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## Human Rights and the New Reality of Climate Change: Adaptation's Limitations in Achieving Climate Justice

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NOTE

**HUMAN RIGHTS AND THE NEW REALITY OF  
CLIMATE CHANGE: ADAPTATION'S  
LIMITATIONS IN ACHIEVING  
CLIMATE JUSTICE**

*Zackary L. Stillings\**

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[L]aws and institutions for the defense of human rights [must] rapidly evolve to the new reality of climate change. When vulnerable communities have tried to use human rights law to defend their rights and seek climate justice, important weaknesses [in human rights law] have been revealed. It is almost impossible for popula-

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\* J.D., May 2014, University of Michigan Law School; B.A., French Language & Literature and International Studies, University of Alabama. I would like to thank my colleagues on the *Michigan Journal of International Law* for their hard work and dedication to the Journal throughout the year and on this Note, with a special thanks to John Atchley for his thoughtful comments and revisions. I greatly benefited from Professor Sara Gosman's valuable insight throughout the writing process.

tions in poor countries to identify and pursue channels of justice, to have their cases heard, or to prove responsibility.<sup>1</sup>

#### INTRODUCTION

In 2005, the Inuit of Canada and the United States filed a petition with the Inter American Commission on Human Rights, alleging that their respective governments had violated their human rights by failing to mitigate climate change harms.<sup>2</sup> The Inuit alleged violations of several specific human rights, including the right to enjoy their culture;<sup>3</sup> the right to enjoy and use the lands they have traditionally occupied;<sup>4</sup> the right to use and enjoy their personal property;<sup>5</sup> the right to health;<sup>6</sup> the right to life, physical integrity, and security;<sup>7</sup> the right to their own means of subsistence;<sup>8</sup> and the right to residence and movement and inviolability in the home.<sup>9</sup> Although the Inter-American Commission on Human Rights ultimately rejected the petition,<sup>10</sup> the Inuit's petition marked the beginning of worldwide attempts to recognize the adverse effects of climate change on human rights.<sup>11</sup>

By November 2007, the Maldives had convened a meeting of small island states to discuss climate change implications for their individual countries.<sup>12</sup> The Maldives, a country of approximately 400,000 people in the Indian Ocean, has taken a leading role in climate change discussions, particularly in discussions related to rising sea levels.<sup>13</sup> At the November 2007 meeting, the so-called Alliance of Small Island States issued the Malé

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1. Submission of Mali to the Office of the High Comm'r for Human Rights (OHCHR) Study, Human Rights and Climate Change (Sept. 2008) [hereinafter Mali Submission], available at <http://www2.ohchr.org/English/issues/climatechange/docs/Mali.pdf> (author's translation).

2. Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (Dec. 7, 2005) [hereinafter Inuit Petition], available at <http://www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf>.

3. *Id.* at 74.

4. *Id.* at 79.

5. *Id.* at 83.

6. *Id.* at 85.

7. *Id.* at 89.

8. *Id.* at 92.

9. *Id.* at 94.

10. Marc Limon, *Human Rights and Climate Change: Constructing a Case for Political Action*, 33 HARV. ENVTL. L. REV. 439, 441 (2009).

11. In many respects, the Inuit's petition sparked a movement to incorporate human rights into climate change much like the Warren County, North Carolina protests sparked the Environmental Justice movement in the United States. See Renee Skelton & Vernice Miller, *The Environmental Justice Movement*, NAT. RES. DEF. COUNCIL, available at <http://www.nrdc.org/ej/history/hej.asp> (last visited Mar. 15, 2014).

12. Limon, *supra* note 10, at 442.

13. Maldives, CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/mv.html> (last updated Feb. 26, 2014).

Declaration, a statement that unequivocally declared, “climate change has clear and immediate implications for the full enjoyment of human rights.”<sup>14</sup> These nations called upon the United Nations to “address the issue as a matter of urgency.”<sup>15</sup>

The United Nations responded. On March 28, 2008, the United Nations Human Rights Council (UNHRC) adopted Resolution 7/23, which stated that climate change “has implications for the full enjoyment of human rights.”<sup>16</sup> The resolution rested on several prior treaties, including the U.N. Charter, the Universal Declaration of Human Rights, the International Covenant on Economic, Social, and Cultural Rights, the International Covenant on Civil and Political Rights, and the Vienna Declaration and Programme of Action.<sup>17</sup> The Office of the High Commissioner for Human Rights then asked individual states to submit information regarding the impact of climate change on human rights within their various territories.<sup>18</sup>

The UNHRC’s Resolution concerned itself with several specific rights.<sup>19</sup> In particular, it found that climate change could impact the right to food, the right to health, the right to housing, and, by implication, the right to self-determination.<sup>20</sup> It is these rights, as well as the right to life mentioned in the Inuit petition, that the majority of scholars have focused on during subsequent discussions regarding climate change and human rights.<sup>21</sup>

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14. Small Island States Conference, Malé, Maldives, Nov. 13-14, 2007, Malé Declaration on the Human Dimension of Global Climate Change, at 2 (Nov. 14, 2007), available at [http://www.ciel.org/Publications/Male\\_Declaration\\_Nov07.pdf](http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf).

15. Limon, *supra* note 10, at 442.

16. H.R.C. Rep. of the Human Rights Council on its Seventh Session, Res. 7/23, U.N. Doc. A/HRC/7/78, at 65 (July 14, 2008) [hereinafter UNHRC 7/23].

17. *Id.*

18. OHCHR, *OHCHR Study on the Relationship Between Climate Change and Human Rights: Submissions and Reference Documents Received*, available at <http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/Submissions.aspx>. For an example of one such submission, see Mali Submission, *supra* note 1.

19. UNHRC 7/23, *supra* note 16.

20. *Id.* ¶1; see also, e.g., Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

21. See, e.g., Margaux J. Hall & David C. Weiss, *Avoiding Adaptation Apartheid: Climate Change Adaptation and Human Rights Law*, 37 YALE J. INT’L L. 309, 332 (2012) (discussing the right to health); David B. Hunter, *Human Rights Implications for Climate Change Negotiations*, 11 OR. REV. INT’L L. 331, 332–33 (2009) (stating that climate change has implicated the rights to life, health, adequate food, adequate water, housing, and self-determination); John H. Knox, *Linking Human Rights and Climate Change at the United Nations*, 33 HARV. ENVTL. L. REV. 477, 486 (2009) [hereinafter Knox, United Nations] (noting, in the context of small island states, that climate change will impact residents’ rights to life, health, food, water, housing, and self-determination); John H. Knox, *Climate Change and Human Rights Law*, 50 VA. J. INT’L L. 163, 207–210 (2009) [hereinafter Knox, *Human Rights*] (discussing the rights to food, health, and self-determination); Limon, *supra* note 10, at 446 (noting that climate change will impact the right to life, right to adequate food, right to water, right to adequate housing, and the right to self-determination).

Specifically, in the months following the UNHRC's Resolution, scholars largely focused on human rights law as it related to climate change mitigation—that is, how to hold large emitting nations for human rights violations arising from failures to mitigate climate harms.<sup>22</sup> In many ways, this was a logical starting point: why not attempt to hold those *actually* responsible for climate change accountable for their past emissions, or for failing to curb future emissions? Due in large part to the weakness of the international human rights regime,<sup>23</sup> however, scholars soon realized that holding large emitters responsible for extraterritorial harms due to climate change would be nearly impossible.<sup>24</sup>

Accordingly, scholars began to turn their attention elsewhere, with several more recent papers specifically examining the applicability of the human rights regime to climate change *adaptation*.<sup>25</sup> In some ways, this approach has proven more successful. In certain situations, for instance, it might well be possible to use human rights law to hold nations responsible for failing to adequately adapt to climate change.<sup>26</sup> Specifically, a nation might—by improperly adapting to future climate change-related disasters—be held responsible for failing to guard its citizens' human rights.

This Note uses the unique lens of environmental justice, a theory largely concerned with basic fairness for all communities, to examine this adaptation-focused body of scholarship and to evaluate its likely implications for the world's most vulnerable nations. Environmental justice is a particularly salient means of evaluating the efficacy of the adaptation-focused approach to climate change, because the theory's central premise is that environmental benefits and burdens should be distributed evenly across communities and populations. Using the principles of environmental justice on an international level, then, is a way to elucidate the differences in environmental benefits and burdens across national boundaries.

This Note uses the cross-border insights of environmental justice to assess the efficacy of addressing those human rights<sup>27</sup> violations likely to

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22. See discussion *infra* Part III B.

23. Human Rights Law is a relatively weak regime. Early scholarship on the subject focused on finding ways to hold different nations liable for mitigation; not finding a satisfactory link to hold emitting countries liable for mitigation failures, the scholarship has turned to imposing liability for climate change based on failures to properly adapt. See *infra* n. 115.

24. See Hall & Weiss, *supra* note 21, at 341–345 (discussing the difficulties involved in applying human rights law to climate change mitigation, including, for example, weak enforcement regimes as well as substantive and procedural problems associated with various human rights treaties).

25. *Id.*; Essentially, climate change adaptation, as opposed to mitigation, is comprised of acts taken by a state in preparation for climate change-related threats to its citizenry. For a more complete definition, see the discussion *infra* Part IV A.

26. This argument is fully discussed *infra* Part IV.

27. For the purposes of determining exactly what qualifies as a “human right,” this paper will mainly discuss those rights that the UNHRC stated were implicated by climate change; most significantly, the right to food, the right to health, the right to housing, and the right to self-determination. See UNHRC 7/23, *supra* note 16. The paper also discusses the right to life, noted by the Inuit in their petition. Inuit Petition, *supra* note 2.

arise from global climate change via an adaptation-focused framework, particularly as such a framework relates to those developing nations most likely to be affected by climate change.<sup>28</sup> Specifically, the Note argues that, although an adaptation-based approach might initially seem more likely to succeed than a mitigation-based approach, it has distinct weaknesses that policy makers should take into account before imposing liability on a state for a failure to adapt to climate change.

The Note will begin by examining the current projections for adverse climate change effects, and by exploring how these effects are likely to fall disproportionately upon those nations least able to adapt to climate change. In this respect, it will examine climate change from the standpoint of developing as opposed to developed countries. For the purposes of this discussion, I will assume, as have recent writers on the subject,<sup>29</sup> that the evidence proving anthropogenic climate change is now incontrovertible.<sup>30</sup>

Part II will then explore how a human rights-based approach to climate change accords with the goals of environmental justice, and why environmental justice is a useful lens through which to examine human rights in this context. By first examining the specific rights that could be implicated in climate change, this Part will show that those most likely to suffer the infringement of these rights reside in precisely those nations with which the environmental justice movement is principally concerned. Framing climate change as a human rights issue has several benefits over a traditional political approach, all of which I will describe in this Part. Finally, this part will discuss the ways in which scholars have attempted to import human rights into climate change negotiations,<sup>31</sup> including the concept of diagonal jurisdiction, as well as through climate change mitigation and adaptation.

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28. “[T]he world’s poor are especially vulnerable to the effects of climate change, in particular those concentrated in high-risk areas, and also tend to have more limited adaptation capacities [ . . . ]” UNHRC 7/23, *supra* note 16.

