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ARTICLE

Of Harm, Culprits and Rectification: Obtaining Corrective Justice for Climate Change Displacement

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Abstract
In light of the accelerating nature of climate change and its effect, it is unsurprising that various entities increasingly resort to courts and tribunals to seek to address the many harms and wrongs that clearly stem from climate change. This article discusses the opportunities in this context for those who face displacement by the effects of climate change, an issue that is not necessarily at the heart of either climate justice debates or climate displacement debates. Discussions about how to respond to displacement arising in the context of climate change often focus on the 'protection space' or 'assistance space', in which those affected are conceptualized as actual or potential seekers of protection or assistance, who may or may not be owed refuge elsewhere on account of unmet needs for shelter, support or safety. This article takes a different approach and conceptualizes those affected as potential or actual seekers of justice, who may be owed rectification for inflicted harm. The article thus contributes to emerging scholarship concerning climate change litigation and climate harm reversal, by focusing on the corrective justice potential for those who face the specific issue of displacement stemming from climate change. To this end, the article provides the relevant practical and analytical background, and discusses key recent law and policy developments in both the domestic and cross-border spheres. The article considers not merely the nexus between displacement stemming from climate change and considerations of justice, but also how and where justice in this context is or may be sought.

Keywords: Climate change, Climate justice, Corrective justice, Climate change litigation, Displacement, Trapped populations

1. INTRODUCTION

The notion that the effects of anthropogenic climate change impact upon human migration or displacement is not new. It made an appearance in the Intergovernmental Panel on Climate Change's (IPCC) First Assessment Report in the early 1990s[1] and has

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1 Intergovernmental Panel on Climate Change (IPCC), 'Policymaker Summary of Working Group II (Potential Impacts of Climate Change)', in *Climate Change: The IPCC 1990 and 1992 Assessments*

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gained traction in recent years in research and policy circles, as well as taking hold in media representations and the public imagination, often when considering ominous consequences of climate change.[2] Arguably, it is regularly construed as the ultimate signifier of the actual or potential ill effects of climate change.[3] Those directly affected, or those who otherwise take an interest, also construe it as one of the central injustices of climate change.[4] Fundamentally, the preamble to the 2015 Paris Agreement now enshrines in an international instrument the idea that matters relating to justice are linked to addressing climate change.[5] Beyond this, justice matters concerning those who have or want to move on account of climate change more specifically are regularly noted. For example, Emele Duituturaga, Executive Director of the Pacific Islands Association of Non-Governmental Organisations (PIANGO), states:

> Many of the situations we find ourselves in, here in the Pacific, are not caused by us. We continue to ask, 'Where is the justice?' Those of us who are least responsible, continue to bear the brunt … . We hope that there will be an openness and an acceptance that climate-induced migration is one that the world community has to be responsible for.[6]

Campaign group 350.org equates climate justice with migrant justice in arguing that '[w]e can't claim to fight for climate justice if we turn away climate refugees after the storms are over and the droughts have ended'.[7] Also, according to 'Climate Justice' (a position paper by the Mary Robinson Foundation), actions that seek to address those displaced or at risk of displacement, in the climate change context, must be founded on considerations of justice and, ultimately, in a Climate Justice Framework for Action.[8]

Justice has no singular meaning or application. Terri Nardin has noted that '[a]rguing about justice [should] force one to articulate and clarify the standards on which one's judgements are based'.[9] This article focuses on one important justice angle – namely, corrective justice. Focusing on this angle is important. Climate change

(IPCC, 1992), pp. 87–113, at 103, para 5.0.10, available at: https://www.ipcc.ch/site/assets/uploads/2018/05/ipcc_90_92_assessments_far_full_report.pdf.

2 E.g., O. Milman, 'Meet the "Climate Refugees" Who Already Had to Leave Their Homes', *The Guardian*, 24 Sept. 2018, available at: https://www.theguardian.com/environment/2018/sep/24/climate-refugees-new-orleans-houston-hurricane-katrina-hurricane-harvey.

3 C. Farbotko, 'Wishful Sinking: Disappearing Islands, Climate Refugees and Cosmopolitan Experimentation' (2010) 51(1) *Asia Pacific Viewpoint*, pp. 47–60.

4 See, e.g., L. Taylor, '"Where Is the Justice?" Ask Climate "Refugees" Sidelined from Global Deal', *Reuters*, 6 Dec. 2017, available at: https://www.reuters.com/article/us-fiji-climatechange-migration/where-is-the-justice-ask-climate-refugees-sidelined-from-global-deal-idUSKBN1E01XG.

5 Paris (France), 12 Dec. 2015, in force 4 Nov. 2016 available at: http://unfccc.int/paris_agreement/items/9485.php.

6 Taylor, n. 4 above.

7 350.org, 'On International Migrants Day, We Must Remember that Standing for Climate Justice Means Standing for Migrant Justice', 2018, available at: https://350.org/migration-justice/?akid=61696.3382245.-6d_oA&rd=1&t=6.

8 Mary Robinson Foundation – Climate Justice, 'Protecting the Rights of Climate Displaced People', Position Paper, June 2016, available at: https://www.mrfcj.org/wp-content/uploads/2016/07/Protecting-the-Rights-of-Climate-Displaced-People-Position-Paper.pdf.

9 T. Nardin, *Law, Morality and the Relations of States* (Princeton University Press, 1983), p. 257.

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and its effects are increasingly referred to in existential terms, as either amounting to a 'climate crisis' or a 'climate emergency'.[10] This points to a growing understanding among many that global warming generates dire effects, that it generates harm and wrongs, the prevention as well as rectification of which is conceived of as increasingly necessary, even if uncertain.[11] This article focuses on one area of apparent wrongdoing and harm: the harm and wrongs encountered by those who face displacement connected with the effects of climate change, many of whom vigorously highlight the injustices involved and have come to pursue avenues for redress and rectification. The article seeks to contribute to ongoing debates about climate justice,[12] by highlighting that corrective justice can be about more than seeking wrongdoers or apportioning fault, with a focus on the very act of rectification instead being a valuable alternative. It also seeks to contribute to ongoing debates about those displaced in the context of climate change, by moving the debate away from the realm of shelter, refuge and protection[13] and into the realm of justice and correction for apparent wrongs.

The article proceeds as follows. It first charts briefly how climate change is connected with human displacement and how this, in turn, is connected with injustice. It then explains in greater detail what corrective justice is, reviewing its scope, aims and possibilities, and highlighting two distinct schools of thought on the issue. The article continues by examining the harm involved in climate change-related displacement, identifying the culprits, as well as discussing opportunities (or the lack thereof) for the rectification or reversal of harm. The final section collates and discusses recent legal and policy developments, at both the domestic and global levels, which incorporate a corrective justice approach to addressing migration and displacement in the context of climate change.

2. CLIMATE CHANGE, PEOPLE ON THE MOVE, AND (IN)JUSTICE

This article takes as established that human activities, particularly those involving the release of greenhouse gas (GHG) emissions, contribute dramatically to anthropogenic climate change and its associated consequences in both the natural and human world.[14] Worth highlighting is a 2018 IPCC report which notes particular populations at greater risk of experiencing the adverse consequences of climate change. These include 'disadvantaged and vulnerable populations, some indigenous peoples, and local

[10] E.g., 'UK Parliament Declares Climate Change Emergency', *BBC News*, 1 May 2019, available at: https://www.bbc.com/news/uk-politics-48126677.

