

Achieving Justice within the International Legal System: Prospects for Climate Refugees

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The problem of climate change continues to create and contribute to numerous problems worldwide cutting across economic, social, cultural, technological, and environmental interests. One of the many consequences of our rapidly changing climate is a significant increase in forced migration and displacement as anthropogenic greenhouse gas emissions alter the atmosphere and the global environment within which we all live. The emergence of so-called 'climate change refugees' and the recognition of this rapidly escalating phenomenon presents a troubling challenge for our future. Whilst discussion continues regarding how such displaced individuals, communities, or in some situations, entire nation states, should be legally recognised, the objective of this paper is to examine the problem through justice discourse. Climate change displacement creates enormous injustice around the world, and is arguably facilitated by an unjust and inequitable international legal and economic system. This paper considers how justice might be achieved for climate change refugees within the international legal system.

The problem of climate change displacement

The many and varied implications of climate change are now widely recognised and well documented.¹ As a result, there exists a series of

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¹ E.g. Nicholas Stern *The Economics of Climate Change: The Stern Review* (Cambridge: CUP, 2007); Intergovernmental Panel on Climate Change *Fourth Assessment Report: Climate Change 2007* (Geneva: IPCC, 2008); and more generally George Monbiot *How to Stop the Planet Burning* (London: Penguin, 2006); Mark Lynas *Six Degrees: Our Future on a Hotter Planet* (London: Harper, 2007).

national, regional, and global legal agreements and non-binding initiatives aimed at mitigating and adapting to our changing climate. The link between climate change and environmental vulnerability has been widely reported and can be evidenced from a multitude of factors including *inter alia* increased droughts, desertification, rising sea-levels and extreme weather patterns. The impact of such environmental change on displacement patterns is stark: specific calculations vary, but current estimates indicate that between 50 and 200 million people will be displaced by 2080 as a direct result of climate change.²

Displacement can occur due to numerous different environmental factors (and combinations thereof), although there are a certain types of environmental change that are commonly identified as causing climate change displacement.³ A rise in sea levels owing to thermal expansion and the melting of glaciers and ice caps consequently threatens small island states and low-lying coastal communities. A conservative estimate suggests a global sea level rise of between 28 to 43 centimetres is likely by the end of the century,⁴ whilst more recent scientific analysis indicates this figure could be closer to 150 centimetres within the same timeframe.⁵ Concerns over food security creates displacement as storm surges lead to coastal erosion, salt contamination, and degrades crop production, whilst coral bleaching destroys stocks of natural marine resources. Similarly, changing rainfall patterns threaten the availability of clean water supplies. Glacial flooding creates large unstable lakes in mountainous regions, which threaten lower-lying communities. And finally, an increased prevalence in cyclones and extreme weather patterns are having disastrous effects in many areas around the

² Robert Nicholls 'Coastal Flooding and Wetland Loss in the 21st Century: Changes Under the SREA Climate and Socio-economic Scenarios' 14 *Global Environmental Change* (2004) 69.

³ For a more detailed discussion on how climate change contributes to displacement see Angela Williams 'Turning the Tide: Recognising Climate Change Refugees in International Law' *Law and Policy* (forthcoming October 2008).

⁴ Intergovernmental Panel on Climate Change *Climate Change 2007: The Physical Science Basis* (New York: CUP, 2007) 409.

⁵ Richard Black 'Forecast for Big Sea Level Rise' *BBC News* available at <http://news.bbc.co.uk/1/hi/sci/tech/7349236.stm> (15 April 2008).

world, as recently demonstrated by Hurricane Katrina which decimated much of New Orleans in 2005. There is a vast amount of on-going research examining the extent to which climate change is responsible for such environmental factors that lead to displacement. However, whilst such analysis continues, and governments carry on debating the extent of the problem, the reality for thousands of people is loss of livelihood, home, family, and possibly, national identity.