29. See, e.g., Hall & Weiss, *supra* note 21, at 317; CAMILLA TOULMIN, CLIMATE CHANGE IN AFRICA 5 (2009).

30. Intergovernmental Panel on Climate Change, Climate Change 2007 Synthesis Report 1 (2007) [hereinafter IPCC Report], available at [http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4\\_syr.pdf](http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf). In March 2014, the IPCC released the most recent report regarding global climate change. Darryl Fears, *U.N. Panel Issues Stern Report on Global Warming*, PITTSBURGH POST-GAZETTE (Apr. 13, 2014, 11:20 PM), <http://www.post-gazette.com/news/environment/2014/04/14/U-N-panel-issues-stern-report-on-global-warming/stories/20140414051>; Eric Holthaus, *Climate Change Could Start the Next World War*, BUSINESS INSIDER (Apr. 19, 2014, 10:27 PM), <http://www.businessinsider.com/climate-change-military-2014-4> (“In a sentence, here’s what [the IPCC reports] found: On our current path, climate change could pose an irreversible, existential risk to civilization as we know it”). While a synthesis report is not due until October 2014, the summary for policymakers confirms that climate change continues to threaten vulnerable communities worldwide. Intergovernmental Panel on Climate Change, Climate Change 2014: Impacts, Adaptation, and Vulnerability, Summary for Policymakers, available at [http://ipcc-wg2.gov/AR5/images/uploads/IPCC\\_WG2AR5\\_SPM\\_Approved.pdf](http://ipcc-wg2.gov/AR5/images/uploads/IPCC_WG2AR5_SPM_Approved.pdf).

31. See generally, Hunter, *supra* note 21.

Part III will assess the most current view of the how best to import human rights law into climate change related harms, and will discuss the merits of using human rights law as it applies to climate change adaptation specifically. In addition to discussing why an adaptation approach may be the most practical way of using human rights law to vindicate the rights of those who may be affected by climate change, this Part discusses the expressive benefits that adaption-based proponents put forth.

Finally, having considered climate change's relationship to environmental justice, the connection between environmental justice and human rights, and the use of human rights law in the context of climate change adaptation, the Note examines the potential constraints on utilizing human rights as a way to punish countries that do not properly adapt to climate change. Specifically, the Note discusses difficulties based in political and economic concerns, as well as concerns rooted in the broader conceptualization of environmental justice. Though the approach of using human rights in climate change adaptation does have many benefits, policymakers should be cautious in utilizing the approach for anything other than as a means to influence international cooperation through traditional, extrajudicial means.

Before continuing, however, the meaning of "environmental justice" in this context necessarily merits a brief explanation. Though a deeper discussion follows,<sup>32</sup> it is worth noting here that this paper takes a specific view of environmental justice, wherein actions are evaluated for their effects on states as international actors, instead of evaluating policy results on specific communities within each state. Otherwise stated, this Note will assume that developing state actors are the relevant communities for which environmental justice would be concerned in the context of climate change, instead of attempting to evaluate discrete environmental justice communities within each developing state.<sup>33</sup>

There are two distinct reasons for taking this approach. First, the state as an actor is the only cognizable entity on the international stage. A particular community within a developing country is simply unable to vindicate its rights through international law in the same manner as the state within which it is located, who effectively acts as *parens patriae* for the

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32. *Infra* Part II B.

33. There are admittedly difficulties with this approach. "[O]ne may question whether states always adequately represent the interests of those most vulnerable to climate change." Knox, *Human Rights*, *supra* note 21, at 216. It is possible that states do not always represent the best interests of their constituents on the international sphere, particularly with regards to the poorest communities within each state. However, there are extreme difficulties in attempting an environmental justice analysis with regards to discrete communities within each developing country. For example, an ethnic group who is the subject of discrimination in one nation may be a majority group in another nation. A paper such as this is simply inadequate to be able to evaluate the specific socio-economic internal politics of every developing nation in the hopes of anticipating potential human rights violations for each individual community. Furthermore, the difficulties and disparities within countries regarding climate change harms are less than the disparities in climate change costs and benefits when comparing developed countries and developing countries.

purposes of international law. Second, any harms that occur to an individual due to climate change are necessarily harms that, by extension, occur to the state. That is, the state suffers a harm because its people suffer harms, and any costs imposed by climate change are borne by both the state and its people.

### I. CLIMATE CHANGE AND ENVIRONMENTAL JUSTICE

Between 2000 and 2004, approximately 262 million people were affected by climate change disasters yearly.<sup>34</sup> Of these, over 98% were located in the developing world.<sup>35</sup> The number of people facing climate change related disasters is only expected to rise as greenhouse gases (GHGs) continue to accumulate in the atmosphere.<sup>36</sup> Risk of human development setbacks is expected to rise in the future as well.<sup>37</sup>

Different areas of the world, however, will experience climate change differently. One author has described the split between those countries that will not experience massive adverse effects of climate change and those that will as a North-South divide based principally upon geography and history.<sup>38</sup> This author states that, “[r]eports demonstrate that the least responsible parties for climate change, i.e. developing countries, are the most vulnerable to the impacts of climate change.”<sup>39</sup> These “Countries of the South”<sup>40</sup> are not only vulnerable because of their geographic locations,<sup>41</sup> but also because of their “low average per capita income, low rates of literacy, low health status, low life expectancies, limited infrastructure, fragility of economic progress, high vulnerability to economic setbacks, lack of capital, large agricultural sectors, and reliance on export of primary products.”<sup>42</sup> Two regions of the world stand out as being particularly vul-

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34. Hunter, *supra* note 21, at 344.

35. *Id.*

36. See, U.N. Dev. Programme, Human Development Report 2007/2008, Fighting Climate Change: Human Solidarity in a Divided World 90 (2007) [hereinafter UNDP Human Development Report 2007/2008], available at [http://hdr.undp.org/sites/default/files/reports/268/hdr\\_20072008\\_en\\_complete.pdf](http://hdr.undp.org/sites/default/files/reports/268/hdr_20072008_en_complete.pdf). For a basic discussion of the evidence of climate change, see TOULMIN, *supra* note 29, at 16–18.

37. Hall & Weiss, *supra* note 21, at 318-19 (“Scientific consensus has coalesced around the idea that the risk of massive human development setbacks increases substantially beyond 3.6 degrees Fahrenheit of temperature change over historic levels, a degree of change which current emissions will well exceed”).

38. See RUCHI ANAND, INTERNATIONAL ENVIRONMENTAL JUSTICE 3,6 (2004) (describing the split as between the countries of the Northern Hemisphere and those of the Southern Hemisphere). This obviously isn’t true in all cases—for example, Australia, New Zealand, Brazil and South Africa are all in the Southern Hemisphere and all tend to identify with the more affluent countries of the Northern Hemisphere—but it serves as a general guideline for determining what nations will be most affected by climate change.

39. *Id.* at 35.

40. *Id.* at 3.

41. *Id.* at 38 (describing how many developing nations are likely to be located in arid or semi arid areas that are particularly vulnerable to climate change).

42. *Id.* at 3.



nerable to climate change: Sub-Saharan Africa and the low-lying island nations of the Pacific and Indian Oceans.

#### A. *Projected Vulnerability of Certain Developing Regions*

“Africa is the continent that will be hit hardest by climate change. Unpredictable rains and floods, prolonged droughts, subsequent crop failures and rapid desertification, among other signs of global warming, have . . . already begun to change the face of Africa.”<sup>43</sup> Toulmin writes that the principle adverse effects of climate change on Africa will be “increased aridity, sea level rise, reduced fresh water availability, cyclones, coastal erosion, deforestation, loss of forest quality, woodland degradation, coral bleaching, the spread of malaria and impacts on food security.”<sup>44</sup>

To illustrate the vulnerability of Sub-Saharan Africa, one need look no further than devastating climate events of the past several years. In 2011, for example, a terrible drought hit the Horn of Africa, “affect[ing] 11 countries and 12 million people.”<sup>45</sup> While this was happening in the East, the Niger River in the West reached its highest levels in 80 years, leaving 1 million people homeless on its expanded banks.<sup>46</sup> The varying rainfalls in different regions of Africa due to climate change will certainly impact the ability of Africans to collect adequate amounts of food,<sup>47</sup> and will undoubtedly affect their ability to collect an adequate supply of water.<sup>48</sup> The region also ranks high on the list of places that will be susceptible to political instability and armed conflict based upon the effects of climate change.<sup>49</sup> As one of the world’s poorest regions,<sup>50</sup> Africa is one of the

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43. Statement by 2004 Nobel Peace Prize Winner Dr. Wangari Muta Maathai, as quoted in *Environmental Sustainability for Development in South Sudan*, SOUTH SUDAN NEWS AGENCY (Feb. 29, 2012), available at <http://www.southsudannewsagency.com/opinion/articles/environmental-sustainability-for-development>.

44. TOULMIN, *supra* note 29, at 24.

45. Ghana: *Climate Change Brings Opportunity Alongside Challenges for Africa*, ALLAFRICA (Nov. 28, 2011), <http://allafrica.com/stories/201111282203.html>.

46. *Id.*

47. See KIRSTIN DOW & THOMAS E. DOWNING, *THE ATLAS OF CLIMATE CHANGE* 65 (mapping projected world-wide crop yields for 2030 based upon climate change, and finding, with a few exceptions, that many of Africa’s staple crops will be less plentiful in the future); see also TOULMIN, *supra* note 29, at 50 (describing the particular effects that climate change will have on Africa’s food supply).

48. See UNDP Human Development Report 2007/2008, *supra* note 36, at 13 (noting that women and girls in Africa are already spending greater portions of their days in the collection of water).

49. See DOW & DOWNING, *supra* note 47, at 43 (showing 23 African countries that will be at a high risk of armed conflict due to climate change, and another 13 that will be at risk for political instability); TOULMIN, *supra* note 29, at 109 (discussing how conflict could arise in Africa due to climate change).

50. See Mark Doyle, *Why is the African Continent Poor?*, BBC News, <http://news.bbc.co.uk/2/hi/africa/8215083.stm> (last updated August 29, 2009).

world's regions least capable of adequately adapting to the changing climate.

Outlooks for low-lying island nations are similarly bleak.<sup>51</sup> The Maldives is a prime example of a nation that could be completely inundated in the future as a direct result of climate change.<sup>52</sup> The average height above sea level for the Maldives is less than two meters. If the sea level were to increase by approximately half a meter, it could flood 15% of the nation's most populous island, Malé, by 2025.<sup>53</sup> This same model shows that half of the island would be underwater by 2100.<sup>54</sup>

Other island nations are in a similar position. The Marshall Islands, for example, discussed the threat to its "territorial integrity" in its OHCHR submission.<sup>55</sup> Its submission noted recent examples of increased flooding,<sup>56</sup> as well as a difficulty in continuing to operate an adequate infrastructure to give citizens access to clean water.<sup>57</sup> Most notably though, the Marshall Islands expressed its fear that the Marshallese would become "climate refugees."<sup>58</sup> The Marshall Islands and the Maldives are not the only ones who need to fear inundation in the coming century: Tuvalu and Vanuatu are also in danger of sinking below the rising ocean in the future.<sup>59</sup>

In fact, the world may have already seen its first "climate refugees." The residents of Huene, an island in the Carteret Atoll in Papua New Guinea have twice attempted to leave their home for a new island; they have twice returned due to conflicts with the new island's original inhabitants.<sup>60</sup> Experts note, however, that their home island may be uninhabit-

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51. See, e.g., Submission of the Maldives to OHCHR Study, Human Rights and Climate Change 19 (Sept. 25, 2008) [hereinafter Maldives Submission], available at [http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Maldives\\_Submission.pdf](http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Maldives_Submission.pdf) ("Sea-level rise is likely to continue for centuries and ultimately completely immerse the Maldives.").

