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**A DISTRIBUTIVE JUSTICE APPROACH TO AN  
INHERENTLY UNJUST PROBLEM: CLIMATE CHANGE  
INDUCED DISPLACEMENT**

LAWS 523: Special Topic: International Climate Change Law

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*Greenhouse gas emissions are causing severe and irreversible changes to the climate. Despite contributing minor amounts to global emissions, poor and developing countries, such as island states in the Pacific, will face the most severe climate change consequences. The inability to cope with and adapt to climatic changes will lead to the displacement of millions of people from their homes, communities and countries. Poor and developing populations will make up the majority of displaced persons. This is climate change induced displacement and its inherent injustice. The present status of international law offers no assistance or protection in the face of climate displacement. A new international legal framework that responds to climate displacement is fundamental. A displacement framework should be grounded in distributive justice theory. Distributive justice allows for the burdens of climate induced displacement to be distributed among the international community in accordance with states' capability to bear such burdens. A new approach under a new framework will allow the displaced financial assistance for relocation and protection in their host countries. Capability-based distributions avoid fault and liability, politically sensitive notions that have obstructed climate justice in the past. Instead, this approach encourages collective responsibility to address a globally induced problem. This is distributive climate justice.*

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## *I Introduction*

The Intergovernmental Panel on Climate Change (IPCC) has stated that the dramatic and irreversible changes to the climate result from human activity.<sup>1</sup> Anthropogenic climate change is the greatest political, legal, environmental and ethical problem the world currently faces.<sup>2</sup> Not all humans, however, have contributed to this problem equally. The notion of climate (in)justice refers to the significant inequities within the climate change sphere. Simply put, those who have contributed to climate change the least, namely the developing world, are suffering the consequences most severely.<sup>3</sup> This fact is particularly prominent in the context of climate change induced displacement.<sup>4</sup>

Around the globe, millions of people have been, or soon will be, displaced from their homes due to climate change rendering areas uninhabitable.<sup>5</sup> If the earth warms to the expected 1.5°C above pre-industrial levels, natural and human systems will be put under immense pressure due to climate-related risks.<sup>6</sup> Particular regions and communities around the globe have increased susceptibility to such risks. The effects of global warming are already changing the environment in the Pacific region, with sea-level rise causing a host of problems and threatening the livelihoods of communities.<sup>7</sup> This paper centres its focus on the Pacific region, where entire island states are vulnerable to inundation.<sup>8</sup> Following the observable pattern, the communities vulnerable to climatic changes and subsequent displacement consistently have low records of greenhouse gas emissions.<sup>9</sup> Herein lies the injustice.

International law, including the international climate change regime, offers no protection mechanism for those forced to relocate. This shortcoming supports the creation of a new

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<sup>1</sup> IPCC *Global Warming of 1.5°C: Summary for Policymakers* (IPCC, Special Report 15, 2018) at 4.

<sup>2</sup> Stellina Jolly and Nafees Ahmad *Climate Refugees in South Asia* (Springer, Singapore, 2019) at 16.

<sup>3</sup> Elkanah Babatunde “Distributive Justice in the Age of Climate Change” (2020) 33 CLJL 263 at 265.

<sup>4</sup> ‘Climate induced displacement’ and ‘climate displacement’ are used throughout this paper as blanket terms referring to all people movement influenced by climate change.

<sup>5</sup> Foresight *Migration and Global Environmental Change: Future Challenges and Opportunities* (Government Office for Science, Final Project Report, 2011) at 25.

<sup>6</sup> IPCC, above n 1, at 5.

<sup>7</sup> Silja Klepp and Johannes Herbeck “The Politics of Environmental Migration and Climate Justice in the Pacific Region” (2016) 7 JHRE 54 at 63; and Simon Albert and others “Heading for the Hills: Climate-Driven Community Relocations in the Solomon Islands and Alaska Provide Insight for a 1.5°C Future” (2018) 18 Regional Environmental Change 2261 at 2262–2263.

<sup>8</sup> Working Group II IPCC *Climate Change 2014: Impacts, Adaptation and Vulnerabilities: Part A: Global and Sectoral Aspects* (IPCC, Fifth Assessment Report, 2014) at 73; and Albert and others, above n 7, at 2262.

<sup>9</sup> Maxine Burkett “Climate Reparations” (2009) 10 Melb J Intl L 509 at 512.

international legal framework that places enforceable obligations on states to assist with the problem of climate induced displacement. Given the scale and complexity of the problem, the inability of current regimes to substantiate any helpful obligations and the necessity of global cooperation, a new legal framework is both justified and essential.

This inherently unjust dilemma warrants a justice-based approach. Distributive justice should provide the foundations for a new legal framework for climate induced displacement. Under such a framework, the burdens of climate induced displacement should be redistributed among states based on states' capability to assist.

Justice-based approaches to the problems associated with climate change have often resembled corrective justice. Corrective justice requires establishing fault, giving rise to compensation.<sup>10</sup> This approach will fail in the displacement context, as it has failed in the past, due to the developed world's clear avoidance to admit fault.<sup>11</sup> Instead, distributive justice aims to redistribute benefits and burdens equitably, without asserting fault.<sup>12</sup> A new approach under a new framework will generate collective responsibility for climate displacement, a globally induced problem. This paper will demonstrate how such an approach will achieve distributive climate justice for the displaced.

Parts II of this paper will provide contextual background. The chapter will discuss climate vulnerability, climate displacement and climate injustice, focusing on the Pacific region. Subsequent analysis of international law in part III will demonstrate the system's failings to respond to this growing problem. Part IV will justify the creation of a new international legal framework. Two theories of justice, corrective and distributive, will be introduced in Part V, including an explanation of why the former is ill-suited to the problem of climate displacement. Application of distributive justice will follow. Part VI will focus on equitably redistributing the financial and hosting burdens of displacement among capable states. The implications of a new legal framework that addresses climate induced displacement will be discussed in part VII, as well as concluding comments.

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<sup>10</sup> Christopher Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (Pretoria University Law Press, South Africa, 2009) at 8.

<sup>11</sup> Sam Adelman "Climate Justice, Loss and Damage and Compensation for Small Island Developing States" (2016) 7 JHRE 32 at 35.

<sup>12</sup> Marco Grasso *Justice in Funding Adaptation under the International Climate Change Regime* (Springer, New York, 2010) at 35.

## *II The Injustice of Climate Induced Displacement*

This introductory chapter will outline the injustice inherent in the problem of climate induced displacement. Despite continuing efforts to halt global warming, there are significant and devastating climatic changes occurring worldwide.<sup>13</sup> The impacts of these changes are disproportionately spread, felt most strongly by those most vulnerable and those who have least contributed to global warming.<sup>14</sup> Among this group are small low-lying islands in the Pacific region. The following chapter will explore climate vulnerability, climate displacement and climate justice in the Pacific region.

### *A The Climate Vulnerable*

The Paris Agreement stipulates that reducing global warming to between 1.5°C and 2°C above pre-industrial levels is necessary to lessen the climatic impacts and risks associated with rising temperatures.<sup>15</sup> Despite this goal, significant changes to natural and human systems have already resulted and will persist.<sup>16</sup> Climatic variability will increase as a result of global warming. Sudden and slow-onset climatic changes will similarly grow in frequency and intensity. Sudden-onset climate impacts include extreme weather events, while slow-onset climatic impacts happen over a longer period and include droughts, sea-level rise and salinisation.<sup>17</sup> Both extreme weather events and slow-onset changes are highly likely to negatively impact ecosystems, food production, water supply, infrastructure, human livelihood and human safety.<sup>18</sup>

These changes and impacts will not affect all parts of the world equally. The disproportionate spread of climate change impacts throughout the globe is widely recognised.<sup>19</sup> The populations anticipated to face the worst of climatic impacts have been labelled the “climate vulnerable”.<sup>20</sup> The IPCC defines vulnerability as:<sup>21</sup>

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<sup>13</sup> IPCC, above n 1, at 5.

<sup>14</sup> Burkett, above n 9, at 510.

<sup>15</sup> Paris Agreement (opened for signature 22 April 2016, entered into force 4 November 2016), art (1)(a).

<sup>16</sup> IPCC, above n 1, at 5.

<sup>17</sup> Fanny Thornton “Of Harm, Culprits and Rectification: Obtaining Corrective Justice for Climate Change Displacement” (2021) 10 TEL 13 at 16.

<sup>18</sup> Working Group II IPCC, above n 8, at 6.

<sup>19</sup> Burkett, above n 9, at 513.

<sup>20</sup> Burkett, above n 9, at 513.

<sup>21</sup> Working Group II IPCC, above n 8, at 5.

The propensity or predisposition to be adversely affected. Vulnerability encompasses a variety of concepts and elements including sensitivity or susceptibility to harm and lack of capacity to cope and adapt.

Island states in the Pacific region are among the climate vulnerable. Succeeding discussion will expand on the multitude of factors that enhance the region's vulnerability to climate change and its impacts.

### *1 Environmental vulnerability*

While sea-level rise is a global problem, its distribution is not uniform, posing the greatest risk for low-lying island states in the Pacific.<sup>22</sup> For example, the Solomon Islands have experienced three times the global average sea-level rise in the past 20 years.<sup>23</sup> The IPCC has confidently stated that sea-level rise will significantly impact coastal areas and low-lying island states.<sup>24</sup> A significant proportion of the population in the Pacific region reside close to the coast.<sup>25</sup> Between 95 to 100 per cent of Tuvalu's, Marshall Islands' and Kiribati's populations live below five meters above sea-level.<sup>26</sup> Sea-level rise will damage or destroy infrastructure, salinisation will compromise freshwater supplies and coastal ecosystems may be lost altogether.<sup>27</sup> Extreme weather events such as coastal flooding and storm surges will increase with sea-level rise and exacerbate these risks.<sup>28</sup> Island communities in the Pacific face the loss of infrastructure, communities, services and even entire nation-states.<sup>29</sup>

Kiribati, a low-lying island in the Pacific, exemplifies these dangers. Agriculture productivity and infrastructure are under threat due to sea-level rise causing salt-water intrusion and coastal erosion.<sup>30</sup> Coastal communities are struggling to protect their homes and assets. The coastal

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<sup>22</sup> Stephanie Perkiss and Lee Moerman "A Dispute in the Making: A Critical Examination of Displacement, Climate Change and the Pacific Islands" (2018) 31 AAAJ 166 at 169.

<sup>23</sup> Albert and others, above n 7, at 3.

<sup>24</sup> Working Group II IPCC, above n 8, at 17 and 24.

<sup>25</sup> Tauisi Taupo, Harold Cuffe and Ilan Noy "Household Vulnerability on the Frontline of Climate Change: The Pacific Atoll Nation of Tuvalu" (2018) 20 Environ Econ Policy Stud 705 at 707.

<sup>26</sup> Perkiss and Moerman, above n 22, at 169.

<sup>27</sup> Perkiss and Moerman, above n 22, at 169; and Working Group II IPCC, above n 8, at 17.

<sup>28</sup> Working Group II IPCC, above n 8, at 17.

<sup>29</sup> Perkiss and Moerman, above n 22, at 167 and 169.

<sup>30</sup> Lacey Allgood and Karen McNamara "Climate-Induced Migration: Exploring Local Perspectives in Kiribati" (2017) 38 Singapore Journal of Tropical Geography 370 at 371.



ecosystem and fisheries that many rely on for subsistence are ceasing to exist.<sup>31</sup> These changes are having extreme impacts on the livelihoods of coastal communities.<sup>32</sup> Available land that is safe from the effects of sea-level rise is scarce given the narrow width of the island, and adaptation options are limited.<sup>33</sup> Estimates depict that over half of Kiribati will be underwater by 2050.<sup>34</sup>

## 2 Socioeconomic vulnerability

Vulnerability is multifaceted. Populations are likely to be vulnerable to climatic changes due to social, economic, cultural, political and institutional factors, as well as geographic location.<sup>35</sup> Heightened vulnerability is associated with low socioeconomic status and limited resources. Developing countries face particular challenges given their limited ability to cope with and adapt to climatic changes.<sup>36</sup> The IPCC has stated that “the countries with the fewest resources are likely to bear the greatest burden of climate change in terms of loss of life and relative effect on investment and economy.”<sup>37</sup>

This stands true for low-lying island states in the Pacific region. The Pacific Islands’ small and remote characteristics mean there is limited access to resources, human capital, employment, technology and infrastructure.<sup>38</sup> While poverty levels are relatively low in the Pacific region, due to cultural and community traditions depicting help and support, hardship will increase as a result of climate change.<sup>39</sup> The economic activity that many Pacific Island communities rely on, such as agriculture, fishing and tourism, risk being lost altogether due to climatic impacts.<sup>40</sup> Climatic disasters and impacts in the Pacific have already contributed to a loss of capital.<sup>41</sup> The small cumulative GDP of Pacific states will be significantly impacted, diminishing an already small pool of resources necessary for adaptation.<sup>42</sup> Local communities have taken adaptation

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<sup>31</sup> Simon Albert and others “Keeping Food on the Table: Human Responses and Changing Coastal Fisheries in Solomon Islands” (2015) 10 PLoS One e0130800 at e0130800.

<sup>32</sup> Albert and others, above n 31, at e0130800.

<sup>33</sup> Allgood and McNamara, above n 30, at 371.

<sup>34</sup> Allgood and McNamara, above n 30, at 371.

<sup>35</sup> IPCC, above n 1, at 5.

<sup>36</sup> Working Group II IPCC, above n 8, at 6.

<sup>37</sup> Working Group II IPCC *Climate Change 2001: Impacts, Adaptation and Vulnerability: Summary for Policy Makers* (IPCC, Third Assessment Report, 2001) at 8.

<sup>38</sup> Perkiss and Moerman, above n 22, at 176.

<sup>39</sup> Taupo, Cuffe and Noy, above n 25, at 708.

<sup>40</sup> Perkiss and Moerman, above n 22, at 176.

<sup>41</sup> Taupo, Cuffe and Noy, above n 25, at 707.

<sup>42</sup> Perkiss and Moerman, above n 22, at 176; Working Group II IPCC, above n 8, at 17.

measures, yet these will soon be inadequate, particularly if the likelihood of whole island inundation presents itself.<sup>43</sup>

For the outlined reasons, low-lying islands in the Pacific region will face the first and worst of climate-related dangers. Populations in the Pacific region are climatically vulnerable. The enhanced exposure to climatic impacts and limited ability to adapt threatens the livelihood and safety of entire island nations. Given the limited coping options for such populations, relocation will become *necessary*. The following section will detail climate induced displacement both generally and in the Pacific region specifically.