Identifying the effects of climate change displacement

Having recognised the problem of climate change displacement in general, it now becomes important to determine the effects such displacement and forced migration is having on individuals and communities. One of the most problematic symptoms of climate change displacement is the resulting inequity and injustice whereby the most vulnerable members of society are commonly the ones who suffer the greatest. Vulnerable communities (be it economic, social, or environmental vulnerability) are much less likely to have the capacity to adapt to a quickly changing climate, which subsequently often translates into problems regarding the availability of clean water supplies and the depletion or degradation of natural resources. Yet, the same vulnerable communities usually make a comparatively small contribution (if indeed any recognisable contribution at all) to the global climate change problem. Accordingly, vulnerable individuals and communities suffer disproportionately as they contribute very little by way of greenhouse gases, yet experience the greatest loss due to an inability to mitigate the effects and adapt to climate change. A poor farmer in coastal Sri Lanka simply will not have the same capacity to respond to our rapidly changing climate (be it by way of mitigation, adaptation, or relocation) as, for example, a rich family in Japan.

The same is true at state level, where the biggest contributors to the problem of climate change are frequently the same nation states that demonstrate the greatest capacity to mitigate or adapt to the consequences, with the result that they are least affected. As a country, the United States may be responsible

for one of the largest contributions of global greenhouse gas emissions but similarly, demonstrates (comparatively) enormous capacity to respond and adapt to the changing climate. Conversely, those states that make a very small contribution to greenhouse gas emissions frequently suffer disproportionately as they lack the capacity to mitigate and adapt. Two very different examples are provided by the nation states of Kiribati and Mali.

Kiribati

The small island state of Kiribati is located in the South Pacific, approximately half-way between Australia and Hawaii. Made up of 33 island and coral atolls, it currently has a population of more than 90,000 people. However, the very existence of the nation state of Kiribati is currently under threat due to climate change as rising sea levels, increased storm surges, salt contamination, and drought all have a debilitating affect on the islands' natural resources and inhabitants.⁶ Much internal migration has already taken place resulting in the main island atoll of Tarawa now being heavily populated. In light of these developments, Kiribati's President, Mr Anote Tong, has now called for international assistance to evacuate the country before it completely disappears.⁷ He used the 2008 World Environment Day to highlight the plight of his nation commenting

‘we may be beyond redemption ... we may be at the point of no return, where the emissions in the atmosphere will carry on contributing to climate change, to produce a sea level change so in time our small, low-lying islands will be submerged’.⁸

Emphasizing the whole global community has a responsibility in respect of addressing the challenge of climate change, Anote Tong suggested a worse case scenario would see Kiribati uninhabitable within 50 years.⁹ The impacts of climate change on Kiribati are now clearly evident and failing a significant

⁶ Fred Pearce ‘Turning Back the Tide’ *New Scientist* (12 February 2000) 44.

⁷ Kathy Marks ‘Paradise lost: climate change forces South Sea islanders to seek sanctuary abroad’ *The Independent* (6 June 2008)

⁸ *Ibid.*

⁹ *Ibid.*

and immediate response from the international community, it appears likely the entire nation state will be displaced and the land be submerged under the Pacific Ocean.¹⁰ However, as a small island developing state Kiribati is responsible for a tiny proportion of global greenhouse gas emissions, yet stands to suffer the most severe of consequences.¹¹ The ability of Kiribati to respond is restricted due to its status as a small island developing state and thus, comparatively weak global negotiating position,¹² along with its limited capacity regarding adaptation.¹³

Mali

The vast majority of the population in Mali live in rural areas and accordingly, are heavily dependent on the country's natural resources for survival. With two-thirds of the country located within the Sahara Desert, for many years Mali has struggled to guarantee a basic level of subsistence for its population.¹⁴ Now, climate change has accentuated the environmental hardship suffered by Malians and an anticipated increase in temperature and decrease in precipitation is likely to further enhance concerns regarding food security.¹⁵ Concerns over declining soil productivity, unpredictable weather patterns, and a drastic reduction in the production of crops have forced younger people to migrate to urban centres in order to find work and support their families. Not only does this form of migration contribute to problems of

¹⁰ The New Economics Foundation calculates that 100 months from August 2008, atmospheric concentrations of greenhouse gases will begin to exceed a point whereby it is no longer *likely* we will be able to avert potentially irreversible climate change. See Victoria Johnson and Andrew Simms *100 months: Technical Note* (New Economics Foundation, 2008) available at <http://www.neweconomics.org/gen/uploads/sbfxtot55p5k3kd454n14zvyy01082008141045.pdf>

¹¹ Many other small island states are in similar positions to Kiribati, for example Tuvalu, the Maldives, and the Marshall Islands.