[11] United Nations (UN) Secretary-General, 'Secretary-General's Remarks on Climate Change', 10 Sept. 2018, available at: https://www.un.org/sg/en/content/sg/statement/2018-09-10/secretary-generals-remarks-climate-change-delivered.

[12] E.g., M. Robinson, *Climate Justice* (Bloomsbury, 2018).

[13] J. McAdam, *Climate Change, Forced Migration and International Law* (Oxford University Press, 2012).

[14] See, e.g., IPCC (V. Masson-Delmotte et al., (eds)), *Global Warming of 1.5°C: An IPCC Special Report on the Impacts of Global Warming of 1.5°C Above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty* (IPCC, 2018).

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communities dependent on agricultural or coastal livelihoods (high confidence)'.[15] Some regions, too, are more susceptible than others; these include drylands, low-lying islands, the Arctic, and small island developing states.[16] The woes of climate change, therefore, are endured unequally.

More directly relevant to this article are the links between climate change, its effects, and people on the move. These links have been well rehearsed elsewhere.[17] This article highlights just one important dichotomy in this context, namely, that climate change has the capacity to play a role both in displacement and entrapment, with at least some similar consequences. Firstly, there is indeed little doubt that climatic change is connected with people on the move. Particularly where rapid climatic events, such as sudden extreme weather events, are concerned, a case can be made that anthropogenic climate change and its effects are a contributing force in the displacement of people. The IPCC in its Fifth Assessment Report collates the evidence of how extreme weather and climatic events are changing, both quantitatively and qualitatively. It notes, for example, that heatwaves are now twice as likely to occur, and strong precipitation events with a risk of flooding are also occurring more regularly.[18] The extreme consequences of such events include increased human mortality risks.[19] Such events are also strongly associated with displacement. As the IPCC highlights, '[a]n increasing … intensity of extreme weather events due to climate change will lead directly to the risk of increased levels of displacement'.[20] The Internal Displacement Monitoring Centre records between 17 and 25 million persons newly displaced annually around the globe by natural disasters for the five years to 2018, the majority of which were caused by weather-related events.[21] The likelihood of being displaced by a natural disaster is now 60% greater than was the case four decades ago.[22] The temporal aspect of this form of displacement is also distinctive; it is often temporary (sometimes quite short-term) rather than permanent.[23] Slow, incremental or long-term changes stemming from anthropogenic climate change – for example, drought or sea-level rise – also impact upon how, where, or how often people move. Personal choice to move

[15] IPCC, 'Summary for Policy Makers', in IPCC, ibid., s. B.5.1.

[16] Ibid.

[17] E.g., J. McAdam (ed.), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart, 2012).

[18] IPCC, 'Summary for Policymakers', in IPCC (T.F. Stocker et al. (eds)), *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2013), pp. 3–29, at 5.

[19] See, e.g., D. Mitchell et al., 'Extreme Heat-Related Mortality Avoided under Paris Agreement Goals' (2018) 8(7) *Nature Climate Change*, pp. 551–3.

[20] W.N. Adger et al., 'Human Security', in IPCC (C.B. Field et al. (eds)), *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2014), pp. 755–91, at 767.

[21] Internal Displacement Monitoring Centre, 'Total Annual New Displacement' (2019) available at: https://www.internal-displacement.org/database/displacement-data. Note that large numbers of people can be displaced by relatively small numbers of events.

[22] Internal Displacement Monitoring Centre and Norwegian Refugee Council, 'Global Estimates 2015: People Displaced by Disasters', July 2015, p. 22, available at: https://www.internal-displacement.org/publications/global-estimates-2015-people-displaced-by-disasters.

[23] Adger et al., n. 20 above, p. 767.

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away (or not) is more likely to be a consideration where change is slower to materialize, alongside a host of other factors, which may include existing migration channels or trends, cultural ties, including attachments to ecosystems, financial and other resources, and so on.[24] That said, slower but long-term impacts reduce the possibility of an eventual return, especially where natural and human support systems have degraded substantially or irreversibly. Moreover, it is important to remember that, irrespective of which climate-driven phenomenon a person responds to, whether short- or long-term, their exposure to risk in a destination area may not be diminished, much as this may have been a motivating factor for departing.[25]

Conversely, climate change has also regularly been associated with so-called 'trapped' populations. The term was noted in a 2011 report published by the United Kingdom (UK) Government Office for Science, which examined linkages between human migration and global environmental change.[26] The report states that 'in the decades ahead, millions of people will be unable to move away from locations in which they are extremely vulnerable to environmental change', not least on account of reduced access to the resources required to move.[27] Hence, climatic change may not only be implicated in forcing people to move but also in preventing them from moving elsewhere, even though it is necessary, or even vital, to do so. Richard Black and co-authors note how this entrapment is linked inextricably to factors such as economic and social capital, available migration channels, and concern over one's possessions in the place departed.[28] Richard Black and Michael Collyer note furthermore that '[d]istinguishing between those who choose to stay and those who are forced to stay is essential [for] the notion of trapped populations'.[29] The latter is best conceptualized as experiencing involuntary or forced immobility, as having no or little choice but to stay,[30] with people concerned facing significant detrimental consequences on account of their immobility.[31] Even where immobility is by choice – for example, an expression of agency and resistance[32] – adverse impacts may well need to be faced. Sonja Ayeb-Karlsson and co-authors, finally, highlight that the literature concerning trapped populations now also addresses scenarios where entrapment arises from environmental factors in conjunction with policies emanating from the state,

[24] Ibid., pp. 768ff.

[25] See, e.g., Foresight, 'Migration and Global Environmental Change: Final Report', UK Government Science Office, 20 Oct. 2011; see also A.E. Piggott-McKellar et al., 'Moving People in a Changing Climate: Lessons from Two Case Studies in Fiji' (2019) 8(5) *Social Science*, pp. 133–50.

[26] Foresight, ibid.

[27] Ibid., p. 9.

[28] R. Black et al., 'Migration, Immobility and Displacement Outcomes Following Extreme Events' (2013) 27(Suppl 1) *Environmental Science & Policy*, pp. S32–S43.

[29] R. Black & M. Collyer, 'Populations "Trapped" at Times of Crisis' (2014) 45 *Forced Migration Review*, pp. 52–6.

[30] Though some may move once the immediate impacts of a disaster or climatic event have subsided: see, e.g., Black et al., n. 28 above, p. S35.

[31] Black & Collyer, n. 29 above, p. 54.

[32] C. Farborko, 'Voluntary Immobility: Indigenous Voices in the Pacific' (2018) 57 *Forced Migration Review*, pp. 81–3.

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such as impermeable borders or a lack of applicable legal frameworks which could facilitate movement.[33]

2.1. *Injustice?*

The preceding section broadly sketched how climate change contributes to displacement and entrapment. In the former scenario there will be some who move on account of the effects of climate change without wanting to. Their preference would have been to stay put, and they may, in fact, move into situations of greater precarity. In the latter scenario some will find themselves in situations where survival or maintaining a livelihood or health and well-being have become extremely challenging and they therefore should in all probability move, but they are unable to do so on account of factors which include a lack of resources. Alternatively, they may be unwilling to do so on account of an express preference to stay put even in the face of increasing precarity. At least some of these scenarios will seem unfair, unjust and wrong to many, as clearly the patterns of behaviour revolve around harm, loss or substantial burdens, which affect some more than others. They concern the loss of both tangible and intangible things that many people value – most basically an inhabitable home and community, an ongoing livelihood base, a sense of personal security, an intimate connection with a place-based history, and so on. Importantly, these experiences of loss arise not by accident but from the actions of others who have not infrequently enjoyed the benefits that derive from these actions. Beyond grasping this injustice intuitively, however, it is important to look towards justice theory for guidance to properly and formally frame these experiences as amounting to injustice. The next section turns to justice theory to outline the origins and scope of corrective justice. A subsequent section then examines whether, from a vantage point of corrective justice, the experiences outlined so far amount to injustice.

