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# FINAL WORD

## DEMOCRACY, LEGITIMACY AND INTERNATIONAL CLIMATE CHANGE LAW AND POLICY

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Thoko Kaime\*

## Introduction

One important theme running through all the chapters to this volume relates to the ownership of the climate change debate. As the various contributions demonstrate, from governments, to peoples, to individuals, NGOs and technocrats, the range of players in the climate change debate is immense. A simple, yet useful, suggestion would be that all these communities of interest do own the debate in some shape or form given the interconnections between their interests and interventions. Although such a response does not unpack the issues, it is clear that climate change presents us with a massive, unprecedented and multi-faceted challenges. It may be seen as an example of deep market failure resulting from misaligned incentives;<sup>1</sup> as a behaviour problem,<sup>2</sup> requiring marked shifts in the choices of millions of organisations and billions of people;<sup>3</sup> as a cue for a fundamental shift in our civilisation, away from the energy systems that have given us the current landscape of 'modernity';<sup>4</sup> as an intertemporal and intergenerational challenge that must deliver results over periods spanning generations;<sup>5</sup> or as an immediate challenge that must be addressed by most, or all, of the world's nations within just a few years.<sup>6</sup> This expansive range of problems posed by climate change couples with the wide ranging constituencies that claim to own the climate change debate brings with it an unprecedented level of co-ordination, co-operation and collective action. Without carefully planned collaboration that takes into account the inputs of all the 'owners' of the climate change debate, it is unlikely that climate change initiatives will enjoy the level of legitimacy necessary to ensure the efficacy of those interventions. In this concluding chapter, I focus on this issue of 'ownership' and examine the role played by international law and international institutions in the framing climate change law and policy. The focus on international institutions is deliberate-the scale of the climate challenge is such that success will be achieved only if effective interstate solutions are fashioned. Building on this obvious need for cross-border collaboration, I argue that in order for international law and policy on climate change to have any impact, there is need for deep form of democratic practice to be

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<sup>1</sup> N Stern *The Economics of Climate Change: The Stern Review* (Cambridge University Press, 2007).

<sup>2</sup> Cohen, S.A., Higham, J.E.S. and Cavaliere, C.T. (2011). Binge flying: Behavioural addiction and climate change.

*Annals of Tourism Research* 38(3), 1070-1089.

<sup>3</sup> Irene Lorenzoni, Sophie Nicholson-Cole, Lorraine Whitmarsh, Barriers perceived to engaging with climate change among the UK public and their policy implications, *Global Environmental Change*, Volume 17, 2007, 445-459.

<sup>4</sup> Nakicenovic, Nebojsa, et al. *Special report on emissions scenarios: a special report of Working Group III of the Intergovernmental Panel on Climate Change*. No. PNNL-SA-39650. Pacific Northwest National Laboratory, Richland, WA (US), Environmental Molecular Sciences Laboratory (US), 2000.

<sup>5</sup> Wood, James C. "Intergenerational Equity and Climate Change." *Geo. Int'l Envtl. L. Rev.* 8 (1995): 293.

<sup>6</sup> Anderson, Kevin, and Alice Bows. "Reframing the climate change challenge in light of post-2000 emission trends." *Philosophical Transactions of the Royal Society A: Mathematical, Physical and Engineering Sciences* 366.1882 (2008): 3863-3882; Schipper, Lisa, and Mark Pelling. "Disaster risk, climate change and international development: scope for, and challenges to, integration." *Disasters* 30.1 (2006): 19-38.

embedded in the processes of international institutions dealing with climate change. International law requires this whilst domestic practice gives the pointers. Unless this is done, the risk of failure for international legal and policy interventions will remain exceptionally high, a risk that the international community can ill-afford.

Currently, there is a bewildering array of institutions that are involved in climate change work.<sup>7</sup> The picture at the international level is that of a fragmented regime of institutions. Such a large and fragmented network has brought with it problems of co-ordination and effectiveness. It has proved incredibly difficult to distil the many interests of the participants in these institutions into coherent and coordinated action, with the result that many of the ambitious targets for climate change have sadly been missed.<sup>8</sup> More worryingly, however, it has become apparent that the many initiatives at the international level have tended to leave behind the polities that are most vulnerable to the effects of climate change;<sup>9</sup> the poorest and least able to adapt to the reality of our changing climate. As a result, key global governance structures are often viewed sceptically by developing countries because the interests of the richest countries remain embedded in processes and outputs of leading international institutions such as the United Nations, the International Monetary Fund and the World Bank.<sup>10</sup> For example, on the boards of the IMF and the World Bank, the biggest emitters continue to wield more votes than the most vulnerable states,<sup>11</sup> yet such institutions are likely to provide some degree of leadership in implementing global environmental policy.<sup>12</sup> It is therefore very important that in addition to fashioning creative and innovative solutions to the problems of climate change, that institutions involved in climate change work ensure that they actively take steps to enhance the legitimacy of their work. It matters not whether the illegitimacy of international institutions is real or perceived, what the evidence shows is that it robs them of the political will needed to maximise their effectiveness. Because of the uneven distribution of climate change impacts along developed- and developing-world lines, these divisions are likely to be exacerbated; a situation which, if unresolved, could fuel

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<sup>7</sup> See generally Yamin, Farhana, and Joanna Depledge. *The international climate change regime: a guide to rules, institutions and procedures*. Cambridge University Press, 2004; Victor, David G. "Toward effective international cooperation on climate change: Numbers, interests and institutions." *Global Environmental Politics* 6.3 (2006): 90-103.