### *B Climate Induced Displacement*

The effects of climate change are rendering villages, cities and islands uninhabitable. It is now 60 per cent more likely a natural disaster will displace any one person than it was four decades ago.<sup>44</sup> In 2009, of the 350 million displaced people, 25 million were considered “climate displaced people”.<sup>45</sup> The number of climate displaced persons will increase dramatically as global warming continues, rendering it one of the “largest global human crises of our time”.<sup>46</sup> Estimates depict that climate change will displace between 150 million to one billion people before 2050.<sup>47</sup> Another estimate states that climate change will displace 10 per cent of the global population in the same period.<sup>48</sup> The following discussion will unpack climate induced displacement.

#### *1 Causes*

Climate induced displacement, environmental migration, climate migration or climate refugee movement are all terms used to denote the movement of people as a result of climate change impacts. The relationship between climate change and people movement, however, is not always direct. Similar to climate vulnerability, climate induced displacement is multi-causal.

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<sup>43</sup> Albert and others, above n 7, at 2263.

<sup>44</sup> Thornton, above n 17, at 16.

<sup>45</sup> Perkiss and Moerman, above n 22, at 169–170.

<sup>46</sup> Perkiss and Moerman, above n 22, at 170.

<sup>47</sup> Jolly and Ahmad, above n 2, at 24.

<sup>48</sup> Perkiss and Moerman, above n 22, at 170.

Displacement may occur due to a combination of factors relating to climatic events, socioeconomic vulnerability and lack of coping capacity.<sup>49</sup>

The unevenly distributed impacts of climate change and enhanced vulnerability of populations extend to climate induced displacement. As articulated, poor or developing populations are facing the brunt of climate-related impacts. These populations have limited ability to adapt to such impacts, despite the greater need to do so. For example, populations in developing states more commonly rely on climatically vulnerable ecosystems as sources of income.<sup>50</sup> Destruction of these ecosystems will leave many unemployed and without income, limiting the chances of successful adaptation. Relocation may be the most realistic option. Alternatively, populations in developed states are unlikely to rely on climatically vulnerable ecosystems or are equipped with ample resources to cope with climatic changes. These populations can likely avoid relocation entirely. Climate induced displacement, therefore, will disproportionately affect poor and developing populations around the globe.<sup>51</sup>

## 2 Types

Climate change induced people movement takes three prominent forms. Firstly, people may be *forced* to move in response to climatic change that renders an area uninhabitable or unsafe. The Foresight report stated that “no migration” will soon be an infeasible option “in the context of future environmental change”, particularly in the context of sudden-onset extreme weather events.<sup>52</sup> Developing populations who cannot cope with climatic events and changes are more likely to have no choice but to relocate. Secondly, people may *choose* to move as a result of climatic changes deteriorating their living circumstances. Slow-onset climatic changes may have the effect of destroying agriculture and ecosystem services.<sup>53</sup> Communities reliant on these sectors may choose to relocate as a result of loss of income. Sudden-onset climatic events will also leave people with the choice to stay and adapt to the changed environment or relocate. Thirdly, climatic changes may lead to the need for people to move but for a multitude of reasons they are *trapped*.<sup>54</sup> This may occur due to low socioeconomic status and lack of resources

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<sup>49</sup> Jolly and Ahmad, above n 2, at 25.

<sup>50</sup> Jolly and Ahmad, above n 2, at 20; See also Maxine Burkett “Behind the Veil: Climate Migration, Regime Shift, and a New Theory of Justice” (2018) 53 Harv CRCL L Rev 445 at 448.

<sup>51</sup> Burkett, above n 50, at 455.

<sup>52</sup> At 16.

<sup>53</sup> Foresight, above n 5, at 45.

<sup>54</sup> Foresight, above n 5, at 13.

necessary for relocation. In some circumstances, “trapped” populations may flee an area despite the lack of appropriate resources. Either alternative is associated with increased vulnerability.

It is important to note the consequences of climate-related people movement exist whether a person was forced out of their home or chose to relocate. Thus, for the purposes of this paper, the distinction of *forced* or *chosen* relocation has minimal relevance.<sup>55</sup> The fact that climate change is necessitating people movement is the crux of this global dilemma.<sup>56</sup>

Furthermore, climate induced displacement can be temporary, permanent, internal or external. Movement resulting from sudden-onset climatic events is often temporary, whereas slow-onset environmental degradation will most commonly result in permanent relocation.<sup>57</sup> External movement involves individuals crossing state borders, while internal movement depicts movement within an individual’s home state.<sup>58</sup> Most climate induced displacement has been internal, for example, from rural or coastal areas into cities.<sup>59</sup> Internal relocation, however, will not always be possible. If entire island states in the Pacific submerge, populations will have no choice but to cross international borders.<sup>60</sup> While internal movement is a significant problem, it is a problem that currently lies within the jurisdiction of states.<sup>61</sup> Therefore, the remainder of this paper focuses on external movement, which justifiably calls for an international response. Regardless of the form climate change induced displacement takes, it will have significant consequences.

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<sup>55</sup> See David Hodgkinson and Lucy Young “In the Face of Looming Catastrophe: A Convention for Climate-Change-Displaced Persons” in Michael Gerrard and Gregory Wannier (eds) *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press, New York, 2013) at 314; the authors state “population movements based on the conclusion that a region will no longer be habitable in the future also constitute “forced” migration.”

<sup>56</sup> Thus, references to climate displacement includes ‘trapped’ populations.

<sup>57</sup> Jolly and Ahmad, above n 2, at 26–27.

<sup>58</sup> Frank Biermann and Ingrid Boas “Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees” (2010) 10 *Global Environmental Politics* 60 at 66; and Chris Methmann and Angela Oels “From ‘Fearing’ to ‘Empowering’ Climate Refugees: Governing Climate-Induced Migration in the Name of Resilience” (2015) 46 *Security Dialogue* 51 at 57.

<sup>59</sup> Methmann and Oels, above n 58, at 57; World Bank *World Development Report 2010: Development and Climate Change* (World Bank, 2010) at 109.

<sup>60</sup> Benoit Mayer “The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework” (2011) 22 *Colo J Intl Envtl L & Poly* 357 at 363.

<sup>61</sup> See Mayer, above n 60, at 369; and United Nations *Guiding Principles on Internal Displacement* UN Doc E/CN.4/1998/53/Add.2 (11 February 1998).

### 3 Consequences

Climate induced displacement will have a range of consequences for both the displaced and regions that receive the displaced. While relocation may intend to retain livelihood, this will not always be the case, particularly for developing populations.

For many, relocation is an emergency response that forces movement without sufficient planning or resources.<sup>62</sup> People may move suddenly in response to environmental dangers, ill-equipped to legitimately set up a new life. Given that the developing world is likely to make up most climate displaced persons, many will lack the resources necessary to move safely and advantageously. Relocation may be maladaptive due to exposure to new and exacerbated vulnerabilities.<sup>63</sup> Housing and employment become major challenges for those who have relocated without adequate planning or assistance.<sup>64</sup> Particularly in the case of external movement, language barriers and niche employment history will render many without sources of income.<sup>65</sup> Researchers have followed climate migrants on their journeys, reporting that a significant majority ended up in overpopulated urban slums exposed to a range of health risks.<sup>66</sup>

Furthermore, as relocation due to climatic change is most commonly not desired, it can have a range of impacts on an individual's sense of culture and identity.<sup>67</sup> Climate displaced persons face leaving behind their traditions, culture and way of life when they leave their home country.<sup>68</sup> In the case of whole island states submerging, many populations will also suffer a loss of statehood.<sup>69</sup>

Without regulation, the hosting of climate displaced persons is also likely to be disproportionately spread throughout the globe. Developing states will take on the bulk of migrants due to comparatively looser laws and regulations.<sup>70</sup> The IPCC has stated that “climate

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<sup>62</sup> Working Group II IPCC, above n 8, at 767.

<sup>63</sup> Methmann and Oels, above n 58, at 61.

<sup>64</sup> Foresight, above n 5, at 67.

<sup>65</sup> Katha Kartiki “Climate Change and Migration: A Case Study from Rural Bangladesh” (2011) 19 *Gender and Development* 23 at 30.

<sup>66</sup> Kartiki, above n 65, at 34.

<sup>67</sup> Working Group II IPCC, above n 8, at 771.

<sup>68</sup> Allgood and McNamara, above n 30, at 381.

<sup>69</sup> Robyn Eckersley “The Common but Differentiated Responsibilities of States to Assist and Receive ‘Climate Refugees’” (2015) 14 *European Journal of Political Theory* 481 at 482.

<sup>70</sup> Fanny Thornton *Climate Change and People on the Move: International Law and Justice* (1<sup>st</sup> ed, Oxford University Press, United Kingdom, 2018) at 7.

change can indirectly increase risks of violent conflicts ... by amplifying well-documented drivers of these conflicts such as poverty and economic shocks.”<sup>71</sup> Unregulated large-scale displacement may lead to overpopulated areas that puts stress on regions, migrants and host citizens. Unemployment and competition for resources will increase if displacement is unplanned and unregulated, which may undermine social cohesion.<sup>72</sup> A flux in unregulated climate displacement poses risks for both human and national security.<sup>73</sup> With climate displaced persons seen as a threat to national security, response policies and action may increase their vulnerability in their new homes.<sup>74</sup>

It is likely, therefore, that the movement of climate displaced persons will be “the movement of people who are rushed, unwanted and unprepared, into unfamiliar and perhaps hostile new environments.”<sup>75</sup>

#### *4 Displacement in the Pacific*

As outlined, low-lying islands in the Pacific region are considered to be ‘climate vulnerable’ because of their exposed environments and limited ability to cope with severe impacts. Populations from atoll states in the Pacific, such as Tuvalu and the Marshall Islands, are likely to represent the first significant wave of climate displaced persons.<sup>76</sup> Given the risk of whole island states submerging, people movement in the Pacific region will soon be limited to external and permanent relocation.<sup>77</sup>

Safe movement from island states is likely to be challenging for many people in the Pacific, particularly the poor.<sup>78</sup> Without the means to relocate offshore, poor populations may find themselves trapped in worsening environmental conditions.<sup>79</sup> The Republic of Kiribati provides an example. Sea-level rise and salinisation of freshwater supplies are increasingly

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<sup>71</sup> Working Group II IPCC, above n 8, at 20.

<sup>72</sup> Foresight, above n 5, at 110.

<sup>73</sup> Mayer, above n 60, at 377; and Methmann and Oels, above n 58, at 56.

<sup>74</sup> Working Group II IPCC, above n 8, at 20.

<sup>75</sup> Burkett, above n 9, at 539.

<sup>76</sup> Allgood and McNamara, above n 30, at 372.

<sup>77</sup> Amy Louise Constable “Climate Change and Migration in the Pacific: Options for Tuvalu and the Marshall Islands” (2017) 17 *Regional Environmental Change* 1029 at 1029.

<sup>78</sup> Foresight, above n 5, at 13.

<sup>79</sup> Foresight, above n 5, at 13.

threatening the livelihoods and security of Kiribati communities.<sup>80</sup> Internal migration is currently occurring, but this is presenting challenges for access to resources and employment.<sup>81</sup> As most of Kiribati's islands are less than three meters above sea-level, internal migration will soon be insufficient in response to continuing sea-level rise and environmental degradation.<sup>82</sup> Despite the need to relocate externally, local community members in Kiribati have voiced reluctance. The low per capita income of Kiribati makes external relocation an expensive and demanding option.<sup>83</sup> Housing, employment and adapting to a new way of life have been frequent concerns among community members.<sup>84</sup> Furthermore, reluctance to leave their home state reflected fears of losing connections with their country, culture, traditions, sovereignty and traditional skills.<sup>85</sup>

External relocation for populations in the Pacific, therefore, will involve “hardship, trauma, and insecurity.”<sup>86</sup> De Blum, Marshall Island Minister, summarised this, “displacement of people in our part of the world is terminal. You know, you lose your sovereignty, you lose your language, you lose your tradition, you lose you.”<sup>87</sup>

### *C The Injustice*

The human activity that has contributed to global warming is spread disproportionately among countries. The impacts of global warming on human life are also disproportionately spread, albeit not in correspondence with the former. These facts present major political, legal, social and moral questions that remain largely unanswered. Climate justice aims to address these issues. The Centre for Climate Justice has sufficiently summarised climate justice as follows:<sup>88</sup>

Climate Justice recognises humanity's responsibility for the impacts of greenhouse gas emissions on the poorest and most vulnerable people in society by critically

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<sup>80</sup> Allgood and McNamara, above n 30, at 375.

<sup>81</sup> At 371.

<sup>82</sup> At 371.

<sup>83</sup> Perkiss and Moerman, above n 22, at 176.

<sup>84</sup> Allgood and McNamara, above n 30, at 379–380.

<sup>85</sup> At 379.

<sup>86</sup> Perkiss and Moerman, above n 22, at 180.

<sup>87</sup> Perkiss and Moerman, above n 22, at 177.

<sup>88</sup> Glasgow Caledonian University “Centre for Climate Justice” (Accessed 21 September 2021) Centre for Climate Justice < <https://www.gcu.ac.uk/climatejustice/>>.

addressing inequality and promoting transformative approaches to address the root causes of climate change.

In short, “the fundamental ethical issues in climate change concern the distribution of the burdens and benefits” relating to it.<sup>89</sup> For the developed world, climate change problems centre primarily around the costs of mitigating emissions.<sup>90</sup> Historically, developed countries have benefitted from “unrestrained exploitation of the environment”.<sup>91</sup> Large, affluent economies have been reliant on burning fossil fuels for energy, thus driving economic development.<sup>92</sup> By way of example, the ‘richest’ 50 per cent of the world is responsible for 86 per cent of global greenhouse gas contributions.<sup>93</sup> Greenhouse gas emissions have accrued significant lifestyle benefits for the developed world.<sup>94</sup> Eric Neumayer stated:<sup>95</sup>

There can be no doubt that the development of the “Northern” countries was eased, if not made feasible in the first place, by having had the possibility of burning large amounts of fossil fuel with the consequence of an accumulation of carbon dioxide in the atmosphere ...

