in 2016 that '[w]e will continue supporting our partners to integrate climate adaptation in development plans, particularly in social protection, disaster risk reduction, and strengthening agriculture and food systems': Republic of Ireland, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 22*' (Speech delivered at the 22<sup>nd</sup> Conference of Parties to the *UNFCCC*, Marrakesh, 16 November 2016) 3 <[http://unfccc.int/files/meetings/marrakech\\_nov\\_2016/application/pdf/ireland\\_cop22cmp12\\_cma1\\_hls.pdf](http://unfccc.int/files/meetings/marrakech_nov_2016/application/pdf/ireland_cop22cmp12_cma1_hls.pdf)>, archived at <<https://perma.cc/45AY-DEVH>>.

<sup>173</sup> Bodansky argues that the primary drivers 'are the potential spillover effects of climate change impacts (for example, in the form of refugees), the sharing of information and expertise, and the moral responsibility of emitting states to compensate victim states for transboundary harms. But, to date, none of these rationales has been sufficient to motivate a strong international response'. He uses the term 'refugee' very loosely here to describe people displaced across a border by the impacts of climate change: Bodansky, 'The *Paris Climate Change Agreement*', above n 21, 308; this is not its legal meaning, and there has been a concerted effort among legal scholars and policymakers to avoid using that term in this context. For the legal definition of 'refugee', see *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 1A(2); The Nansen Initiative, 'Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change' (Report, December 2015) vol I and II <<https://nanseninitiative.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-1.pdf>>, archived at <<https://perma.cc/RXW4-CKV2>>, <<https://nanseninitiative.org/wp-content/uploads/2015/02/PROTECTION-AGENDA-VOLUME-2.pdf>>, archived at <<https://perma.cc/8GTP-HA7J>>; Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford University Press, 2012).

<sup>174</sup> Belize, above n 5, 4.

<sup>175</sup> See, eg, Senegal, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 21*' (Speech delivered at the High-Level Segment of the 21<sup>st</sup> Conference of the Parties to the *UNFCCC*, Paris, 7 December 2015) 3 <[http://unfccc.int/files/meetings/paris\\_nov\\_2015/application/pdf/cop21cmp11\\_hls\\_speech\\_senegal.pdf](http://unfccc.int/files/meetings/paris_nov_2015/application/pdf/cop21cmp11_hls_speech_senegal.pdf)>, archived at <<https://perma.cc/C9WC-WCS5>>.

such as technology transfers in the areas of agriculture, forestry and clean energy.<sup>176</sup>

Predictably, some developing countries prioritise support for adaptation over mitigation. For example, at COP 21 in 2015, Dominica focused its call for enhanced action and international cooperation on adaptation and support for loss and damage.<sup>177</sup> Vanuatu argued that '[i]t is crucial that adaptation support rests on the developed countries' obligations under the *Convention* rather than shifting the burden to developing countries with limited means'.<sup>178</sup> Venezuela similarly observed in 2014 that given historical responsibility and differentiated responsibilities, large developed countries must bear the cost of developing countries adapting to climate change.<sup>179</sup>

While the *UNFCCC* recognises the right to promote sustainable development,<sup>180</sup> some developing countries argue that support for adaptation and mitigation serves their broader objective of realising the right to development (a wider concept).<sup>181</sup> They fear that if they channel their resources into climate change action, this will have negative repercussions for their own economic development. Similarly, in the refugee context, states hosting large numbers of refugees emphasise the impact on their society, economy, environment and development objectives,<sup>182</sup> with some calling for international cooperation to bridge the gap between the provision of more immediate humanitarian assistance and longer-term development.<sup>183</sup>

With respect to technology transfer, specifically, Iran noted in 2014 that moving towards a low carbon economy is 'technology intensive', emphasising

<sup>176</sup> Gabonese Republic, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 21*' (Speech delivered at the 21<sup>st</sup> Conference of the Parties to the *UNFCCC*, Paris, 8 December 2015) 3–4 <[http://unfccc.int/files/meetings/paris\\_nov\\_2015/application/pdf/cop21cmp11\\_hls\\_speech\\_gabon.pdf](http://unfccc.int/files/meetings/paris_nov_2015/application/pdf/cop21cmp11_hls_speech_gabon.pdf)>, archived at <<https://perma.cc/SQ2V-CUJL>>.