<sup>8</sup> Keohane, Robert O., and David G. Victor. "The regime complex for climate change." *Documento de debate* (2010): 10-33; Biermann, Frank, et al. "The fragmentation of global governance architectures: A framework for analysis." *Global Environmental Politics* 9.4 (2009): 14-40; Hale, Thomas. "A climate coalition of the willing." *The Washington Quarterly* 34.1 (2011): 89-101.

<sup>9</sup> Richards, Michael. "Poverty reduction, equity and climate change: global governance synergies or contradictions." *Globalisation and Poverty. London, UK, Overseas Development Institute* (2003); Adger, W. Neil. "Scales of governance and environmental justice for adaptation and mitigation of climate change." *Journal of International Development* 13.7 (2001): 921-931.

<sup>10</sup> Schoenholtz, Andrew I. "The IMF in Africa: Unnecessary and undesirable western restraints on development." *The Journal of Modern African Studies* 25.3 (1987): 403-433; Woods, Ngaire, and Domenico Lombardi. "Uneven patterns of governance: how developing countries are represented in the IMF." *Review of International Political Economy* 13.3 (2006): 480-515.

<sup>11</sup> Vestergaard, Jakob, and Robert H. Wade. "Protecting power: how Western states retain the dominant voice in the World Bank's governance." *World development* (2013) Leech, Dennis, and Robert Leech. "A new analysis of a priori voting power in the IMF: recent quota reforms give little cause for celebration." in *Power, Voting, and Voting Power: 30 Years After*. Springer Berlin Heidelberg, 2013. 389-410.

<sup>12</sup> Woods, Ngaire. "Making the IMF and the World Bank more accountable." *International Affairs* 77.1 (2001): 83-100; See also Dreher, Axel, Jan-Egbert Sturm, and James Raymond Vreeland. *Does membership on the UN security council influence IMF decisions?: evidence from panel data*. CESifo, 2006.

further discord between the developed and developing world.<sup>13</sup> It is this concern with the legitimacy of international climate change law and policy that is at the centre of this book and this chapter's contribution. Drawing inspiration from the various people-centred discussions of the preceding chapters, it discusses the obligation of international institutions to act in a more democratically accountable manner and outlines what steps can be taken to enhance such democratic culture. The assumption is that the embedding of democratic practice will result in the raising of the legitimacy of these institutions. In order to fully appreciate better the need for greater citizen participation in the activities of international institutions, it is critical to provide an overview of the network of regimes involved in international climate change law and policy.

### **A Snapshot of International Climate Change Institutions**

There is an impressive array of international institutions involved in climate change work.<sup>14</sup> Because of their number and differing interests, they have variously been described as being fragmented and dispersed.<sup>15</sup> This characteristic of the international regime does affect the efficacy of international institutions in particular, as coordination becomes harder.<sup>16</sup> It also encourages the fragmentation of efforts as well as providing opportunities for reluctant states to find an avenue to be seen to be doing something whilst thwarting ambitious programmes pursued by other institutions in the network.<sup>17</sup> Additionally, it makes it hard to assess with a reasonable degree of certainty the impact that the collective efforts of these institutions are having on reversing human-induced climate change. But more importantly, the sheer number of institutions makes it difficult to assess the level of accountability that each institution has.

Perhaps the best known institutions are those built around the United Nations Framework Convention on Climate Change (UNFCCC).<sup>18</sup> By design, the UNFCCC enjoys nearly universal membership. As a framework convention, it birthed the Kyoto Protocol,<sup>19</sup> which was intended to strengthen the regime and provide a basis for binding obligations for the regimes participants. In effect, however, the practical effect of Kyoto has been limited and at most symbolic largely because the Protocol did not place any exacting obligations on developing nations and also because the United States, a major emitter, signed but never

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<sup>13</sup> Hulme, Mike. *Why we disagree about climate change: understanding controversy, inaction and opportunity*. Cambridge, UK, 2009; Ikeme, Jekwu. "Equity, environmental justice and sustainability: incomplete approaches in climate change politics." *Global Environmental Change* 13.3 (2003): 195-206.

<sup>14</sup> Keohane and David, n 8 above, 6; see also Bernstein, Steven. "International institutions and the framing of domestic policies: the Kyoto Protocol and Canada's response to climate change." *Policy Sciences* 35.2 (2002): 203-236.

<sup>15</sup> Bierman, n 8 above. See also Okereke, Chukwumerije, Harriet Bulkeley, and Heike Schroeder. "Conceptualizing climate governance beyond the international regime." *Global Environmental Politics* 9.1 (2009): 58-78.