3. CORRECTIVE JUSTICE: ORIGINS AND SCOPE

In essence, justice is thought to encapsulate the idea that every person[34] is rendered their due[35] in the social life of humans; that the way in which one is treated is fair and right. This definition of justice is so broadly cast as to make questionable its relevance when discussing an issue as complex as climate change and its associated effects. A more useful framing may present questions of justice as posing one of two possible problems, the first of which is that someone once rightfully possessed something which was taken away, in particular because of another entity's action or inaction. What is due in this case is the restoration of that something, which may be an object, a state of affairs,

[33] S. Ayeb-Karlsson, C.D. Smith & D. Kniveton, 'The Conceptual Birth of Trapped Populations and the Danger of Using It as a Policy Tool', *TransRe*, 26 Sept. 2018, available at: http://transre.org/index.php/blog/conceptual-birth-trapped-populations-and-danger-using-it-policy-tool.

[34] As well as other creatures: see, e.g., R. Garner, *A Theory of Justice for Animals: Animal Rights in a Nonideal World* (Oxford University Press, 2013).

[35] See, e.g., Plato, *The Republic*, trans. B. Jowett (ebook@Adelaide, 2012), p. 331e.

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or other property. Alternatively, someone does not have access to a fair share of what should be common resources or privileges (or, arguably, burdens). What is due in this instance is a balancing of shares of privileges and, indeed, burdens. The idea that justice revolves around these two problems stems from Aristotle,[36] who proposed, firstly, a distinction between 'higher', or divine, justice and the 'particular' justice of human relations. Secondly, he proposed that within the latter we find corrective and distributive justice, which encompass the two problems just noted:

> Of particular justice and that which is just in the corresponding sense, (A) one kind is that which is manifested in distributions of honour or money or the other things that fall to be divided among those who have a share in the constitution … , and (B) one is that which plays a rectifying part in transactions between man and man.[37]

Both types of particular, or human, justice are conceptualized around proportion – that is, its restoration or establishment – either between a doer and a sufferer of harm or loss (corrective justice) or between a have and a have-not of social goods (distributive justice). Martin Malin argues that both variants 'share the goal of equality, which is the mean between excess and too little'.[38] With regard to corrective justice, an obligation is inferred to restore the sufferer of harm to a state akin to what it was before the harm was experienced. In the case of distributive justice, an obligation is inferred to bestow between associated entities the same share of communal bounties (and, arguably, burdens). Both are commonly associated with distinct branches of the law: corrective justice notably with private law, as expressed, for example, in the compensatory reasoning that undergirds tort and contract. Distributive justice is more prominent in public law; it resonates, for example, in progressive taxation or in legal provisions to secure a minimum degree of social welfare.[39]

This article focuses on corrective justice. In its classical iteration, corrective justice is concerned primarily with the reversal of wrongs which stem from the harmful or injurious actions of others. Aristotle described it thus:

> But the justice in transactions between man and man is a sort of equality indeed, and the injustice a sort of inequality … according to arithmetical proportion. For it makes no difference whether a good man has defrauded a bad man or a bad one a good one …; the law looks only to the distinctive character of the injury, and treats the parties as equal, if one is in the wrong and the other is being wronged, and if one inflicted injury and the other has received it. Therefore … the judge tries to equalize things by means of the penalty, taking away from the gain of the assailant.[40]

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[36] Aristotle, *The Nicomachean Ethics of Aristotle*, trans. D. Ross (Oxford University Press, 1954), p. 111.

[37] Ibid.

[38] M.H. Malin, 'The Distributive and Corrective Justice Concerns in the Debate over the Employment at Will: Some Preliminary Concerns' (1992) 68(1) *Chicago-Kent Law Review*, pp. 117–46.

[39] See, e.g., D. Klimchuck, 'On the Autonomy of Corrective Justice' (2003) 23(1) *Oxford Journal of Legal Studies*, pp. 49–64, at 49 ff; also P. Benson, 'The Basis of Corrective Justice and Its Relation to Distributive Justice' (1992) 77 *Iowa Law Review*, pp. 515–615, at 515.

[40] Aristotle, n. 39 above, p. 115.

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He suggests that corrective justice is about a disturbance to the notional equality between formal equals which existed before the harm or injury was inflicted.[41] Over time, this understanding has undergone several transformations.[42] Aristotle positioned corrective justice to be a concern among 'equal parties'. Subsequently, some have debated whether its scope and application are influenced by the social standing of the doer and sufferer of harm.[43] Others have debated the solidity of the claim that it is only corrective justice (as opposed to its alternate, distributive justice) which entails concrete – that is, legally enforceable – duties.[44] One of the most vigorous debates concerning corrective justice – and one of relevance to the discussion in this article – emerged in the 20th century in discussion between two schools of thought: instrumentalism and ethicism. Building more directly on Aristotle, and thus a notable proponent of the ethicist stance, Ernest Weinrib argues that:

> [in] corrective justice, quantitative equality pairs one party with another. Corrective justice treats the defendant's unjust gain as correlative to the plaintiff's unjust loss. The disturbance of the equality connects two, and only two, [parties].[45]

What seemingly matters in correction is that doer and sufferer are connected through the harm-causing act, which generates a duty to correct for the former, and only the former. Instrumentalists, on the other hand, argue that it is neither the relationship between the two that is essential in contemplating correction, nor the notion of fault or wrongdoing it implies, but that correction is enacted irrespective of the party that inflicts the harm. Jules Coleman, a notable proponent of the instrumentalist school, asks '[w]ith all the options available for allocating costs … , why impose them on particular injurers?' rather than on other types of harm-reversal entity, including insurance-type bodies or similar risk- or loss-sharing mechanisms.[46]

What remains indisputable in these debates is that corrective justice relates to the experience of harm, of something damaging having occurred, which ought to be rectified, with the reinstatement of a prior state of affairs, or something akin to it, as the goal. For some, what matters most is actor identification and, with it, fault or wrongdoing. For others, what matters more is harm identification and subsequent rectification, whereas the identification of a culprit who has acted wrongly is relatively immaterial. This distinction matters greatly when considering the responsibilities of a variety of actors under domestic or international law and regulation in the context of rectification of harm stemming from displacement or entrapment in the context of climate change. The distinction also matters when considering the extent to which such

[41] E.J. Weinrib, 'Corrective Justice in a Nutshell' (2002) 52(4) *The University of Toronto Law Journal*, pp. 349–56, at 349.

[42] I. Englard, *Corrective and Distributive Justice: From Aristotle to Modern Times* (Oxford University Press, 2009).

[43] Ibid, pp. 18ff.

[44] Ibid.

[45] E.J. Weinrib, 'Corrective Justice' (1992) 77 *Iowa Law Review*, pp. 403–26, at 410.

[46] J. Coleman, 'Tort Law and the Demands of Corrective Justice' (1992) 67(2) *Indiana Law Journal*, pp. 349–79, at 352.

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responsibilities may be legally enforced or avoided. Before turning to this legal analysis, the next section looks at important core concepts in ethicism and instrumentalism, respectively, and discusses their application to displacement (and its 'relation' entrapment) connected with climate change. What are the types of harm concerned? Is it possible to identify culprits whose responsibilities could be engaged? Finally, can harm stemming from displacement actually be rectified, in particular where the displacement experience has environmental origins? These questions, as well as their responses, also inform the subsequent law and policy discussion.