<sup>177</sup> Commonwealth of Dominica, above n 74, 3.

<sup>178</sup> Vanuatu, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 21*' (Speech delivered at the 21<sup>st</sup> Conference of the Parties to the *UNFCCC*, Paris, 8 December 2015) <[http://unfccc.int/files/meetings/paris\\_nov\\_2015/application/pdf/cop21cmp11\\_hls\\_speech\\_vanuatu.pdf](http://unfccc.int/files/meetings/paris_nov_2015/application/pdf/cop21cmp11_hls_speech_vanuatu.pdf)>, archived at <<https://perma.cc/G36M-5U3H>>.

<sup>179</sup> Bolivarian Republic of Venezuela, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 20*' (Speech delivered at the 20<sup>th</sup> Conference of the Parties to the *UNFCCC*, Lima, 10 December 2014) 6 <[http://unfccc.int/files/meetings/lima\\_dec\\_2014/statements/application/pdf/cop20\\_hls\\_venezuela.pdf](http://unfccc.int/files/meetings/lima_dec_2014/statements/application/pdf/cop20_hls_venezuela.pdf)>, archived at <<https://perma.cc/T5HS-4UDB>>.

<sup>180</sup> See *UNFCCC* arts 3(4)–(5).

<sup>181</sup> See, eg, Vanuatu, above n 178; and Senegal, above n 175, 3, which noted that developing countries cannot be asked to commit to a transition towards low carbon economies without provision for the accompanying insurance, as they have a legitimate right to development.

<sup>182</sup> See, eg, Namibia's statement in 2014: 'Noting that Namibia, like many African countries, found that assisting refugees placed an additional burden on its own economy and development, she called for increased support from the international community': Executive Committee of the Programme of the United Nations High Commissioner for Refugees, *Summary Record of the 676<sup>th</sup> Meeting*, 65<sup>th</sup> sess, UN Doc A/AC.96/SR.676 (7 October 2014) 4 [14] (Namibia).

<sup>183</sup> For example, Algeria stated in 2007 that '[c]ooperation projects should bridge the gap between humanitarian assistance and long-term development and address durable solutions'. Executive Committee of the Programme of the UNHCR, *Summary Record of the 614<sup>th</sup> Meeting*, UN GAOR, 58<sup>th</sup> sess, 614<sup>th</sup> mtg, UN Doc A/AC.96/SR.614 (6 November 2007) 14 [72].

the need for international cooperation to develop, transfer and disseminate technology.<sup>184</sup> The representative explained that since fossil fuels will continue to provide affordable, accessible and reliable energy for decades to come, transferring technologies and ‘associated know how’ to achieve cleaner energy from fossil fuels was ‘of paramount importance’.<sup>185</sup> The representative also pointed out that such transfers were ‘critical for sustainable agriculture to promote food security and to combat hunger and poverty across the globe’.<sup>186</sup>

## 2 *The Nature of States’ Responsibilities in Law*

In international refugee law, even if it could be argued that states have a legally binding obligation to engage in international cooperation, the problem is defining what this means in terms of the individual contributions of states.<sup>187</sup> In the climate change context, this has been somewhat resolved since the obligations of developed countries to support their developing counterparts have been incorporated into international legal instruments.<sup>188</sup> However, as detailed below, the scope of these obligations is not always clear, leaving states with a certain amount of discretion.

Pursuant to the *UNFCCC*, developed countries have various legal obligations to support capacity building, provide financial resources and transfer technology to developing countries to enable them to meet their own commitments.<sup>189</sup> This includes a specific obligation to assist developing countries with the costs of adaptation.<sup>190</sup> In some of these provisions, however, the obligation relates to *engaging in* cooperation rather than delivering concrete outputs. For example, under art 4(1)(c), all parties must ‘[p]romote and cooperate in the development, application and diffusion, including transfer, of technologies, practices and processes’,<sup>191</sup> while under art 4(1)(e), they must ‘[c]ooperate in preparing for adaptation to the impacts of climate change’.<sup>192</sup>

The *Paris Agreement* contains similar obligations, requiring developed countries to provide financial resources to assist developing countries with mitigation and adaptation<sup>193</sup> (and to provide information about this),<sup>194</sup> and requiring all parties to ‘strengthen cooperative action on technology development

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<sup>184</sup> Iran, above n 85, 3.