<sup>16</sup> Pattberg, Philipp, and Johannes Stripple. "Beyond the public and private divide: remapping transnational climate governance in the 21st century." *International Environmental Agreements: Politics, Law and Economics* 8.4 (2008): 367-388; Oberthür, Sebastian. "Interplay management: enhancing environmental policy integration among international institutions." *International Environmental Agreements: Politics, Law and Economics* 9.4 (2009): 371-391; Van Asselt, Harro. "From UN-ity to Diversity-The UNFCCC, the Asia-Pacific Partnership, and the Future of International Law on Climate Change." *Carbon & Climate L. Rev.* (2007): 17.

<sup>17</sup> Bäckstrand, Karin. "Accountability of networked climate governance: The rise of transnational climate partnerships." *Global Environmental Politics* 8.3 (2008): 74-102.

<sup>18</sup> United Nations Framework Convention on Climate Change art. 2, opened for signature May 9, 1992, 1771 U.N.T.S. 107, S. Treaty Doc. No. 102-38.

<sup>19</sup> Kyoto Protocol to the United Nations Framework on Climate Change UN Doc FCCC/CP/1997/7/Add. 1, Dec. 10, 1997; 37 ILM 22 (1998)

ratified the agreement.<sup>20</sup> International negotiations for a successor to Kyoto floundered from 2009 and as a consequence, the international community had no UNFCCC based agreement as the Kyoto Protocol arrangements wound down in 2012. The situation was served at the last minute, when delegates agreed to extend the much maligned Kyoto Protocol for another 8 years to 2020.<sup>21</sup> Despite these setbacks, the UNFCCC will likely remain the preferred framework for organising climate change and adaptation efforts.<sup>22</sup>

Although the bulk of the efforts in relation to the regulatory framework for climate change have focused on the UNFCCC, there is a number of complementary institutional frameworks that have had a significant impact in the reduction of climate change inducing emissions. Perhaps the most significant amongst these is the Montreal Protocol on Substances that Deplete the Ozone Layer.<sup>23</sup> Indeed a number of states, spurred on by the lack of progress under the UNFCCC and Kyoto, have suggested that the Montreal Protocol should be utilised to reduce other specialised warming gases.<sup>24</sup>

In addition to these environment-focused institutions, efforts have also been undertaken by multilateral institutions whose core mandate is not environmental. The most significant of these is the World Bank, which manages the Clean Development Mechanism (CDM),<sup>25</sup> a key part of the Kyoto Protocol's emissions reduction mechanisms. CDM is intended to spur investment in clean technologies in developing countries. Additionally, the Bank, working alongside other multilateral financial institutions and the Global Environmental Facility<sup>26</sup> is responsible for managing the financial arrangements that allow developing countries to participate within the UNFCCC processes and Kyoto. Apart from these initiatives, which are explicitly linked to the UNFCCC, the Bank has also developed an internally-driven comprehensive approach in its lending strategies that incorporates climate change considerations in its assessment of proposed projects.<sup>27</sup> The driver behind this strategy is

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<sup>20</sup> Böhlinger, Christoph. "The Kyoto protocol: a review and perspectives." *Oxford Review of Economic Policy* 19.3 (2003): 451-466; Von Stein, Jana. "The International Law and Politics of Climate Change Ratification of the United Nations Framework Convention and the Kyoto Protocol." *Journal of Conflict Resolution* 52.2 (2008): 243-268; Löschel, Andreas, and Zhong Xiang Zhang. "The economic and environmental implications of the US repudiation of the Kyoto Protocol and the subsequent deals in Bonn and Marrakech." *Weltwirtschaftliches Archiv* 138.4 (2002): 711-746; Biermann, Frank, and Rainer Brohm. "Implementing the Kyoto Protocol without the USA: the strategic role of energy tax adjustments at the border." *Climate Policy* 4.3 (2004): 289-302.

<sup>21</sup> Metz, Bert. "The legacy of the Kyoto Protocol: a view from the policy world." *Wiley Interdisciplinary Reviews: Climate Change* 4.3 (2013): 151-158; Bradshaw, Michael. "Sustainability, Climate Change, and Transition in Global Energy." *The Handbook of Global Energy Policy* (2013): 48-63.

<sup>22</sup> Keohane and David, n 8 above, 10.

<sup>23</sup> Montreal Protocol on Substances that Deplete the Ozone Layer 1522 UNTS 3; 26 ILM 1550 (1987)

<sup>24</sup> Velders, Guus JM, et al. "The importance of the Montreal Protocol in protecting climate." *Proceedings of the National Academy of Sciences* 104.12 (2007): 4814-4819.

<sup>25</sup> IPCC (2007). "Glossary" in *Climate Change 2007: Report of the Intergovernmental Panel on Climate Change* (B. Metz et al. Eds.). Cambridge University Press, Cambridge, U.K., and New York, N.Y., U.S.A.

<sup>26</sup> Clémençon, Raymond. "What future for the global environment facility?." *The Journal of Environment & Development* 15.1 (2006): 50-74; Young, Zoe. *A new green order? The World Bank and the politics of the Global Environment Facility*. Pluto Press, 2002; Hickey, Valerie, and Stuart L. Pimm. "How the World Bank funds protected areas." *Conservation Letters* 4.4 (2011): 269-277.