¹² See the Alliance of Small Island States who frequently join together for global negotiations: <http://www.sidsnet.org/aosis/>

¹³ See current plans for adaptation: Ministry of Environment, Land and Agricultural Development *National Adaptation Programme of Action* (January 2007) available at <http://unfccc.int/resource/docs/napa/kir01.pdf>

¹⁴ For more detailed information, see the World Bank's World Development Indicators.

¹⁵ Tanveer Butt, Bruce McCarl, Alpha Kergna 'Policies for reducing agricultural sector vulnerability to climate change in Mali' 5 *Climate Policy* (2006) 583

insecurity, the spread of HIV, and other difficulties associated with urban poverty and unsecure accommodation, but problems also persist in rural areas as Malian elders are left to etch out a living in increasingly hostile environments. Some communities have been fortunate to receive funding from local charities for the construction of dams so that water can be caught and used to grow food during the dry season. However, climate change displacement is increasingly jeopardising such aid efforts. During 2006 funds were made available to local villages for the construction of community dams but, because many of the able-bodied men were absent having migrated elsewhere in search of work, construction could not begin until their return. As a result, the dams were not finished until later than planned coinciding with the first heavy rains of the season, which resulted in more than 60% of the dams being destroyed and washed away.¹⁶ Whilst farmers in Mali have contributed almost nothing to the build-up of greenhouse gases in the atmosphere, they are nonetheless living in a region highly vulnerable to the impact of climate change and suffer the most drastic consequences, which subsequently leads to large scale displacement.¹⁷ Whilst there is no doubt some element of economic migration evident in Mali (and elsewhere), whereby people relocate for the primary reason of better availing themselves of more prosperous economic and employment opportunities, the link between climate induced environmental change and increased migration and displacement is clearly evident and increasingly problematic in the case of Mali.

As many villagers have been forced to leave their native rural communities in order to secure a living elsewhere, a migration path has developed from Mali, through neighbouring Mauritania, and onwards into the Atlantic Ocean where attempts are made to travel by boat to mainland Europe (usually Spain).¹⁸

¹⁶ *Human Tide: The Real Migration Crisis* Christian Aid Report (May 2007) 43.

¹⁷ *Ibid* at 44.

¹⁸ Following enhanced surveillance and control of the Strait of Gibraltar to prevent migrants entering the Spanish mainland, traffickers now appear to be targeting the longer (and thus more dangerous) route between Mauritania and the Canary Islands. See James Orr '35 Africa migrants die on boat crossing to Spain' *The Guardian* (26 August 2008).

Recent reports from both the Red Cross and the UN Refugee Agency indicate a sharp increase in the number of people attempting to make the sea crossing from North Africa to Southern Europe.¹⁹ Whilst comparatively few migrant deaths at sea are reported each year, the actual mortality rate is estimated to be much higher as the bodies of many refugees are never recovered. The Red Cross estimates between 2,000 and 3,000 people die trying to reach Spain every year.²⁰ Once more, the injustice of climate change displacement is evident: the people of Mali who are responsible for negligible greenhouse gas emissions, suffer the most dire and extreme consequences.

Kiribati and Mali provide two illustrations of the way in which climate change displacement fosters injustice and creates disproportionate levels of suffering for those most vulnerable. However, there are many, many more such examples. The aim of this paper is to focus on the injustice created by climate change displacement and contemplate how justice might be better achieved within the international legal system and thus, such situations remedied. But, what does justice mean? And how might the concept of justice translate in the specific context of climate change?