<sup>185</sup> Ibid.

<sup>186</sup> Ibid.

<sup>187</sup> Dowd and McAdam, above n 1.

<sup>188</sup> For a detailed analysis of the legal form of the *Paris Agreement* and the legal character of its provisions, see Bodansky, ‘The Legal Character of the *Paris Agreement*’, above n 139; Savaresi, above n 17, 19–20.

<sup>189</sup> See, eg, *UNFCCC* arts 4(1)(c), 4(3), 4(5).

<sup>190</sup> *UNFCCC* art 4(4).

<sup>191</sup> Ibid art 4(1)(c). Another example is art 4(1)(h), which requires states party to ‘[p]romote and cooperate in the full, open and prompt exchange of relevant scientific, technological, technical, socio-economic and legal information related to the climate system and climate change, and to the economic and social consequences of various response strategies’. See also art 5(c).

<sup>192</sup> Ibid art 4(1)(e).

<sup>193</sup> *Paris Agreement* art 9(1).

<sup>194</sup> Ibid art 13(9).

and transfer'.<sup>195</sup> Most of the other provisions on cooperation and assistance do not impose legal obligations,<sup>196</sup> including with respect to capacity building.<sup>197</sup> For example, art 11(3) states that all parties 'should' cooperate to enhance the capacity of developing countries to implement the agreement and that developed country parties 'should' enhance support for capacity building in developing countries.<sup>198</sup>

### 3 *States' Understanding of their Responsibilities*

A number of developing countries have variously referred to developed countries as having 'commitments',<sup>199</sup> a 'responsibility',<sup>200</sup> 'obligations'<sup>201</sup> and/or 'a duty'<sup>202</sup> to provide financial support, technology and/or capacity building, implying varying degrees of legal obligation. Some have made specific reference to states' obligations under the *Paris Agreement* and/or the *UNFCCC* to give their statements greater legal weight. For example, at COP 22, in 2016, Malaysia 'urge[d] developed country Parties, in line with their obligations under

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<sup>195</sup> Ibid art 10(2). Bodansky, 'The Legal Character of the *Paris Agreement*', above n 139, 145–6, argues that provisions directed at 'developed country parties' are collective in nature, since a plural subject 'usually suggests that these provisions are intended to create collective rather than individual obligations' (although he notes that 'in at least some cases this does not appear to be true'). This could somewhat blur the specific obligations of individual states.

<sup>196</sup> For example, *Paris Agreement* art 9(3) states that 'developed country Parties should continue to take the lead in mobilizing climate finance', while art 9(2) encourages other parties to provide support to developing countries' mitigation and adaptation efforts. Article 3 — which sets out key principles — 'recogniz[es] the need to support developing country Parties for the effective implementation of this Agreement'. Article 7(7) recommends that parties strengthen their cooperation on adaptation.

<sup>197</sup> All parties do, however, have an obligation to regularly report on any measures taken to enhance the capacity of developing countries: see ibid art 11(4). Article 13(15) states that '[s]upport shall also be provided for the building of transparency related-capacity of developing country Parties on a continuous basis': ibid.

<sup>198</sup> Ibid art 11(3).

<sup>199</sup> See, eg, People's Republic of China, above n 77, 2.

<sup>200</sup> See, eg, Malaysia, above n 167, 2; United Arab Emirates, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 22*' (Speech delivered at the 22<sup>nd</sup> Conference of the Parties to the *UNFCCC*, Marrakesh, November 2016) 2 <[http://unfccc.int/files/meetings/marrakech\\_nov\\_2016/application/pdf/unitedarabemirates\\_cop22cmp12cma1\\_hls.pdf](http://unfccc.int/files/meetings/marrakech_nov_2016/application/pdf/unitedarabemirates_cop22cmp12cma1_hls.pdf)>, archived at <<https://perma.cc/JB5Q-P74J>>.