<sup>27</sup> Van Rooij, Benjamin. "Greening industry without enforcement? An assessment of the World Bank's pollution regulation model for developing countries." *Law & Policy* 32.1 (2010): 127-152; Freestone, David. "7 The World Bank and sustainable development." *Research Handbook on International Environmental Law* (2010): 138; "Dani, Anis; Freeman, Ade; Thomas, Vinod. 2011. "Evaluative Directions for the World Bank Group's Safeguards and Sustainability Policies." Washington, DC: World Bank. Available at <https://openknowledge.worldbank.org/handle/10986/2339>; Hatcher, Pascale. "Taming risks in Asia: the World Bank Group and new mining regimes." *Journal of Contemporary Asia* 42.3

enable the Bank's funds to stimulate clean technologies in new development projects such as those in agriculture and infrastructure.

Other non-environmental institutional arrangements that have adopted a climate change focus include the G8 and G20 clubs of nations. In relation to the G8, a wide thematic scope has enabled the club to adopt climate issues within their purview.<sup>28</sup> Although the group's sessions give prominence to the issue, little action has resulted from their meetings.<sup>29</sup> More crucially, the exclusive nature of the club has limited engagement with constituencies most affected by climate change. In order to address this, the G8 has included 5 of the most influential developing nations at all its sessions in a format that has been labelled G8+5.<sup>30</sup> In a similar fashion, the G20, the group of 20 finance ministers and reserve bank governors from the 20 major economies have also picked up the climate challenge.<sup>31</sup> Given the proximity of this group to financial policy, it could be assumed that getting financing for emissions reductions would be easier. In practice, this has turned out not to be the case. The G20s agenda has been too full with other considerations for climate change concerns to take centre-stage.<sup>32</sup>

Clearly there are a lot of initiatives being promoted for the climate change agenda; and in many ways these initiatives perhaps reflect the scale of the problem. Some initiatives have some considerable results whilst others are nothing more than mere talk shops. Yet, despite the multiplicity of these forums, many stakeholders, particularly those from developing countries feel they are excluded from the processes. Even within the deliberately universal structures of the UNFCCC, many developing states soon discover that they do not have the expertise to participate effectively.<sup>33</sup> This unavailability of expertise, coupled with the lack of power to influence decision-making in the financial frameworks of the UNFCCC has led to a perception of exclusion. The view is not much different from the operations of other complementary institutional arrangements such as those considered above. By their very nature, clubs such as the G8 or G20 focus on narrowly defined interests that fail to capture

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(2012): 427-446; McDermott, Constance L., et al. "Operationalizing social safeguards in REDD+: actors, interests and ideas." *Environmental Science & Policy* 21 (2012): 63-72; Buntaine, Mark T. "Does the Asian Development Bank Respond to Past Environmental Performance when Allocating Environmentally Risky Financing?" *World Development* 39.3 (2011): 336-350.

<sup>28</sup> Keohane and David, n 8 above, 7. See also Nhamo, Godwell. "Co-Leadership in Climate Change: An Agenda to 2013 and Beyond." *Politikon* 36.3 (2009): 463-480; Victor, David G. "Toward effective international cooperation on climate change: Numbers, interests and institutions." *Global Environmental Politics* 6.3 (2006): 90-103; Fues, Thomas. "Global governance beyond the G8: reform prospects for the summit architecture." *Internationale Politik und Gesellschaft* 2.2007 (2007): 11-24; Harris, Paul G. "Beyond Bush: Environmental politics and prospects for US climate policy." *Energy policy* 37.3 (2009): 966-971.

<sup>29</sup> Keohane and David, n 8 above, 7. See also Kirton, John, and Jenilee Guebert. "Compliance with climate change commitments: The G8 record, 1975-2007. (2008). G8 Research Group available at [www.g8.utoronto.ca/evaluations/complianceclimate\\_080605.pdf](http://www.g8.utoronto.ca/evaluations/complianceclimate_080605.pdf).

<sup>30</sup> Fues, above. See also Smith, Gordon. "G7 to G8 to G20: Evolution in Global Governance." (2011) CIGI G20 Papers No. 6 available at <http://dspace.cigilibrary.org/jspui/bitstream/123456789/31335/1/G7%20to%20G8%20to%20G20.pdf?1>.

<sup>31</sup> Kim, Joy Aeree, and Suh-Yong Chung. "The role of the G20 in governing the climate change regime." *International Environmental Agreements: Politics, Law and Economics* 12.4 (2012): 361-374; Barbier, Edward. "Global governance: The G20 and a global green new deal." *Economics: The Open-Access, Open-Assessment E-Journal* 4 (2010): 2; Bauer, Steffen. "It's About Development, Stupid! International Climate Policy in a Changing World." *Global Environmental Politics* 12.2 (2012): 110-115.