Justice and Climate Change

In its broadest sense, the idea of justice is commonly associated with notions of fairness and the type of behaviour society generally deems either morally right or wrong. Furthermore, justice is intrinsically linked with the law as indicated by its Latin origin *jus*, which literally translates to 'law' or 'right'. However, whilst it might appear a straightforward exercise to identify the type of activities that embody ideas of justice, any such determination is ultimately made based predominately on social and moral values. Indeed, most people would consider they could determine when justice has been achieved, or if an

¹⁹ Alex Wynter 'Deadly Passage' *2 Magazine of the International Red Cross and Red Crescent Movement* (2006) available at

http://www.redcross.int/EN/mag/magazine2006_2/index.html

²⁰ Graham Keeley 'Grim Toll of African Refugees Mounts on Spanish Beaches' *The Observer* (13 July 2008) <http://www.guardian.co.uk/world/2008/jul/13/spain>

end-result is right, or just. However, whilst generally reflective of society's values, this approach is inevitably subjective. For example, within criminal law some sections of society might deem a punishment involving restorative justice acceptable when loss has been suffered, whereby an offender is brought face to face with the victim to learn how the offender's actions have affected others and created suffering or loss. However, in the very same situation, different parts of society might consider that the same crime necessitates imprisonment (or maybe even the death penalty), in order to reach the same level of justice or fairness. Accordingly in this situation, whether or not justice is achieved for the victim depends largely on a subjective judgment based on moral values. Moreover, because of the universal popularity of the term and its associated social and political importance, there is much discussion and dispute as to its exact interpretation and application within both law and political theory. Therefore, although there is a general appreciation of what justice represents, and the type of values it encapsulates, the term itself requires greater examination in order to establish more specifically how it should be interpreted within international law, and in relation to climate change displacement.

There is an enormous volume of literature within political theory examining the idea of justice and the complexities of its interpretation and application.²¹ In some of the earliest theorising, Aristotle considered that justice consists of treating 'equals' equally, and 'unequals' unequally, in proportion to their inequality.²² Justice discourse has subsequently evolved different forms, or subdivisions, that have been recognised and developed within political theory and two of which, are commonly identified as starting points of discussion on the topic.²³ First, justice can be distinguished as being corrective or remedial in character whereby its primary function is to correct wrongdoings by way of punishment or compensation. Secondly, justice can be identified as

²¹ E.g. Thomas Pogge (ed.) *Global Justice* (Oxford: Blackwell, 2001); John Rawls *A Theory of Justice* (Oxford: OUP, 1999 2nd ed.); Tom Campbell *Justice: Issues on Political Theory* 2nd ed. (2001).

²² Aristotle ref.

²³ Campbell *Justice: Issues on Political Theory* 2nd ed. (2001) p.15.

adopting a social or distributive function so as to ensure a fair distribution of benefits and burdens throughout groups identified by social, racial, class, or gender characteristics.²⁴ It is argued here that both of these subdivisions of justice are instrumental for addressing the problem of climate change displacement.

Remedial Justice

The idea of corrective, or remedial justice (simply termed remedial justice from this point forward) can be attributed to Aristotle's early description of ideas of 'compensatory justice' where it is considered the role of the judge is

'...to make the parties equal by the penalty he imposes, whereby he takes from the aggressor any gain he may have secured ... [t]his explains why the disputants have recourse to a judge; for to go to a judge is to do justice ... [w]hat the judge does is to restore equality'.²⁵

In this way, Aristotle is seen to recognise corrective justice as the mean between loss and gain. This thesis has been elaborated and developed so that the primary function of remedial justice is now commonly considered to be rectifying the wrong done to a victim, or to put simply, to correct the injustice.²⁶ Thus, the essential features of remedial justice have been identified as (i) the parties are treated as equal, (ii) there is damage inflicted by one party on another, and (iii) the remedy seeks to restore the victim to the condition he or she was in before the unjust activity occurred.²⁷ Much of the theory underlying remedial justice can be applied to the problem of climate change displacement; there are important questions of equality (or equality of options), damage being suffered by one party as a direct result of the actions of others, and the need for a remedy to restore or compensate the victim (i.e. those displaced by climate change).

²⁴ Campbell *Justice: Issues on Political Theory* 2nd ed. (2001) p.15-16. Note also inter-generational justice.

²⁵ Aristotle *The Ethics* (J.A.K.Thompson trans., 1955) 148-149.