4. HARM, CULPRITS, RECTIFICATION AND CLIMATE DISPLACEMENT

Corrective justice is about harm reversal. For some, the core issue is to reverse the harm itself, so its identification is vital. For others, the most essential aspect of corrective justice is the identification of the doers of harm and, hence, of fault or wrongdoing. Either way, most agree that harm, or at least its effects, ought to be reversed. How are these matters to be conceptualized when climate change displacement and its corollary, entrapment, are added into the mix?

4.1. *Harm*

What is the harm in moving somewhere else? Undoubtedly, doing so is not necessarily or inevitably detrimental or harmful.[47] Nevertheless, the experience of harm is not foreign to people on the move, at least under certain conditions. The literature concerning those who move (or are moved) elsewhere involuntarily, in particular, paints a stark picture of potential harm and suffering.[48] Broadly speaking, harm refers to 'a disruption of or interference in [an entity's] well-being, including damage to [its] body, psychological state, capacities to function, life plans, or resources over which we take [it] to have an entitlement'.[49] It refers to disturbances of a person's tangible and intangible 'belongings'. Broadly speaking, disturbances to homes, livelihood bases, and infrastructure are examples of tangible harm when it is connected with moving elsewhere involuntarily, or when a move is not undertaken although it is seemingly or increasingly necessary. Importantly, especially where displacement is concerned, this type of disturbance is coupled with harm that revolves around loss of heritage, customs and traditions connected with place and livelihood, harm to a sense of self and identity, and many other non-material types of harm stemming from disruptions to the often

[47] Piggott-McKellar et al., n. 25 above.

[48] See, e.g., M.M. Cernea & H. Mohan Mathur (eds), *Can Compensation Prevent Impoverishment? Reforming Resettlement through Investment and Benefit-Sharing* (Oxford University Press, 2008).

[49] J. Hampton, 'Defining Wrong and Defining Rape', in K. Burgess-Jackson (ed.), *A Most Detestable Crime: New Philosophical Essays on Rape* (Oxford University Press, 1999), pp. 118–56, at 120.

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place-based human experience of individuals and communities.[50] Even anticipating having to move somewhere else forcibly brings with it intangible harm.[51]

The degree of harm experienced might depend on the scope of the displacement. Those who move far, including across borders, may struggle more with immaterial losses than those who move short distances and within a familiar cultural context, or those who do not move at all, even as material assets disintegrate. Equally, those who move in familiar contexts may have a different experience from those who move into distant camp-like conditions, which not infrequently preclude their participation or assimilation in the host cultural and economic context[52] and can translate into prolonged precarity. Precarity might generally increase after moving away, not least as people move into more vulnerable settings compared with those from which they have departed. Yet, as has been pointed out, precarity may also increase by staying put.

The stimulus to move might also influence the experience of harm. It may not necessarily be tied singularly to an environmental motivator. However, even when environmental factors are the key motivator, their specific characteristics affect the nature of the harm, as does their location. Alison Heslin and co-authors detail how the experience of loss and damage is different, for example, for small islanders who face the consequences of sea-level rise and other climate hazards, compared with the experience of those in West Africa who face desertification and other climatic impacts as well as their consequences.[53] Harm in the context of climate change and displacement is varied and context-specific. Its identification and rectification must inevitably account for this and might have to be approached on a case-by-case basis.

4.2. *Culprits*

What about the 'doers' of any harm experienced? Are they, and their fault or wrongdoing, easily identified? Arguably not, as obstacles to swift identification are abundant.[54] Firstly, a large number of actors are involved in generating GHG emissions, none of whom alone emits individually damaging amounts and none of whom sets out deliberately to cause harm by engaging in activities that involve emissions.[55]

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[50] O. Serdeczny, E. Waters & S. Chan, *Non-Economic Loss and Damage in the Context of Climate Change: Understanding the Challenges* (German Development Institute, 2016), p. 1; S.O. Becker & A. Ferrara, 'Consequences of Forced Migration: A Survey of Recent Findings' (2019) 59 *Labour Economics*, pp. 1–16.

[51] S.-S. Shong Hwang et al., 'Anticipation of Migration and Psychological Stress and the Three Gorges Dam Project in China' (2007) 65(5) *Social Science and Medicine*, pp. 1012–24.

[52] A. Heslin et al., 'Displacement and Resettlement: Understanding the Role of Climate Change in Contemporary Migration', in R. Mechler et al. (eds), *Loss and Damage from Climate Change* (Springer, 2019), pp. 237–58, at 244.

[53] Ibid.

[54] See, e.g., F. Thornton, *Climate Change and People on the Move: International Law and Justice* (Oxford University Press, 2018), Ch. 5; E. Neumayer, 'In Defense of Historical Accountability for Greenhouse Gas Emissions' (2000) 33(2) *Ecological Economics*, pp. 185–92; E.A. Page, 'Distributing the Burdens of Climate Change' (2008) 17(4) *Environmental Politics*, pp. 556–75; and D.A. Farber, 'The Case for Climate Change Compensation: Justice for Climate Change Victims in a Complex World' (2008) 2 *Utah Law Review*, pp. 377–413, at 395 ff.

[55] Although it may be increasingly less plausible to argue the latter point: see, e.g., D. Hasemayer, 'U.S. Supreme Court Refuses to Block Exxon Climate Fraud Investigation', *Inside Climate News*, 7 Jan.

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Secondly, even if one were to contemplate the 'doing' of harm at the collective level by focusing on, say, states or major corporations whose aggregate emissions arguably amount to something harmful, emissions quantities have changed, and keep changing, over time. Borders and corporate ownership, too, have moved and continue to evolve. Thus, contemplating doers of harm in any context involving the effects of climate change is difficult. The challenge is at best only partially alleviated by emerging attribution science,[56] which seeks to pinpoint the drivers of extreme weather and climatic events. Referred to also as 'probabilistic event attribution' (PEA), attribution science does permit determinative assessments of the probable contribution of GHG emissions to local weather and other events[57] – although it is perhaps more instructive for slow-onset than for rapid-onset events. Nevertheless, inferring from PEA data the responsibility of a specific actor (or group of actors) for the adverse effects of specific events remains fraught with many difficulties,[58] and creates substantial challenges for achieving fault-based corrective justice.

When it comes to displacement in the context of climate change, causal challenges are yet more pronounced. The motivation to move is not necessarily tied to a single factor. Here, the causal challenges of attributing a climatic event and its effects to climate change and its drivers are coupled with the challenges of identifying that climatic event as the single or core driver of displacement (or entrapment). Arguably, however, the case may more easily be made for sudden climatic impacts than for impacts that evolve more slowly.

4.3. *Rectification*

If corrective justice is essentially about reversing or rectifying harm, then what are the opportunities for achieving rectification, and the obstacles against it, when harm stems from displacement or entrapment? The article has already clarified that harm may well result from having to move elsewhere, all the more so if an element of force is involved, as well as from being unable to do so. How does one return to a prior state of affairs in this context? Addressing the infliction of harm may involve a full apology, or even punishment of some sort.[59] However, pecuniary compensation is the more usual pathway pursued to achieve corrective justice, both in fault-based and no-fault claims. Here, two related issues deserve further elaboration. Firstly, how does one quantify the relevant

2019, available at: https://insideclimatenews.org/news/07012019/exxon-climate-fraud-investigation-supreme-court-ruling-massachusetts-attorney-general-healey.