<sup>32</sup> Larionova, Marina. "Assessing G8 and G20 effectiveness in global governance so far." *International Organisations Research Journal* 5.31 (2010): 99-120;

<sup>33</sup> Baumert, Kevin A. "Participation of developing countries in the international climate change regime: lessons for the future." *Geo. Wash. Int'l L. Rev.* 38 (2006): 365.

the complexity of interests involved in climate change solutions. The result has been a perception that the solutions emanating from these institutions lack legitimacy and can therefore be ignored. This lack of legitimacy is real a risk to international climate change policy and cannot therefore be ignored. There is therefore a key need to imbue climate change institutions, particularly those at the international level, with much needed legitimacy-enhancing practices. Taking my cue from the people-centric initiatives that have been advocated by all the papers in this book, I argue that democratic cultures need to be entrenched not only within local initiatives but also within international institutions designed to tackle climate change. In fact, it is possible to distil from international law the basis of a responsibility to establish such democratic culture.

### **The Legal Basis for Democratic Cultures in International Institutions**

Although international law enshrines a principle of procedural democracy applicable to states, there does not exist a corresponding legal framework of democracy that could be applied to the structure and functioning of the international legal system as a whole. Given the difficulties of applying traditional state doctrines to the international legal order, perhaps this is not surprising. However, in the context of states and international law, democracy has borne observable legal consequences.<sup>34</sup> This is especially true in connection with the duty of the state to ensure that it puts in place mechanisms that allow democratic participation by citizens.<sup>35</sup> Where this duty is breached, other states have the right to invoke measures to redress the violation. Given the dramatic impact such sanctions may have, one should not underestimate the importance of such a remedy.

Yet, despite this context, international institutions, although created by states, cannot be seen as their equivalent, especially in terms of the democratic imperative. Decision making within these institutions lacks the sort of popular participation that international law requires of states. Thus, although the work of international institutions will often have a direct public impact, the functioning of international institutions is often generally considered to be without any democratic checks. However, since an international institution is created by states, the source and legitimacy of the exercise of powers by international institutions is derived from the consent validly expressed by the different states party to the constitutional treaty of the institution.<sup>36</sup> Since states and their governments are to be considered as the legitimate representatives of the population in their territory, the delegation of certain powers to international institutions by these representatives is indirectly based on a form of popular consent. Consequently, the exercise of powers by international institutions cannot be considered illegitimate by definition, although its legitimacy will often not be 'democratic' as is traditionally understood.<sup>37</sup>

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<sup>34</sup> Franck, Thomas M. "The emerging right to democratic governance." *The American Journal of International Law* 86.1 (1992): 46-91; Fox, Gregory H. "Right to Political Participation in International Law, The." *Yale J. Int'l L.* 17 (1992): 539; Franck, Thomas M. "Democracy as a Human Right." *Stud. Transnat'l Legal Pol'y* 26 (1994): 73; Crawford, James. "Democracy and International Law." *British Yearbook of International Law* 64.1 (1994): 113-133; Steiner, Henry J. "Political participation as a Human Right." *Harv. Hum. Rts. YB* 1 (1988): 77; Fox, Gregory H., and Georg Nolte. "Intolerant democracies." *Harv. Int'l. LJ* 36 (1995): 1.

<sup>35</sup> Franck, above. See also Steiner, Henry J. "Political participation as a Human Right." *Harv. Hum. Rts. YB* 1 (1988): 77.

<sup>36</sup> d'Aspremont, Jean, and Eric De Brabandere. "Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise, The." *Fordham Int'l LJ* 34 (2010): 190.

<sup>37</sup> As above, at 211-216.

In light of this lack of direct legitimacy of origin, and the absence of a periodical legitimacy or accountability test through direct elections or any other mechanism, the legitimacy of international institutions must be addressed through the way in which the functions are exercised, a process that Aspremont and Brabandere term ‘legitimacy of exercise’.<sup>38</sup> The exercise of powers by international institutions must then be subjected to a legitimacy assessment principally through the procedures followed. In particular, the institution must adhere to its own constitutional framework and also the international legal obligations binding on its progenitors including the requirement not to thwart democratic participation. However, since many international climate change institutions do not have a prescription to enhance democratic participation, this must be deliberately engineered into their processes. Traditionally, international institutions have been managed by a multilateral framework of states, not unlike the way in which treaties are negotiated,<sup>39</sup> albeit with a secretariat and procedural rules. Keohane and Nye observe that the traditional international organisation was created as a “creature of states”<sup>40</sup> while Dahl describes them as “bureaucratic bargaining systems.”<sup>41</sup> These weak devices for cooperation were not viewed as lacking legitimacy because policy was determined domestically; the international institution merely played a technical and facilitative role.<sup>42</sup> States therefore tended to participate in international regimes with states that were pursuing policies consistent with their own.<sup>43</sup> It is obvious from the outset that an international climate change regime could not function under this model of international institution because the interests of the ‘owners’ of the climate change debate often conflict and complementarity is less common. Additionally, the need for wider participation in these institutions requires their processes to be adapted to reflect the aspirations of the grassroots – a requirement that is can easily be found in international law.