These historical “luxury”<sup>96</sup> emissions have not gone without consequences. However, it is not the high-emitting developed nations who are facing the music. The climate vulnerable, characteristically poor or developing countries, are set to disproportionately face majority of climate change impacts while simultaneously lacking the resources to cope and adapt. The climate vulnerable have minuscule levels of past and present emissions compared to their developed high-emitting counterparts.<sup>97</sup> Nevertheless, the developing world will suffer roughly 80 per cent of the damage caused by climate change.<sup>98</sup> In other words, “the poorest are paying and will continue to pay for the emissions-intensive behaviour of the rich.”<sup>99</sup> While not all

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<sup>89</sup> Grasso, above n 12, at 3.

<sup>90</sup> Grasso, above n 12, at 3.

<sup>91</sup> Babatunde, above n 3, at 265.

<sup>92</sup> Henry Shue “Subsistence Emissions and Luxury Emissions” (1993) 15 *Law & Policy* 39 at 60.

<sup>93</sup> Babatunde, above n 3, at 266.

<sup>94</sup> Thornton, above n 70, at 130.

<sup>95</sup> Eric Neumayer “In Defence of Historical Accountability for Greenhouse Gas Emissions” (2000) 33 *Ecological Economics* 185 at 189.

<sup>96</sup> See generally Shue, above n 92.

<sup>97</sup> Burkett, above n 9, at 514.

<sup>98</sup> Naomi Klein “Climate Rage: The only way to Stop Global Warming is for Rich Nations to Pay for the Damage they’ve done – or face the Consequences” *Rolling Stone* (online ed, United States, 12 November 2009).

<sup>99</sup> Burkett, above n 9, at 514.



developing countries are low-emitters, China and India having recently spiked in emissions,<sup>100</sup> this is certainly true for the Pacific Islands. The World Bank has stated that Pacific Island states contribute only one metric ton per capita of greenhouse gas emissions, one-ninth of the per capita emissions of developed countries.<sup>101</sup>

Climate change is a problem of human security and well-being for the developing world, with minimal focus on mitigation.<sup>102</sup> The burden of adapting to climate change and coping with impacts presents the most significant challenge for poorer populations. While adaptation is the most pressing issue, developing countries have significantly weaker adaptive capacity than developed countries.<sup>103</sup> Adaptive capacity is “the ability of a system to adjust to climate change (including climate variability and extremes) to moderate potential damages, to take advantage of opportunities, or to cope with consequences.”<sup>104</sup> Adaptive capacity is greater when a country has ample resources, easy access to technology and a stable economy.<sup>105</sup> This is not the case for developing nations, after all “we live in a world with an abundance of wealth and natural resources and advances in technology, albeit unequally distributed.”<sup>106</sup> Thus, developing nations suffering the brunt of environmental impacts are beginning their fight against climate change severely disadvantaged.

Climate injustice is strikingly present in the context of climate induced displacement. The injustice plainly presents itself in the fact that the emission activity of some states over time has led to the displacement of populations in other states. The consequences of emissions, such as displacement, disproportionately affects populations that are less well-off and have contributed comparatively little to global emissions. A mere one per cent of global greenhouse gas emissions are attributable to small island developing states and less than a tenth of one per cent are attributable to the Pacific Islands.<sup>107</sup> The Pacific Islands are also suffering some of the gravest impacts of climate change and will make up the first wave of climate displaced persons.

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<sup>100</sup> Jonathan Pickering and Christian Barry “On the Concept of Climate Debt: Its Moral and Political Value” (2012) 15 *Critical Review of International Social and Political Philosophy* 667 at 671 and 676–677.

<sup>101</sup> DataBank “Data: Climate Change” (Accessed 21 September 2021) The World Bank <<http://data.worldbank.org/topic/climate-change>>.

<sup>102</sup> Grasso, above n 12, at 4.

<sup>103</sup> Grasso, above n 12, at 22.

<sup>104</sup> Grasso, above n 12, at 22; see also Working Group II IPCC, above n 8, at 214.

<sup>105</sup> Grasso, above n 12, at 22.

<sup>106</sup> Perkiss and Moerman, above n 22, at 167.

<sup>107</sup> Perkiss and Moerman, above n 22, at 176.

The Executive Director of the Pacific Islands Association of Non-Governmental Organisations captures the injustice in his statement:<sup>108</sup>

Many of the situations we find ourselves in, here in the Pacific, are not caused by us. We continue to ask, ‘Where is the justice?’ Those of us who are least responsible, continue to bear the brunt ... We hope that there will be an openness and an acceptance that climate-induced migration is one that the world community has to be responsible for.

The rising need for external relocation and inherent injustice of the problem begs analysis of current international law that might offer assistance. As the following chapter will demonstrate, such assistance is scarce and demonstrably insufficient.

### *III The Law*

In 2008, the United Nations High Commissioner for Refugees stated, “although there is a growing awareness of the perils of climate change, its likely impact on human displacement and mobility has received too little attention.”<sup>109</sup> Over a decade later, the displaced are still struggling to find a place in international law. Despite attempts to find sanctuary under international refugee law, human rights law and other international instruments, those displaced by climate change currently fall through a legal gap. The following chapter will detail the inadequacies of existing legal avenues, foreshadowing the need for a new international legal framework that addresses climate induced displacement.

#### *A Refugee Law*

The term “climate refugees” is prevalent in literature, despite no legal recognition of the concept.<sup>110</sup> The label conceptualises those displaced by climate change as refugees who appropriately fall under the protection of international refugee law. However, climate-

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<sup>108</sup> Thornton, above n 17, at 14.

<sup>109</sup> Office of the United Nations High Commissioner for Refugees *Climate Change, Natural Disasters and Human Displacement: A UNHRC Perspective* (UNHCR The UN Refugee Agency, Climate Change Policy Paper, 23 October 2008) at 1.

<sup>110</sup> Methmann and Oels, above n 58, at 56.

displaced people lack legitimate protection under the 1951 Geneva Convention on the Status of Refugees.

The convention defines refugee as a person who is outside the country of their nationality and is unable or unwilling to return to their home country because of a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.<sup>111</sup> The definition presents significant challenges for climate displaced persons. Firstly, persecution has been defined as the “sustained or systematic violation of basic human rights demonstrative of a failure of state protection.”<sup>112</sup> The violation of such rights must present an “imminent risk”.<sup>113</sup> As articulated, climate displacement can take different forms and will not always be in response to an imminent risk but *gradual* environmental degradation. Furthermore, the state must be responsible for the harm or persecution.<sup>114</sup> This presents an obvious barrier for those displaced by environmental degradation as a result of climate change. Commentators have recognised that ‘persecution’ may be possible to prove if the state has intentionally failed to protect its people from the harmful effects of climate change.<sup>115</sup> However, the final and perhaps ultimate hurdle requires the persecution be because of race, religion, nationality, social group or political opinion. Climatic disasters and impacts “do not discriminate” on the basis of one of the convention’s five recognised grounds.<sup>116</sup> Thus, meeting the definition of a refugee will prove extremely difficult for the majority of climate displaced persons.

The United Nations Human Rights Committee (UNHRC) recently considered Ioane Teitiota’s refugee application in New Zealand. Teitiota’s unsuccessful battle illustrates the difficulty in reconciling climate displacement with refugee law. Teitiota was seeking to escape the rising seas and climatic impacts occurring in his home state, Kiribati. Sea-level rise had resulted in

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<sup>111</sup> Convention Relating to the Status of Refugees 189 UNTS 137 (opened for signature 28 July 1951, entered into force 22 April 1954), art 1.

<sup>112</sup> *Refugee Appeal No. 74665/03* (7 July 2004) at [41]; and *AF (Kiribati)* [2013] NZIPT 800413 at [53].

<sup>113</sup> United Nations Human Rights Committee [UNHRC] *Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning Communication No.2728/2016* (UNHRC, CCPR/C/127/D/2728/2016, 23 September 2020) at [4.5].

<sup>114</sup> Thea Phillip “Climate Change Displacement and Migration: An Analysis of the Current International Legal Regime’s Deficiency, Proposed Solutions and a way Forward for Australia” (2018) 19 *Melb J Intl L* 639 at 645–646; and UNHRC, above n 113, at [8.4].

<sup>115</sup> Mayer, above n 60, at 383; and Matthew Scott *Climate Change, Disasters, and the Refugee Convention* (Cambridge University Press, United Kingdom, 2020) at 7. An example of this is if a state has intentionally prevented internal migration or humanitarian aid.

<sup>116</sup> Scott, above n 115, at 4.

contaminated freshwater supplies, environmental degradation and scarcity of safe land which led to violent disputes.<sup>117</sup> Teitiota claimed that rejecting his refugee application and sending him back to Kiribati violated his right to life. The UNHRC, however, found that Teitiota's right to life was not at imminent risk, a requirement for persecution.<sup>118</sup> Furthermore, the claimed harm was not caused by the state of Kiribati<sup>119</sup> and the environmental degradation was experienced by Kiribati's population indiscriminately, unrelated to the conventions' recognised grounds.<sup>120</sup> Thus, refugee law offered no protection for Teitiota. This conclusion was reached despite the climatic impacts in Kiribati being so extreme that the Kiribati Government plans to evacuate the entire population.<sup>121</sup>

While some academics have contended that the inapplicability of refugee law is "a lack of will rather than of law",<sup>122</sup> it is contentious whether refugee law is the most appropriate regime for climate displacement. Climate displaced persons have repudiated the "undignified" label of "climate refugees", holding that it fails to reflect the true nature of climate displacement.<sup>123</sup> Refugee law protects those escaping harm or persecution caused by their home state. Climate displaced persons are reluctantly leaving their home state due to harm caused, most commonly, by states other than their own. The label fails to capture the loss of culture, traditions and sense of identity that many will experience and thus ignores the inherent injustice of displacement.<sup>124</sup> The majority of academics share the view that "no matter the complexity of the legal gymnastics used to equate climate displacees with formal refugees, the label is not applicable."<sup>125</sup>

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<sup>117</sup> UNHRC, above n 113, at [3].

<sup>118</sup> At [8.4].

<sup>119</sup> At [9.12].

<sup>120</sup> *AF (Kiribati)*, above n 112, at [75].

<sup>121</sup> Jolly and Ahmad, above n 2, at 42.

<sup>122</sup> Andrew Baldwin and Elisa Fornalé "Adaptive Migration: Pluralising the Debate on Climate Change and Migration" (2017) 183 *The Geographical Journal* 322 at 324.

<sup>123</sup> Eckersley, above n 69, at 482.

<sup>124</sup> Allgood and McNamara, above n 30, at 381.

<sup>125</sup> Andrea Simonelli "Climate Displacement and the Legal Gymnastics of Justice: Is it all Political?" (2011) 35 *Ethics & International Affairs* 303 at 303.

## *B The International Climate Change Regime*

### *1 Migration as adaptation*

Within the international climate change regime, people movement due to climate change is commonly considered a form of adaptation.<sup>126</sup> The term “climate migrants” has resulted. Under this conceptualisation, migration is portrayed as an adaptive choice to improve livelihood.<sup>127</sup> Despite classifying migration as adaptation, no international instrument provides the required assistance to bring this conceptualisation to life.

Relocation and displacement were notably mentioned in the 2010 Cancun Adaptation Framework, albeit only in one sentence.<sup>128</sup> Following the Cancun agreements, the United Nations High Commissioner for Refugees unsuccessfully attempted to create a global guiding framework for displacement.<sup>129</sup> In the same year, the 2011 Foresight report proposed the potential of migration as “transformational adaptation strategy” that empowers migrants to increase their “resilience”.<sup>130</sup> While the report encouraged new policy to ensure migration occurs in managed and beneficial ways,<sup>131</sup> this suggestion has not manifested in international law. Most recently and adhering to the trend, the Paris Agreement failed to establish any legitimate guidance, merely acknowledging the rights of migrants in the preamble.<sup>132</sup>

The lack of any international mechanism that puts “migration as adaptation” into practice presents a real obstacle for populations in the Pacific Islands. There are existing migration schemes in place in Australia and New Zealand. These schemes, however, will become increasingly inadequate in response to the large level of displacement set to occur<sup>133</sup> and “do not bring an appropriate answer to the necessity that *all* climate migrants be given a new place

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<sup>126</sup> Jolly and Ahmad, above n 2, at 43.

<sup>127</sup> Methmann and Oels, above n 58, at 60.

<sup>128</sup> UNFCCC COP 16 *The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention* UN Doc FCCC/CP/2010/7/Add.1 (15 March 2011), art 14(f).

<sup>129</sup> Phillip, above n 114, at 642.

<sup>130</sup> At 175.

<sup>131</sup> At 173.

<sup>132</sup> Preamble.

<sup>133</sup> Michele Klein Solomon and Koko Warner “Protection of Persons Displaced as a Result of Climate Change: Existing Tools and Emerging Frameworks” in Michael Gerrard and Gregory Wannier (eds) *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press, New York, 2013) at 290.

to live in dignity.”<sup>134</sup> For example, the New Zealand government has created the Pacific Access Category to allow 75 individuals and their immediate families from Tuvalu to migrate per year.<sup>135</sup> The scheme requires proof of language ability, employment plans and the fulfilment of income requirements; all problems in the case of forced environmental displacement.<sup>136</sup> Australia and New Zealand both have seasonal worker programs set up for Kiribati residents.<sup>137</sup> Seasonal relocation, however, is not a viable option in light of Kiribati’s expected inundation. Despite the obvious inadequacies of these schemes, the New Zealand government has asserted it “does not have an explicit policy to accept people from Pacific Island countries due to climate change”.<sup>138</sup>

Without international support, migration is unlikely to be adaptive. As discussed in chapter II, relocation due to climatic impacts commonly occurs in unplanned, unmanaged ways. Migrants typically lack sufficient resources and find themselves in situations of equal or exacerbated vulnerability. Without international assistance, migration will remain a highly stressful, disruptive and traumatic experience for many.

Furthermore, migration as adaptation silences callings for climate justice by shrinking both rights and responsibilities.<sup>139</sup> Migrants bear the burden of relocation, shifting responsibility away from institutional agents.<sup>140</sup> Migration as adaptation portrays relocation as a proactive and smart choice, which undoubtedly “masks the inequalities and disproportionate burden” experienced by the climate vulnerable.<sup>141</sup> Perceiving climate induced displacement through an adaptive lens fails to account for the losses and psychological stress migrants will suffer.<sup>142</sup> Ultimately, this conceptualisation “is an oversimplification and a restrictive approach” to climate displacement.<sup>143</sup> Thus, analysis of alternative legal avenues for addressing the problem of displacement is necessary.

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<sup>134</sup> Mayer, above n 60, at 386.