<sup>201</sup> For example, in 2016, Kenya referred to 'the obligations of developed country Parties to provide additional, predictable and sustainable support in terms of finance, technology and capacity building to meet the adaptation and mitigation needs of the developing country Parties': Republic of Kenya, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 22*' (Speech delivered at the 22<sup>nd</sup> Conference of the Parties to the *UNFCCC*, Marrakesh, 15 November 2016) 2 <[http://unfccc.int/files/meetings/marrakech\\_nov\\_2016/application/pdf/kenya\\_cop22cmp12cma1\\_hls.pdf](http://unfccc.int/files/meetings/marrakech_nov_2016/application/pdf/kenya_cop22cmp12cma1_hls.pdf)>, archived at <<https://perma.cc/QPV6-NNCA>>. See also Malaysia, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 21*' (Speech delivered at the 21<sup>st</sup> Conference of the Parties to the *UNFCCC*, Paris, December 2015) 3 <[http://unfccc.int/files/meetings/paris\\_nov\\_2015/application/pdf/cop21cmp11\\_hls\\_speech\\_malaysia.pdf](http://unfccc.int/files/meetings/paris_nov_2015/application/pdf/cop21cmp11_hls_speech_malaysia.pdf)>, archived at <<https://perma.cc/9SPW-CGVC>>.

<sup>202</sup> *Summary Record of the 5<sup>th</sup> Meeting*, UN GAOR, 2<sup>nd</sup> Comm, 64<sup>th</sup> sess 5<sup>th</sup> mtg, UN Doc A/C.2/64/SR.5 (4 November 2009) 8 [63].

the *Paris Agreement* to accelerate and scale up the provision of financial, technological and capacity support for adaptation'.<sup>203</sup>

In calling for support, developing countries have also pointed to the efforts that developing countries are already making, implying that they deserve assistance to extend these further. Part of Peru's explanation in demanding further support, for example, was 'recognition of the efforts that developing countries have already made'.<sup>204</sup> They have also highlighted the disproportionate burden that they bear relative to their own contributions to global emissions. Nepal, for instance, argued that countries like its own 'deserve[d] special assistance in creating and maintaining climate-resilient societies'.<sup>205</sup> Indeed, developing countries have tended to focus on their adaptation objectives rather than their desire to contribute to a reduction in global emissions, highlighting the particularly devastating impact that climate change is having in some parts of the world.<sup>206</sup>

By way of comparison, developed countries have not generally set out their reasons for providing support to developing ones. Generally, they have announced the measures they have taken (or will take) without specifying the

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<sup>203</sup> Malaysia, above n 167, 4. See also Timor Leste's statement: 'we would like to urge developed country parties to take the lead to reduce their respective greenhouse gas emissions and to provide financial support for developing countries based on the principles and provisions of the *Convention* as well as the *Paris Agreement*'. Timor-Leste, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 22*' (Speech delivered at the 22<sup>nd</sup> Conference of the Parties to the *UNFCCC*, Marrakesh, 16 November 2016) 2 <[http://unfccc.int/files/meetings/marrakech\\_nov\\_2016/statements/application/pdf/timor\\_lest\\_e\\_cop22cmp12cma1\\_hls.pdf](http://unfccc.int/files/meetings/marrakech_nov_2016/statements/application/pdf/timor_lest_e_cop22cmp12cma1_hls.pdf)>, archived at <<http://perma.cc/9YBV-DC54>>.

<sup>204</sup> UN SCOR, 66<sup>th</sup> sess, 6587<sup>th</sup> mtg, UN Doc S/PV.6587 (20 July 2011) 23.

<sup>205</sup> UN GAOR, 67<sup>th</sup> sess, 15<sup>th</sup> plen mtg, Agenda Item 8, UN Doc A/67/PV.15 (28 September 2012) 31–2.