52. *Id.*

53. *Id.*

54. *Id.*

55. Submission of the Republic of the Marshall Islands to OHCHR Study, Human Rights and Climate Change 4 (Dec. 2008) [hereinafter Marshall Islands Submission], available at [http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Republic\\_of\\_the\\_Marshall\\_Islands.doc](http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Republic_of_the_Marshall_Islands.doc).

56. *Id.* at 8.

57. *Id.* at 6.

58. *Id.* at 10.

59. Limon, *supra* note 10, at 456.

60. See DOW & DOWNING, *supra* note 47, at 69 ("The 2,000 inhabitants of the Carteret islands, Papua New Guinea, have been forced to move to an adjoining island, after their fruit trees were killed by an increasingly saline water supply, and their homes were washed away by high tides and storms."); Neil MacFarquhar, *Refugees Join List of Climate Change Issues*, N.Y. TIMES, May 29, 2009, at A4, available at [http://www.nytimes.com/2009/05/29/world/29refugees.html?\\_r=0](http://www.nytimes.com/2009/05/29/world/29refugees.html?_r=0). See also Morgan Godfery, *New Zealand Refuses Climate Change Refugees – Mass Action Is Now Needed*, THE GUARDIAN (May 11, 2014, 8:40 PM), <http://www.theguardian.com/commentisfree/2014/may/12/new-zealand-refuses-climate-change-refugees-mass-action-is-now-needed> (discussing a recent case in New Zealand, where I-Kiribati were

able by 2015.<sup>61</sup> By 2050, there may be as many as 200 million such refugees worldwide.<sup>62</sup> Some nations are preparing, in various ways, to move to safer land in higher countries.<sup>63</sup>

### B. *Applying Environmental Justice Principles to Climate Change*

The plight of both Sub-Saharan Africa and the low-lying island nations due to climate change is made all the worse by the fact that these nations, as a whole, had little to no hand in creating the problem in the first place.<sup>64</sup> Otherwise stated, “the countries that bear the least responsibility for creating the problem [of global warming] are the most vulnerable to climate change.”<sup>65</sup> The countries of the developing world, then, bear much greater costs related to climate change than those in the more developed North, while those in the North reap the vast majority of the benefits of emitting GHGs.<sup>66</sup> “This equation does not represent a fair or just scenario.”<sup>67</sup>

The concepts of fairness and justice are two core precepts of the environmental justice movement. Environmental justice advocates stress that “environmental burdens and benefits should not fall in disproportionate patterns.”<sup>68</sup> In the United States, this has manifested itself in the context of economically disadvantaged communities and communities of color, who have historically borne the brunt of the environmental effects of heavy industry siting.<sup>69</sup> The framework has been broadened when discussing international climate justice.<sup>70</sup> Though environmental justice has tradi-

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denied refuge because they were not within the legal definition of refugees, despite being refugees under a “sociological definition”).

61. MacFarquhar, *supra* note 60.

62. *Id.*

63. These nations include Kiribati, Paul Chapman, *Entire Nation of Kiribati to be relocated over rising sea level threat*, TELEGRAPH (Mar. 7, 2012 8:59 AM), <http://www.telegraph.co.uk/news/worldnews/australiaandthepacific/kiribati/9127576/Entire-nation-of-Kiribati-to-be-relocated-over-rising-sea-level-threat.html>; Tuvalu, Leslie Allen, *Will Tuvalu Disappear Beneath the Sea?*, SMITHSONIAN.COM (Aug. 2004), <http://www.smithsonianmag.com/travel/tuvalu.html?c=y&page=3> (“[Tuvalu’s] leaders had just started asking Australia and New Zealand to accept Tuvaluans as environmental refugees . . .”); and the Maldives, Knox, *United Nations*, *supra* note 21, at 498.

64. DOW & DOWNING, *supra* note 47, at 46–47 (showing that Sub-Saharan Africa has been responsible for 2% of world-wide historical emissions, and that “other countries including small islands” have historically been responsible for 0.4% of GHG emissions); *see also* Marshall Islands Submission, *supra* note 55, at 6 (“The Republic of the Marshall Islands has essentially nil greenhouse gas emissions”).

65. ANAND, *supra* note 38, at 28.

66. *See id.* at 17.

67. *Id.* at 55.

68. CLIFFORD RECHTSCHAFFEN ET AL, ENVIRONMENTAL JUSTICE: LAW, POLICY, AND REGULATION 3 (2009).

69. *Id.* at 37 (describing the disparate levels of hazardous waste facility placement between communities of color and predominantly white communities).

70. *See id.* at 400.

tionally been concerned with intra-state inequality, the extrapolation of the theory to global climate change necessarily requires an *inter*-state analysis that takes into account states as the relevant communities of analysis.

Historically, the environmental justice movement has focused on four separate conceptualizations of “justice”: distributive justice,<sup>71</sup> procedural justice,<sup>72</sup> corrective justice,<sup>73</sup> and social justice.<sup>74</sup> Each of the four conceptualizations of “justice” as defined by the environmental justice movement is implicated at the inter-state level by the harms associated with climate change.

The differential burdens and benefits accruing to both developed and developing countries undoubtedly implicate distributive justice concerns. In the domestic context, environmental justice demands that each person has a “right to equal treatment,” and an equal distribution of goods and opportunities.<sup>75</sup> Extrapolating this definition to climate change on the international scale, environmental justice demands an equal distribution of costs and benefits for GHG emissions.<sup>76</sup> Equality amongst nations on the costs and benefits of climate change, however, is a long way off. “On a per capita basis, although countries of the South do not consume as many resources and are less polluting of the atmosphere by carbon dioxide or sulfur dioxide emissions, they bear greater costs than the benefits they accrue as compared to countries of the North.”<sup>77</sup> This difference in costs and benefits is the hallmark of a system that lacks distributional fairness. The vast poverty in developing countries only serves to exacerbate the problem; indeed, the “disproportional impact is relevant . . . where climate effects will be felt most acutely by those groups who are already in vulnerable situations.”<sup>78</sup>

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71. “[T]he right to equal treatment, that is, to the same distribution of goods and opportunities as anyone else has or is given.” Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENVTL. LAW REP. 10681, 10683 (2000).

72. “[T]he right to treatment as an equal. That is the right, not to an equal distribution of some good or opportunity, but to equal concern and respect in the political decision about how these goods and opportunities are to be distributed.” *Id.*

73. “Corrective justice involves not only the just administration of punishment to those who break the law, but also a duty to repair the losses for which one is responsible.” *Id.* at 10683.

74. “[T]hat branch of the virtue of justice that moves us to use our best efforts to bring about a more just ordering of society – one in which people’s needs are more fully met. The demands of social justice are . . . first, that the members of every class have enough resources and enough power to live as befits human beings, and second, that the privileged classes, whoever they are, be accountable to the wider society for the way they use their advantages.” *Id.* at 10698.

75. *Id.*

76. While “equality” in this sense may be somewhat vague—for example, should costs and benefits be based on a per-capita basis, or should each nation share costs and benefits based on some other criteria—it is clear that there is anything but parity on the international stage at this point.

77. ANAND, *supra* note 38, at 17.

78. Dr. Siobhan McInerney-Lankford, *Human Rights and Climate Change: Reflections on International Legal Issues and Potential Policy Relevance*, in THREATENED ISLAND NA-

Procedural justice is also a concern in the context of climate change. Domestically, environmental justice has stood for the ideal that each community be given the chance to be represented in decision-making bodies that decide how goods, resources, and costs are allocated.<sup>79</sup> The ideal of procedural justice does not change at all in the international context. In short, each nation should have an equal say in how the benefits and harms of GHG emissions are allocated worldwide.

As far as procedural justice goes, however, the states of the developing world simply lack power to be considered equally at the bargaining table.<sup>80</sup> The Marshall Islands, for example, has stated that “international multilateral negotiations have created a platform under which [the Marshall Islands], with limited political weight, is forced to bargain desperately against large political powers, in an attempt to preserve what should otherwise be rights entitled to all humans.”<sup>81</sup> The disparities in bargaining power are particularly unjust, considering that, because developing countries do not emit much to begin with, they have little to bargain with in terms of emissions reductions. In contrast, the largest emitting countries are politically powerful in climate change negotiations *precisely because* they have emissions they are able to reduce.

Climate change harms similarly violate the idea of corrective justice, which holds that a person or group that causes a generalized harm to another has a duty to make good those losses for which the person or group is responsible. In the context of global climate change, the implications of this ideal are clear: those nations that are primarily responsible for climate change should “repair the losses for which [they] are responsible.”<sup>82</sup> Through the lens of corrective justice, then, the worst emitters should, at the very least, be obligated to help those nations who will bear the brunt of climate change deal with its effects. This could be through technological transfers, or monetary transfers; indeed, developed countries have set up several funds to help developing countries deal with the adverse effects of climate change.<sup>83</sup> However, there is currently no overarching plan to help

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TIONS: LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE 195, 199 (Michael B. Gerrard & Gregory E. Wannier eds., 2013).

79. Kuehn, *supra* note 71.

80. It is also worth noting that environmental justice concerns could very well exist *within* each state as well as on the international stage. See ANAND, *supra* note 38, at 39, quoting MATHEW PATERSON, GLOBAL WARMING AND GLOBAL POLITICS (1996) (discussing how, within individual states, there may be minority groups that lack specific protections and may be more vulnerable to government inaction as it relates to climate change). As an example, an ethnic group could show differential treatment in government permitting. See *generally* Ogoniland Case, Comm. No. 155/96 (Nigeria). As noted earlier, however, I primarily approach the concept of environmental justice as it relates to states in their capacity as sovereigns on the international stage. See *supra* Part I.

81. Marshall Islands Submission, *supra* note 55, at 13.

82. Kuehn, *supra* note 71.

83. See Hall & Weiss, *supra* note 21, at 321–22 (discussing different methods for funding adaptation in the developing world); Dow & Downing, *supra* note 47, at 98–99 (discussing different means of funding climate change responses and showing that only a small

each developing nation deal with the effects of climate change, and funding for adaptation projects has consistently languished behind the requests of developing nations.<sup>84</sup>

Finally, the idea of social justice requires an examination of whether each person is able to live “as befits a human being”<sup>85</sup> and whether those who are more advantaged—in this case, the more developed nations of the North—are accountable for the way in which they use their advantages. Climate change’s effect on human rights certainly calls into question whether each person, particularly in developing countries, is able to live as befits a human being. It is also certainly possible to question whether the industrialized emitters of the North have used their advantages in a way that respects the rights of developing countries.<sup>86</sup> Taken on the international level, this concept of social justice can also be analogized to traditional ideas of international sovereignty: a nation should be free to govern itself without unnecessary hindrances from other states. Climate change—caused by large emitting states—is certainly a hindrance for developing nations.

The climate change harms that currently befall the developing world implicate all aspects of environmental justice. The benefits of climate change—namely, industrialization and wealth—have accrued principally upon the emitting nations of the Northern Hemisphere, while those in the developing world will be left to foot the bill. In the next Part, this Note will address the human rights that are implicated by the adverse effects of climate change and how they relate to environmental justice’s broader conceptions of “justice.”<sup>87</sup>

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proportion of Overseas Development Assistance goes towards financing climate change mitigation and adaptation); *see also infra* Part IV A (discussing the Adaptation Fund).