<sup>135</sup> Mayer, above n 60, at 386.

<sup>136</sup> Constable, above n 77, at 1029.

<sup>137</sup> Klepp and Herbeck, above n 7, at 67.

<sup>138</sup> Klepp and Herbeck, above n 7, at 68.

<sup>139</sup> Giovanni Bettini, Sarah Nash and Giovanna Gioli “One Step Forward, Two Steps Back? The Fading Contours of (In)justice in Competing Discourses on Climate Migration” (2017) 183 *The Geographical Journal* 348 at 349.

<sup>140</sup> Bettini, Nash and Gioli, above n 139, at 349.

<sup>141</sup> Jolly and Ahmad, above n 2, at 69.

<sup>142</sup> Working Group II IPCC, above n 8, at 771.

<sup>143</sup> Jolly and Ahmad, above n 2, at 97.

## 2 *Loss and damage*

“Loss and damage” within the international climate change regime recently emerged as a potential avenue for addressing climate displacement. Displacement may be viewed as loss or damage resulting from climate change impacts, and therefore requires the international community’s support to address it. Despite theoretical potential, actual support and action under this notion are yet to eventuate.

The international legal system has “struggled to define the boundaries of responsibility for harmful actions”.<sup>144</sup> Despite the continued calls of small island states to address climate-related harms,<sup>145</sup> developed nations have historically avoided the topic of climate change-related loss and damage.<sup>146</sup> However, in 2007, the Bali Action Plan introduced “loss and damage” to the international climate change arena.<sup>147</sup>

In 2010, “loss and damage” emerged in international negotiations regarding the Cancun Agreement.<sup>148</sup> The Conference of the Parties (COP) in Durban, 2011, and in Doha, 2012, referenced establishing an international mechanism to address loss and damage associated with the impacts of climate change.<sup>149</sup> In 2013, the parties to the United Nations Framework Convention on Climate Change (UNFCCC) agreed to establish the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts. The key functions of the mechanism are to enhance understanding of risk management, strengthen dialogue and coherence between stakeholders and enhance action and support to address loss and damage resulting from climate change.<sup>150</sup>

While not explicitly defined, loss and damage include more than that which can be reduced through adaptation, namely “unavoidable” damage.<sup>151</sup> Theoretically, the mechanism will

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<sup>144</sup> Working Group III IPCC *Climate Change 2014: Mitigation of Climate Change: Social, Economic and Ethical Concepts and Methods* (IPCC, Fifth Assessment Report, 2014) at 218.

<sup>145</sup> Moleen Monita Nand and Douglas K Bardsley “Climate Change Loss and Damage Policy Implications for Pacific Island Countries” (2020) 25 *Local Environment* 725 at 730.

<sup>146</sup> Daniel Bodansky “The Paris Climate Change Agreement: A New Hope?” (2016) 110 *AJIL* 288 at 309.

<sup>147</sup> *UNFCCC COP 13 The Bali Action Plan: Outcome of the Work of the Ad Hoc Working Group on Longer-term Cooperative Action under the Convention* UN Doc FCCC/CP/2007/6/Add.1 (14 March 2008), art 1(c)(iii).

<sup>148</sup> Thornton, above n 70, at 111.

<sup>149</sup> Thornton, above n 70, at 112.

<sup>150</sup> UNFCCC “Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts (WIM)” (2021) <[www.unfccc.int](http://www.unfccc.int)>; Adelman, above n 11, at 46.

<sup>151</sup> Eckersley, above n 69, at 482.

provide support to vulnerable, developing countries in response to the unavoidable impacts of climate change, such as displacement.<sup>152</sup> The operationalisation of the mechanism is still a work in progress. COP21 in Paris, 2015, agreed the executive committee of the Warsaw Mechanism would set up a task force to “develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change.”<sup>153</sup> The task force established at COP21 is presently in phase two, which involves the identification of best practice to minimise and address displacement.<sup>154</sup>

It is unclear exactly how loss and damage arising from climate displacement will be addressed, particularly given that the Paris agreement has been carefully drafted to avoid liability and financial compensation.<sup>155</sup> Further, developed countries have been reluctant to recognise loss and damage in any practical sense out of fear of subsequent litigation and liability.<sup>156</sup> The mechanism currently provides no support for the displaced, and whether it will in the future remains uncertain. Inaction and uncertainty will not suffice for climate induced displacement.

Following the UNFCCC’s recognition of climate-related loss and damage, smaller state-led responses to the problem of displacement have emerged, such as the Nansen Initiative.<sup>157</sup> However, climate induced displacement, a global phenomenon, requires a global response. While state-led initiatives are a step in the right direction, their voluntary nature is unlikely to attract enough key players and effective implementation on the global scale remains a significant challenge.<sup>158</sup> Despite the potential for displacement to be addressed through loss and damage, the current status of the Warsaw Mechanism maintains the legal gap in which climate displaced persons reside.<sup>159</sup>

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<sup>152</sup> Eckersley, above n 69, at 482.

<sup>153</sup> Thornton, above n 70, at 113.

<sup>154</sup> Thornton, above n 17, at 30–31.

<sup>155</sup> Article 8; see also Thornton, above n 70, at 113.

<sup>156</sup> Nand and Bardsley, above n 145, at 731.

<sup>157</sup> Phillip, above n 114, at 643.

<sup>158</sup> Albert Kraler, Caitlin Katsiaficas and Martin Wagner *Climate Change and Migration: Legal and Policy Challenges and Responses to Environmentally Induced Migration* (European Union, PE 655.591, 2020) at 15.

<sup>159</sup> Phillip, above n 114, at 643.



### *C International Human Rights Law*

The connection between climate change and human rights has recently become prominent in academic and policy discourse.<sup>160</sup> It is plausible that the injustice of climate change prompts human rights law to provide “the platform under international law in filling up the existing protection gaps to promote climate justice.”<sup>161</sup> Human rights discourse encapsulates states’ responsibility to preserve and protect the fundamental rights of all people, including the displaced.<sup>162</sup> However, analysis of international human rights law will demonstrate the flaws in applying it to climate displacement.

Violations of fundamental human rights emerge from severe environmental degradation.<sup>163</sup> The argument for a human rights-based approach is grounded in the fact that regions are reduced to uninhabitability, threatening human rights such as the right to life, food, water and shelter.<sup>164</sup> Furthermore, the disproportionate effect displacement will have on poor and vulnerable populations means that relocation may threaten other internationally recognised human rights, such as the rights to cultural heritage, livelihood, clothing, housing and self-determination.<sup>165</sup>

International instruments and bodies have acknowledged climate change’s threat to human rights. The UNHRC has stated that the right to life “cannot be construed in a restrictive fashion”,<sup>166</sup> and that states have human rights obligations to protect the rights of displaced persons.<sup>167</sup> The Paris Agreement acknowledges that states should consider and promote obligations regarding the rights of migrants and people in vulnerable situations.<sup>168</sup> However, vulnerable populations were disappointed with Paris given it failed to stipulate any mechanism that would actually protect their rights.<sup>169</sup> Despite acknowledging the connection between

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<sup>160</sup> Jolly and Ahmad, above n 2, at 67.

<sup>161</sup> Jolly and Ahmad, above n 2, at 68.

<sup>162</sup> At 64.

<sup>163</sup> Jolly and Ahmad, above n 2, at 69–70.

<sup>164</sup> At 70.

<sup>165</sup> At 70; International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), arts 1, 3 and 11(1).

<sup>166</sup> Jolly and Ahmad, above n 2, at 70; UNHRC, above n 113, at [9.4].

<sup>167</sup> UNHRC, above n 113, at [9.4].

<sup>168</sup> Preamble.

<sup>169</sup> Jolly and Ahmad, above n 2, at 96.

climate change and fundamental human rights, international human rights law fails to provide concrete protection for the displaced.

In Teitiota's application for refugee status in New Zealand, he argued for protection on the basis that severe environmental degradation violated his right to life. The UNHRC rejected this argument, setting the precedent that the burden for establishing a violation of the right to life is high. The UNHRC notably stated that the effects of climate change "may become incompatible with the right to life with dignity", thereby triggering non-refoulement rights.<sup>170</sup> While this is a seemingly promising step towards the vision of human rights discourse, enforcement of human rights law remains problematic. The limited jurisdictional reach of international human rights law results in a lack of sufficient enforcement mechanisms.<sup>171</sup> The International Court of Justice (ICJ) has no enforcement mechanism to ensure human rights violations do not reoccur.<sup>172</sup> Thus, while international human rights law provokes a moral responsibility of states, its practical application is vague and the likelihood of states not accepting the full extent of their obligations does not guarantee protection.<sup>173</sup> In the case of large-scale climate displacement, human rights law is an inviable protection mechanism.

#### *D Conclusion*

The conclusion of this chapter, unsurprisingly, is that there is no comprehensive international framework that addresses climate displacement.<sup>174</sup> The injustice of climate displacement is globally recognised. There is growing awareness of the threat unassisted displacement poses to the livelihoods and rights of displaced populations. Nevertheless, the legal gap remains. Attempts to re-interpret existing instruments are not enough. The existing instruments cannot reasonably provide the assistance and protection millions of displaced persons will soon need. Subsequent analysis will show that a new approach embedded in a new international legal framework is the most suitable option for climate displaced persons going forward.

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<sup>170</sup> UNHRC, above n 113, at [9.11].

<sup>171</sup> Siobhán McInerney-Lankford "Human Rights and Climate Change: Reflections on International Legal Issues and Potential Policy Relevance" in Michael Gerrard and Gregory Wannier (eds) *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (Cambridge University Press, New York, 2013) at 231.

<sup>172</sup> Jennifer Skinner "The State Responsibility in the Face of Environmentally Displaced Persons" (2014) 4 *Wake Forest J L & Poly* 417 at 427–428.

<sup>173</sup> Mayer, above n 60, at 388.

<sup>174</sup> Foresight, above n 5, at 154.

## *IV An International Legal Framework for Climate Displacement*

The following chapter will lay the foundations for a new international legal framework that *directly* addresses climate induced displacement. The current and predicted state of climatic impacts in the Pacific region make a new legal framework both justified and essential. In order to demonstrate the theoretical basis of a new legal framework, succeeding discussion will situate the framework in the Pacific region. Despite this focus, a new legal framework should respond to *global* climate induced displacement.

### *A Justification for a new Framework*

#### *1 Scale and nature of the problem*

The growing magnitude and international implications of the problem of climate displacement call for a new international framework. The predictions for climate displacement range from millions to billions of people.<sup>175</sup> Large-scale, unregulated displacement will have significant economic, security, political and social implications for the international community.<sup>176</sup> Thus, it is in the international community's interest to provide a coordinated response to the problem of displacement. Despite the scale and nature of the problem, no "coherent multilateral governance framework" offers protection to climate displaced people.<sup>177</sup> No global agreement attributes assisting, protecting or hosting responsibilities to states.<sup>178</sup> Resultingly, states have no legitimised legal obligations to respond to the matter. Those displaced by climate change are effectively fighting this battle on their own.

We cannot wait for islands to sink before we act.<sup>179</sup> The situation in the Pacific region calls for immediate international attention. Given that the current legal avenues have proven inadequate, a new international framework is essential.<sup>180</sup>

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<sup>175</sup> Jolly and Ahmad, above n 2, at 24.

<sup>176</sup> Hodgkinson and Young, above n 55, at 309.

<sup>177</sup> Hodgkinson and Young, above n 55, at 308.

<sup>178</sup> Hodgkinson and Young, above n 55, at 309.

<sup>179</sup> Solomon and Warner, above n 133, at 295.

<sup>180</sup> Contrast Jane McAdam "Swimming Against the Tide: Why a Climate Change Displacement Treaty is Not *the* Answer" (2011) 23 Int'l J Refugee L 2 at 5.

## *2 Existing obligations*

A new international legal framework that places obligations on states related to climate displacement reflects existing obligations under the UNFCCC. The UNFCCC acknowledges that responses to climate change require global cooperation.<sup>181</sup> Furthermore, the UNFCCC recognises the enhanced and disproportionate vulnerability of low-lying island states, and that responses to climate change and its impacts must prioritise the needs of vulnerable developing states.<sup>182</sup> Article 4 of the framework details the commitments developed parties have towards developing parties. This includes assisting developing parties that are particularly vulnerable to the impacts of climate change to meet the costs of adaptation.<sup>183</sup>

The creation of the Warsaw Mechanism to address climate change-related loss and damage, however, recognises that climate change impacts are likely to extend beyond those which can be adapted to. The worsening extent of climatic impacts renders it implausible that the obligation of developed states to assist developing states does not extend beyond adaptation measures. Additionally, developed parties to the agreement have an obligation under article 4(8) to assist small island countries (among others) to meet their specific needs arising from climatic impacts and with the implementation of response measures.<sup>184</sup> The specific needs and response measures of small island states will increasingly revolve around relocation. Thus, the obligations under the UNFCCC support the implementation of obligations on states to assist those displaced by climate change in a new climate displacement framework.

### *B Scope of a new Framework*

#### *1 A legally binding, freestanding framework*

The UNFCCC is a framework instrument that does not directly bind states to their obligations.<sup>185</sup> Non-binding obligations in existing international instruments within the climate

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<sup>181</sup> United Nations Framework Convention on Climate Change 1771 UNTS 101 (opened for signature 16 March 1982, entered into force 21 March 1994) [UNFCCC], preamble.

<sup>182</sup> Preamble and art 3(2).

<sup>183</sup> Article 4(4).

<sup>184</sup> Articles 4(8)(a), (b), (d) and (g).

<sup>185</sup> Thornton, above n 70, at 84.

change regime are too often and too easily skirted around by states.<sup>186</sup> A new displacement framework should include legally binding obligations on states to address climate induced displacement. Another international instrument that fails to oblige states' action will serve no benefit for the displaced.<sup>187</sup>

A legal framework that responds to climate induced displacement should be freestanding.<sup>188</sup> In this way, it can complement existing law but provide a unique and flexible mechanism for addressing climate displacement distinctively.<sup>189</sup> Given the looming potential for the inundation of entire island nations, and the shortcomings of current legal mechanisms, the displaced are likely to find greater sanctuary in an independent framework that directly responds to their needs.