<sup>206</sup> See, eg, Honduras, 'Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 22*' (Speech delivered at the 22<sup>nd</sup> Conference of the Parties to the *UNFCCC*, Marrakesh, November 2016) <[http://unfccc.int/files/meetings/marrakech\\_nov\\_2016/application/pdf/honduras\\_cop22cmp12cma1\\_hls\\_sp.pdf](http://unfccc.int/files/meetings/marrakech_nov_2016/application/pdf/honduras_cop22cmp12cma1_hls_sp.pdf)>, archived at <<https://perma.cc/7ZPW-UUGQ>>. In this statement, Honduras noted that developed countries must make new and additional financial resources available to developing countries to cope with the effects of climate change.

basis for doing so.<sup>207</sup> Arguably, this is because they do not want to add to a growing body of state practice that may strengthen their obligations in this domain. Certainly, they have rarely referred to their responsibilities under international law.<sup>208</sup> This is to be expected and does not necessarily imply that legal developments have not influenced their conduct.

However, some states have argued that they are ‘playing [their] part’,<sup>209</sup> affirming a ‘spirit of solidarity’,<sup>210</sup> or acknowledging an ‘urgent need’<sup>211</sup> for developing countries to receive support. In 2013, after recalling the damage that industrialised countries have caused the environment, Switzerland noted that

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<sup>207</sup> For example, in 2014, after setting out its own progress, Finland stated that it ‘stands ready to help developing countries to achieve the same’. The representative described Finland’s financial contributions to various funds, but did not provide a basis for having done so. Finland, ‘Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 20*’ (Speech delivered at the 20<sup>th</sup> Conference of the Parties to the *UNFCCC*, Lima, 9 December 2014) 4 <[http://unfccc.int/files/meetings/lima\\_dec\\_2014/statements/application/pdf/cop20\\_hls\\_finland.pdf](http://unfccc.int/files/meetings/lima_dec_2014/statements/application/pdf/cop20_hls_finland.pdf)>, archived at <<https://perma.cc/7SSC-GSCA>>. In 2013, Denmark set out financial contributions it had made and would make, but did not specify the basis, apart from a reference to ‘our commitments’: Denmark, ‘Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 19*’ (Speech delivered at the 19<sup>th</sup> Conference of the Parties to the *UNFCCC*, Warsaw, November 2013) 2 <[http://unfccc.int/files/meetings/warsaw\\_nov\\_2013/statements/application/pdf/cop19\\_hls\\_denmark.pdf](http://unfccc.int/files/meetings/warsaw_nov_2013/statements/application/pdf/cop19_hls_denmark.pdf)>, archived at <<https://perma.cc/XH54-AHVM>>. Germany similarly set out its financial contributions without specifying the basis for doing so: above n 91, 2–3. See also Canada, ‘Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 22*’ (Speech delivered at the 22<sup>nd</sup> Conference of Parties to the *UNFCCC*, Marrakesh, 16 November 2016) 5–6 <[http://unfccc.int/files/meetings/marrakech\\_nov\\_2016/application/pdf/canada\\_cop22cmp12\\_cma1\\_hls.pdf](http://unfccc.int/files/meetings/marrakech_nov_2016/application/pdf/canada_cop22cmp12_cma1_hls.pdf)>, archived at <<https://perma.cc/HZ6K-SW7B>>; Canada, above n 90, 1; Japan, ‘Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 20*’ (Speech delivered at the 20<sup>th</sup> Conference of Parties to the *UNFCCC*, Lima, December 2014) 2–3 <[http://unfccc.int/files/meetings/lima\\_dec\\_2014/statements/application/pdf/cop20\\_hls\\_japan.pdf](http://unfccc.int/files/meetings/lima_dec_2014/statements/application/pdf/cop20_hls_japan.pdf)>, archived at <<https://perma.cc/E5RL-53AJ>>.

<sup>208</sup> For exceptions, even though not particularly strongly worded, see Italy, ‘Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 19*’ (Speech delivered at the 19<sup>th</sup> Conference of Parties to the *UNFCCC*, Warsaw, 20 November 2013) <[http://unfccc.int/files/meetings/warsaw\\_nov\\_2013/statements/application/pdf/cop19\\_hls\\_italy.pdf](http://unfccc.int/files/meetings/warsaw_nov_2013/statements/application/pdf/cop19_hls_italy.pdf)>, archived at <<https://perma.cc/5RTX-7BFE>>; Israel, above n 7, 4.