[56] R.A. James et al., 'Attribution: How Is It Relevant to Loss and Damage Policy and Practice', in Mechler et al., n. 52 above, pp. 113–54.

[57] F. Otto, R. James & M. Allen, 'The Science of Attributing Extreme Weather Events and Its Potential Contribution to Assessing Loss and Damage Associated with Climate Change', Environmental Change Institute, University of Oxford, 2014, available at: https://unfccc.int/files/adaptation/workstreams/loss_and_damage/application/pdf/attributingextremeevents.pdf; also National Academies of Sciences, Engineering, and Medicine, *Attribution of Extreme Events in the Context of Climate Change* (National Academies Press, 2016).

[58] S. Marjanac & L. Patton, 'Extreme Weather Event Attribution Science and Climate Change Litigation: An Essential Step in the Causal Chain' (2018) 36(3) *Journal of Energy and Natural Resource Law*, pp. 265–98.

[59] S.M. Lazar, 'Corrective Justice and the Possibility of Rectification' (2008) 11(4) *Ethical Theory and Moral Practice*, pp. 355–68.

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harm? Secondly, how is intangible harm compensated? In the context of environmentally motivated displacement (and potential entrapment), there are relevant examples on which to draw. For the quantification of losses stemming from climate-driven displacement, it may be worth looking at several communities in the United States (US) state of Alaska, who are facing significant relocation pressures stemming from global warming-driven flooding and erosion caused by melting permafrost and diminishing sea ice.[60] Relocation is pressing for many of the largely Alaskan native communities concerned, not least to prevent entrapment in increasingly precarious conditions. To support relocation efforts, various domestic bodies, such as the Army Corps of Engineers, in recent years have quantified the (often significant) costs involved in relocating, or re-establishing, community and personal assets.[61] For one community concerned, the cost per individual has been estimated at USD 380,000.[62] That said, those involved acknowledge that quantification has not sufficiently accounted for the intangible harm that is likely to be involved.[63] Nevertheless, relocation of some affected communities is now under way.[64]

Addressing the challenge of intangible harm perhaps somewhat more effectively was a compensation scheme which targeted harm from displacement or relocation stemming from 20th century US nuclear testing in the South Pacific.[65] For about a decade in the post-Second World War era, the US conducted dozens of nuclear tests in the Marshall Islands, which at the time were a United Nations (UN) Trust Territory administered by the US.[66] Notwithstanding obligations arising from its trusteeship to protect local populations, the US removed many people from several of the area's atolls prior to testing and kept – arguably entrapped – them in distant places while their home islands were polluted.[67] Eventually, those affected sought compensation, which resulted in a Nuclear Fund 'to address past, present and future consequences of the Nuclear

[60] See, e.g., R. Bronen, 'Climate-Induced Displacement of Alaska Native Communities', Brookings-LSE Project on Internal Displacement, 30 Jan. 2013; also K. Mandel, 'In Alaska, a Town Threatened by Climate Change Gets Federal Funding to Relocate', *ThinkProgress*, 23 Mar. 2018, available at: https://thinkprogress.org/newtok-alaska-gets-relocation-funding-35b4434242a6.

[61] See, e.g., United States Army Corps of Engineers – Alaska District, 'Alaska Village Erosion Technical Assistance Program', Apr. 2006, available at: http://www.housemajority.org/coms/cli/AVETA_Report.pdf.

[62] A. York, 'Alaskan Village Stands on Leading Edge of Climate Change', 29 Dec. 2009, available at: https://poweringanation.unc.edu/alaskan-village-stands-on-leading-edge-of-climate-change/#:~:text=Alaskan%20village%20stands%20on%20leading%20edge%20of%20climate%20change,-Reporters%20Anna%20York&text=As%20Newtok's%20tribal%20administrator%2C%20he,of%20frozen%20soil%20called%20permafrost.

[63] E.g., C. Welch, 'Climate Change Has Finally Caught up to This Alaska Village', *National Geographic*, 22 Oct. 2019, available at: https://www.nationalgeographic.com/science/2019/10/climate-change-finally-caught-up-to-this-alaska-village.

[64] Ibid.

[65] See, e.g., D. Pevec, 'The Marshall Islands Nuclear Claims Tribunal: The Claims of the Enewetak People' (2006) 35(1) *Denver Journal of International Law and Policy*, pp. 221–37.

[66] Trusteeship Agreement for the Former Japanese Mandated Islands, signed 2 Apr. 1947, in force 18 July 1947, Art. 6, available at: https://www.loc.gov/law/help/us-treaties/bevans/b-un-ust000012-0951.pdf.

[67] Pevec, n. 65 above, p. 228.

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Testing Program'.[68] The Fund has been controversial, not least for having a finite budget and for precluding the claimants' entitlement to seek alternatives for recompense. Nevertheless, it is worth highlighting here because seeking redress under the Nuclear Fund included the possibility of compensation for 'hardship and suffering' involved in both displacement and return,[69] thus covering intangible harm arising from the displacement experience.

Of course, corrective justice is not only about quantifying tangible and intangible harm in order to aid or effect compensation and rectification. It is about genuinely attempting, at least, to return to a prior state of affairs. Here, a very cautious approach is necessary, as recompense for displacement too often falls short of reinstating a prior state of affairs, even where recompense has been fairly generous. Rather, the evidence is strong that compensation-oriented approaches struggle to fully alleviate or rectify harm, which is much better tackled by also including consultation (in pursuit of participatory justice), income and livelihood restoration, and other additional safety nets to accompany it.[70] The experience of those who are relocated or displaced to make way for major infrastructure developments, such as dams, offers a good example of the failures of over-reliance on compensation. Focusing on reservoir resettlement in China, Li Heming and co-authors note the frequent experience of poverty following relocation because, although compensation materialized, it failed fully to 'restore original living standards'.[71]

The challenges to a corrective justice approach to displacement (and entrapment) in the context of climate change are therefore many. Harm is not always easily quantified, which is problematic for both ethicist and instrumentalist approaches to corrective justice. Culprits are difficult to identify, which is particularly detrimental for obtaining corrective justice that is fault-based. Full rectification or reversal is not straightforward to achieve, which again complicates both ethicist and instrumentalist takes on corrective justice. Nevertheless, legal and policy channels grounded in both ethicist and instrumental corrective justice have begun to emerge for those who face unwanted movement or entrapment. The article will now present some of the key relevant developments.

5. CLIMATE CHANGE, DISPLACEMENT AND CORRECTIVE JUSTICE IN LAW AND POLICY

Despite the challenges involved in approaching climate change-related harm, including harm stemming from displacement, from the perspective of corrective justice,

[68] See Agreement between the Government of the United States and the Government of the Marshall Islands for the Implementation of Section 177 of the Compact of Free Association, 25 June 1983, in force 21 Oct. 1986; further details in US Department of State, 'Report Evaluating the Request of the Government of the Republic of the Marshall Islands Presented to the Congress of the United States of America', Nov. 2004, available at: https://2001-2009.state.gov/p/eap/rls/rpt/40422.htm.

[69] Pevec, n. 65 above, pp. 231ff.

[70] S.D. Tamondong, 'Can Improved Resettlement Reduce Poverty?', in M.M. Cernea & H.M. Mathur (eds), *Can Compensation Prevent Impoverishment? Reforming Resettlement through Investment and Benefit-Sharing* (Oxford University Press, 2008), pp. 394–417.

[71] L. Heming, P. Waley & P. Rees, 'Reservoir Resettlement in China: Past Experience and the Three Gorges Dam' (2001) 167(3) *The Geographical Journal*, pp. 195–212, at 200.