## 2 External displacement

A new legal framework that responds to displacement must prioritise cross-border people movement. Jane McAdam has criticised existing displacement proposals, arguing they wrongly focus on external displacement.<sup>190</sup> While internal climate displacement has been more prevalent globally, it is currently dealt with through other instruments.<sup>191</sup> The predicted inundation of islands in the Pacific region arguably gives rise to a greater and more urgent need for regulation of cross-border displacement.<sup>192</sup> For this reason, a displacement framework should appropriately address external displacement first and foremost.

If an international displacement framework that primarily responds to external displacement is successful, then the framework could extend to include internal displacement.<sup>193</sup> This may be increasingly necessary as internal climate displacement grows in frequency. The extension to internal climate displacement would likely entail the international community providing

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<sup>186</sup> Anne Peters, Heike Krieger and Leonhard Kreuzer "Due Diligence: The Risky Risk Management Tool in International Law" (2020) 9 Cambridge Int Law J 121 at 126.

<sup>187</sup> Burkett, above n 9, at 538.

<sup>188</sup> Contrast McAdam, above n 180, at 8 and 12; McAdam argues that a displacement instrument should not be freestanding, nor superior to other mechanisms. However, it is inevitable that a framework responding to international displacement will be the predominant instrument that populations in the Pacific region rely on.

<sup>189</sup> Bonnie Docherty and Tyler Giannini "Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees" (2009) 33 Harv Envtl L Rev 349 at 350.

<sup>190</sup> McAdam, above n 180, at 8.

<sup>191</sup> See Mayer, above n 60, at 369; and United Nations *Guiding Principles on Internal Displacement*, above n 61.

<sup>192</sup> See Mayer, above n 60, at 369.

<sup>193</sup> See generally Hodgkinson and Young, above n 55.

support, predictably in the form of financial assistance, to host states for displacement within their borders. While the potential to address internal displacement is neither the focus nor within the scope of this paper, it is important to acknowledge this potential for the future.

### *3 Financing and hosting*

A new framework must address both the financial costs of displacement and hosting responsibilities of states through legally enforceable obligations. One of the grave injustices of climate displacement is that the displaced are typically poor and vulnerable communities who lack the resources to move safely and beneficially. Financial assistance under a new framework is fundamental for ensuring people movement occurs without unnecessary hardship. Furthermore, given that there is currently no obligation on states to accept displaced persons,<sup>194</sup> the framework must provide for the obligation of states to receive and host the displaced.

This paper aims to identify how the financial and hosting obligations regarding displacement can be shared fairly among the international community. The focus of this paper is at the theoretical level, with minimal focus directed at implementation and enforcement mechanisms. While implementation and enforcement mechanisms are important elements for the success of an international instrument, full exploration of these elements is beyond the scope of this paper. Previous proposals, namely that by Bonnie Docherty and Tyler Giannini,<sup>195</sup> and David Hodgkinson and Lucy Young,<sup>196</sup> detail implementation and enforcement mechanisms that may be applicable.

### *C Finding the Political Will*

While a displacement framework may be both justified and necessary, the political will of states to agree to a framework remains a hurdle. The following discussion will outline factors that incentivise states' political will to cooperate.

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<sup>194</sup> Adelman, above n 11, at 43.

<sup>195</sup> Docherty and Giannini, above n 189, at 350 and 373.

<sup>196</sup> Hodgkinson and Young, above n 55, at 315.

### *1 Self-interest and mutual gains*

It is widely recognised that states lack the political will to agree to legally binding obligations.<sup>197</sup> While this is an obvious hurdle, the scale and nature of climate induced displacement is arguably an incentive in itself. Without a coordinated response, the fear of climate displaced persons migrating to neighbouring states in masses, causing violent conflict and threatening states' sovereignty and national security, might materialise.<sup>198</sup> By sharing the responsibility between themselves, states are likely to avoid the gravest consequences of a displacement flux. Thus, states' self-interests will be protected.

A new displacement framework can conceivably provide mutual gains, furthering states' self-interests.<sup>199</sup> Climate change action has had difficulty gaining momentum. States have been reluctant to employ substantial mitigation efforts out of fear of detriment to their economies.<sup>200</sup> "Retaining development's prosperity while trying to provide justice for those most acutely affected by fossil fuel pollution" has long been a political challenge.<sup>201</sup> However, developed states need not give up "development's prosperity" due to climate induced displacement. The history of mitigation efforts makes it arguable that states would prefer to continue with more feeble mitigation targets while simultaneously assisting the relocation of those suffering the gravest impacts of emissions.<sup>202</sup> The alternative, significantly reducing emissions to zero, is unlikely to be the favoured option.<sup>203</sup> While this is not a heartening suggestion for combatting climate change, it incentivises political will favouring a global legal framework for climate displacement.

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<sup>197</sup> McAdam, above n 180, at 15–16.

<sup>198</sup> Methmann and Oels, above n 58, at 55.

<sup>199</sup> Elisa Calliari, Swenja Surminski and Jaroslav Mysiak "The Politics of (and Behind) the UNFCCC's Loss and Damage Mechanism" in Reinhard Mechler and others (eds) *Loss and Damage from Climate Change* (Springer, Cham, Switzerland, 2019) at 174.

<sup>200</sup> Henry Shue "Subsistence Protection and Mitigation Ambition: Necessities, Economic and Climatic" (2019) 21 *British Journal of Politics and International Relations* 251 at 255.

<sup>201</sup> Simonelli, above n 125, at 311.

<sup>202</sup> See generally United Nations Environment Programme *Emissions Gap Report 2020* (United Nations Environment Programme, 2020).

<sup>203</sup> See generally United Nations Environment Programme, above n 202.

## *2 Morality and justice*

The perhaps most powerful factors incentivising global cooperation to address climate displacement are grounded in justice and morality. Without a globally coordinated response, potentially millions of people will be homeless or living in poverty, with their livelihoods and lives at risk. Unlike many other climate change-related disputes, climate displacement revolves around people. While it may be easy to turn a blind eye to environmental degradation, it will arguably be much more challenging to turn a blind eye to such a large-scale human crisis.<sup>204</sup> Climate induced displacement provokes a moral responsibility which if ignored signals a humanity crisis in itself. The disproportionate burden of displacement felt by poor and developing populations strengthens the moral responsibility of states to assist.

Climate induced displacement is an inherently unjust problem. There is obvious injustice in whole islands sinking in the Pacific as a result of greenhouse gas emissions, despite the entirety of the Pacific region contributing one-tenth of one per cent to global emissions.<sup>205</sup> Additionally, the benefits that have resulted from substantial global emissions are being enjoyed elsewhere, while low contributors bear the brunt of the consequences.<sup>206</sup> The issue of climate induced displacement is therefore firmly centred in morality and justice; justice demands the problem be addressed. For this reason, justice theory should most appropriately guide a new legal framework that addresses climate displacement. The following chapter will unpack two theories of justice that may be applicable in this context.

### *V A Justice-Based Approach*

Commentators have been critical of climate change legal analysis, arguing that it has often been ill-attentive to questions of climate justice.<sup>207</sup> Fanny Thornton, who has extensively grappled with the issue of climate justice, notes that “law is generally considered to be a ‘system of regulations to govern conduct [...] in response to the need for regularity, consistency and justice based upon collective human experience’.”<sup>208</sup> Thornton contends that despite

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<sup>204</sup> Perkiss and Moerman, above n 22, at 170.

<sup>205</sup> Perkiss and Moerman, above n 22, at 176.

<sup>206</sup> Thornton, above n 70, at 195–196.

<sup>207</sup> Thornton, above n 70, at 6.

<sup>208</sup> Thornton, above n 70, at 8.



receiving little attention to date, justice theory provides a “particularly appropriate analytical framework” to approach the problem of climate displacement.<sup>209</sup> Marco Grasso has similarly argued that in light of the ethical issues associated with climate change, “justice is fundamental in fostering collaboration among states”.<sup>210</sup> Grasso further contended that a justice-based approach to climate change problems might imply greater legitimacy and enhance global cooperation.<sup>211</sup>

As articulated in Chapter II, the distribution of benefits and burdens associated with climate change presents a significant ethical issue that stands true in the context of climate induced displacement. Justice theory can provide an adequate response to the inequities of climate displacement. However, scholars have disagreed over which justice theory should prevail. Two particular theories dominate the literature: corrective justice and distributive justice. This chapter will explore both theories of justice, outlining why distributive justice must prevail in this context.

#### *A Corrective Justice (and its Limitations)*

“The primary aim of corrective justice is to correct historical wrongs and to compensate victims who suffer the loss of a protected interest such as livelihood or property.”<sup>212</sup> Corrective justice in the displacement context considers people movement as damage, loss, or harm that is compensable.<sup>213</sup> Corrective justice requires a victim who has suffered harm, and a perpetrator who is causally linked to the harm suffered.<sup>214</sup> In practical terms, a corrective justice-based displacement response might entail a developed state, such as the United States, paying compensation to an island state in the Pacific region for the harm caused by its emissions.<sup>215</sup> Succeeding analysis will highlight the practical limitations of corrective justice in the context of climate displacement.

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<sup>209</sup> At 7.

<sup>210</sup> Grasso, above n 12, at 2.

<sup>211</sup> Grasso, above n 12, at 4.

<sup>212</sup> Adelman, above n 11, at 38.

<sup>213</sup> Thornton, above n 70, at 8.

<sup>214</sup> Thornton, above n 70, at 10 and 73.

<sup>215</sup> Nand and Bardsley, above n 145, at 731.

### *1 Causality and harm*

Corrective justice is fault-based.<sup>216</sup> There must be a perpetrator who is at fault for the harm caused to another. There are many challenges relating to causality in the climate displacement context that render establishing fault very difficult. Climate displacement is usually multi-causal. While climate change impacts may be one influential factor, many other factors, such as socioeconomic status, often play a significant role in displacement.<sup>217</sup>

Identifying a culprit is another hurdle. Climate change is an “aggregate effort problem that is truly global in scope, in that GHG emissions from anywhere contribute to climate change everywhere.”<sup>218</sup> There is obvious difficulty in attributing emissions to a particular entity and then finding causality between those emissions and the harm suffered.<sup>219</sup> There is a long and time-lagged causal chain of climate change, and causers of harm are dispersed around the globe.<sup>220</sup> Harm caused is likely the cumulative effect of emissions resulting from a host of insignificant acts performed by a host of actors.<sup>221</sup> Thus, pinpointing direct causality would be an onerous if not impossible task. Additionally, present harm is likely the result of past actions performed with “excusable ignorance”.<sup>222</sup> Can blame be attributed to entities for emissions that occurred before the emergence of scientific evidence that greenhouse gases are harmful?<sup>223</sup> Responsibility for emissions does not always equate to culpability, making corrective justice difficult to apply in this context.<sup>224</sup>

Furthermore, the harm associated with displacement is not easily quantified.<sup>225</sup> The harm suffered by displaced persons include tangible losses, such as damage to property and assets, but also intangible harms, such as psychological harm and loss of livelihood, which are

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<sup>216</sup> Thornton, above n 17, at 21.

<sup>217</sup> Thornton, above n 70, at 73.

<sup>218</sup> Daniel Cole “The Problem of Shared Irresponsibility in International Climate Law” in André Nollkaemper and Dov Jacobs (eds) *Distribution of Responsibilities in International Law* (Cambridge University Press, United Kingdom, 2015) at 293. GHG= Greenhouse Gas Emissions.

<sup>219</sup> Thornton, above n 17, at 23; Thornton raises the concept of “attribution science” (the ability to attribute climate impacts to an entity’s emissions) but notes that attribution science is still in its infancy and “fraught with many difficulties.” See also Cole, above n 218, at 308–309; for the same conclusion about attribution science.

<sup>220</sup> Ewan Kingston “The Just Allocation of Climate Burdens” (Thesis MA Philosophy, Victoria University of Wellington, 2012) at 115.

<sup>221</sup> Thornton, above n 70, at 74.

<sup>222</sup> Eckersley, above n 69, at 485; and Pickering and Barry, above n 100, at 673.

<sup>223</sup> Eckersley, above n 69, at 485; and Pickering and Barry, above n 100, at 673.

<sup>224</sup> Pickering and Barry, above n 100, at 672.

<sup>225</sup> Thornton, above n 17, at 25.

arguably immeasurable.<sup>226</sup> How can the loss of culture, identity, traditions and statehood be appropriately compensated? Corrective justice aims to ‘correct’ harms to restore victims to their position prior to the harm occurring.<sup>227</sup> It is contentious as to whether the harms of displacement can be fully ‘corrected’ through monetary reparations.<sup>228</sup> Evidence suggests that “impoverishment and suffering persist long after, and often in spite of, compensation for displacement”.<sup>229</sup> These difficulties suggest corrective justice is ill-suited to the problem of displacement.

## *2 Litigation challenges*

Litigating a corrective justice claim would require a wrongdoer to have committed a harmful act in breach of an international obligation.<sup>230</sup> Theoretically, a corrective justice claim could give rise to liability as a result of violating the “no-harm” rule.<sup>231</sup> The no-harm rule holds that states should not cause harm to, or violate the rights of, other states.<sup>232</sup> The no-harm rule is customary international law and recognised in the UNFCCC.<sup>233</sup> The “polluter pays” and “beneficiary pays” principles arguably also support corrective claims. The polluter pays principle holds that those who pollute are responsible for compensating the harm caused.<sup>234</sup> The beneficiary pays principle similarly places responsibility on states to compensate for harm from which they have benefited.<sup>235</sup> Thus, corrective justice would entail “polluters” and “beneficiaries” compensating for the harm they have caused to displaced claimants in violation of the no-harm rule.

However, claims to correct harm caused by emissions have been largely unsuccessful.<sup>236</sup> This is partly due to the soft-law nature of the forementioned rules and principles, and states’ reluctance to commit themselves to obligations that might give rise to liability.<sup>237</sup> A key reason

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<sup>226</sup> Thornton, above n 70, at 71 and 92.

<sup>227</sup> Mbazira, above n 10, at 8.

<sup>228</sup> Burkett, above n 9, at 531.

<sup>229</sup> Thornton, above n 70, at 92.

<sup>230</sup> Luke Elborough “International Climate Change Litigation: Limitations and Possibilities for International Adjudication and Arbitration in Addressing the Challenge of Climate Change” (2017) 21 NZJEL 89 at 97.

<sup>231</sup> See Nand and Bardsley, above n 145, at 731.

<sup>232</sup> Grasso, above n 12, at 46.

<sup>233</sup> Preamble and art 3(1).

<sup>234</sup> Thornton, above n 70, at 73.

<sup>235</sup> Eckersley, above n 69, at 487.

<sup>236</sup> Perkiss and Moerman, above n 22, at 178.