<sup>209</sup> The Australian representative set out Australia’s actions internationally without mentioning the basis for doing so, stating in passing that Australia is ‘more than playing our part’. This indirectly acknowledges that Australia has a part to play: Australia, above n 88, 3.

<sup>210</sup> Liechtenstein, above n 154, 3.

<sup>211</sup> In 2013, Finland recognised ‘the urgent need to commit both at home and abroad’, setting out its own climate financing to developing countries for both mitigation and adaptation. Finland, ‘Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 19*’ (Speech delivered at the 19<sup>th</sup> Conference of the Parties to the *UNFCCC*, Warsaw, 20 November 2013) 3 <[http://unfccc.int/files/meetings/warsaw\\_nov\\_2013/statements/application/pdf/cop19\\_hls\\_finland.pdf](http://unfccc.int/files/meetings/warsaw_nov_2013/statements/application/pdf/cop19_hls_finland.pdf)>, archived at <<https://perma.cc/96YN-WM27>>.

they ‘therefore have a duty to help other countries to develop in the shape of transferring know-how and technology’.<sup>212</sup>

Some developed countries have referred specifically to the particular needs of Least Developed Countries. In 2016, for example, the Czech Republic acknowledged that ‘the poorest and most vulnerable countries are dependent on support’.<sup>213</sup> Belgium stated that all developed countries should be involved in mitigation and adaptation efforts in a balanced manner to ensure that the poorest and most vulnerable countries receive adequate financial support to address the challenges they face, noting that significant capacity building efforts were required.<sup>214</sup> While acknowledging a responsibility to assist countries most in need, Italy distanced itself from individual responsibility by placing the obligation on the ‘international community’ generally.<sup>215</sup> Interestingly, this has been a common feature of the international refugee regime: developed countries have often referred to the responsibilities of the ‘international community’, rather than their own responsibilities or those of developed countries as a group.<sup>216</sup>

## VII CONCLUSION

No single state can resolve the drivers of refugee movement or respond to the protection needs of the world’s refugees, just as no single state can mitigate or address the global impacts of climate change. The need for international cooperation and responsibility sharing in both cases is clear. Yet, an examination of states’ statements in public fora over a number of years reveals that it is ultimately *national* interests that prevail when determining how such global issues should be addressed. This may partly explain why there has been much more progress in solidifying states’ cooperative obligations relating to climate change — a global problem that affects all countries, albeit some more than

<sup>212</sup> Swiss Confederation, ‘Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 19*’ (Speech delivered at the 19<sup>th</sup> Conference of the Parties to the *UNFCCC*, Warsaw, November 2013) 2–3 <[http://unfccc.int/files/meetings/warsaw\\_nov\\_2013/statements/application/pdf/cop19\\_hls\\_s\\_witzerland.pdf](http://unfccc.int/files/meetings/warsaw_nov_2013/statements/application/pdf/cop19_hls_s_witzerland.pdf)>, archived at <<http://perma.cc/LGC7-VZNT>>. See also UN GAOR, 63<sup>rd</sup> sess, 8<sup>th</sup> plen mtg, UN Doc A/63/PV.8 (24 September 2008) 31.

<sup>213</sup> Czech Republic, ‘Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 22*’ (Speech delivered at the 22<sup>nd</sup> Conference of the Parties to the *UNFCCC*, Marrakesh, 16 November 2016) 2 <[http://unfccc.int/files/meetings/marrakech\\_nov\\_2016/statements/application/pdf/czechrepublic\\_cop22cmp12cma1\\_hls-62872.pdf](http://unfccc.int/files/meetings/marrakech_nov_2016/statements/application/pdf/czechrepublic_cop22cmp12cma1_hls-62872.pdf)>, archived at <<http://perma.cc/RLR5-U7RA>>.

<sup>214</sup> Belgium, ‘Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 22*’ (Speech delivered at the 22<sup>nd</sup> Conference of the Parties to the *UNFCCC*, Marrakesh, November 2016) 3 <[http://unfccc.int/files/meetings/marrakech\\_nov\\_2016/statements/application/pdf/belgium\\_cop22cmp12cma1\\_hls\\_fr.pdf](http://unfccc.int/files/meetings/marrakech_nov_2016/statements/application/pdf/belgium_cop22cmp12cma1_hls_fr.pdf)>, archived at <<http://perma.cc/6AU4-B4RZ>>.