²⁶ Shelton *Remedies in International Human Rights Law* (2000) OUP p.38.

²⁷ *Ibid.*

However, it is worth recognising that the context within which much of the discourse concerning remedial justice has been developed relates to acts between individuals, rather than to unjust acts committed by a government or a state against an individual. Nonetheless, this approach does provide a basis for public law remedies and as such, the theory could arguably be applied to those suffering climate change displacement.²⁸

One example of remedial justice being sought in relation to a community suffering damage by way of displacement, due to the action of other parties, is a case lodged in February 2008 by the Alaskan village of Kivalina against a group of oil, coal, and power companies.²⁹ The Plaintiffs are the native Inupiat village of Kivalina, which is made up of approximately 400 people and whose ancestors have occupied the area since 'time immemorial'.³⁰ Kivalina is located on the tip of a six-mile barrier reef located between the Chukchi Sea, and the Kivalina and Wulik Rivers on the Northwest coast of Alaska, some seventy miles north of the Arctic Circle. Kivalina claims that global warming is destroying their village and thus, must be relocated soon, or alternatively be abandoned and cease to exist. Both the United States Army Corps of Engineers and the United States Government Accountability Office have undertaken studies concluding *inter alia* that '[r]emaining on the island ... is no longer a viable option for the community'.³¹ Both conclude that Kivalina must be relocated due to the effects of climate change estimating the cost at somewhere between \$95 and \$400 million.³²

Kivalina complains that climate change has reduced the sea ice, which acts as a protective barrier to the coastal storms that batter the coast. Specifically, it is claimed that '[d]ue to global warming, the sea ice forms later in the year, attaches to the coast later, breaks up earlier, and is less extensive and thinner, thus subjecting Kivalina to coastal storm waves and surges. These

²⁸ *Ibid.* p.39

²⁹ *Kivalina v ExxonMobil Corp. et al* (2008) in the deferral court in San Francisco, see <http://www.climatelaw.org/cases/country/us/kivalina/Kivalina%20Complaint.pdf>

³⁰ *Kivalina v ExxonMobil Corp. et al* (2008) para.1

³¹ *Ibid.* para. 185

³² *Ibid.* para. 186

storms and waves are destroying the land upon which Kivalina is located'.³³ Moreover, the damage suffered by Kivalina as a result of the impacts of climate change are to such a grave degree that the village is becoming uninhabitable and the entire community must now be relocated.³⁴ Based on these facts, Kivalina is pursuing two main causes of action. First, Kivalina is seeking monetary damages for the defendant's contribution to global warming through emissions of large quantities of greenhouse gases.³⁵ Secondly, Kivalina is seeking monetary damages for civil conspiracy and concert of action against a number of the defendants for participation in conspiratorial and other actions intended to suppress the knowledge of the link between greenhouse gas emissions and global warming, thereby furthering the defendants' abilities to contribute to global warming.³⁶

In response, the defendants have sought to have the claim dismissed by recognising what they suggest to be the inordinately difficult problem of factual proof in tracing property losses suffered by the plaintiffs, to human-induced changes in the global climate.³⁷ Moreover, they claim a lack of any legal precedent for holding a collection of defendants liable for such global atmospheric damage. The three specific grounds on which the defendants assert the claim by Kivalina must be dismissed are (1) the plaintiffs fail to plead facts supporting the causation element of their nuisance claims, (2) the plaintiffs cannot pursue a federal common law nuisance claim because such claims are limited to claims *by States* seeking *injunctive relief*, and because federal common law in any event has been displaced by a federal statute addressing the subject of greenhouse gas emissions, and (3) the plaintiffs' conspiracy and concert of action claims are purely derivative of their underlying nuisance claims and do not survive dismissal of those claims.³⁸ A hearing has been scheduled in respect of the claim made by Kivalina, and the

³³ *Ibid.* para. 16

³⁴ *Ibid.* para. 17

³⁵ *Ibid.* para. 249-267

³⁶ *Ibid.* para. 268-282

³⁷ See <http://turtletalk.files.wordpress.com/2008/07/oil-companies-motion-to-dismiss.pdf>

³⁸ *Ibid.* at p. 1-2.

motion to dismiss the complaint lodged by the defendants, for 9 December 2008.