<sup>237</sup> Eckersley, above n 69, at 485.

for the historical failings of these claims is attributable to the disinclination of judicial bodies to “ascribe a sufficient causal relationship” between emissions and harm that would give rise to liability.<sup>238</sup> For example, in 2011 the Republic of Palau sought advice from the ICJ as to whether a breach of the no-harm rule could give rise to a successful litigation claim.<sup>239</sup> The answer was no due to the difficulty of placing blame for specified climate impacts. The lack of international obligations that can give rise to liability, and the reluctance of the ICJ to attribute causal responsibility for emissions, limit the likelihood of successful litigation based on corrective justice.<sup>240</sup>

Furthermore, litigating a claim for harm caused is likely to be expensive and time-consuming. This is inappropriate in the context of climate displacement. The populations most likely to be affected by climate displacement are typically those in poor and developing states. Financing a corrective justice claim is an unrealistic prospect, especially given its unlikely success. Additionally, displacement is likely to be rapid and highly stressful for many, making a corrective justice claim an impractical priority. Accordingly, claims on behalf of the climate vulnerable are understandably infrequent.<sup>241</sup>

### *3 Disincentivising cooperation*

Corrective justice involves holding states liable for their emission activity and requiring them to compensate for the harm caused. Liability and compensation remain “politically sensitive and legally challenging in the climate change context, contributing to limited prospects for corrective justice, and thus limited prospects related to justice claims.”<sup>242</sup> States have been reluctant to admit fault or accept responsibility arising from emissions.<sup>243</sup> Even with the creation of the Warsaw Mechanism, argued to be underpinned by corrective principles,<sup>244</sup> the references to loss and damage have carefully avoided the language of corrective justice, liability and compensation.<sup>245</sup> It remains unlikely that states will agree to be bound by obligations that might give rise to liability. The consent-based nature of international

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<sup>238</sup> Simonelli, above n 125, at 308.

<sup>239</sup> Perkiss and Moerman, above n 22, at 177–178.

<sup>240</sup> Simonelli, above n 125, at 307–308.

<sup>241</sup> Burkett, above n 9, at 518.

<sup>242</sup> Thornton, above n 70, at 192.

<sup>243</sup> Eckersley, above n 69, at 494.

<sup>244</sup> Thornton, above n 17, at 30.

<sup>245</sup> Thornton, above n 70, at 113.

instruments<sup>246</sup> and that of the jurisdiction of the ICJ<sup>247</sup> places states' cooperation as a priority. A corrective justice approach to a displacement framework will only disincentivise states' much needed cooperation.

Furthermore, the inclusion of notions such as liability and compensation in a displacement response risks tarnishing the concept of climate justice altogether.<sup>248</sup> If justice is perceived as developed states paying off their "climate debt", such states will predictably decline to be involved.<sup>249</sup> Corrective justice is, therefore, an inappropriate basis for a climate displacement framework that is dependent on states' cooperation.

#### *4 Conclusion*

Corrective justice arguably moves the focus away from assistance and protection, and into the realm of rectification and correction.<sup>250</sup> Financial compensation for harm does not help to resolve one of the key problems of climate displacement; those moving will still lack legal protection. Addressing climate displacement under a corrective justice approach places too much weight on historical responsibility, neglecting the important need to work out a "fair distribution of rights and responsibilities for the future."<sup>251</sup> Given its associated challenges and unlikely success, corrective justice provides an "unhelpful and potentially counterproductive frame" in this context.<sup>252</sup> An alternative justice theory should prevail.

#### *B Distributive Justice*

Distributive justice aims to equitably allocate among parties the costs and benefits of climate change.<sup>253</sup> While corrective justice is concerned with blaming and punishing,<sup>254</sup> distributive justice focuses on redirecting international resources to address entrenched inequalities. Under

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<sup>246</sup> Nico Krisch "The Decay of Consent: International Law in an Age of Global Public Goods" (2014) 108 AJIL 1 at 4.

<sup>247</sup> Cole, above n 218, at 307 and 311. Only two countries, Cuba and Netherlands, have accepted the automatic jurisdiction of the ICJ under the UNFCCC.

<sup>248</sup> Pickering and Barry, above n 100, at 679.

<sup>249</sup> Pickering and Barry, above n 100, at 679.

<sup>250</sup> Thornton, above n 17, at 15.

<sup>251</sup> Pickering and Barry, above n 100, at 680.

<sup>252</sup> Pickering and Barry, above n 100, at 669.

<sup>253</sup> Grasso, above n 12, at 5.

<sup>254</sup> Grasso, above n 12, at 35.

a distributive justice lens, climate induced displacement is an “undeserved and disproportionate burden requiring collective rebalance.”<sup>255</sup>

### *1 Distributive justice in international law*

Distributive justice is recognisable in existing international legal instruments. The UNFCCC, for example, is “fundamentally distributive in nature.”<sup>256</sup> The regime frames several responsibilities of developed states to assist and support developing states. The UNFCCC makes particular reference to the disproportionate burden felt by vulnerable populations.<sup>257</sup> The framework provides for the “appropriate burden sharing” of financial assistance and resourcing among developed states.<sup>258</sup> This exhibits distributive justice qualities, as the article intends for the burdens of climate change to be distributed fairly among states. Furthermore, the UNFCCC recognises the common but differentiated responsibilities of states (CBDR).<sup>259</sup> While later chapters will expand on the CBDR principle, the notion of *common responsibility* shares similarities with distributive justice.<sup>260</sup>

### *2 Distributive justice in climate displacement*

The burdens of climate displacement are unequally distributed, disproportionately effecting developing and low-lying island states.<sup>261</sup> A distributive justice approach would focus on equitably redistributing the burdens of displacement. Unlike corrective justice, distributive justice provides for the equitable sharing of more than just money, including shelter and social duties.<sup>262</sup> A distributive justice-based international framework that responds to climate displacement can include obligations to assist with the financial costs of displacement as well as hosting the displaced.

This begs the question, what is equitable distribution in this context? “Distributive justice demands that the burdens of reducing a problem either be shared equally or based upon merit

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<sup>255</sup> Thornton, above n 70, at 8.

<sup>256</sup> Thornton, above n 70, at 139.

<sup>257</sup> Article 3(2).

<sup>258</sup> Article 4(3).

<sup>259</sup> Preamble.

<sup>260</sup> Thornton, above n 70, at 136–137.

<sup>261</sup> Thornton, above n 70, at 192.

<sup>262</sup> Grasso, above n 12, at 35.

or deservedness.”<sup>263</sup> In this context, the burden of responding to displacement could, and some argue should, be distributed among states according to emissions.<sup>264</sup> This argument can be negated mainly because it resonates too closely with corrective justice. States are unlikely to accept obligations based on their emissions due to their strong reluctance to admit fault and expose themselves to liability. For this reason, the burdens of climate displacement should be distributed among states in accordance with their capability to bear such burdens. This method of allocation will give distributive justice the greatest legitimacy.

### *3 Avoiding the problems of corrective justice*

Distributive justice avoids the contentious notions of liability, fault and compensation that underpin corrective justice. Distributive justice does not purport to “correct” harm as corrective justice does. This approach recognises that correcting harm is not always possible, nor is identifying and causally linking wrongdoers.<sup>265</sup> Rather than emphasising liability, distributive justice aims to equitably share the responsibility for a problem among parties involved.<sup>266</sup> Thus, the issues of causality, correcting harm and liability are nullified. The response to displacement does not have to be political and divisive, as it would be under a corrective justice approach. Rather, distributive justice enables collective responsibility that departs from the cycle of blame. This is likely to counter the historical reluctance of the developed world to accept responsibility for their emissions by avoiding the topic altogether.

Furthermore, distributive justice has the power to help a much larger group of people much more efficiently. While individuals may successfully bring a corrective justice claim for the harm they have suffered, this will not provide the widespread assistance and protection required for global displacement.<sup>267</sup> A displacement framework based on distributive justice affords assistance to all displaced persons, not just those who have the resources and ability to bring a claim.

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<sup>263</sup> Donald A Brown “Climate Change” in John Dernbach (ed) *Stumbling Towards Sustainability* (Environmental Law Institute, Washington D.C., 2002) at 300.

<sup>264</sup> Docherty and Giannini, above n 189, at 386.

<sup>265</sup> Mbazira, above n 10, at 113; and Andrew Cohen “Corrective vs. Distributive Justice: The Case of Apologies” (2016) 19 *Ethical Theory and Moral Practice* 663 at 676.

<sup>266</sup> Mbazira, above n 10, at 114.

<sup>267</sup> Arthur Glass “The Markus way with Dichotomies: Corrective and Distributive Justice” (2020) 160 *Thesis Eleven* 43 at 46.

#### *4 Conclusion*

Under a distributive justice-based framework, states will be obliged to help mitigate the burdens of a problem they have contributed to. However, the distributive justice nature of the proposed framework avoids finger-pointing. Rather, this approach entails “a common responsibility grounded in the fact that all states have causally contributed to their plight, albeit in varying degrees which cannot be, and need not be, precisely determined.”<sup>268</sup> Thus, distributive justice is preferable in the context of climate displacement. The following chapter will expand on how the burdens of climate displacement can be distributed equitably.

### *VI Distributing the Burdens of Displacement*

A distributive justice-based legal framework for climate induced displacement requires the equitable distribution of displacement-related burdens. Subsequent discussion will elaborate on how capability-based distributions under a new framework can fairly apportion the costs of displacement and hosting responsibilities among the international community.

#### *A Distributing Financial Burdens*

The notion of financial assistance is not new within the climate change regime. The UNFCCC provides for the obligation that developed countries contribute financial resources to assist developing parties to cope with climatic impacts.<sup>269</sup> In reality, financial contributions do not equate to demand.<sup>270</sup> Furthermore, there is a lack of financial commitments that assist climate displacement.<sup>271</sup>

“It is beyond doubt that responding to climate change impacts involves significant costs and that developing countries, in particular, may not be able to meet these themselves.”<sup>272</sup> Climate displacement is set to disproportionately affect populations in poor and developing countries. Without financial assistance, people movement due to climate change is likely to increase

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<sup>268</sup> Grasso, above n 12, at 5.

<sup>269</sup> Article 4(3).

<sup>270</sup> Thornton, above n 70, at 157.

<sup>271</sup> Thornton, above n 70, at 160.

<sup>272</sup> Thornton, above n 70, at 156.



poverty and threaten livelihoods. Thornton has suggested that “equity could be achieved through redistribution of costs which may accrue for those who are challenged with people movement.”<sup>273</sup> Distributing the costs of displacement (in the form of financial assistance) among the international community is likely to mitigate the harms, and therefore the injustice, associated with displacement.

The uptake of a new displacement framework by states will strongly depend on the distribution pattern of financial burdens. Gaining global cooperation will only be likely if states perceive the distribution of burdens as fair and enticing.<sup>274</sup> Succeeding discussion will expand on how distributing financial assistance among states according to capability will achieve cooperation.

### *1 The need for cooperative sovereignty*

A new legal framework that responds to climate displacement by requiring financial assistance from states must strike a balance between acquiring the necessary funds that the displaced need (and deserve) and maintaining state sovereignty. The ideal is to arrive at a perception of cooperative sovereignty. State sovereignty has proven a challenge to climate change responses.<sup>275</sup> The consent-based nature of international law reflects states’ desire to remain sovereign.<sup>276</sup> States do not have to agree to a treaty or agreement; it is their sovereign right to choose to do so or not. Resultingly, states have been able to hide behind the shield of sovereignty to avoid unfavourable obligations. The idea of “cooperative sovereignty” reflects states exercising their sovereign autonomy to choose to cooperate. Conceivably, cooperative sovereignty would encourage other states to cooperate, helping the particular agenda to gain traction.

A distributive justice-based response to displacement will promote the notion of cooperative sovereignty. As previously mentioned, there are existing incentives for states to cooperate in a displacement response. In short, such incentives include:

- avoidance of the consequences associated with mass displacement (such as threats to state sovereignty and security);

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<sup>273</sup> Thornton, above n 70, at 10.

<sup>274</sup> Grasso, above n 12, at 19.

<sup>275</sup> Elizabeth Burleson “Climate Change Consensus: Emerging International Law” (2010) 34 WM & Mary Envtl L & Poly Rev 543 at 587.

<sup>276</sup> Krisch, above n 246, at 2–3.

- maintaining current emission targets (by assisting those most affected as a sort of trade-off); and
- mitigating the risk of a large-scale human crisis.

These factors may drive initial interest in a climate displacement response. The dilemma is that, despite recognising the need and moral duty to help, states are likely to remain reluctant to expose themselves to any form of liability. The following discussion will detail the potential liability problem and explain how a distributive justice-based approach circumvents this problem, ultimately encouraging cooperative sovereignty.

## *2 The problem of potential liability*

A legally binding displacement framework has the potential to give rise to liability in two forms. Firstly, if a displacement framework distributes financial burdens among states according to past and present emissions, this could be perceived as liability giving rise to compensation. Contentions of liability and compensation have not gained support within the international climate change regime.<sup>277</sup> The largest emitters have not accepted the notion of historical responsibility so far, and future acceptance remains doubtful.<sup>278</sup> Attempts have been made to hold states responsible for their emitting behaviour, albeit unsuccessfully. In 2008, the Alliance of Small Island States argued for collective funding from Annex I parties to the UNFCCC based on states' historical greenhouse gas emissions and ability to pay.<sup>279</sup> The proposal, unsurprisingly, was not successful.<sup>280</sup>

Distributing burdens according to historical and current emissions sits too closely with corrective justice. Essentially, states will be required to compensate for their high emitting behaviours. This resembles liability. It is highly doubtful that developed states will exercise their sovereign right to join a regime that solidifies compensatory mechanisms based on their emissions.<sup>281</sup> Therefore, distribution according to emissions is unlikely to achieve cooperative sovereignty.

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<sup>277</sup> Thornton, above n 70, at 192.

<sup>278</sup> Eckersley, above n 69, at 487.

<sup>279</sup> Thornton, above n 70, at 110–111.

<sup>280</sup> At 110–111.

<sup>281</sup> Nand and Bardsley, above n 145, at 734.

Secondly, states may be reluctant to accept obligations to financially assist with displacement out of fear of liability arising from future breaches of such obligations. Agreement to legally binding obligations represents a commitment that many states will be hesitant to make. A new international framework, therefore, should take account of this hesitancy. Distributing financial assistance on a capability basis arguably avoids the forementioned problems by changing the narrative. The following section will unpack this.