### **Democratic Cultures as a Pathway to Legitimacy: The Centrality of Participatory Rights**

Where, as is the case in the area of climate change, conflict between domestic policies must be resolved by an international regime, it is necessary that the regime’s institutions be perceived as legitimate. Just as democracy is viewed as legitimating states, many have argued that the international governance should similarly be democratised.<sup>44</sup> It is apparent

<sup>38</sup> As above, at 215. See also d’Aspremont, Jean. "The rise and fall of democracy governance in international law: A reply to Susan Marks." *European Journal of International Law* 22.2 (2011): 549-570.

<sup>39</sup> Keohane, Robert O. "International institutions: Can interdependence work?." *Foreign Policy* (1998): 82-194. See also Keohane, Robert O., and Lisa L. Martin. "The promise of institutionalist theory." *International Security* 20.1 (1995): 39-51.

<sup>40</sup> Keohane, Robert O., and Joseph S. Nye. "Power and Interdependence revisited." *International Organization* 41.04 (1987): 725-753, at 726.

<sup>41</sup> Dahl, Robert A. "Can international organizations be democratic? A skeptic’s view." *Democracy’s edges* (1999): 19-36, at 21.

<sup>42</sup> Keohane, Robert O. *After hegemony: Cooperation and discord in the world political economy*. Ch 4, Princeton University Press, 2005.

<sup>43</sup> As above.

<sup>44</sup> Steffek, Jens, and Maria Paola Ferretti. "Accountability or “good decisions”? The competing goals of civil society participation in international governance." *Global Society* 23.1 (2009): 37-57; Stiglitz, Joseph E. "Democratizing the International Monetary Fund and the World Bank: Governance and Accountability." *Governance* 16.1 (2003): 111-139; Zürn, Michael. "Democratic governance beyond the nation-state: The EU and other international institutions." *European Journal of International Relations* 6.2 (2000): 183-221; Patomäki, Heikki. "Problems of democratizing global governance: time, space and the emancipatory process." *European Journal of International Relations* 9.3 (2003): 347-376; Nanz, Patrizia, and Jens Steffek. "Assessing the democratic quality of deliberation in international governance: criteria and research strategies." *Acta Politica* 40.3 (2005): 368-383; Stevenson, Hayley, and John S. Dryzek. "The discursive democratisation of global climate governance." *Environmental politics* 21.2 (2012): 189-210; Murphy,

that the multilateral or ‘club model’ of international organisations has weak democratic legitimacy because states as participants are not necessarily democratically accountable.<sup>45</sup> Firstly, a substantial number of states are considered to be undemocratic.<sup>46</sup> Secondly, Dahl highlights the problem of delegation, and argues that “delegation might be so extensive as to move a political system beyond the democratic threshold.”<sup>47</sup> This argument applies to the negotiators appointed by different states, and applies *a fortiori* to the organisation’s secretariat. Concerns about the legitimacy of institutional bureaucracy are often raised in relation to the IMF and the World Bank.<sup>48</sup> Thirdly, states have theoretically equal influence in a multilateral forum regardless of population or other factors which give particular states a special interest in the matter under consideration. This problem has been discussed in the context of the United Nations General Assembly where states comprising a small percentage of the world population can pass a resolution by a two-thirds vote.<sup>49</sup> Fourthly, this apparent equality of states is undermined by the problem of vastly unequal resourcing of state delegations.<sup>50</sup> Lastly, the public is often presented with the outcomes of these negotiations as *fait accomplis*, perhaps in part due to the lack of transparency, effectively pre-empting demands for renegotiation.<sup>51</sup>

Those with a cosmopolitan view of democracy take this criticism a step further, rejecting the view that the problem of international democratic legitimacy can be reduced to a problem of national democratic legitimacy. In support of this view Archibugi argues that democratic states do not necessarily advance democratic principles above national interests.<sup>52</sup> Where problems cannot be effectively addressed through multilateralism, cosmopolitan democrats seek “political representation for citizens in global affairs, independently and autonomously of their political representation in domestic affairs.”<sup>53</sup> Referring to the model of the European

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Hannah. "Rethinking the roles of non-governmental organisations at the World Trade Organization." *Australian Journal of International Affairs* 66.4 (2012): 468-485; Headley, James, and Andreas Reitzig. "Does foreign policy represent the views of the public? Assessing public and elite opinion on New Zealand's foreign policy." *Australian Journal of International Affairs* 66.1 (2012): 70-89.

<sup>45</sup> Chapman, Terrence L., Johannes Urpelainen, and Scott Wolford. "International bargaining, endogenous domestic constraints, and democratic accountability." *Journal of Theoretical Politics* 25.2 (2013): 260-283. See also Bodansky, Daniel. "Legitimacy in International Law and International Relations." *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2012): 321.

<sup>46</sup> Jahn, Beate. "Kant, Mill, and illiberal legacies in international affairs." *International Organization* 59.1 (2005): 177-207; Chimni, B. S. "13 Legitimizing the international rule of law." *The Cambridge Companion to International Law* (2012): 290.

<sup>47</sup> Dahl, n 36 above, at 21.