There remain fairly significant questions regarding this claim in respect of causation, remoteness, and the attribution of liability, which could well hamper its success. Nevertheless, the claim lodged by Kivalina presents a clear example of the theory of remedial justice being applied to the problem of climate change displacement whereby the community of Kivalina are attempting to seek redress and compensation to correct the injustice they have suffered as a result of the actions of others, namely the oil, power and coal companies.

This claim, and its success or otherwise, also raises interesting questions about the role of litigation in achieving justice for those affected by climate change displacement. Increasingly within environmental and human rights law, the action of bringing a claim for litigation might not necessarily be carried out with the primary objective of achieving a legal result, but rather, to bring attention to the problem with a view to reaching an out of court settlement. The adoption of justice discourse in relation to climate change displacement is perhaps well suited to public interest litigation, which subsequently results in negotiated settlements, rather than legal judgements. It may be a more effective technique of achieving justice as opposed to relying on the (perhaps) limited remedies available to a court that is ultimately guided by judicial precedent. An out of court settlement could allow parties to reach a better, or more just, result whilst the threat of legal proceedings remains as an incentive to reach an agreement.

A different way in which remedial justice might be pursued in respect of climate change displacement is if corrective action is taken at state level. There remain logistical and jurisdictional challenges in pursuing this option and once more there currently exists no precedent, however, it is conceivable that at some future point one state could bring a legal action against another

state in order to correct an injustice in relation to climate change damage and displacement. A country such as Tuvalu currently faces being completely submerged and the entire nation displaced due to climate change.³⁹ In this situation, it may be possible for Tuvalu to bring an action against (for example) Australia or the United States for failing to recognise their global responsibility in respect of climate change.⁴⁰ By not participating in the Kyoto Protocol and by being responsible for large quantities of greenhouse gas emissions, it could be alleged that the United States (and until recently, Australia) should be held responsible for the damage suffered by the nation of Tuvalu. In this way, as the victim, Tuvalu may seek to achieve remedial justice by rectifying the wrong done by other states. In order to achieve justice for those displaced by climate change, such a remedy might include financial compensation by way of damages (in a similar vein to the *Kivalina* claim above), or the compulsion of (for example) Australia to accept the population of Tuvalu as 'climate refugees'. The International Court of Justice (ICJ) initially appears the obvious forum within which such a dispute might be heard, however the Court's lack of compulsory jurisdiction over the United States is problematic. Another possible avenue is to request an Advisory Opinion from the ICJ on the matter, although procedurally an organ of the UN must initiate this process where legal questions arise within the scope of their activities.⁴¹

³⁹ See the Tuvalu statement presented by His Excellency the Rt. Hon. Bikenibeu Paeniu, Prime Ministerial Special Envoy on Climate Change, United Nations Framework Convention on Climate Change (COP3) 8 December 1997, Kyoto, available at <<http://www.tuvaluislands.com/kyoto-panieu.htm>>.

⁴⁰ Indeed Tuvalu threatened to bring an action against Australia in 2002: 'Tiny Pacific Nation Takes on Australia' *BBC News* (4 March 2002) available at <http://news.bbc.co.uk/1/hi/world/asia-pacific/1854118.stm>

⁴¹ Andrew Strauss 'The Legal Option: Suing the United States in International Forums for Global Warming Emissions' 33 *Environmental Law Reporter* (2003) 10185; Timo Koivurova 'International Legal Avenues to Address the Plight of Victims of Climate Change: Problems and Prospects' 22 *Journal of Environmental Law and Litigation* (2007) 267.