### *3 Distributing according to capability*

Under a distributive justice approach, a legal framework should distribute the financial burdens associated with displacement among states based on their capability to assist.<sup>282</sup> While some commentators favour the “polluter-pays” or “beneficiary-pays” principles,<sup>283</sup> these contentions imply liability, resembling corrective justice. For reasons previously outlined, this will disincentivise states’ cooperation. The United Kingdom Secretary of State for Energy and Climate Change warned:<sup>284</sup>

We should be cautious about saying we are strictly liable for some particular event or some particular change, but that does not mean we shouldn’t work with others to try to *help* some of the poorest people in our world adapt to the impact of climate change.

Financial obligations according to states’ capability avoids liability. Capability distributions “would require all states to do what they can within the limits of their respective ability to assist climate refugees, irrespective of their causal contribution to the problem.”<sup>285</sup> States would be required to contribute financial assistance to the displaced in accordance with their capability to do so, not in accordance with their emission history. Thus, the international community would share the responsibility to financially assist the displaced, enabling safe and secure relocation. This method exhibits a departure from corrective justice. Rather than attributing blame and enforcing compensation, a distributive justice approach based on capability shares

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<sup>282</sup> A state’s ‘capability’ should be assessed objectively through measures such as GDP; See Eckersley, above n 69, at 488. A framework similar to the Climate Equity Reference Framework (CERF) could be implemented to determine capability. CERF analyses the fairness of states’ nationally determined contributions based on total emissions (which should be excluded in this case), and the capacity of the state, determined by GDP; See Shue, above n 200, at 257.

<sup>283</sup> See generally Adelman, above n 11; and Burkett, above n 9.

<sup>284</sup> Thornton, above n 70, at 114.

<sup>285</sup> Eckersley, above n 69, at 488.

the burdens of a globally induced problem among the international community fairly and reasonably. A distribution mechanism that reflects states' capabilities is more likely to gain the international community's cooperation.

Furthermore, obligations could stay adaptive to the fluctuating capabilities of individual states. If the agreed-upon financial contributions of a state become financially unviable, contributions could be adjusted to align with the actual capability of the state at any one time. In this way, distribution according to capability broadly aligns with the principle of CBDR. The UNFCCC acknowledges that the responsibilities of states' concerning climate change differ based on their respective capabilities and social and economic conditions.<sup>286</sup> A flexible, capability-based distribution mechanism encompasses this aspect of the CBDR principle and may mitigate the hesitancy of states to lock themselves into binding financial obligations. Without liability looming, states may be more likely to exercise their sovereign right to choose to cooperate.

An approach that avoids liability and instead achieves an equitable distribution pattern is more likely to gain the cooperation of states and achieve cooperative sovereignty. Given the persistent reluctance of states to admit fault, "a capability-based approach to the state responsibility to assist ... appears to be the only politically feasible option in the near term."<sup>287</sup>

Providing financial assistance for displacement is only one side of coin. The other side, namely hosting and protecting the displaced, warrants attention.

### *B Distributing Hosting Burdens*

There are distributive injustices relating to sheltering and hosting the climate displaced.<sup>288</sup> States have demonstrated reluctance to receive the displaced.<sup>289</sup> No international mechanism obliges states to host climate displaced persons.<sup>290</sup> There are no globally agreed-upon criteria or quotas for the admission of climate displaced persons.<sup>291</sup> Resultingly, developing countries,

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<sup>286</sup> Preamble; see also Hodgkinson and Young, above n 55, at 318; note that the authors also recognise CBDR as encompassing differences in historical emissions, but for the reasons outlined this aspect of the principle should not be applicable in a new displacement framework.

<sup>287</sup> Eckersley, above n 69, at 492.

<sup>288</sup> Thornton, above n 70, at 193.

<sup>289</sup> Jolly and Ahmad, above n 2, at 68.

<sup>290</sup> Solomon and Warner, above n 133, at 249.

<sup>291</sup> Solomon and Warner, above n 133, at 249.

notably those who lack the resources to handle a migration flux, are predicted to receive the vast majority of climate displaced persons.<sup>292</sup> This will have adverse effects on host regions, such as increasing conflict, poverty and economic stress.<sup>293</sup> This will also negatively impact the displaced, who are likely to find themselves in unfavourable conditions, exposed to new vulnerabilities.<sup>294</sup>

Thornton has argued that this burden can and should be equitably redistributed among states.<sup>295</sup> Subsequent discussion will expand on how the responsibility of states to host the climate displaced can be apportioned fairly through a distributive justice approach.

### *1 Burden sharing*

Thornton has likened the distribution of hosting responsibilities in the displacement context to burden sharing, a concept rooted in international law.<sup>296</sup> Burden sharing “arises in international law and relations, not least in relation to hosting or sheltering people on the move.”<sup>297</sup>

The idea of “burden sharing” among the international community reflects existing international law principles such as solidarity and cooperation.<sup>298</sup> Commitments to cooperation are visible within the United Nations Charter<sup>299</sup> and the Universal Declaration of Human Rights.<sup>300</sup> In the 1951 Refugee Convention, it is noted that international cooperation is required to share what would otherwise be an “unduly heavy burden” on states.<sup>301</sup> The UNFCCC’s burden sharing principle, CBDR, applies to mitigation and adaptation,<sup>302</sup> and arguably extends to other climate change responses such a displacement.<sup>303</sup>

The presence of burden-sharing in international law supports a distributive justice-based global response to climate displacement. The concept of burden sharing is akin to distributive justice,

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<sup>292</sup> Thornton, above n 70, at 7.

<sup>293</sup> Working Group II IPCC, above n 8, at 20.

<sup>294</sup> Methmann and Oels, above n 58, at 61.

<sup>295</sup> Thornton, above n 70, at 187–188.

<sup>296</sup> Thornton, above n 70, at 161–162.

<sup>297</sup> At 161.

<sup>298</sup> Thornton, above n 70, at 163.

<sup>299</sup> Charter of the United Nations, arts 55 and 56.

<sup>300</sup> *Universal Declaration of Human Rights* GA Res 217A (1948), art 22.

<sup>301</sup> Convention Relating to the Status of Refugees, preamble.

<sup>302</sup> Articles 3(1), 4(1) and 4(3)).

<sup>303</sup> Eckersley, above n 69, at 482.

which ultimately aims to equitably share the burdens of a problem among parties.<sup>304</sup> The responsibility of states to host the climate displaced exists as a “burden” to be shared among the international community. As with financial assistance, the distribution of hosting responsibilities must be fair and enticing to gain states’ cooperation and achieve cooperative sovereignty.

## *2 Distributing according to capability*

Distribution, or burden sharing, according to historical emissions is as problematic for hosting responsibilities as it is for financial assistance. Distributing hosting responsibilities among the international community according to emission contributions may be perceived as a form of compensation from high-emitting states.<sup>305</sup> If this perception exists, it is unlikely states will exercise their sovereign right to agree to cooperate. Displacement predictions range from millions to billions of people. Disincentivising states’ cooperation in hosting the climate displaced will negatively impact the displaced and put undue pressure on cooperative states.

Therefore, the distribution of hosting responsibilities among states should be in accordance with states’ capability to host the displaced.<sup>306</sup> Capability-based distributions will avoid placing unfeasible duties on states that in turn have undesirable effects for the displaced. No state must take on more displaced persons than is sensible in light of their particular circumstances. In this way, climate displacement is unlikely to have harmful effects on host regions, as it would if displacement remained unregulated. Further, this limits the likelihood of harmful displacement effects flowing on to the displaced themselves, such as through hostility and conflict.<sup>307</sup>

Some states may be reluctant to join an international framework that binds them to hosting responsibilities.<sup>308</sup> New Zealand and Australia, for example, may show reluctance given that a significant proportion of Pacific Island citizens are likely to end up in their territory. Distributing according to capability, however, will prevent a state from taking on more displaced persons than is economically and socially viable. Further, a distributive justice-based

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<sup>304</sup> Thornton, above n 70, at 161.

<sup>305</sup> Thornton, above n 70, at 127.

<sup>306</sup> See above n 282.

<sup>307</sup> Burkett, above n 9, at 539; and Working Group II IPCC, above n 8, at 20.

<sup>308</sup> Docherty and Giannini, above n 189, at 400.

approach to displacement can stay flexible to states' capability at different times. This may help to mitigate reluctance and therefore enhance global cooperation to combat the problem of climate displacement.

Distributing according to capability avoids implications that states are being held liable for their emission activity. Rather than focusing on emission contributions, a capability-based approach focuses on fairly sharing the burden of displacement among the international community. This rightly directs the aim of a displacement framework towards collective responsibility to assist and protect, rather than blame and punish.

### *3 Additional considerations*

This paper's focus has been to suggest a theoretical-level legal framework that directly addresses climate induced displacement. As articulated, the distribution of hosting responsibilities among the international community should be in accordance with states' capability. However, it is indisputable that hosting distributions will have a significant impact on the displaced. While this proposal presents a fair mechanism for distribution, it thus far has not accounted for the practical realities of hosting displaced persons. The following discussion will briefly detail additional considerations that should guide hosting responsibilities under a displacement framework.

#### (a) Perspectives of the displaced

While the division of financial assistance among states can occur without thorough consultation with the displaced, hosting responsibilities should take greater account of their perspectives.<sup>309</sup> Adhering to Hodgkinson and Young's proposal, an international displacement framework that allocates hosting responsibilities should aim to implement three principles: proximity, safeguarding of culture and self-determination.<sup>310</sup>

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<sup>309</sup> Docherty and Giannini, above n 189, at 388. This will also help to promote "procedural justice", which has been recognised as important in global negotiations that directly affect human livelihoods; see Grasso, above n 12, at 54.

<sup>310</sup> Hodgkinson and Young, above n 55, at 325.

The principle of proximity calls for resettlement of populations as close to their cultural area as possible.<sup>311</sup> This may be particularly appropriate for island states in the Pacific region “given their strong connections to both land and seascapes.”<sup>312</sup> Pacific Island populations may be drawn to New Zealand and Australia, countries nearby where there are considerable established communities of people from the Pacific region.<sup>313</sup> Further, climate displacement will be disruptive to many people’s culture, traditions and ways of life.<sup>314</sup> A displacement framework must therefore ensure that intangible cultural heritage is safeguarded and respected in host states.<sup>315</sup> The third principle that should guide the distribution of hosting responsibilities is self-determination.<sup>316</sup> Self-determination is relevant to climate induced displacement both in terms of *when* an individual chooses to move and *where*. Given the disproportionate, disruptive and potentially devastating impacts that displacement will have, the displaced should have the right to choose their destination insofar as it is practical to do so.<sup>317</sup> As “migration will ultimately result in displacement by physical separation and the potential loss of historical relationships of community strengthened by cultural traditions,”<sup>318</sup> adhering to these principles will be important for mitigating the harmful effects of displacement.

Implementing the forementioned principles is likely to influence the pattern of distribution of the displaced among states. Some regions are likely to be more popular as destinations. A primarily capability-based approach to distribution means no state will take on more displaced persons than is feasible. This may impact displaced persons’ right to choose where they end up. This is an obvious shortfall but is necessary to entice global cooperation. If “popular” states were required to take on an excessive quantity of displaced persons, they would likely decline to be involved in the global response to displacement. Disincentivising states’ cooperation will not benefit the displaced. Thus, while adherence to the forementioned principles should guide distribution as much as possible, limitations will necessarily exist. While not all displaced persons may end up in their preferred destination, they will be protected and welcomed into a

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<sup>311</sup> At 325.

<sup>312</sup> At 326.

<sup>313</sup> At 326.

<sup>314</sup> Perkiss and Moerman, above n 22, at 180.

<sup>315</sup> Hodgkinson and Young, above n 55, at 328.

<sup>316</sup> Hodgkinson and Young, above n 55, at 326; and International Covenant on Economic, Social and Cultural Rights, art 1.

<sup>317</sup> Eckersley, above n 69, at 459; the author considers displaced persons’ right to choose their destination country to be “a form of recognition of, and partial compensation for, the injustice and trauma of their loss and damage.”

<sup>318</sup> Perkiss and Moerman, above n 22, at 179.



new state. This is the fundamental aim of an international displacement framework. The potential for relocation elsewhere may be available in time.

An international displacement framework should respect and reflect the objective of the Kiribati Government's long-term evacuation plan: migration occurs with dignity and self-determination.<sup>319</sup> Consulting with the displaced and attempting to abide by the three forementioned principles is likely to further this objective.

(b) The rights of the displaced in their host-countries

A displacement framework that distributes hosting responsibilities among states must protect the rights of the displaced in their host-countries. International refugee law recognises that certain circumstances provoke international responsibility for the rights and protection of persons who are displaced and "unable to rely on their own nation for protection."<sup>320</sup> While the displaced do not sit comfortably under the Refugee Convention, the basic premise of refugee law provides an applicable standard for the rights and protection of climate displaced persons. Academics have contended that a treaty for climate change displaced persons "should be premised on the rights and protection that States *have already agreed to accord to traditional refugees*."<sup>321</sup> This is because refugee law provides "comprehensive codification"<sup>322</sup> of "civil, political, economic, social and cultural rights, based on a principle of nondiscrimination."<sup>323</sup>

Climate displaced persons have not fled their home country out of well-founded fear of persecution<sup>324</sup> but rather to escape the dire effects of climate change that threaten their livelihoods. This distinction alone does not justify climate displaced persons receiving any lesser protection of their rights. Thus, an international displacement framework should broadly reflect the rights and obligations that arise under international refugee law.

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<sup>319</sup> Klepp and Herbeck, above n 7, at 56.

<sup>320</sup> Hodgkinson and Young, above n 55, at 323.

<sup>321</sup> Hodgkinson and Young, above n 55, at 323; see also Docherty and Giannini, above n 189, at 376.

<sup>322</sup> Docherty and Giannini, above n 189, at 376.

<sup>323</sup> Hodgkinson and Young, above n 55, at 323–324.

<sup>324</sup> Convention Relating to the Status of Refugees, art 1.

### *C Conclusion*

The fundamental issues of displacement revolve around the costs of displacement and the lack of obligations on states to receive the displaced. Without financial assistance, displacement is likely to involve hardship and insecurity. Without obligations on states to receive the displaced, many will end up in unfavourable conditions, potentially living illegally and in circumstances of heightened vulnerability. Given the globally attributable responsibility for climate change, and therefore climate displacement, the international community has a moral duty to address climate induced displacement.