<sup>48</sup> Higgott, Richard. "Economic Multilateralism: A Search for Legitimacy and Coherence in the Early Twenty-first Century." in *State, Globalization and Multilateralism*. Springer Netherlands, 2012. 61-78;

<sup>49</sup> Kim, Soo Yeon, and Bruce Russett. "The new politics of voting alignments in the United Nations General Assembly." *International Organization* 50.4 (1996): 629-652; Dixon, William J. "The evaluation of weighted voting schemes for the United Nations General Assembly." *International Studies Quarterly* (1983): 295-314; Dunoff, Jeffrey L. "Is sovereign equality obsolete? Understanding twenty-first century international organizations." *Netherlands Yearbook of International Law 2012*. TMC Asser Press, 2013. 99-127.

<sup>50</sup> Zhang, ZhongXiang. "Meeting the Kyoto targets: the importance of developing country participation." *Journal of Policy Modeling* 26.1 (2004): 3-19;

<sup>51</sup> Keohane, n 35 above; Beierle, Thomas C., and Jerry Cayford. *Democracy in practice: Public participation in environmental decisions*. RFF Press, 2002, at 55-62.

<sup>52</sup> Archibugi, D. (1998) 'Principles of Cosmopolitan Democracy', in D. Archibugi, D. Held and M. Köhler (eds), *Re-imagining Political Community*. Cambridge: Polity, 198-228; Archibugi, Daniele. "Cosmopolitan democracy." *New Left Review* 4 (2000): 137-150.

<sup>53</sup> Archibugi, above at 222.

Parliament, they view the direct election of representatives to international institutions and the creation of a global civil society as a realistic alternative to the traditional club model. In contrast, Dahl is sceptical that international organisations can have a democratic character.<sup>54</sup> He observes that democracy can be considered a “system of popular control over governmental policies or decisions” or democracy as a system of fundamental rights. For Dahl, two obstacles exist to the democratisation of international organisations. Firstly, as the *demos* is enlarged, the effect of an individual’s participation in government meaningfully is reduced. Secondly, the individual is required to understand information which he has only second-hand knowledge, as opposed to personal experience. Public choice theory illustrates a relationship between these two obstacles: voters rationally prefer ignorance where the cost of informing themselves on a particular topic is greater than the benefit of that knowledge.<sup>55</sup> The less chance individuals have of influencing government policy, the smaller the benefit they obtain by reaching an informed opinion.<sup>56</sup> Additionally, any effective international climate change regime must be global in scope, thus reducing the effect of an individual’s participation to the smallest degree possible. Furthermore, accessing the relevant information is more costly.<sup>57</sup> Although some effects of climate change and any regulatory regime would be known first hand, for many individuals the consequences of climate change, being non-uniform, would only be communicated by news media and political actors rather than through experience and anecdotal evidence from within their community. Dahl observes that in matters of foreign policy and international relations the majority of people tend to be uninformed due to the remoteness and complexity of the subject-matter, and that policy is made by elites and scrutinized by a small attentive public.<sup>58</sup> The exception to this is when a particular issue activates the otherwise sedentary majority, often in opposition to the views of the elites.<sup>59</sup> It is likely that these observations are also largely true of climate change; there are complex scientific and economic arguments to be digested, and while much of the world will see some effects of climate change, they are most likely to be pronounced in specific regions.<sup>60</sup>

Despite these challenges, there is compelling evidence that demonstrates that despite the constraints outlined above, many international institutions are beginning to appreciate the importance of paying particular attention to the individuals that are affected by their mandate. For example, Krajewski observes that in the field of international economic law there is increasing transparency in the form of the publication of documents, minutes of meetings and ‘open doors’ hearings.<sup>61</sup> This effort is also supported by independent evaluation bodies which allow for inputs to the work of international organisations on the initiative of individuals.<sup>62</sup>

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<sup>54</sup> Dahl, above n 36, at 22.

<sup>55</sup> As above.

<sup>56</sup> As above.

<sup>57</sup> Dinshaw, Ayesha, Aarjan Dixit and Heather McGray. 2012. “Information for Climate Change Adaptation: Lessons and Needs in South Asia.” Working Paper. World Resources Institute, Washington DC. Available online at <http://www.wri.org/publication/climate-change-adaptation-lessons-south-asia>.

<sup>58</sup> Dahl, above n 36, at 24.

<sup>59</sup> As above.

<sup>60</sup> Wiener, Jonathan B. "Think globally, act globally: The limits of local climate policies." *University of Pennsylvania Law Review* 155.6 (2007): 1961-1979.

<sup>61</sup> Krajewski, Markus. "Democratic Governance as an Emerging Principle of International Economic Law." *Society of International Economic Law (SIEL) Inaugural Conference Paper*. 2008.

<sup>62</sup> Bernstein, Steven. "Legitimacy in global environmental governance." *J. Int'l L & Int'l Rel.* 1 (2004): 139, at 140-3; Bäckstrand, Karin. "Democratizing global environmental governance? Stakeholder democracy after the world summit on sustainable development." *European Journal of International Relations* 12.4 (2006): 467-498.