<sup>215</sup> Italian Republic, ‘Statement at the High-Level Segment of the *United Nations Framework Convention on Climate Change COP 21*’ (Speech delivered at the 21<sup>st</sup> Conference of the Parties to the *UNFCCC*, Paris, December 2015) 2 <[http://unfccc.int/files/meetings/paris\\_nov\\_2015/application/pdf/cop21cmp11\\_hls\\_speech\\_italy.pdf](http://unfccc.int/files/meetings/paris_nov_2015/application/pdf/cop21cmp11_hls_speech_italy.pdf)>, archived at <<http://perma.cc/P2ZT-A4W4>>: ‘The role of the international community will be crucial to help the poorer countries, in particular those with the most fragile territories: islands, deserts, mountains’.

<sup>216</sup> For example, in 2016, Sweden ‘called on the international community to show solidarity and share responsibility with host countries’: see Executive Committee of the Programme of the UNHCR, *Summary Record of the 691<sup>st</sup> Meeting*, UN GAOR, 66<sup>th</sup> sess, 691<sup>st</sup> mtg, UN Doc A/AC.96/SR.691 (13 October 2015) 5 [19].

others — than with respect to refugee movements, the impacts of which are often geographically limited. International refugee law does not yet have a mechanism to systematically, equitably and predictably allocate responsibilities among states at a global level, and it is widely acknowledged that states are not yet prepared to adopt an international legal instrument to fill this gap.<sup>217</sup> Even within the climate change context, states appear more willing to support developing countries with mitigation rather than adaptation, since the former will have benefits far beyond the recipient state's borders.

Overall, however, states appear not to question the centrality of the international cooperation principle in climate change law, even though their statements leave a number of questions unanswered. The extent to which their individual efforts will bring about the necessary reduction in emissions and the stabilisation of global temperatures to which the *Paris Agreement* aspires remains to be seen. In terms of supporting developing states to implement their commitments, the scope of international cooperation is not entirely clear. Developed states have legal obligations, but most are either collective (focused on cooperating towards, rather than achieving, an end) or general (in terms of what they are required to provide, when, and to whom). In their public statements, states neither spell out their obligations clearly nor link their actions to them. Notwithstanding this, climate change law is ahead of refugee law in that supporting capacity building, providing financial resources and transferring technology are the subject of international legal obligations.

International cooperation is an inherently opaque concept that does not permit clear definition, either in the climate change or refugee contexts. Given that states have been unwilling to accept and implement set emissions reduction targets — including states that were indisputably large emitters (and, simultaneously, had the strongest economies) — it is highly unlikely that states would accept set financial or physical responsibility sharing targets to address the protection needs of refugees.<sup>218</sup> The nature of refugee protection is, in any case, different: unlike the ongoing, global problem of climate change, refugee movements are situation-specific. States are therefore even less likely to agree to preformulated obligations without knowing when, where, or how often they will be triggered.

New binding obligations on international cooperation are not politically palatable in the refugee context at present. However, the implementation of the *Comprehensive Refugee Response Framework* ('CRRF') — and, in turn, the *Global Compact on Refugees* — may provide an interim solution. Annexed to the *New York Declaration* adopted by the UN General Assembly in September

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<sup>217</sup> Dowd and McAdam, above n 1. Wall calls for the adoption of a framework convention in refugee law to fill this gap, inspired by the *UNFCCC*: Wall, above n 53.

<sup>218</sup> Failed attempts by the European Commission to implement a quota system for the distribution of refugees are indicative of this: see, eg, European Commission, 'Commission Recommendation on a European Resettlement Scheme' (Recommendation No C(2015) 3560 final, 8 June 2015); European Commission, 'Proposal for a Council Decision Establishing Measures in the Area of International Protection for the Benefit of Italy and Greece' (Proposal No COM(2015) 286 final, 27 May 2015); Heaven Crawley, 'Named and Shamed: EU Countries Are Failing To Share Responsibility For Refugees', *The Conversation* (online), 19 July 2017 <<http://theconversation.com/named-and-shamed-eu-countries-are-failing-to-share-responsibility-for-refugees-80918>>, archived at <<http://perma.cc/BC64-7VG7>>.