A distributive justice-based approach to displacement presents a fair and enticing mechanism for global cooperation. Distributing financial and hosting responsibilities among states per states' capability allows collective responsibility, without asserting individual responsibility. As states have demonstrated reluctance to be held responsible for their emission activity, it is necessary to avoid contentions of blame and fault. Rather, capability-based distribution enables the international community to offer their help because it is needed, not because they are at fault. Distributing according to capability maintains reasonable obligations on states. This is likely to incentivise states' cooperation and afford widespread assistance and protection to the displaced.

## *VII Implications of a Distributive Justice Approach*

This paper suggests a new legal framework that addresses the unjust problem of climate induced displacement through a distributive justice approach. The following chapter will assess whether this proposal sufficiently addresses the forementioned problem, and thus achieves *distributive climate justice*.

### *A Climate Displacement under a new Framework*

#### *1 The Pacific region*

The proposed international legal framework for climate displacement will have significant implications for the inevitable displacement of populations in the Pacific region. With

worsening environmental degradation, communities in the Pacific Islands have considered migrating elsewhere, albeit with well-founded concerns and apprehensions.<sup>325</sup> Individuals have (unsuccessfully) attempted to find protection under existing law, such as Teitiota's claim for refugee status in New Zealand.<sup>326</sup> Despite climatic impacts worsening and relocation becoming the most hopeful option, no international mechanism has provided the necessary assistance for relocation to populations in the Pacific region. The proposed framework does precisely that. It responds to the calls of those who lie at the frontline of climate change.

Small islands in the Pacific will face the most severe and most immediate consequences of climate change.<sup>327</sup> Without relocation, infrastructure, food and water supplies and livelihoods are under threat.<sup>328</sup> Without assisted relocation, the displaced will endure hardship, trauma and insecurity.<sup>329</sup> The proposed displacement framework aims to ensure financial assistance for populations to relocate across borders and protection at their destinations. Thus, populations in the Pacific region have a lifeline.

## *2 Global displacement*

The application of this framework is by no means limited to the Pacific region. Up to one billion people will be displaced by climate change,<sup>330</sup> with approximately 80 per cent of this displacement occurring in developing countries.<sup>331</sup> Low-lying islands are just one of the many environments that are particularly vulnerable to climatic impacts. For example, one-third of Bangladesh's coastal land is expected to be underwater within the next 50 years.<sup>332</sup> Further, one meter of sea-level rise is likely to displace seven million people in India.<sup>333</sup> The response to climatic impacts in areas such as India and Bangladesh has predominantly been internal migration, with some illegal cross-border movement.<sup>334</sup> Significant internal migration as a

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<sup>325</sup> Allgood and McNamara, above n 30, at 379–380.

<sup>326</sup> *AF (Kiribati)*, above n 112.

<sup>327</sup> Taupo, Cuffe and Noy, above n 25, at 706.

<sup>328</sup> Perkiss and Moerman, above n 22, at 169; and Working Group II IPCC, above n 8, at 6 and 17.

<sup>329</sup> Perkiss and Moerman, above n 22, at 180.

<sup>330</sup> Jolly and Ahmad, above n 2, at 5.

<sup>331</sup> Robert Falkner and others "Climate Change, Displacement and International Justice" (podcast, 14 October 2020) The London School of Economics and Politics <<https://www.youtube.com/watch?v=kY2kYi9l808>>.

<sup>332</sup> Jolly and Ahmad, above n 2, at 21.

<sup>333</sup> At 24.

<sup>334</sup> At 3 and 123.

result of climate change has led to overpopulation in cities, giving rise to health problems and conflict.<sup>335</sup>

An international displacement framework may encourage more people to relocate across borders. This will ease the load of internal migration in developing countries. Further, a new framework can support more viable and long-term movement, ensuring that people are equipped to relocate and protected in their host regions. This framework will substantially mitigate the problems associated with global climate induced displacement.

### *B Climate Justice?*

A central question remains: does distributing the burdens of displacement among states according to their capability achieve climate justice for the displaced?

Some commentators argue that climate justice is only truly achievable through admissions of fault by high-emitting developed countries and subsequent compensation or reparations awarded to the climate vulnerable.<sup>336</sup> For example, Docherty and Giannini formulated a displacement framework that attributes responsibility primarily according to emission contributions but recognised that such an approach also takes account of states' varying abilities to assist.<sup>337</sup>

The authors' proposal essentially holds states responsible for their contributions to climate change (and displacement) and requires them to redress their wrongs, resembling corrective justice. This form of justice is unlikely to eventuate into widespread assistance and protection. A new legal framework for displacement must flip Docherty and Giannini's contention. The burdens of displacement should primarily be distributed according to capability. Circumstantially, this is likely to coincide with high-emission history. The following section will unpack this correlation, bringing *distributive climate justice* to light.

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<sup>335</sup> Kartiki, above n 65, at 34.

<sup>336</sup> See Burkett, above n 9; and Adelman, above n 11; for examples of this argument.

<sup>337</sup> Docherty and Giannini, above n 189, at 386.

### *1 Financial assistance*

If capability reflects a nation's wealth,<sup>338</sup> greater capability of states to provide financial assistance is highly likely to coincide with high emission history.<sup>339</sup> Developed countries, representing less than 20 per cent of the global population, are responsible for 75 per cent of all greenhouse gas emissions.<sup>340</sup> Developed, and therefore capable, states have built their wealth and economic success through burning fossil fuels for decades,<sup>341</sup> enabling them to develop.<sup>342</sup> For example, the estimated GDP of the United States is upwards of 20 billion US dollars,<sup>343</sup> and the United States has contributed roughly 25 per cent to global emissions.<sup>344</sup> The United States portrays a country with high capability to assist who has also significantly contributed to greenhouse gas emissions. Thus, the proposed framework will afford one of the big contributors to climate change a significant role to play in the global displacement response.

Capability-based distributions promotes collective responsibility for climate change and climate displacement, while simultaneously and inadvertently requiring developed and high-emitting (capable) states to contribute to the solution to a greater extent. This is not direct compensation for the harm they have caused. Rather, this approach involves states mitigating the impacts of their actions without accepting fault or liability. This brings justice, albeit in a roundabout form, for the displaced. One commentator has argued that helping to increase the adaptive capacity of developing countries resembles a form of compensation in itself.<sup>345</sup> Similarly, it is arguable that the provision of financial assistance represents states' acceptance to address the harm caused by their emissions, an indirect form of compensation. Capability to financially assist may not match perfectly with emission contributions in every instance.<sup>346</sup> However, the likelihood of this correlation existing for most states furthers climate justice to an unprecedented extent.

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<sup>338</sup> Grasso, above n 12, at 22.

<sup>339</sup> Docherty and Giannini, above n 189, at 386.

<sup>340</sup> Klein, above n 98.

<sup>341</sup> Shue, above n 92, at 60.

<sup>342</sup> Pickering and Barry, above n 100, at 675.

<sup>343</sup> DataBank "World Development Indicators" (Accessed 2 September 2021) The World Bank <<https://databank.worldbank.org/reports.aspx?source=world-development-indicators>>.

<sup>344</sup> Klein, above n 98.

<sup>345</sup> Burkett, above n 9, at 532.

<sup>346</sup> For example, India, a significant emitter, is still considered a developing country; See Barry and Pickering, above n 100, at 671 and 676–677.

While the demand for reparations and compensation have not disappeared,<sup>347</sup> this approach promotes a more realistic construction of justice in the current political climate. Some developing countries, including small island states, have repudiated the idea of developed states compensating for their emission history, instead favouring strategies that enhance collective responsibility.<sup>348</sup> This is attributable to recognition that holding states accountable for emissions is unlikely to achieve justice in the near term.<sup>349</sup> Ultimately, the climate vulnerable cannot afford to wait for an admission of fault that might never come. Robyn Eckersley summarises this:<sup>350</sup>

Focusing on those states with the financial and technical capability to provide assistance and relief to climate refugees has the merit of focussing on what is required to get the job done for climate refugees.

Financial assistance for displacement must appropriately come from capable states, or in other words, those states who have significantly contributed to the global warming that is driving climate displacement. This represents a significant step towards climate justice.

## *2 Hosting responsibilities*

Again, the question arises as to whether distribution of hosting responsibilities according to capability achieves climate justice. The ultimate aim of an international framework that addresses displacement is to secure assistance and protection for the displaced. While capability-based hosting distributions are not compensation for the harm caused, compensatory approaches will not provide the displaced with the necessary legal entry and protection in host countries.

The proposed distributive-justice based framework requires states to welcome the displaced into their territories and ensure their needs and rights are protected. Capability-based distributions will ensure that states are obliged to host displaced persons to the extent that is reasonable in light of the states' circumstances. This approach will mitigate fears of an

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<sup>347</sup> Julia Dehm "Climate Change, 'Slow Violence' and the Indefinite Deferral of Responsibility for 'Loss and Damage'" (2020) 29 GLR 220 at 235.

<sup>348</sup> Pickering and Barry, above n 100, at 679.

<sup>349</sup> Pickering and Barry, above n 100, at 679.

<sup>350</sup> Eckersley, above n 69, at 491.

unregulated displacement flux, which in turn is likely to ensure better treatment and protection of the displaced. Thus, the potential harms of unregulated displacement, such as conflict and hostility, will be substantially mitigated under this framework.

Agreement to hosting obligations represents states' willingness to address the impacts of a problem they have contributed to. This approach entails the international community recognising that global emissions have displaced communities from their homes and agreeing to be a part of the collective response to displacement.

A new place to live does not fully address the injustices endured by the climate vulnerable. Beyond physical deprivation, the displaced are likely to suffer a loss of cultural identity and connection with their homeland.<sup>351</sup> While this framework cannot ensure cultural grievances do not occur, it does aim to substantially mitigate the traumatic and disruptive impacts of displacement, thus lessening the injustice. Obtaining and promoting the perspectives of the displaced and affording them rights akin to that under refugee law will help to achieve this objective. Consulting with the displaced demonstrates a willingness to address the stark inequalities of climate change and mitigate to some extent the disproportionate effects of displacement.

While this is not justice in its most obvious form, it certainly marks a significant step closer to justice in the context of climate induced displacement. Sharing this responsibility among the international community encapsulates collective responsibility to address this globally induced problem. Thus, the displaced are no longer fighting this battle on their own.

### *3 Room for corrective justice?*

This paper has argued that distributive justice, as opposed to corrective justice, should form the basis of an international legal framework for climate displacement. That is not to say that corrective justice has no place in the climate displacement context. Some of the climate vulnerable may still seek admissions of fault and compensation from high-emitting countries. This proposal does not aim to achieve corrective justice primarily because it is unlikely to eventuate into the urgent and widespread assistance that the displaced need. A distributive

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<sup>351</sup> Falkner and others, above n 331.

justice-based framework does not prevent the displaced from seeking corrective justice on their own accord. Thus, corrective justice may have a role to play outside of a displacement framework, and mainly in the form of soft law.

An ICJ advisory opinion may be a favourable avenue for displaced persons seeking more than distributive justice offers. Advisory opinions are not binding but can play an important role in identifying legal and ethical standards and breaches of such standards.<sup>352</sup> An ICJ advisory opinion in the displacement context could attribute responsibility to states for their contributions to emissions and, therefore, displacement. Recognition of high emitting states' responsibility for climate change and displacement by the ICJ may provide a greater sense of justice for some displaced persons.

Furthermore, there has been some success of climate change litigation at the domestic level, albeit typically in the realm of mitigation and this success has not yet progressed to the international level.<sup>353</sup> Nevertheless, this may restore the hope of some displaced persons that there is future potential for corrective justice.

The two justice theories can co-exist. A distributive justice approach to climate displacement does not preclude corrective justice having a place in the displacement context, or climate change more generally. However, a framework that responds to displacement will be most effective if it is distributive in nature. It is reasonable to assume that after receiving financial assistance and a new place to live with dignity, the desire for corrective justice may lessen.

### *C Conclusion*

Climate induced displacement has the potential to threaten millions of lives around the globe. The injustices of climate induced displacement are difficult to refute. Those who have contributed to global greenhouse gas emissions the least will face the first and worst of climate change impacts. Small islands in the Pacific region have contributed a negligible amount to global emissions. Nevertheless, populations in the Pacific region will be displaced from their

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<sup>352</sup> See *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 95.

<sup>353</sup> See for example *Luciano Lliuya v RWE AG* [2015] Essen Regional Court 2 O 285/15; *Urgenda Foundation v State of the Netherlands* [2015] HAZA C/09/00456689; and *Neubauer et al v Germany*, BVerfG, Order of the First Senate of 24 March 2021 – 1 BvR 2656/18 -, paras. 1–270; please note that only the German version is authoritative. Translations are generally abridged.



homelands as a result of climatic impacts. Furthering the injustice, the countries who have significantly contributed to emissions and, therefore, to displacement, have no legally enforceable obligations to assist the displaced. Existing legal instruments were not designed for the purpose of responding to an emerging climate induced displacement crisis. The current state of the law means that Pacific Island communities have nowhere to turn when their islands submerge.

“Since climate change is international in origin, it should have an international solution.”<sup>354</sup> A new international framework that directly responds to climate induced displacement is necessary to fill the existing gap in international law. Unlike other international instruments, the response to climate induced displacement requires legally binding obligations. While states have shown historical reluctance to bind themselves to international agreements, the unique nature of the proposed displacement framework intends to mitigate this reluctance.

Distributive justice theory should provide the basis for the response to displacement. Distributive justice aims to equitably distribute burdens and responsibilities among parties without fault or blame. Rather than being held liable for their actions, states’ cooperation will reflect the notion of shared responsibility for climate change and climate displacement. The proposed legal framework for displacement entails redistributing the burdens of displacement, namely financial assistance and hosting responsibilities, among the international community according to states’ capability to assist.

Justice does not have to resemble finger-pointing and blaming.<sup>355</sup> The blame game has not succeeded in the climate change arena. A distributive justice approach helps to achieve climate justice without asserting fault. Rather than focusing on who did what, distributive justice centres around cooperation and shared responsibility to help those who need it the most. Under this approach, states do not need to admit their wrongs; rather, they need to agree to share this burden and be part of a cumulative effort of humanity and justice. Implementation of this framework will redistribute the disproportionately felt burdens of climate displacement among the international community. This is distributive climate justice.

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<sup>354</sup> Docherty and Giannini, above n 189, at 382.

<sup>355</sup> Thornton, above n 17, at 14.

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