84. Hunter, *supra* note 21, at 360.

85. This is, of course, similar to expressions of basic human rights, discussed *infra* Part III A.

86. The Marshall Islands makes just this contention. *See* Marshall Islands Submission *supra* note 55, at 5. Environmental justice, particularly in the context of social justice, is not concerned solely with the environment, but rather the broader milieu in which society and environment reflect each other. In this respect, “[c]limate change is as much a humanitarian and human development concern as it is an environmental one. The most vulnerable populations are not the people driving climate change. Of those living on less than a dollar a day, few have electricity, cars, refrigerators, or water heaters. But, because their lives are tied to climate conditions and they have few resources to buffer against bad or progressively difficult conditions, they are likely to bear the highest human costs.” DOW & DOWNING, *supra* note 47, at 12.

87. It is important to note, here, that a situation that causes an environmental justice concern is not a per se violation of international human rights law. As such, environmental justice itself is not a part of international law. However, the concerns that environmental justice raises are indicative of a potential for human rights violations, and as such, are useful in evaluating situations for their implications on recognized human rights.

## II. HUMAN RIGHTS IN THE CONTEXT OF CLIMATE CHANGE

### A. *Human Rights and the Benefits of an Environmental Justice Lens*

International human rights treaties enshrine several rights, among them the rights to adequate food, adequate housing, life, health, and self-determination.<sup>88</sup> These human rights can be split into three general categories:<sup>89</sup> 1) civil and political rights;<sup>90</sup> 2) economic, social, and cultural rights;<sup>91</sup> and 3) rights held by groups or by individuals because of their membership in a group.<sup>92</sup> In some way, each of these human rights is implicated by climate change, particularly in the developing world.

The right to self-determination is one of the principle rights that may be lost due to climate change, and is of great concern to nations such as the Marshall Islands.<sup>93</sup> The right of a people to govern themselves, preserved in the ICCPR,<sup>94</sup> raises environmental justice concerns, particularly with respect to procedural justice. For example, imagine that in fifty years, a small island nation is submerged. Its people move to another country where they must assimilate. From a procedural justice standpoint, these people are no longer given an equal voice on the international stage. Their original government would no longer be able to advocate for their interests, their voices subsumed into their new host country's international representation. Because procedural justice dictates that each shareholder be given a voice at the bargaining table, the loss of that voice on the international stage would offend this notion of justice.<sup>95</sup>

Offenses against the rights to life, food, and housing also raise questions of environmental justice, though for these rights the concern is rooted in distributive justice. The violation of each of these human rights is, in a very real sense, a cost that individuals and their state representatives must bear due to the actions of others. For example, extreme weather events and rising sea levels have the potential to kill countless individuals worldwide. Climate change, in contributing to the severity of such events,

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88. See, e.g., UDHR, *supra* note 20, arts. 3–11 (the right to life); International Covenant on Economic, Social, and Cultural Rights, arts. 11–12, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR] (the rights to food, water, and housing); International Covenant on Civil and Political Rights, art. 1, (DATE) 999 U.N.T.S. 171 [hereinafter ICCPR] (the right of a people to self-determination).

89. Knox, *Human Rights*, *supra* note 21, at 168–69.

90. ICCPR, *supra* note 88.

91. ICESCR, *supra* note 88.

92. See, e.g., ICCPR, *supra* note 88, art. 1; Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

93. Marshall Islands Submission, *supra* note 55; see also, Maldives Submission, *supra* note 51.

94. ICCPR, *supra* note 88, art. 1.

95. This situation is not far fetched, particularly in light of the geopolitics of Oceania. Australia and New Zealand—by far the two most populous countries in the region—would be likely receiver states for climate refugees.

could thus be directly responsible for violations of the right to life.<sup>96</sup> Climate change similarly implicates the right to health, in that the number of people expected to suffer from cases of diarrhea, malnutrition, and malaria is expected to dramatically increase by 2030.<sup>97</sup> The right to food would similarly be violated when crop yields decline due to climate change, resulting in famine.<sup>98</sup> The right to housing, established in the ICESCR,<sup>99</sup> is similarly prone to violation because of climate change. The displacement of one million people along the Niger River is but one example of a weather event that deprived individuals of the right to adequate housing.<sup>100</sup>

Each of these examples would impose costs upon both individuals and their governments.<sup>101</sup> As such, the burdens associated with anthropogenic greenhouse gas emissions are far greater in the developing world, while the benefits of these emissions have accrued principally on the developed nations of the North. On its face, then, the disparate impacts on human rights contravene the principles of distributional justice.

Framing climate change with the language of human rights law is a departure from the largely technical language of past climate change treaties.<sup>102</sup> Using human rights law as a way to look at climate change alters the discussion from one based purely on science to one based on the effects of climate change upon specific populations. In short, human rights law humanizes climate change, something that had been lacking in the climate justice debate until recent years.<sup>103</sup> The approach “puts the focus on those who will suffer from climate change,”<sup>104</sup> and in doing so “provides a

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96. DOW & DOWNING, *supra* note 47, at 76–77 (mapping weather disasters between 2000–2010, specifically noting disasters where more than 1,000 people perished).

97. *Id.* at 66–67.

98. For a description of expected crop yield changes in the developing world, see *id.* at 65.

99. ICESCR, *supra* note 88, art. 11.

100. *Ghana: Climate Change Brings Opportunity Alongside Challenges for Africa*, *supra* note 45.

101. While each of these losses comes at a high cost for the relevant individuals, the costs that governments must bear to cope with these deprivations are significant for the purposes of this paper. For instance, when populations suffer from climate change events, developing governments must provide some sort of relief to the affected individuals. Increasing rates of malaria, diarrhea, and malnutrition, for example, lead to a less productive workforce for governments already in financial straits; when the government must make additional social services available to cope with these climate change-related ills, it means that the government must necessarily forego other development projects.

102. See, e.g., Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, U.N. Doc. FCCC/CP/1997/7/Add.1, 37 I.L.M. 22 art. 3 (1998) (“In the first quantified emission limitation and reduction commitment period, from 2008 to 2012, the assigned amount for each Party included in Annex I shall be equal to the percentage inscribed for it in Annex B of its aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A in 1990, or the base year or period determined in accordance with paragraph 5 above, multiplied by five.”).

103. Limon, *supra* note 10, at 451.

104. Hunter, *supra* note 21, at 332.



clear moral and ethical counterweight to arguments based primarily on economic efficiency or political expedience.”<sup>105</sup>

In addition to humanizing the effects of global warming, there are other benefits to discussing climate change using the language of human rights law, such as:

drawing attention and giving voice to the concerns and opinions of vulnerable and marginalized social groups;<sup>106</sup> enhancing equity in international decision-making; encouraging more effective, fairer, and more sustainable policy outcomes through the promotion of accountability concepts and of participatory and democratic principles in decision-making; emphasizing international cooperation - even to the extent that cooperation might be deemed a legal obligation; and responding to gaps in the existing climate change policy architecture.<sup>107</sup>

In this respect, then, utilizing a human rights approach to climate change achieves several key goals: it forces individuals to think about the future human consequences that will result from climate agreements, it puts the emphasis on the states where the harm is likely to be greatest, and it shows that those states that are the most vulnerable are also the least able to help themselves against the threat of climate change. Finally, “a rights based approach implies that some positions or interests cannot easily be compromised.”<sup>108</sup>

Perhaps more importantly, though, the use of human rights law brings a potential legal solution to a moral imperative. That is, it could lead to a way to hold large emitters—those most responsible for climate change—responsible for the harms that they cause. As the Inuit’s petition shows, the original intent of importing human rights law into the discussion of climate change was to hold the world’s largest emitters responsible for the harms they were causing.<sup>109</sup> Thus, if a link could be drawn between an international human rights treaty and a specific harm,<sup>110</sup> then it would be

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105. *Id.* at 347.

106. The author of this quote later expands on this particular point, showing the environmental justice implications of utilizing a human rights approach. “[U]sing a human rights framework helps amplify the voices of those who are disproportionately affected by climate change – the poor, marginalized, and vulnerable people . . . who might otherwise not be heard and who, if empowered to do so, could make an important contribution to improving climate change policy.” Limon, *supra* note 10, at 451.

107. *Id.* at 450.

108. Hunter, *supra* note 21.

109. Inuit Petition, *supra* note 2 (attempting to hold the United States, the world’s largest GHG emitter, responsible for human rights violations).

110. Most links between human rights violations and climate change would be found in the ICESCR, because the rights to health, food, and housing are all located within that document. ICESCR, *supra* note 88, arts. 11–12. It is worth noting that the United States of America is not a party to the ICESCR.

possible to determine if a human right had been violated and if an emitting state could be held responsible for this violation.<sup>111</sup>

### B. *Applying Human Rights to Climate Change Harms*

Following the Inuit Petition and the Malé Declaration, scholars began to address the question of how human rights law could be used to redress harms caused by climate change.<sup>112</sup> From an environmental justice standpoint, it would make sense for the international legal system to find a way to hold the largest emitters responsible for their past and current emissions, because the inequities caused by the North's GHG emissions violate each of the environmental justice movement's four concepts of justice. Since the industrial revolution, the nations of the North have been emitting GHGs into the atmosphere—GHGs which are now causing the warming of the climate. Under any concept of fairness, it would be reasonable to use international law to make the largest emitters stop further emissions, or at least to make them compensate countries that would be negatively affected by those emissions.<sup>113</sup> The way that scholars initially proposed for doing this was rooted in mitigating future climate change by reducing present emissions worldwide.<sup>114</sup> If the international community were able to regulate the emitters, the argument goes, then it would force those most responsible for climate change to either curb their emissions, compensate the least culpable victims of climate change, or a combination of both.

Unfortunately, the human rights legal regime is relatively weak.<sup>115</sup> The regime is built so that states sign and ratify treaties that enshrine specific human rights. Signing a treaty signals a state's promise to implement

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111. Each state party to the ICESCR agrees to put its edicts into place within its own domestic system. Because of this, any human rights violation would also be a violation of the laws of the country in question. *Id.* art. 2.

112. See, e.g., Knox, *Human Rights*, *supra* note 21, at 200, 212.

113. The concept of making an entity pay for the damages caused by its pollution has been used, for example, in the domestic law of the United States, and as such, is not a foreign concept in the legal systems of some industrially developed nations. Cf. Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199, 279 (1996) (describing how, in the United State's Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the United States Congress created a system for pollution compensation and clean-up where the "polluter pays").

114. Hall & Weiss, *supra* note 21, at 319 ("[t]o date, legal scholars and practitioners analyzing climate change have typically discussed mitigation . . .").

115. Lesley Wexler, *The Non-Legal Role of International Human Rights Law in Addressing Immigration*, 2007 U. CHI. LEGAL F. 359, 375 (2007) (recognizing "the numerous weaknesses and shortcomings of international law and . . . human rights laws in particular."); see generally Jacob David Werksman, *Could a Small Island State Successfully Sue a Big Emitter?: Pursuing a Legal Theory and a Venue for Climate Justice*, in THREATENED ISLAND NATIONS 409, 428 (Michael B. Gerrard & Gregory E. Wannier, eds., 2013) (describing three possible cases of suits in international fora between a small developing state and a large emitter, none of which offer particularly substantial outcomes for the developing state).

the law of the particular treaty in its domestic legal system.<sup>116</sup> When a state ratifies one of the human rights treaties, it promises to respect the human rights of its own citizens by implementing laws congruent with the treaty. That is, the state pledges to the international community that it will uphold human rights within its jurisdiction for those subject to its authority. The jurisdiction, then, is vertical; a state is only responsible for those under its direct control.