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embryonic efforts to do just that are under way in law and policy. This section focuses on key legal and policy developments concerning harm stemming from displacement in the context of climate change, with the analysis divided into an examination of fault-based (ethicist) and no-fault (instrumentalist) approaches. The assessment purports to be not so much all-encompassing as illustrative of what the key initiatives, possibilities, and shortfalls are or have been.

5.1. *The Ethicist Approach*

The ethicist's understanding of corrective justice is fault-based and premised on the identification of a culprit. Perpetrators of injustice, of course, are commonly considered by legal institutions such as courts and tribunals. So far, such institutions have struggled to determine that the GHG emissions attributable to a particular entity are sufficiently causally related to harm experienced in order to entail a responsibility to correct said harm.[72] A number of determinations by judicial or other public bodies have found that various entities, including public authorities and corporate actors, have a responsibility to curb or offset their emissions, or at least to curb them beyond initially agreed targets.[73] However, no rulings so far recognize a concrete responsibility to correct any harm that such emissions might have caused directly or indirectly.[74]

Attempts to seek an authoritative determination grounded in corrective justice in the context of climate change harm have been made, and some have included a displacement dimension.[75] They have succeeded in varying degrees. To begin with, it is important to note that, although the notion of a right not to be displaced has gained some traction – especially in the public international law world – and with it corresponding responsibilities not to contribute to or cause displacement, this notion has soft law origins and is not considered to apply extraterritorially (against another state). This puta-

[72] M. Burger & J. Gundlach, *The Status of Climate Change Litigation: A Global Review* (United Nations Environment Programme, 2017), p. 20.

[73] E.g., *Urgenda Foundation* v. *The State of the Netherlands* [2015] HAZA C/09/00456689; upheld on appeal in late 2018, and again in the Dutch Supreme Court in 2019; more information on the trajectory of the case and English translation of court findings is available at: https://www.urgenda.nl/en/themas/climate-case. See also J. van Zeben, 'Establishing a Governmental Duty of Care for Climate Change Mitigation: Will *Urgenda* Turn the Tide?' (2015) 4(2) *Transnational Environmental Law*, pp. 339–57; and B. Mayer, '*The State of the Netherlands* v. *Urgenda Foundation:* Ruling of the Court of Appeal of The Hague (9 October 2018)' (2019) 8(1) *Transnational Environmental Law*, pp. 167–92. The Supreme Court decision in *Urgenda*, in particular, is heavily grounded in human rights obligations, including those arising under the European Convention on Human Rights (i.e., right to life); more on rights dimensions below. Also M. Robert et al., 'Transboundary Climate Challenge to Coal: One Small Step Against Dirty Energy, One Giant Leap for Climate Justice', in M.B. Gerrard & G.E. Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing World* (Cambridge University Press, 2015), pp. 589–626.

[74] Though there have been some determinations concerning the consequences of adaptation measures: see, e.g., Burger & Gundlach, n. 72 above.

[75] Note also the pursuit of legal avenues that do not revolve around corrective justice: e.g., J. McAdam, 'No "Climate Refugees" in New Zealand', Brookings Institution, 13 Aug. 2014, available at: https://www.brookings.edu/blog/planet policy/2014/08/13/no-climate-refugees-in-new-zealand.

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tive legal basis is therefore of limited use when seeking a determination to correct harm stemming from displacement in the climate change context.[76]

The most pertinent current case may be that of Peruvian farmer Saúl Luciano Lliuya, which is currently making its way through the German legal system. Lliuya, supported by non-governmental organization (NGO) Germanwatch, alleges that the GHG emissions of German energy producer RWE have contributed to glacial melt in his Andean home community of Huaraz, threatening it with flooding and, ultimately, the potential displacement of the community. He also asserts that RWE, which is Europe's single biggest GHG emitter, knew about the harmful effects of its emissions. Although the case primarily tests responsibility for distant emitters to contribute to preventative and adaptation measures, and therefore does not address displacement directly, the decision may ultimately affect whether the villagers of Huaraz, and others in a similar position, have to move – or not.

The applicant is seeking a court order for RWE to provide the community with partial funding necessary for corrective measures to prevent flooding – equal to RWE's share in the GHG emissions which it can be said to have contributed historically to the threat of flooding.[77] In monetary terms the recompense sought is arguably negligible. However, as the case relies on tort-based reasoning, variants of which are found in most other legal systems, its impact, if successful, is not to be underestimated.[78] Although a lower court dismissed Lliuya's claim on causality grounds, a higher court has more recently concluded it has jurisdiction in the matter and that the 'distance between emissions and impact do [sic] not rule out the application of general nuisance or tort law'.[79] With this determination, the court has undoubtedly taken a step towards overcoming constraints of jurisdiction and justiciability which plagued earlier claims involving climate change harm in both domestic and international legal fora.[80] That said, whether the case succeeds in the evidentiary phase, where causal claims will be dissected, remains to be seen. At present, the court is seeking permission from the state of Peru to inspect the relevant premises.[81]

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[76] E.g., M. Morel, M. Stavropoulou & J.-F. Durieux, 'The History and Status of the Right Not To Be Displaced' (2012) 41 *Forced Migration Review*, pp. 5–7; M. Morel, *The Right Not To Be Displaced in International Law* (Intersentia, 2014).

[77] *Lliuya* v. *RWE A.G.*, Az. 2 O 285/15 Essen Regional Court (2015); unofficial English translations of relevant court documents at Germanwatch, 'Court Documents of the Case of Huarez', 13 Dec. 2017, available at: https://germanwatch.org/en/14841.

[78] W. Frank, C. Bals & J. Grimm, 'The Case of Huarez: First Climate Lawsuit on Loss and Damage Against an Energy Company Before German Courts', in Mechler et al., n. 52 above, pp. 475–82.

[79] Germanwatch, *General Ruling of the Civil High Court in Hamm: Corporate Responsibility for Climate Change Impacts Exists in German Law – Depending on Evidence in Any Specific Case to Show Responsibility*, 2017, p. 2, available at: https://germanwatch.org/sites/germanwatch.org/files/announcement/20810.pdf.

[80] Domestic: e.g., *Kivalina* v. *ExxonMobil*, 696 F.3d 849 (9th Cir. 2012,) which stumbled over the 'political question doctrine' (by which courts hold that certain issues pose political and not legal questions); international: e.g., R.E. Jacobs, 'Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice' (2005) 14(1) *Pacific Rim Law and Policy Journal*, pp. 103–28.

[81] Germanwatch, 'The "Huaraz Case" at a Glance', updated 5 June 2020, available at: https://germanwatch.org/en/huaraz.

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Human rights norms,[82] especially those stemming from international or regional frameworks, have also provided important grounds on the basis of which to challenge alleged culprits in the climate change harm context, including where displacement consequences are involved. The enjoyment of human rights (or the lack thereof) are undoubtedly impacted upon by the effects of climate change.[83] Some have raised concerns about the very survival of human rights and the rule of law as climate change accelerates.[84] Making such norms the foundation for a corrective justice-type claim has certainly proved to be challenging. A so-called Inuit petition lodged in the regional human rights system in the Americas in 2005 faltered. The Inter-American Commission on Human Rights concluded that it found it impossible to deduce that the alleged facts (habitat and livelihood degradation and destruction on account of the effects of climate change in the Arctic, threatening the continued survival of local communities and their way of life) amounted to a violation by the US of human rights under the American Declaration of the Rights and Duties of Man.[85]

More promising perhaps was a now-concluded investigation by the Philippine Commission on Human Rights into corporate responsibility for human rights breaches stemming from the emissions generated by major carbon producers (carbon majors) active in the Philippines. The investigation was the result of a petition lodged with the Commission by domestic community organizations and concerned individuals with the aid of Greenpeace Southeast Asia.[86] It was argued that 47 carbon majors should be held accountable for a host of rights violations, which affect certain groups more than others, among them 'displaced persons'.[87] Predictably, the corporations involved rejected responsibility, denying that 'their particular acts … [are] directly causing or directly linked to the prejudice claimed'.[88] Nevertheless, the Commission has

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82 On the relevance of certain human rights norms, see also J. McAdam, 'Climate Change Displacement and International Law: Complementary Protection Standards', Office of the UN High Commissioner for Refugees (UNHCR), May 2011, available at: https://www.unhcr.org/4dff16e99.pdf.