There are other possible forums within which remedial justice could be sought at the state level, perhaps most notably, the Law of the Sea Tribunal.⁴² The Law of the Sea Convention arguably extends obligations to the environmental damage created by greenhouse gas emissions, but is similarly limited in its applicability due to the United States refusing to adhere to the tribunal's binding adjudicatory system. Nonetheless, scope remains for other states to potentially be held to account by this Tribunal.⁴³ Accordingly, it is evident that remedial justice has an important role in the broader goal of achieving justice for those affected by climate change displacement. There may well be problems with quantifying the justice (as there similarly is in other areas of law), when an entire country is submerged and ceases to exist, or damages are sought to compensate communities suffering displacement from climate change. How does one determine what level of compensation is adequate when individuals are forced to leave their native land? Similarly, there are technical and jurisdictional challenges to be met in finding an appropriate forum within the international legal system for such disputes to be heard. However, the theory of remedial justice presents an important legal tool for addressing the suffering created by climate change displacement.

Distributive Justice

Focusing on social functions in order to ensure a fair distribution of benefits and burdens for all, this second subdivision of the theory of justice is similarly applicable to climate change. Distributive justice is concerned more generally with welfare and fairness (rather than compensation or remedy described above) and has been examined throughout both political theory and the law. The link between climate change and distributive justice has been well established within political theory,⁴⁴ however, it is also possible to see

⁴² Possibly also the WTO dispute settlement mechanism, and the Straddling Stocks Agreement although the links between this agreement and climate change displacement are more tenuous.

⁴³ Andrew Strauss 'The Legal Option: Suing the United States in International Forums for Global Warming Emissions' 33 *Environmental Law Reporter* (2003) 10185 at 10188.

⁴⁴ Eg. Edward Page *Climate Change, Justice and Future Generations* (Edward Elgar, 2006); Steve Vanderheiden *Atmospheric Justice: A Political Theory of Climate Change* (OUP, 2008)

evidence of the relationship within the international legal system. In many ways, the theory of distributive justice is articulated through the principle of generational equity, a concept now commonly employed throughout international law. The principle of intergenerational equity is now well established as a mechanism for ensuring the needs of future generations are balanced with those of the current generation. Examined in academic discourse,⁴⁵ incorporated into many international agreements,⁴⁶ and recognised within ICJ jurisprudence,⁴⁷ intergenerational equity and the interests of future generations are commonly referenced within the international legal system. Indeed, much of the discussion regarding distributive justice and climate change has tended to focus on the distribution of benefits and burdens across generations in line with this principle.⁴⁸

However, whilst the distribution of justice across generations is unquestionably a valid and important claim, it is perhaps the principle of intra-generational equity, which is instead concerned with the distribution of benefits within the current generation, which holds greater significance for climate change displacement. Whilst intergenerational equity is an important objective, it seems a somewhat futile aim if there continues to be such vast degrees of inequity within the current generation. Thus, priority must be accorded to the more immediately relevant intra-generational equity principle when pursuing justice for climate change refugees. By its very nature, intra-generational equity implies some notion of minimising the North-South divide and rectifying the present imbalance found within the international economic and legal systems in order to achieve justice and equity within the current generation. Moreover, as discussed above, this sense of injustice within the current generation is evident in respect of climate change displacement and

⁴⁵ E.g. by Edith Brown Weiss and Catherine Redgwell.

⁴⁶ e.g. UNFCCC preamble and Article 3(1); Whaling Convention preamble; Convention on Biological Diversity preamble and Article 2 definition of 'sustainable use'; World Heritage Convention Article 4.

⁴⁷ See e.g. Dissenting judgment of Judge Weeramantry in *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests case (New Zealand v France)* ICJ Reports (1995), p.341.

⁴⁸ Edward Page *Climate Change, Justice and Future Generations* (Cheltenham, Edward Elgar, 2006).

thus, would benefit from the intra-generational approach of rebalancing benefits and burdens within the current generation. Furthermore, since the theory of distributive justice shares many similar qualities and objectives, it could well be interpreted as being akin to the international principle of intra-generational equity, or at least evidence of the theory in practice within the international legal system.