The transboundary harms associated with climate change do not map well onto this regime.<sup>117</sup> Industrialized countries emit GHGs, which accumulate in the atmosphere, warm the climate, and cause harms to nations worldwide. Under a traditional reading of international human rights law, the emitting states will have no obligation to protect human rights of those in other countries, because they have no treaty-based extraterritorial obligations.

Professor Knox has shown that there is a way to read the various human rights treaties that would oblige states to respect the human rights of those outside their jurisdiction.<sup>118</sup> These rights, then, would be *diagonal*, as compared to the traditional reading of the treaties, in which the rights are *vertical*. When a state becomes a party to the ICCPR, for example, it pledges to “respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.”<sup>119</sup> This language has been interpreted to mean that a state party must respect the rights of those under its “effective control.”<sup>120</sup> This is a difficult test, but not an impossible one.<sup>121</sup>

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116. See ICESCR, *supra* note 88, art. 2 (“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”); ICCPR, *supra* note 88, art. 2 (“Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”); see also Convention on the Elimination of All Forms of Discrimination Against Women, art. 2, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) (States parties undertake . . . “(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women . . .”).

117. Hall & Weiss, *supra* note 21, at 348 (“human rights law, at least as it is conventionally understood, does not neatly accommodate issues relating to ‘climate change’ . . .”).

118. Knox, *Human Rights*, *supra* note 21, at 201.

119. ICCPR, *supra* note 88, art. 2.

120. Knox, *Human Rights*, *supra* note 21, at 202.

121. *Id.* at 204. Professor Knox says the best chance for a diagonal remedy under the ICCPR would be in extreme cases, such as the effects of climate change on small island states. He writes, “[a]s their territory literally disappears, they are arguably at the larger, more powerful countries that have caused the harm.” *Id.* If this held true, then the island

Under the ICESCR, states party to the Convention pledge to “take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means.”<sup>122</sup> As compared to the equivalent clause in the ICCPR, the clause establishing duty under the ICESCR lacks a jurisdictional component. Because there is no statement limiting a state’s duties under this treaty to those within its borders, “[treaty obligations under the ICESCR] may generally be regarded as extending to all acts of state irrespective of where they may be taken as having effect.”<sup>123</sup> The ICESCR is also significantly different from the ICCPR in that it specifically denotes a duty of international co-operation.<sup>124</sup>

The lack of a jurisdictional component and the inclusion of a duty to cooperate make it “plausible, at the very least, that the ICESCR imposes extraterritorial duties.”<sup>125</sup> It is possible that the ICESCR could require states to contribute funds to help developing countries achieve their human rights obligations. In the context of climate change, this would be spent to help the receiving country adapt to climate change while mitigating future harms.<sup>126</sup> There is no consensus about the contours of this obligation, however.<sup>127</sup> One scholar has suggested that a reasonable interpretation of the treaty would require a state party to “ensure that it does not undermine the enjoyment of rights of those in foreign territory.”<sup>128</sup>

There are several considerations that make these readings of extraterritorial obligations under international human rights treaties difficult. The first of these is that the legal bases for extraterritorial duties are contested.<sup>129</sup> The more developed states have resisted readings of the ICESCR, for example, that would require them to aid other states in their obligations to fulfill human rights.<sup>130</sup> Thus, the second obstacle to such readings is largely political, in that it is difficult for a smaller state to advocate for a particular interpretation of a treaty when the political will of the

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state could make a claim that they were under the effective control of the other state, and thus invoke the ICCPR.

122. ICESCR, *supra* note 88, art. 2.

123. Knox, *Human Rights*, *supra* note 21, quoting Matthew Craven, *Human Rights in the Realm of Order: Sanctions and Extraterritoriality*, in *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES*, 233, 251 (Fons Coomans & Menno T. Kamminga, eds., 2004).

124. ICESCR, *supra* note 88, art. 2.

125. Knox, *Human Rights*, *supra* note 21, at 207.

126. *Id.* at 208.

127. *Id.* at 207.

128. *Id.* at 209, quoting Matthew Craven, *Human Rights in the Realm of Order: Sanctions and Extraterritoriality*, in *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES* 233, 253 (Fons Coomans & Menno T. Kamminga, eds., 2004).

129. *Id.* at 210.

130. *Id.*

most powerful states is against that interpretation.<sup>131</sup> Finally, as Professor Knox states, the requirement of respecting the rights of those in other states would only affect each country in its individual capacity, instead of requiring that each country take worldwide emissions into account when evaluating its own emissions.<sup>132</sup> Under this reading then, each country could determine that its own emission levels are acceptable, because no one country alone produces enough GHGs to create global warming harms that would infringe on human rights.<sup>133</sup> Rather, the problem is a global one with multiple significant actors.

Even without the problems of extraterritorial obligations, however, it became apparent that the application of human rights law in the context of climate change would be difficult to apply to large emitting states. The United States' submission to the OHCHR regarding climate change and human rights identified three problems with the application<sup>134</sup> and declared that "[t]he basic characteristics of climate change suggest that this challenge is not especially amenable to human rights-based solutions."<sup>135</sup> The United States first noted that "climate change is a highly *complex* environmental issue, characterized by a long chain of steps between the initial human activities that produce the greenhouse gas emissions and the eventual physical impacts that may result from those emissions."<sup>136</sup> The submission goes on to say that it is not possible to tell what increases in global temperatures are due to natural variability and which are due to anthropogenic emissions.<sup>137</sup> In other words, the United States' first objection is that it is nearly impossible to accurately apportion responsibility for climate change harms, because the causal link is too attenuated and it is difficult to determine whether an occurrence is naturally occurring or influenced by GHG emissions.

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131. See Marshall Islands Submission, *supra* note 55.

132. *Id.* at 211.

133. IPCC, *Climate Change 2001: Mitigation*, contribution of Working Group III to IPCC Third Assessment Report 606 (2001), available at <http://www.ipcc.ch/ipccreports/tar/wg3/index.php?idp=383> ("Any individuals' or nations' actions to address the climate change issue, even the largest emitting nation acting alone, can have only a small effect.").

134. The Office of the High Commissioner for Human Rights made similar findings about the problems in attributing responsibility to emitting states based on human rights law. See OHCHR, Report of the Office of the United Nations High Comm'r for Human Rights on the Relationship Between Climate Change and Human Rights 70, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009) [hereinafter OHCHR Report], available at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=498811532>.

135. Submission of the United States of America to OHCHR Study, Observations by the United States of America on the Relationship Between Climate Change and Human Rights 17 (2008) [hereinafter United States Submission], available at <http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/USA.pdf>.

136. *Id.* at 18 (emphasis in original).

137. *Id.*

The United States also objected on the grounds that every nation was, in one way or another, partially responsible for climate change.<sup>138</sup> Finally, the United States objected to the use of human rights law for climate change harms because of the amount of time that GHGs remain in the atmosphere.<sup>139</sup> The objection is based on a belief that many people who benefitted from past emissions are no longer living, and that many people who benefit today are not responsible for the gases that are currently causing climate change.<sup>140</sup> This concern—the “wrongdoer identity problem”—is a concern with any apportioning of climate change responsibility, whether in a domestic or international context.<sup>141</sup>

Each of the United States’ objections is valid when attempting to find a way to use human rights law as it relates to climate change mitigation. However, if instead one focuses on climate change adaptation and the potential human rights violations that can happen from failing to adapt to climate change, the objections are no longer relevant.<sup>142</sup> For example, the wrongdoer identity problem is solved in that a person is able to know that his or her government did not properly adapt to climate change harms. While “[d]iscussion of climate change has long focused on ‘mitigation’; more recently . . . the discussion has shifted to ‘adaptation’ . . .”<sup>143</sup>

Applying human rights law to climate change adaptation, then, may alleviate the causation problems found when applying human rights law to climate change mitigation. The next Part lays out the basic arguments for the application of human rights law to climate change adaptation before discussing the benefits of such an application.

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138. *Id.* at 20 (“[C]limate change is a *global* phenomenon. A worldwide and diffuse set of actors – public and private, wealthy and poor – collectively determine the world’s anthropogenic greenhouse emission levels.”). The United States then quoted an earlier Intergovernmental Panel on Climate Change (IPCC) finding that stated, “[n]o single individual or nation can determine the composition of the world’s atmosphere. Any individuals’ or nations’ actions to address the climate change issue, even the largest emitting nation acting alone, can have only a small effect. As a consequence, individuals and nations acting independently will provide, together, fewer resources than all individuals and nations would if they acted in concert. This characteristic provides an important motivation for collective, global action.” IPCC, *Climate Change 2001: Mitigation*, contribution of Working Group III to IPCC Third Assessment Report 606 (2001), available at <http://www.ipcc.ch/ipccreports/tar/wg3/index.php?idp=383>.

139. United States Submission, *supra* note 135, at 21.

140. For an interesting discussion of this particular problem, see Eric A. Posner & Cass R. Sunstein, *Climate Change Justice*, 96 *Geo. L. J.* 1565, 1593 (2008).

141. *Id.*

142. Hall & Weiss, *supra* note 21, at 348 (“[H]uman rights law, at least as it is conventionally understood, does not neatly accommodate issues relating to ‘climate change,’ these deficiencies are at least partly cured when adaptation is separated from a broader discussion of climate change”).

143. Victor B. Flatt, *Adapting Laws for a Changing World: A Systemic Approach to Climate Change*, 64 *Fla. L. Rev.* 269, 270 (2012).

### III. CLIMATE CHANGE ADAPTATION'S HUMAN RIGHTS IMPLICATIONS

#### A. *Adaptation Programs and the Human Rights— Adaptation Framework*

Each year, the parties to the United Nations Framework Convention on Climate Change (UNFCCC) meet in a “Conference of the Parties” (COP) in order to monitor the implementation of the UNFCCC, the principle UN Convention related to climate change.<sup>144</sup> At COP 16, held in Cancun, Mexico in 2010, the Conference of the Parties affirmed that in the future, adaptation would need to be addressed with the same priority as mitigation.<sup>145</sup> Adaptation merits more attention because, with the current state of worldwide GHG emissions, “mitigation efforts alone are unlikely to solve the problems of climate change.”<sup>146</sup>

Before discussing the human rights framework as applied to climate change adaptation, though, it will be useful to get a general idea of what “adaptation” means in practice. There are, in fact, two separate types of climate change adaptation practices: proactive and reactive.<sup>147</sup> Proactive practices include those “designed to avoid human suffering and, thus, may help countries meet their obligations to promote human rights.”<sup>148</sup> Examples of this type of practice include building higher levees,<sup>149</sup> preparing evacuation and disaster relief plans,<sup>150</sup> increasing crop and livelihood diversification,<sup>151</sup> implementing famine early-warning systems,<sup>152</sup> and creating water-storage projects.<sup>153</sup> Reactive measures, on the other hand, are those measures implemented after a harm has already occurred. Measures in this group include emergency responses,<sup>154</sup> post-disaster recovery,<sup>155</sup> and relocation efforts for those displaced by natural disasters.<sup>156</sup>

The UNFCCC proscribed that the least developed countries in the world (LDCs) prepare reports that show their needs related to adapta-

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144. United Nations Framework Convention on Climate Change, art. 7, May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC] (“[K]eep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention.”).

145. Cancun Adaptation Framework, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, available at [http://unfccc.int/adaptation/cancun\\_adaptation\\_framework/items/5852.php](http://unfccc.int/adaptation/cancun_adaptation_framework/items/5852.php).