83 E.g., Office of the UN High Commissioner for Human Rights, 'Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights' (15 Jan. 2009), UN Doc. A/HRC/10/61; also S. Humphreys (ed.), *Human Rights and Climate Change* (Cambridge University Press, 2010).

84 D. Carrington, '"Climate Apartheid": UN Expert Says Human Rights May Not Survive', *The Guardian*, 25 June 2019, available at: https://www.theguardian.com/environment/2019/jun/25/climate-apartheid-united-nations-expert-says-human-rights-may-not-survive-crisis.

85 Bogota (Colombia), 2 May 1948, available at: https://www.oas.org/dil/access_to_information_human_right_American_Declaration_of_the_Rights_and_Duties_of_Man.pdf; 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, 7 Dec. 2005, available at: http://www.earthjustice.org/library/legal_docs/petition-to-the-interamerican-commission-on-human-rights-onbehalf-of-the-inuit-circumpolar-conference.pdf; for analysis see, e.g., J. Harrington, 'Climate Change, Human Rights, and the Right to be Cold' (2007) 18(3) *Fordham Environmental Law Review*, pp. 513–35.

86 Commission on Human Rights, Republic of the Philippines, Petition Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impact of Climate Change, Case No. CHR-NI-2016-0001, available at: https://www.greenpeace.org/philippines/press/1237/the-climate-change-and-human-rights-petition.

87 Ibid., p. 7 (and throughout).

88 Respondent LafargeHolcim's Manifestation *Ad Cautelam* (Without Any Acceptance or Submission to Jurisdiction), 15 Sept. 2016, p. 2, available at: https://www.business-humanrights.org/sites/default/files/Lafarge%20Holcim%20Response.pdf.

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now determined that the corporations involved could be held accountable for rights violations stemming from the emissions they generate.[89] This undoubtedly provides hope for those seeking climate justice,[90] although the issue is yet to be fully tested in a court of law. The Commission does not have the authority to order penalties or compensation, but it has arguably set an informal precedent to be tested further.[91]

More recently, Australia has found itself the subject of a complaint to the Human Rights Committee, which oversees state compliance with the International Covenant on Civil and Political Rights.[92] The complainants comprise a group of Traditional Owners from a number of Australia's Torres Strait Islands, who are supported, among others, by ClientEarth and Twenty Essex Chambers in the UK. They seek a finding that Australia's climate change mitigation policies lack in ambition, threaten enjoyment of a range of rights (to life, culture, and others) and continued human habitation in the Torres Strait Islands. The group's demands include that Australia phases out coal in energy production, reduces its emissions by 65% compared with 2005 levels by 2030, and commits at least AUSD 20 million for climate measures that deal with the adverse effects of climate change.[93] Although it is important to note that the Committee can only recommend certain actions or outcomes and cannot order compensation, a positive finding would undoubtedly contribute to invigorating the pursuit of justice for climate change harm based on human rights. It is promising that the Committee found in a recent General Comment concerning the right to life that '[e]nvironmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life'. It further noted state party obligations to take measures to preserve the environment and protect it against adverse influences, including those stemming from climate change.[94]

Both tort law and domestic law, as well as regional and international human rights law, have provided grounds in various jurisdictions to seek the rectification of harm from alleged culprits in cases where displacement or entrapment in worsening conditions is threatened or feared in the context of climate change. These developments

[89] Amnesty International, 'Philippines: Landmark Decision by Human Rights Commission Paves Way for Climate Litigation', 9 Dec. 2019, available at: https://www.amnesty.org/en/latest/news/2019/12/landmark-decision-by-philippines-human-rights-commission-paves-way-for-climate-litigation/?fbclid=IwAR02dN5HX1EPY1_Q27UtEDbhw1HP1PReWLnfa7BqmnTIwG8e4G_Fl8PYWg4; I. Kaminski, 'Fossil Fuel Firms "Could Be Sued" for Climate Change', *Independent*, 9 Dec. 2019, available at: https://www.independent.co.uk/environment/cop25-madrid-climate-change-greta-thunberg-fossil-fuel-lawsuit-a9239601.html?fbclid=IwAR2NyneKfakGUcWYXHF7_IgIr16L_Bm5kuEN8Rld2Gd-rQCsmp_w9EeKj-0; the relevant Commission report has not yet been published.

[90] Kaminski, ibid.

[91] Ibid.

[92] New York, NY (US), 16 Dec. 1966, in force 23 Mar. 1976, available at: https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf.

[93] H. Cross, 'It's a National First. A Global First. Torres Strait Islanders Are Taking Legal Action Over the Federal Government's Failure to Act on Climate Change', *National Indigenous Times*, 29 May 2019, available at: https://nit.com.au/its-a-national-first-a-global-first-torres-strait-islanders-are-taking-legal-action-over-the-federal-governments-failure-to-act-on-climate-change.

[94] Human Rights Committee, 'General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life' (30 Oct. 2018), UN Doc. CCPR/C/GC/36, pp. 14–5.

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are in their infancy and face hurdles which centre around issues of causality and enforcement. Nevertheless, they continue to be pursued, and continued legal activism may present victims with avenues to pursue culprits.

5.2. *The Instrumentalist Approach*

For instrumentalists, pursuing a particular culprit is less important than achieving rectification or reversal of harm. Here, it is particularly useful to look at initiatives which have emerged under the umbrella of the UN Framework Convention on Climate Change (UNFCCC)[95] in recent years to address climate change loss and damage. The UNFCCC regime remains fundamentally grounded in the principle of 'common but differentiated responsibilities and respective capabilities': the idea that some have contributed more to anthropogenic climate change than others, that some will suffer its effects more than others, and that some can do more to address this than others. Partially grounded in this understanding, in 2013 the UNFCCC Conference of the Parties (COP) established the Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts (Warsaw Mechanism),[96] alongside an Executive Committee to guide its implementation. The Paris Agreement,[97] which has been effective since 2016, also includes dedicated provisions concerning loss and damage in Article 8. Areas for action and support include 'risk insurance facilities, climate risk pooling and other insurance solutions', reflecting an instrumentalist approach to corrective justice (albeit a market-based one which may only marginally relate to corrective justice). Institutionally, the only initiative that has been actually supported so far is the establishment of a Clearing House for Risk Transfer, to serve as a 'repository for information'.[98]

The Paris COP furthermore agreed that the Warsaw Mechanism's Executive Committee would set up a Task Force on Displacement to work with relevant bodies internal and external to the UNFCCC to 'develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change'.[99] Its initial terms of reference were to rely on science and evidence in order to '[i]dentify legal, policy and institutional challenges', as well as 'good practices' and 'lessons learned',[100] which avoids the language of corrective justice or harm or wrongs having occurred. The Taskforce is presently engaged in Phase 2 (2019–21)

[95] New York, NY (US), 9 May 1992, in force 21 Mar. 1994, available at: http://unfccc.int.