2016, the *CRRF* sets out the central elements for comprehensive responses to large movements of refugees ‘based on the principles of international cooperation and on burden- and responsibility-sharing’.<sup>219</sup> It has been described as a ‘paradigm shift in the way in which the international community responds to refugees’, in that it calls for a ‘whole of society approach by host countries to refugees — where not only the national governments but also local authorities, civil society groups, faith communities and the private sector pool their forces to respond to refugees’.<sup>220</sup> In particular, it will involve much closer cooperation and joint planning between humanitarian and development actors.<sup>221</sup> It remains to be seen how much this will involve true *international* cooperation among states, compared to a joined up approach *within* states responding to large scale refugee influxes. However, since the *CRRF* will form the basis of the *Global Compact on Refugees* to be adopted by the UN General Assembly in 2018, its political and normative weight may be strengthened.

Logically, any improvement of international cooperation in this context will most likely derive from a realisation of the social, economic and political benefits that can accrue from sharing the responsibility for refugee protection, and/or pressure from states intensifying their own efforts. An initial step would be to replace the term ‘burden sharing’, which is so common in the refugee context, with ‘responsibility sharing’ (and some would even argue ‘opportunity sharing’).<sup>222</sup> While this may seem largely semantic, it would have considerable conceptual (and practical) significance that might help to counter some of the negative implications that ‘burden sharing’ entails. Further, a cautious adaptation of the CBDPRC principle — or the concept of differentiated responsibilities, more generally — into international refugee law discourse could help to promote wider acceptance of the idea that refugee protection is a common global concern and a joint responsibility, but that some states are able to contribute greater resources to addressing it than others. Nevertheless, any reflection of this notion must be mindful of the caveats expressed above relating to the distinctions between the climate change and refugee regimes, particularly the imperative for states to fully uphold their existing refugee law obligations. In conclusion, while there is still much progress to be made, states’ efforts to tackle climate change

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<sup>219</sup> *New York Declaration*, UN Doc A/RES/71/1, annex I, [1].

<sup>220</sup> Volker Türk, *The New York Declaration: Once in a Lifetime Opportunity to Enhance Refugee Protection* (11 October 2016) Kaldor Centre for International Refugee Law <<http://www.kaldorcentre.unsw.edu.au/news/new-york-declaration-once-lifetime-opportunity-enhance-refugee-protection>>, archived at <<http://perma.cc/DH3T-QYCV>>.

<sup>221</sup> See, eg, *New York Declaration*, UN Doc A/RES/71/1 [38], [85]. See also Dowd and McAdam, above n 1.

<sup>222</sup> See, eg, Canada’s views noted in António Guterres, ‘Closing Remarks at the 66<sup>th</sup> Session of the Executive Committee of the High Commissioner’s Programme’ (Speech delivered at the 66<sup>th</sup> Session of the Executive Committee of the High Commissioner’s Programme, Geneva, 9 October 2015) <<http://www.unhcr.org/en-au/excom/speeches/562f4a5415/closing-remarks-66th-session-executive-committee-high-commissioners-programme.html>>, archived at <<https://perma.cc/76V7-6AVF>>; US Committee for Refugees and Immigrants, *USCRI Calls upon Heads of State to Pledge Support for Refugees* (August 2016) <<http://refugees.org/news/uscri-calls-upon-heads-state-pledge-support-refugees/>>, archived at <<https://perma.cc/DC48-RW9Z>>; UN Women, ‘Report of the Global Migration Group (GMG): Meetings around the UN Summit for Refugees and Migrants’ (Report, Global Migration Group, 2016) 13 <[http://www.globalmigrationgroup.org/system/files/UNW\\_16020\\_GMG\\_Report\\_finaldesign.pdf](http://www.globalmigrationgroup.org/system/files/UNW_16020_GMG_Report_finaldesign.pdf)>, archived at <<https://perma.cc/E7RL-64EK>>.

collectively demonstrate that international cooperation is possible on a wide scale. Indeed, in both the refugee and climate change contexts, it is a humanitarian imperative of the highest order.