146. Daniel H. Cole, *Climate Change, Adaptation, and Development*, 26 UCLA J. ENVTL. L. & POL’Y 1, 2 (2008).

147. Hall & Weiss, *supra* note 21, at 326.

148. Hunter, *supra* note 21, at 359.

149. *Id.*

150. *Id.*

151. Hall & Weiss, *supra* note 21, at 326.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*; Hunter, *supra* note 21, at 359.

tion.<sup>157</sup> These “National Adaptation Programmes of Action,” or NAPAs, have been filed on behalf of 47 nations, and address these nations’ “*urgent* and *immediate* needs to adapt to climate change – those for which further delay would increase vulnerability and/or costs at a later stage.”<sup>158</sup> Each NAPA lays out the LDC’s adaptation needs, and proposes different projects that would help the LDC adapt to climate change.<sup>159</sup> Using the NAPAs that each LDC has submitted, the UNFCCC secretariat has developed a project database that lists each country’s proposed projects, ranked in order of importance, alongside the proposed cost of each project.<sup>160</sup>

Each of these NAPAs shows that LDCs are well aware of potential threats to their populations based on climate change.<sup>161</sup> It is the national government’s awareness that adaptation is necessary that raises the duty to protect the human rights of those within its territory.<sup>162</sup> Otherwise stated, there are “human rights implications of a failure to adapt sufficiently to a changing environment.”<sup>163</sup> Importantly, this view does not account for where fault lies for climate change. Margaux Hall and David

157. UNFCCC, *supra* note 144, art 3.

158. *National Adaptation Programmes of Action (NAPAs)*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, [http://unfccc.int/national\\_reports/napa/items/2719.php](http://unfccc.int/national_reports/napa/items/2719.php) (last visited Mar. 1, 2014) (emphasis in original); *see also NAPAs Received by the Secretariat*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, [http://unfccc.int/cooperation\\_support/least\\_developed\\_countries\\_portal/submitted\\_napas/items/4585.php](http://unfccc.int/cooperation_support/least_developed_countries_portal/submitted_napas/items/4585.php) (last visited Mar. 1, 2014).

159. The NAPAs themselves are relatively in depth and show a deep recognition of impending harms from climate change. For examples of specific programs that individual LDCs in Sub-Saharan Africa have identified as necessary to adequately adapt to climate change, see Djibouti Ministry of Habitat, Urbanization, Env’t, & Reg’l Planning, *Programme d’Action National d’Adaptation aux Changements Climatiques*, at 55 (Oct. 2006), available at <http://unfccc.int/resource/docs/napa/dji01f.pdf> (describing a proposed project to reduce the vulnerability of Khor Angar and Atar-Damerjog to climate variability at a cost of \$1 million USD); Government of The Gambia, *Gambia National Adaptation Programme of Action (NAPA) on Climate Change*, at 62 (Nov. 2007), available at <http://unfccc.int/resource/docs/napa/gmb01.pdf> (detailing a proposed project that would increase fresh water availability in The Gambia at a cost of \$910,000 USD); Ministry of Mines, Natural Res., & Env’t, Env’t Affairs Dep’t, Republic of Malawi, *National Adaptation Programmes of Action (NAPA): Under the United Nations Framework Convention on Climate Change (UNFCCC)*, at 14 (Mar. 2006) available at <http://unfccc.int/resource/docs/napa/mwi01.pdf> (describing a project to “develop and promote user-friendly sustainable livelihood strategies to target communities in areas that are vulnerable to climate change, such as the Shire Valley in southern Malawi” at a total cost of \$4,500,000 USD).

160. *NAPA Priorities Database*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, [http://unfccc.int/cooperation\\_support/least\\_developed\\_countries\\_portal/napa\\_priorities\\_database/items/4583.php](http://unfccc.int/cooperation_support/least_developed_countries_portal/napa_priorities_database/items/4583.php) (last updated Mar. 29, 2012).

161. Awareness of general threats implicitly supports the assertion that different nations are well aware of the human rights implications of climate change. For example, The Gambia’s proposed plan to increase access to fresh water is related to a recognition of the human right to potable water. *Gambia National Adaptation Programme of Action (NAPA) on Climate Change*, *supra* note 159, at 62.

162. See *Case of Budayeva and Others v. Russia*, HUDOC EUR. CT. H.R. (Mar. 20, 2008), <http://echr.ketse.com/doc/15339.02-11673.02-15343.02-20058.02-etc-en-20070405/view/>, discussed *infra*.

163. Hall & Weiss, *supra* note 21, at 345.



Weiss write, “[t]hat a government did not cause a particular harm is not an excuse for its failure to act in the face of it.”<sup>164</sup> A duty to adapt, then, is particularly important for developing countries, who had little to no role in climate change but are nonetheless responsible for protecting the human rights of their citizens. For this reason, the majority of scholarship regarding this type of application of human rights law has been focused on developing countries.<sup>165</sup>

This may at first seem counterintuitive—as one scholar asks, “how can states have legal duties to address a problem for which they are not legally responsible?”<sup>166</sup> The reasoning here is illustrated in the European Court of Human Rights Case, *Budayeva v. Russia*.<sup>167</sup> The case involved a mudslide in the Russian town of Tyrnauz, in the Central Caucasus. Russian authorities had received reports of mudslides damaging a dam that protected the town, and a government administrator had asked for funds to repair the dam.<sup>168</sup> The authorization to repair the dam never came, a mudslide destroyed the dam, and subsequently buried portions of the town, killing between eight and twenty-seven people.<sup>169</sup> In the *Budayeva* case, the Court held that states were legally required to guard against threats to the right to life, and that they were required to “take practical measures to ensure the protection of those whose lives might be endangered.”<sup>170</sup>

The case is an excellent illustration of the vertical means of enforcing human rights law. The Russian government knew that a mudslide could occur within its territory, potentially depriving Russian citizens of their right to life. While the natural disaster itself does not represent a violation of the right to life, the failure of the Russian government to act in the situation *was* a violation. After Russia failed to act, its citizens were rightly able to vindicate the loss of the right to life.

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164. *Id.* at 346; Knox, *Human Rights*, *supra* note 21, at 197 (“The fact that the state did not cause the threat does not excuse the state’s failure to try to protect against it.”).

165. Flatt, *supra* note 143 at 271 n. 8 (discussing how the attention to adaptation “has primarily focused on adaptation in developing countries”).

166. Knox, *United Nations*, *supra* note 21, at 478.

167. *Case of Budayeva and Others v. Russia*, HUDOC EUR. CT. H.R. (Mar. 20, 2008), <http://echr.ketse.com/doc/15339.02-11673.02-15343.02-20058.02-etc-en-20070405/view/>. For an additional illustration of this principle, see *Öneryildiz v. Turkey*, 2004-XII Eur. Ct. H.R. 1, a case involving the failure of the Turkish government to alert a community living in a slum about the potential of a methane gas explosion near their homes. After the explosion occurred, the European Court of Human Rights found that the Turkish government had failed to secure the full accountability of state actors to “guarantee respect for the right to life.”

168. *Case of Budayeva and Others v. Russia*, HUDOC EUR. CT. H.R. (Mar. 20, 2008), <http://echr.ketse.com/doc/15339.02-11673.02-15343.02-20058.02-etc-en-20070405/view/>.

169. *Id.*

170. Knox, *United Nations*, *supra* note 21, at 174–75. It is worth noting that the *Budayeva* decision was based upon the European Convention on Human Rights, a regional treaty whose language is functionally similar to that of the Universal Declaration of Human Rights. Compare Council of Europe, European Convention on Human Rights, Nov. 4 1950, art. 2.1 (“Everyone’s right to life shall be protected by law.”) with UDHR, *supra* note 88, art. 3 (“Everyone has the right to life, liberty, and security of person.”). The *Öneryildiz* case was also decided under the European Convention on Human Rights.

The situation would be similar for an application of human rights law in the context of climate change adaptation. For example, several projects in LDCs have been funded by the Adaptation Fund, a funding mechanism created to “finance concrete adaptation projects and programmes in developing countries that are parties to the Kyoto Protocol and are particularly vulnerable to the adverse effects of climate change.”<sup>171</sup> The Adaptation Fund has granted over \$165 million in funding for adaptation-related projects in twenty-five nations worldwide over the past two years.<sup>172</sup> For example, the Fund granted approximately \$9.1 million to Mauritius to “combat[ ] beach erosion and flood risk in the coastal areas of Mon Choisy, Riviere des Galets, and Quatre Soeurs.”<sup>173</sup> If the government of Mauritius were to squander this money, it would then be possible for “legal advocates [to] wield human rights law to hold the government accountable for its actions[.]”<sup>174</sup> Though this would likely have to occur after a harm results from the misuse of adaptation funds,<sup>175</sup> it would at least seem possible that an average citizen who was harmed by the effects of climate change could sue her own government for malfeasance in certain situations.<sup>176</sup>

Because of this possibility, challenges based on human rights law in climate adaptation would stand a greater chance of success than challenges rooted in mitigation. Hall and Weiss contend that, “claims under human rights instruments based on a state’s failure to adapt sufficiently to climate change are less problematic than claims related to a state’s causing and then failing to mitigate climate change, because adaptation more easily

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171. *About the Adaptation Fund*, ADAPTATION FUND (2011), available at <https://www.adaptation-fund.org/about>.

172. *Id.* The Adaptation Fund is funded by a tax on the Clean Development Mechanism (CDM), which is a mechanism for countries to trade credits to enable different nations to meet their emissions goals under the Kyoto Protocol. *Id.* This has led some to question whether the Adaptation Fund should be viewed as foreign aid, or simply as compensation for harms caused by emissions. See TOULMIN, *supra* note 29, at 28. This is discussed further *infra*, Part IV B.

173. *Climate Change Adaptation Programme in the Coastal Zone of Mauritius*, ADAPTATION FUND (Nov. 16, 2011 11:34 AM), <https://www.adaptation-fund.org/project/climate-change-adaptation-programme-coastal-zone-mauritius>.

174. Hall & Weiss, *supra* note 21, at 348. Hall and Weiss offer another way to conceptualize a potential claim: “complaints relating to allocation process, or any particular action, inaction, or failed action in these projects, may give rise to human rights claims related to adaptation practices.” *Id.* at 326.

175. *Id.* at 348.

176. It is possible to imagine such a situation in the context of the Mauritius aid mentioned above. Part of the funding is to develop an “early warning system, to be staffed all day, every day, to alert communities to incoming storm surges.” If this funding were used for a different purpose, particularly one that was not helpful in adapting to climate change, it may be possible for the family of someone who perishes in a storm surge to hold the government liable for a violation of the right to life. The reasoning would be similar to that in *Budayeva*—roughly, that someone was deprived of his right to life because of the government’s failure to warn of an impending threat to that right. See *Climate Change Adaptation Programme in the Coastal Zone of Mauritius*, *supra* note 173.

fulfills human rights' rigid state-actor and causation requirements than does mitigation."<sup>177</sup>

### B. *Benefits of an Adaptation-Based Approach*

Utilizing human rights in a climate change adaptation context offers several distinct benefits. First, holding nations liable for human rights violations resulting from a failure to adapt to climate change would give developing nations a way in which to prioritize adaptation projects. Though these nations already prioritize such projects,<sup>178</sup> prioritizing them based upon how much each project would affect basic human rights could ensure that the best protections are given to the greatest numbers of persons.<sup>179</sup> The adaptation approach focuses on smaller communities of persons as well—instead of looking at the emissions of a developed state, the approach instead looks at adaptation measures used to protect discrete communities.<sup>180</sup>

Professor Hunter makes the observation that, in the face of limited adaptation funding, this approach could set priorities for where limited funding should be spent during emergencies.<sup>181</sup> Imagine a climate change-related famine occurs in the Horn of Africa. A government in the region has enough funding to temporarily feed some of the population, but is unable to provide for each citizen. The government could use the right to food as a way to determine what segments of the population get supplemental food supplies during the famine. For example, the government could grant food benefits to the poorest segment of the population, while allowing those who can afford food to continue to purchase for themselves. In this way, the government would guarantee that each citizen still had access to food.