[96] Decision 2/CP.19, 'Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts' (11–23 Nov. 2013), UN Doc. FCCC/CP/2013/10/Add.1.

[97] N. 5 above.

[98] UNFCCC Secretariat, 'Clearing House on Risk Transfer', 2019, available at: http://unfccc-clearinghouse.org.

[99] Decision 1/CP.21, 'Adoption of the Paris Agreement' (13 Dec. 2015), UN Doc. FCCC/CP/2015/10/Add.1, para. 49.

[100] UNFCCC Secretariat, 'Terms of Reference of the Task Force on Displacement', 2017, paras 6(a) and (d), available at: http://unfccc.int/files/adaptation/groups_committees/loss_and_damage_executive_committee/application/pdf/tor_task_force.pdf.

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and has been granted enhanced spheres in which to act.[101] These still cover the identification and collation of best practice, but have been expanded to include the capacity to provide '[e]nhanced support for formulating laws, policies and strategies that reflect efforts to avert, minimize and address displacement'.[102] There is no reason to conclude that this support could not also cover rectification measures. That said, it is important to highlight that the Decision concerning adoption of the Paris Agreement emphasizes that provision for loss and damage 'does not involve or provide a basis for any liability or compensation'.[103] This calls into question, for now, the possibility of corrective resolution of loss or harm stemming from climate change, including harm arising from displacement.

Nevertheless, the emphasis on insurance and similar mechanisms in the Paris Agreement leaves open the possibility of some instrumentalist response to harm related to climate change, albeit via mechanisms which are imperfect from the perspective of corrective justice, not least because inputs from substantial GHG emitters presently are not considered mandatory. Insurance-type mechanisms relevant to climate change, and even climate mobility, have emerged in recent years, both nationally and regionally.[104] These schemes support farmers in conditions of drought, international labour migrants in the pursuit of work overseas, and those who have borne the brunt of severe weather events in rebuilding. However, such schemes need to be scaled up in order to have an impact in addressing the many types of harm stemming from climate change, including in relation to displacement and entrapment, and undoubtedly this requires resources, including financial input.[105] For now the UNFCCC Loss and Damage Mechanism itself is not an express beneficiary of financial contributions as agreed under the Paris Agreement, in contrast to the mechanisms governing mitigation and adaptation measures.[106] Even if it were, it would be likely to have to compete with the mitigation and adaptation sphere for scarce resources, as many potential contributors to climate finance mechanisms do not contribute in accordance with capacity and responsibilities.[107]

The climate finance architecture is intricate and comprises many funds.[108] Among growing complexity, the UNFCCC COP set up the Green Climate Fund in 2011 to 'support projects, programmes, policies and other activities in developing country

[101] UNFCCC Secretariat, 'Task Force on Displacement: Plan of Action for 2019–2021', in 'Report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts – Addendum' (15 Nov. 2019), UN Doc. FCCC/SB/2019/5/Add.1.

[102] Ibid., p. 10.

[103] Decision 1/CP.21, n. 99 above, para. 52.

[104] Thornton, n. 54 above, Ch. 6.

[105] A. Markandya & M. Gonzales-Eguino, 'Integrated Assessment for Identifying Climate Finance Needs for Loss and Damage: A Critical Review', in Mechler et al., n. 52 above, pp. 343–62.

[106] Art. 9.

[107] See, e.g., Thornton, n. 54 above, Ch. 6; also various contributions in J. Pickering, C. Betzold & J. Skovgaard, 'Special Issue: Managing Fragmentation and Complexity in the Emerging System of International Climate Finance' (2017) 17 *International Environmental Agreements: Politics, Law and Economics*, pp. 1–16.

[108] See, e.g., UNFCCC Secretariat, 'Introduction to Climate Finance', 2020, available at: https://unfccc.int/topics/climate-finance/the-big-picture/introduction-to-climate-finance.

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Parties'.[109] The Fund was to 'receive financial inputs from developed country Parties to the Convention' as well as other sources.[110] Hence, it was to be underpinned by vaguely corrective principles. However, billions and billions of dollars in funding are required to address comprehensively the harm of climate change in poorer countries alone.[111] Pledges and contributions to the Green Climate Fund (as well as others) have not been able to keep up with the stipulated demand,[112] which is a significant issue for rectification.

6. CONCLUSION

Arguing that displacement (or entrapment) stemming from climate change raises issues from the perspective of justice is intuitively correct and theoretically eminently possible. Justice-based discourses must join others that are preoccupied with conceptualizing solutions for those who cannot stay put in the face of climate change. Among an array of justice-inflected perspectives, corrective justice issues stick out as particularly pertinent. Given the accelerating nature of climate change, coupled with the multiplication of its effects, the increasingly visible suffering stemming from climate change and the continuing absence of sufficient political action to correct injustice, it is unsurprising that initiatives that seek to address the injustices of climate change have now begun to emerge. Clearly, it is not enough to simply identify the relevant injustices, and more must be done to crystalize and advance their practical resolution.[113] Many pertinent developments are arguably in their infancy, though their relevance may well increase with time and urgency, and as those affected increasingly resort creatively to the institutional, legal and other channels available to have injustices heard and addressed.[114]

Because obligations grounded in corrective justice are sometimes considered more weighty, or perhaps more formal, than those grounded in other types of justice, resistance by emitters to rectification-type schemes or processes has been fairly pronounced. Nevertheless, somewhat promising developments are under way in both the ethicist and instrumentalist realms. In the former, an array of case law has begun to emerge which seeks to hold to account those who cause harm with regard to climate change. Causal hurdles remain significant, as do those related to enforcement, but a willingness by courts and similar bodies to confront the issue is emerging, including in case law that involves issues of displacement. Although it is unlikely that success in court would ever deliver full rectification of the relevant harm or wrongs, the symbolic value of

[109] Decision 3/CP.17, 'Launching the Green Climate Fund' (11 Dec. 2011), UN Doc. FCCC/CP/2011/9/Add.1, paras 2 and 3.

[110] Ibid., Annex, paras 29 and 30.

[111] See, e.g., 'Roadmap to US$100 Billion' (2016), available at: https://www.dfat.gov.au/sites/default/files/climate-finance-roadmap-to-us100-billion.pdf.

[112] Climate Funds Update, 'The Green Climate Fund' (2019), available at: https://climatefundsupdate.org/publications/the-green-climate-fund-2019.

[113] A. Sen, *The Idea of Justice* (Harvard University Press, 2009).

[114] E.g., S. Suliman et al., 'Indigenous (Im)mobilities in the Anthropocene' (2019) 14(3) *Mobilities*, pp. 298–318.

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advances in court should not be underestimated. The many types of harm and the wrongs of climate change would be formally acknowledged. Moreover, with legal advances may come climate-positive action, as major emitters – or their insurers – respond to the threat of successful litigation.

In the instrumentalist realm, no-fault approaches to tackling the harm of climate change have also slowly begun to emerge. The problem here is related less to establishing causality than to determining contribution. No-fault compensation requires resourcing and this is readily avoided where nobody is concretely responsible. However, as it becomes more obvious that climate change and its effects are deeply harmful, the pressure to contribute to rectification by instrumentalist means may build. Importantly, instrumentalist regimes that address climate change harm must ensure that harm arising in relation to displacement and entrapment is worthy of remediation via compensatory channels in the same way as other detrimental consequences of climate change.

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