In terms of the legal significance of intra-generational equity, there has unsurprisingly been less support and enthusiasm for its adoption compared to its intergenerational counterpart, primarily due to the commitment required by states to address the global poverty gap. The establishment in 1974 of the New International Economic Order (NIEO)⁴⁹ recognised

‘the gap between the developed and the developing countries continues to widen in a system which was established at a time when most of the developing countries did not even exist as independent States and which perpetuates inequality.’⁵⁰

Whilst the intention of the NIEO to banish prevailing disparities and secure prosperity for all can hardly be criticised,⁵¹ many of the principles included to guide the NIEO in order to facilitate this objective were met with strong resistance by developed States which objected to any agreement (non-binding or otherwise) that implied the existence of an obligation to provide development assistance.⁵² Whilst an increasing number of international agreements include some sense of aid or support for developing countries,⁵³ there remains a great deal of reluctance on the part of developed states to recognise or commit to any legal obligation which implies redistributive justice. Recent attempts to recognise ‘a collective responsibility to uphold the

⁴⁹ Declaration adopted by the UNGA A/RES/3201 (S-VI).

⁵⁰ 1974 NIEO A/RES/3201 (S-VI), para. 1.

⁵¹ NIEO, para. 4(b).

⁵² For an overview of the relationship between equity and the New International Economic Order (NIEO) see e.g. French ‘International Environmental Law and the Achievement of Intragenerational Equity’ 31 *Environmental Law Reporter* (2001) 10496.

⁵³ Many agreements now include the principle of ‘common but differentiated responsibilities’ and include obligations in respect of *inter alia* cooperation, the transfer of technology, and financial assistance.

principles of human dignity, equality and equity at the global level' have resulted in a universal pledge by states to meet the UN Millennium Goals by 2015, but such commitment remains of moral significance only.⁵⁴

Thus, any overt reference to creating a legal obligation that necessitates redistributive justice is generally met with resistance by developed states. However, there are now a number of principles and mechanisms, which aim to promote distributive justice by focusing on specific discrete obligations, rather than calling for a general move towards social redistribution. The principle of 'common but differentiated responsibility' is fairly widespread within international environmental law and is found throughout the climate change regime. Both the UNFCCC and Kyoto Protocol recognise this principle and that efforts to protect the climate system should be done so on the basis of equity and in accordance with states common but differentiated responsibilities and respective capacities.⁵⁵ In a similar way distributive justice is evident via the requirement for new and additional financial resources to be provided by the most wealthy states (Annex II states) so as to support developing states' efforts to adapt and mitigate to climate change. The requirement for transfer of technology similarly presents another example. Therefore, whilst there is no overarching obligation for states to redistribute benefits and burdens per se, there are a number of principles within the international legal system that aim to achieve distributive justice and equity among states by concentrating on specific mechanisms.

Achieving Justice for Climate Change Refugees

Achieving justice for those affected by climate change displacement inherently encapsulates both remedial, and distributive, forms of justice. In many ways, justice operates on a dual level in this context. First, a requirement for a fair distribution of benefits and burdens can be implemented into relevant law and policy in order to mitigate and adapt to problems of climate change

⁵⁴ UNGA Resolution A/Res/55/2 (18 September 2000).

⁵⁵ Article 3(1) UNFCCC. Also see article 4(1) UNFCCC and article 10 Kyoto.

displacement. This level focuses on creating a framework within which principles of distributive justice can be developed so that the legal system promotes and supports a fair distribution of justice across all participants (be they states, communities, or individuals). Next, remedial justice provides a second layer so that should a situation arise whereby injustice is suffered as a result of climate change displacement, despite a system based on distributive justice already being in place, there exists an opportunity for corrective action to be taken in order to compensate the victim and thus, arrive at a just outcome. Therefore, the recognition of both types of justice is imperative in order to properly address to problem of climate change displacement.

However, ultimately both 'subdivisions' of justice require *some* element of redistribution, whether that is a distribution of benefits and burdens so as to realign social welfare, or a redistribution of responsibility so as to provide compensation where, for example, a state contributes to an injustice. Indeed, one could suggest that such an approach encapsulates both remedial and distributive justice in an attempt to provide a more holistic methodology: distributive justice is employed by way of specific legal mechanisms and principles in order to create a system or infrastructure that properly reflects the value and importance of justice, whilst remedial justice is employed where there the system fails and corrective action is required. Working together, both forms of justice promote and aim to achieve justice in respect of climate change displacement.