Contrast this with a government that only gave food to a privileged group, or conversely, opened its granaries for every citizen regardless of income. If this were the case, those who ended up without the means to obtain an adequate supply of food could possibly claim that the government did not protect their right to food, due to the fact that the government could have protected this right had it chosen a different distribution mechanism.

From the standpoint of environmental justice, the human rights-climate change adaptation framework would, on first glance, appear to be

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177. Hall & Weiss, *supra* note 21, at 315.

178. See *NAPA Priorities Database*, *supra* note 160.

179. See Hall & Weiss, *supra* note 21, at 356.

180. *Id.*

181. Hunter, *supra* note 21, at 360–61. Hunter uses the example of the right to housing and compares the relative necessity of providing housing to different victims of Hurricane Katrina. While illustrative of the point, I use a separate example because the United States is not a party to the ICESCR, in which the right to housing is enshrined. There was a case in the aftermath of Katrina that attempted to hold various parties liable for contributing to climate change, thereby adding to the Hurricane's ferocity. This case was dismissed by the 5th Circuit. See *Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010).

highly desirable, at least as it relates to power structures within individual nations.<sup>182</sup> For example, holding an LDC's government accountable for adaptation failures would seem fair in the case of a government that had policies protecting rights for one group while ignoring rights violations related to a separate group. From the standpoint of distributional justice, it would seem appropriate to give the second group a means to vindicate their lost rights in some way, whether in a domestic or international forum.

Similarly, the notion of corrective justice would dictate that those who have been injured in some way by a government's failure to properly adapt should be compensated for that loss. The desire to compensate someone who loses a home, or goes hungry, or loses a loved one due to a climate-change related event is perfectly reasonable, and touches upon our basic conceptualization of fairness. It is the sad truth that, ultimately, people worldwide will suffer due to climate change; this suffering will largely be the result of the actions of other people, separated by decades of time and thousands of miles. A basic concept of justice, then, would say that any compensation for someone whose basic human rights are violated by climate change would be instinctually desirable.

There are obvious benefits to utilizing the human rights legal regime in the context of climate change adaptation. This use of the regime seems possible given the vertical nature of human rights and also seems to be a means by which to get compensation to those whose rights have been infringed upon. While these benefits are undeniable, there are also certain aspects of the proposal which merit pause. In the next Part, I discuss different reasons to use restraint in exercising this approach, with particular attention to how an environmental justice perspective may caution against the use of human rights as the law would apply to direct lawsuits in international or national fora against developing states.

#### IV. CAUTIONING AGAINST AN ADAPTATION APPROACH TO UTILIZING HUMAN RIGHTS IN CLIMATE CHANGE

Despite the benefits of applying human rights law in this way, the developed nations of the world have largely rejected applying human rights law as it applies to climate change. The United States has been the most vocal, and has flatly stated that "a complex global environmental problem [climate change] with these characteristics does not lend itself to human rights-based solutions."<sup>183</sup> The American submission to the OHCHR continues by saying that "the United States takes the view that a 'human rights approach' to addressing climate change is unlikely to be effective, and that climate change can be more appropriately addressed through traditional systems of international cooperation and international mecha-

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182. While this type of challenge may appear desirable in a limited hypothetical such as this, there are other considerations that make an actual suit such as this one a questionable goal. See *infra* Part IV.

183. United States Submission, *supra* note 135, ¶ 6.

nisms for addressing this problem, including through the political process.”<sup>184</sup>

There is a distinct lack of enthusiasm in the submissions from other developed nations as well. Canada “believes the UNFCCC is the most appropriate forum in which to address issues related to climate change,”<sup>185</sup> necessarily implying that the human rights framework is a less appropriate means of addressing the problem. France’s submission only notes briefly that a study could be useful to identify possible gaps between the human rights treaties and climate change, but makes no comment on the application of human rights law in any context.<sup>186</sup> The United Kingdom states that “climate change in itself is not a human rights violation” and instead advocates for international cooperation in addressing the threat that climate change poses.<sup>187</sup>

There are thus two main concerns with litigating human rights law in the adaptation context. The first of these, as indicated by the reluctance of developed countries to implement human rights law related to climate change, is largely based on political and economic concerns, while the second rests in the different concepts of environmental justice.<sup>188</sup>

#### A. *Political and Economic Constraints*

The political problem begins in that it is likely that LDCs would be the primary targets for adaptation-related litigation based on human rights law. As a practical consideration, the world’s largest historical emitter—and thus, the first likely target for such a challenge—is exempt from these types of suits in many cases, because the United States is not a party to the ICESCR.<sup>189</sup> The countries of the European Union, while signatories, are also not necessarily friendly to the idea of using human rights law in this context. Second, the states that are going to suffer the worst effects of climate change are those that are the least able to adapt adequately to

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184. *Id.* ¶ 4.

185. Submission of Canada to OHCHR Study, Government of Canada Response to Request for Information by the Office of the High Commissioner for Human Rights Concerning a Request in the Human Rights Council Resolution 7/23 for a Detailed Analytical Study of the Relationship Between Climate Change and Human Rights 1 (Nov. 2008), available at <http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Canada.pdf>.

186. Submission of France to OHCHR Study, *Reponse au Questionnaire du Haut Commissariat aux Droits de l’Homme Suite a la Resolution 7/23 du Conseil des Droits de l’Homme* 3 (Aug. 21, 2008), available at <http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/France.pdf>.

187. Submission of the United Kingdom of Great Britain and Northern Ireland to OHCHR Study, Human Rights Council Resolution 7/23: “Human Rights and Climate Change” 3, available at <http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/UK.pdf>.

188. *See supra* Part II.

189. This would exempt the United States from liability based on claims of violations to the right to food, the right to water, the right to health, and the right to housing. *See ICESCR, supra* note 88.

protect all human rights.<sup>190</sup> Thus, the more developed, wealthier nations of the North have more funding to spend on fewer climate change problems while those of the South have significantly less money to spend on substantially more severe problems stemming from climate change.<sup>191</sup>

Another hurdle is that the protection of human rights represents a positive obligation for states. That is, states must utilize their power in order to safeguard certain rights in some cases and in others must protect against the intrusion against these rights by climate change events. The protection of these rights for LDCs is also positive in that private actors and other nations have typically caused the harms; the government of an LDC must take affirmative action to guard against the results of the harms.<sup>192</sup>

However, such positive obligations are the hardest type of obligations for a government to uphold. Beth Simmons has said that “[t]here is little doubt that most governments do not have the capacity to implement every aspect of their international legal obligations. Most operate under administrative and resource constraints; these are severe in the poorest countries. In no area is this truer than in the provision of positive rights . . .”<sup>193</sup> The poorest countries she speaks of are, of course, those most likely to suffer harms related to climate change. The positive obligation to protect from the adverse effects climate change, while congruent with the reading of the *Budayeva* decision, represents a substantial departure from the factual situation that led to *Budayeva*, where no actor, save nature itself, was in any way responsible for the mudslide that caused such massive damage. Contrast this with global climate change, where scientists can identify which nations are primarily responsible for causing particular harms. In the case of climate change-related harms, then, it is not that the international community cannot identify who is responsible; it is that international law itself is inadequate for making the culpable parties take responsibility for their actions.

Acting affirmatively to guard against human rights violations is even more difficult for LDCs considering the costs of adaptation against availa-

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190. See *supra*, Part II.

191. J.B. Ruhl, *Climate Change Adaptation and the Structural Transformation of Environmental Law*, 40 ENV'T'L L. 363, 403 (“[I]t is the least developed countries that drew the short straw – they will feel climate change more severely and have the least capacity to reduce vulnerability and boost resilience.”); see also, Int’l Council on Human Rights, *Climate Change and Human Rights: A Rough Guide* 1 (2008), available at [http://www.ichrp.org/files/reports/45/136\\_report.pdf](http://www.ichrp.org/files/reports/45/136_report.pdf) (“[R]esource shortages also limit the capacity (of governments as well as individuals) to respond and adapt to climate change.”).

192. McInerney-Lankford, *supra* note 78, at 218 (“In the context of climate change, the obligation to protect is more positive, because it requires States to *take steps* to protect persons within its jurisdiction or to exercise effective control against the negative impacts of climate change. It may also require that States *take action* to protect persons against the harmful acts of private parties and non-State actors that cause or accelerate climate change.”) (emphasis in original).

193. BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS 359 (2009).

ble funding.<sup>194</sup> Some estimates show that, in the developing world, adapting to climate change will cost between \$50-80 billion on a yearly basis.<sup>195</sup> Other estimates are higher—one source says that by 2015, developing countries will need \$86 billion annually to properly adapt.<sup>196</sup> The World Bank has estimated the yearly cost at \$70-100 billion annually between 2010 and 2050.<sup>197</sup> The funding available to developing nations earmarked for adaptation is significantly less.<sup>198</sup> While the developed countries of the world have pledged to make \$100 billion a year available to the developing world for climate change mitigation and adaptation by 2020,<sup>199</sup> key details of this plan have still not been decided.<sup>200</sup>

Given that developed countries are against the use of human rights (at least as it applies to them) in the context of climate change, the difficulties poor governments face in implementing positive rights, and the limited funding that developing nations have to address climate change, using human rights as a means of holding developing nations liable for violations may not be conducive to fostering political consensus in future climate change negotiations. According to Marc Limon, a large reason for the initial argument for importation of human rights law in the context of climate change was that the nations most likely to suffer from climate change became frustrated that there was no way to hold large emitters accountable for the “devastating human consequences” that resulted from their emissions.<sup>201</sup> Using human rights law seemed a logical way to look at the problem, with the hopes that large emitters would be forced to take account for the human rights violations in other nations. Developing countries were especially frustrated, though, because of their “knowledge of unequal

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194. This is a particularly important point, since the means of using human rights in climate change adaptation relates to a government misuse of funding.

195. TOULMIN, *supra* note 29, at 27 (“Building on estimates from the World Bank, Stern and the IPCC, Oxfam estimates that adaptation in developing countries will cost at least US\$50-80 billion each year.”).

196. See Hunter, *supra* note 21, at 359.

197. *Economics of Adaptation to Climate Change: Global Cost Estimate*, WORLD BANK (2012), available at <http://climatechange.worldbank.org/content/adaptation-costs-global-estimate>.

198. Hunter, *supra* note 21, at 360 (“Taken together, all of the currently identified sources of support for adaption remain substantially less than the estimated adaptation costs.”); TOULMIN, *supra* note 29, at 27 (“Currently, there are a series of adaptation funding sources available, but most of these have total funds under \$100 million.”). These sources include those like the Adaptation Fund, which in the past two years has given out \$156 million. See also, DOW & DOWNING, *supra* note 47, at 98–99 (showing the amounts of money pledged to developing countries, and how a small proportion of this money has been used for climate adaptation purposes); Cole, *supra* note 146, at 3 (“the costs of climate change are expected to rise, especially in the less-developed countries (LDCs) of the world’s tropical regions.”).