Such a trend is mirrored in the European Union, with rights to access documents, obligations to give reasons and the right to petition the Parliament and an ombudsman.<sup>63</sup>

Applied to the climate change debate, a right to access documents would result in lower informational costs. Further, the establishment of independent review bodies would result in a transfer of informational costs from individuals to those bodies. Just as professional networks and an attentive public scrutinise unelected national institutions such as central banks and the judiciary, transparency rights appear a powerful (and relative to other suggestions, less controversial) way of building an international civil society reducing the informational costs previously mentioned. More importantly, for our purposes, such rights have the effect of increasing the sense of ownership over climate change policy and law. In short, transparency rights are a good indicator of useful democratic practice and in turn a good foundation for legitimacy.

So far, individual rights of information and petition have been considered. However, many international human rights documents also recognise collective or group rights.<sup>64</sup> It is argued that if institutions recognise and strive to protect collective demands for representation in their processes, institutional bureaucracies will gain democratic legitimacy by virtue of such inclusive approaches. One way in which international regimes protect collective interests is by hearing NGOs as *amicus curiae*, representing particular groups.<sup>65</sup> This is already evident in the practice of international organisations; the WTO dispute resolution panel and the ICSID both may consider such briefs.<sup>66</sup> It is argued that such NGO participation provides a mechanism to increase democratic legitimacy since it allows 'owners' that would otherwise not be heard to have a platform where their concerns are taken seriously.

What is clear from the above is that international climate change institutions ignore the call to be democratically accountable at their own peril. The various owners of the climate change debate demand accountability. International law does begin to provide the framework and tools for building such legitimacy particularly through the framework set out in international human rights for political participation and protection of minority and group rights. But that is just the beginning: the message from this book and the various case studies that the preceding chapters have introduced is that there are examples of good practice everywhere.

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<sup>63</sup> Magnette, Paul. "Between parliamentary control and the rule of law: the political role of the Ombudsman in the European Union." *Journal of European Public Policy* 10.5 (2003): 677-694; Bovens, Mark. "New forms of accountability and EU-governance." *Comparative European Politics* 5.1 (2007): 104-120.

<sup>64</sup> See generally, Gedicks, F. (2010). *The Recurring Paradox of Groups in the Liberal State*. *Utah Law Review*, 47; Offe, Claus. "'Homogeneity' and constitutional democracy: coping with identity conflicts through group rights." *Journal of Political Philosophy* 6.2 (1998): 113-141; Fletcher, Joseph F., Peter H. Russell, and Philip Eyrikson Tetlock. *The clash of rights: Liberty, equality, and legitimacy in pluralist democracy*. New Haven: Yale University Press, 1996; Lerner, Nātān. *Group rights and discrimination in international law*. Vol. 77. Martinus Nijhoff Publishers, 2003.

<sup>65</sup> Raustiala, Kal. "States, NGOs, and international environmental institutions." *International Studies Quarterly* 41.4 (1997): 719-740; Tarrow, Sidney. "Transnational politics: contention and institutions in international politics." *Annual Review of Political Science* 4.1 (2001): 1-20; Betsill, Michele M., and Elisabeth Corell. "NGO influence in international environmental negotiations: a framework for analysis." *Global Environmental Politics* 1.4 (2001): 65-85;

<sup>66</sup> Howse, Robert. "Membership and its privileges: The WTO, civil society, and the amicus brief controversy." *European Law Journal* 9.4 (2003): 496-510; Umbricht, Georg C. "An 'amicus curiae' brief on amicus curiae briefs at the WTO." *Journal of International Economic Law* 4.4 (2001): 773-794; Levine, Eugenia. "Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation." *Berkeley J. Int'l L.* 29 (2011): 200; VanDuzer, J. "Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation." *McGill Law Journal* 52.4 (2007).

The task of climate change practitioners everywhere is to ensure that such good practice is shared amongst different constituencies at different levels, from the local to the international.

### **Conclusion: From the Local to the International and Back-Opportunities for Cross-Learning**

The preceding chapters have not only laid out the justifications, if they were needed, for popular participation in the development of climate change policy. Whilst it is easy to justify democratic accountability at the domestic level, the same cannot be easily done at the international level. However, it is clear that in the same way that local institutions gain more efficacy in their functions through legitimacy, the same is true of international institutions. One sure way of establishing such legitimacy is through the involvement of the constituencies that will likely be affected by the actions of the international institution. Although such an imperative is lacking in many of the constitutional documents of international institutions, it is clear that such a foundation can be found in general international law. With regard to international institutions responsible for climate change and policy, the processes for embedding democratic practice at the international level are only at a nascent stage. However, there is a huge scope of practice at the domestic level that can easily inform initiatives at the international level. The fieldwork based assessments considered in Part II are a very good example. Yet, that traffic ought not to flow one way. A deliberative form of democracy, such as that has been advocated in this chapter and Part I of the book requires constant improvement of practice whenever possible. Consequently, good international practice must necessarily filter down to local arrangements. Establishing such a network of information exchange is no easy task but one that is necessary for raising the cultural legitimacy of international climate change law and policy.