199. Hall & Weiss, *supra* note 21, at 327.

200. Fiona Harvey, *Green Climate Fund to discuss \$100bn pledged by rich countries*, GUARDIAN (Aug. 23, 2012, 08:36 AM), <http://www.guardian.co.uk/environment/2012/aug/23/un-green-climate-fund-climate-change>.

201. Limon, *supra* note 10, at 440.

power relationships underlying the problem, as illustrated by the ‘inverse relationship between responsibility for climate change and vulnerability to its impacts.’”<sup>202</sup>

There is already a considerable amount of distrust between developed and developing countries in climate change negotiations.<sup>203</sup> Developing countries distrust the North in that they believe the developed countries may try to prevent their future development, or try to make adaptation funds conditional based on human rights factors.<sup>204</sup> Enforcing human rights law against developing countries in the context of adaptation realizes both of these fears. If international law were to dictate that a developing country’s government must compensate those whose rights have been violated by a failure to properly adapt, it would necessarily mean that some of that government’s money would be unable to go to other development projects. By establishing liability for countries that fail to use adaptation funding to protect human rights, the legal scheme would imply

that any adaptation funding is somewhat conditional. That is, a country would be required to use its funds to protect human rights in a given situation, as opposed to what that country’s government believed to be the best use of a given amount of money, lest it potentially be held liable for failure to properly adapt to climate change.<sup>205</sup>

A final political consideration is that, during any climate-change related event, a nation would simply be able to declare a “state of emergency,” and suspend its human rights obligations immediately.<sup>206</sup> Some

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202. *Id.*

203. Developed countries are skeptical about the use of human rights because they feel that developing countries may try to use climate change as a way to advocate for the recognition of a human right to a ‘safe and secure environment.’ Developing countries are concerned that the West could use human rights to prevent their development, or to make the grants of adaptation funds conditional upon other criteria. *Id.* at 460-61.

204. *Id.*

205. As an illustration, imagine that a developing nation has \$100 million to spend on adapting to climate change. It could spend the money to protect the coastal homes of a fifty-person village, or could spend the money to improve the infrastructure in its capital city, with money to spare for relocating the village. The first project protects the right to housing for those in the village, and the second project protects no human rights. The second project, though, would be of much greater value to a greater number of people. The country’s government would like to improve its infrastructure and provide for the relocation of the threatened village, but if human rights law were to govern adaptation, it may require that the government undertake the first option instead, lest it be held liable for a rights violation.

206. See McInerney-Lankford, *supra* note 78 at 233. She goes on to state that “the sobering conclusion is, therefore, that human rights law does not display any special capacity to tackle the social and human impacts of climate change and that the existing weaknesses of the human rights regime appear exacerbated in conditions of climate change, with little obvious sign of renewal or reinforcement in the future.” *Id.*; see also, Scott P. Sheeran, *Reconceptualizing States of Emergency Under International Human Rights Law: Theory, Legal Doctrine, and Politics*, 34 MICH. J. INT’L L. 491, 492 (“The central international human rights



authors have argued that this could make the argument of adaptation liability nearly toothless.<sup>207</sup>

Developing countries were the ones to first say that human rights should be used in the context of climate change. They said this in order to get the world's largest emitters to bear some responsibility for the harms that they caused in the developing world. These countries have a much more difficult time adapting to climate change, and have a much smaller budget with which to do so. Based on this history, utilizing human rights law to hold developing countries liable for inadequate adaptation to climate change runs the risk of increasing the distrust apparent during climate change negotiations. If this distrust were to somehow impede future negotiations, then the benefit to those who were compensated by offending states may be less than the ultimate value of having a greater amount of international cooperation.

### B. *Environmental Justice Concerns*

Environmental justice's broader conceptualizations of "justice" may similarly caution against using human rights law as a sword against developing nations in the adaptation context. The use of human rights law in this way could have implications rooted in concerns of distributive justice, procedural justice, corrective justice, and social justice. Can we in good conscience tell developing countries that their governments are the only ones liable for climate-change related harms, because the only way that international law will function is against governments who do not properly adapt? Can we in good conscience tell developing countries this, considering that the largest emitters in the world are functionally immune from such a challenge, despite being responsible for the vast majority of anthropogenic GHGs?<sup>208</sup> "Perhaps we must, but that is surely because the law is wrong, rather than because our instincts of fairness, equity, and justice are wrong."<sup>209</sup>

Distributive justice requires that everyone is given the right to equal treatment, and that benefits and costs are evenly distributed amongst populations.<sup>210</sup> In the context of global climate change, this means that each nation should be equally benefited and burdened by anthropogenic GHG emissions. While the current state of the world is nowhere near a level of parity that would satisfy the dictates of distributive justice, the proposal to hold developing nations' governments responsible for adaptation failures would only serve to exacerbate the distributive disparity already apparent in adverse climate change events. The benefits of GHG emissions are highly concentrated in the North, the countries who also

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treaties envisage a regime of derogation allowing states parties to temporarily adjust their obligations under the treaties in exceptional circumstances.").

207. McInerney-Lankford, *supra* note 78, at 233.

208. Dow & Downing, *supra* note 47, at 46–47.

209. Limon, *supra* note 10, at 468–69.

210. See Kuehn, *supra* note 71.

control the funding for individual adaptation projects. The costs of GHG emissions are largely experienced in the developing South, whose governments in many circumstances must ask for funding from the North to implement protections for their populations. At best, holding developing states' governments liable for human rights violations related to climate change events does nothing to ameliorate the distribution of costs and benefits associated with GHG emissions. Indeed, it may even discourage development in developing countries. If a specific nation were forced to spend large amount of money in compensating those harmed by climate change because it could not adapt properly, it would be foregoing money that could otherwise be used to help the country become more developed.

Procedural justice requires that each party be treated as an equal—taken on the international stage, it requires that each state have a voice in climate change negotiations.<sup>211</sup> There are already large disparities in bargaining power in international climate change negotiations.<sup>212</sup> Small, developing states are less politically powerful than developed, economically powerful emitters.<sup>213</sup> The ultimate effect of the human rights–adaptation framework is that the most powerful states, the world's largest emitters, are functionally immune from human rights challenges based on climate change. Instead, under an adaptation framework, those very governments who used their marginal political clout to advocate for a human rights approach to climate change are the same governments who would be liable for human rights violations following a climate change-related event. The original intent of importing human rights law into the climate change discussion was to find a way to hold the world's largest emitters liable for their actions. Developing states, sitting at the negotiating table, used their limited political weight to advocate for the use of human rights law; when this law is then used against them instead of against those who are truly responsible for climate change, it appears as though their initial desires went unnoticed. If the world's developing nations could, for example, have a voice on the best way to meld international human rights law to the new realities of climate change, it is certain that the result would be different—that those nations emitting GHGs would be held responsible for their harms. The fact that developing nations' desires cannot be realized in this manner—and indeed, could be turned against them—would seem to violate the ideal of procedural justice.

Corrective justice is, of the four broader conceptions of justice encapsulated in the term “environmental justice,” the concept that will be most offended by the human rights–climate change adaptation framework. Corrective justice, in the context of climate change, requires that the nations of the world that are most responsible for the harms arising from climate change help those nations who will suffer damages due to climate change. The idea of corrective justice in this context should require that the

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211. See Kuehn, *supra* note 71.

212. See Marshall Islands Submission, *supra* note 55.

213. *Id.*

world's developed nations help each developing nation that is harmed by climate change to the extent that there is no net detriment to them as a result of GHG emissions. In other words, this ideal should be viewed as akin to a common law tort remedy: those responsible for the harm should have the duty to make the victims of the harm whole again. However, on the international plane, the human rights in climate change adaptation scheme does nothing to help compensate nations who have to spend money to protect themselves from the results of someone else's actions.<sup>214</sup> There is no justice in forcing a poor nation to spend the contents of its limited coffers on internal claims of climate change harms, while those who are at fault for climate change in the first place continue to enrich themselves while emitting more GHGs.

Finally, the ideal of social justice remains unsatisfied by a climate change adaptation-human rights framework. In the domestic context, social justice dictates that each individual should be able to live "as befits a human being." Extrapolated to the international plane, with states as the relevant actors, an equivalent ideal is that each nation should be able to function unhindered by the actions of other states. In this respect, a requirement that developing states spend funds for harms caused by other states seems, at its core, unfair—particularly when these states are already limited in their overarching capacity for rights protections.

Ultimately, it would seem that implementing human rights law to punish the poorest nations of the world would be manifestly unjust. The final result of using human rights in the context of climate change adaptation is that those who are most to blame for climate change are able to continue emitting to the detriment of the developing world, while the world's least wealthy governments could see their funding further limited and constrained in considering options for climate change adaptation.

#### CONCLUSION

All of this is not to say that the argument for using adaptation in the context of climate change lacks merit; on the contrary, it seems the best and most practical way to implement human rights law in the context of climate change. Just because it may be possible to allow developing nations to be held accountable for failures to properly adapt, however, does not mean that it should be the preferred method of introducing human rights law to climate change.

Instead, the human rights implications of climate change adaptation should be used to further inform negotiators at climate change conferences, and to humanize the climate change debate writ large. Using human rights as a way to frame the issue of climate change is expressively desira-

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214. The only "compensation" that these nations received is through the Adaptation Fund. The Adaptation Fund, as a tax on the CDM, is viewed in the developing world as a compensatory fund for harms that they will endure as a result of the CDM. However, even this fund isn't truly "compensatory," in that its funding is given to projects that a committee best determines fit the plans for "adaptation," making the fund more like aid than compensation. See TOULMIN, *supra* note 29.

ble, in that it can contribute a way to conceptualize the real dangers to real people arising from climate change.<sup>215</sup> It is possible, too, that an increased focus on human rights during climate change negotiations will be able to better build a political will to take action,<sup>216</sup> whether it is increasing the amount of money that the developed world gives the developing world for adaptation purposes<sup>217</sup> or simply to call attention to the moral imperative of helping developing nations.<sup>218</sup>

Mali, in its submission to the OHCHR, stated that, “[w]hen vulnerable communities have tried to use human rights law to defend their rights and seek climate justice, important weaknesses [in human rights law] were revealed.”<sup>219</sup> It seems unjust for the international community to tell nations, such as Mali, that the best way for them to achieve climate justice is to adapt properly under human rights law, lest they be held accountable for the harms their people suffer due to climate change. Rather, the international community should take note of Mali’s submission, and find a way to make “laws and institutions for the defense of human rights . . . evolve to the new reality of climate change.”<sup>220</sup>

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215. Limon, *supra* note 10, at 458–59.

216. Hunter, *supra* note 21, at 332 (“A human rights approach . . . puts the focus on those who will suffer from climate change, in the hopes of building the political will to compel humanity to put more resources into both adapting and mitigating climate change.”).

217. Cole, *supra* note 146, at 17–18 (“[D]eveloped countries certainly have the capability to both mitigate a significant percentage of their GHG emissions at reasonably low cost and assist LDCs with adapting to changing environmental circumstances by funding discrete adaptation projects and broader economic development projects.”).

218. Limon, *supra* note 10, at 448 (“[W]hen the malign impacts fall heaviest on the weakest and most vulnerable then the international community is duty-bound to respond.”).

219. Mali Submission, *supra* note 1.

220. *Id.*