

Like Oil and Water: A Sceptical Appraisal of Climate Change and Human Rights

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Abstract

The human rights paradigm can make a valuable contribution in appreciating the impacts of climate change upon individuals. While the rationale is attractive, the advantages should not be overstated. The paradigm is not without its own limitations, which in the climate change context include establishing violations, identifying perpetrators and overcoming their territorial application. A survey of US and Australian courts suggests that environmental protection approaches have to date proven more effective than human-rights-orientated litigation strategies. Furthermore, compensating individuals, relocating communities and abandoning territory are not wholly appropriate as human rights remedies. They do not adequately ensure justice for several reasons, particularly because they prioritise procedural rights and impair the enjoyment of several substantive human rights.

Introduction

In searching for solutions to the challenges posed by climate change, attention has recently been given to the effect of anticipated environmental conditions, particularly sea level rise, upon individuals. While such impacts can be appreciated in human rights terms with good reason, applying that discourse may present its own unique challenges. Part one of this article offers a critique of the contributions made by a human rights perspective, querying whether environmental impacts can be characterised as violations and whether responsibility can be attributed to perpetrators. Part two compares the utility of human rights-based litigation strategies against orthodox environmental protection approaches. Using specific human rights as examples, part three considers whether compensation and resettlement for affected communities are appropriate remedies within the human rights paradigm.

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I. Climate Change and the Search for Solutions

The environmental conditions associated with climate change are expected to be dramatic. Within the Pacific region, for example, residential dwellings in Papua New Guinea's Cataret Islands have already been washed away and rising sea levels may occasion further coastal erosion.¹ The 'environmental security' of other states including Nauru is threatened.² Climate change is 'seriously affecting the right of people within small island developing States to a future'³ such that reducing carbon emissions is 'a matter of survival'.⁴

The United Nations Framework Convention on Climate Change (UNFCCC) is 'a significant first step forward' in addressing such 'deep concerns'.⁵ Small island developing states take the view that developed states 'have the primary responsibility' for mitigating climate change.⁶ The UNFCCC recognises the particular vulnerability of low-lying states, solicits financial contributions from developed countries and embeds 'common but differentiated responsibilities and respective capabilities'.⁷ However, recalcitrant developed states are not believed to be acting with sufficient urgency. Mandatory emission targets, for example, are only now being legislatively entrenched.⁸ Developed states may take the view that they will not again undertake 'environmental appeasement' to accommodate the 'guilt-laden' arguments of developing countries as they did during the ozone layer negotiations.⁹ Asymmetrical treatment concerning economic redistributions and pollution entitlements is also said to skew the climate change regime in favour of developing countries.¹⁰ Nevertheless, effort is required to prompt developed states into action, either by reaffirming and enforcing their existing obligations or proposing novel legal solutions.

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- 1 Tariq Ali Khan et al, 'Relative Sea Level Changes in Maldives and Vulnerability of Land due to Abnormal Coastal Inundation' (2002) 25 *Marine Geodesy* 133.
 - 2 Nauru Federal Government, *The Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* (1994) at 36–45.
 - 3 Alliance of Small Island States ('AOSIS') 'Buenos Aires AOSIS Ministerial Declaration on Climate Change' (Submissions from Parties at the UN Framework Convention on Climate Change 10th Conference of the Parties (UNFCCC COP-10) at Buenos Aires, 17 December 2004) at 3 <<http://unfccc.int/resource/docs/cop10/misc03.pdf>> accessed 25 February 2009.
 - 4 Smaller Island States, 'Ninth Smaller Island States Summit: Summary of Decisions' (Summary of Decisions of 27 October 2000 at the Ninth Smaller Island States Summit of the 31st Pacific Islands Forum at Kiribati, 27–30 October 2000) at [6]–[7] <www.dfat.gov.au/geo/spacific/regional_orgs/pif31_communique.pdf> accessed 25 February 2009.
 - 5 *Forum Communiqué* (31st Pacific Islands Forum, Kiribati, 27–30 October 2000) at [46]–[7] <www.dfat.gov.au/geo/spacific/regional_orgs/pif31_communique.pdf> accessed 25 February 2009.
 - 6 Tuiloma Slade, Representative of Samoa on behalf of AOSIS, Statement at 57th UNGA, 2nd Committee, 14 November 2002.
 - 7 *United Nations Framework Convention on Climate Change*, opened for signature on 9 May 1992, 1771 UNTS 164 (entered into force 21 March 1994) ('UNFCCC'), preamble, art 3.
 - 8 See, for example, the *Climate Change Bill* 2007 (United Kingdom).
 - 9 Victor Williams, 'Ozone Depletion, Developing Countries, and Human Rights: Seeking Better Ground on Which to Fight for Protection of the Ozone Layer' (1994–1995) 10 *Journal of Natural Resources and Environmental Law* 83 at 108–109, 111.
 - 10 Michael Weisslitz, 'Rethinking the Equitable Principle of Common but Differentiated Responsibility: Differential versus Absolute Norms of Compliance and Contribution in the Global Climate Change Context' (2002) 13 *Colorado Journal of International Environmental Law and Policy* 473 at 509.

International environmental law has traditionally been the preferred context for addressing questions concerning the natural environment. Its principles envisage the civil liability of states for trans-boundary air pollution.¹¹ Furthermore, the ‘*corpus*’ of that law includes the obligation upon states to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states.¹² Several states have organised themselves politically to enforce these principles.¹³ However, existing environmental governance mechanisms are perceived to be unreceptive to their particular interests. The possibility of initiating legal proceedings against developed states has, therefore, been canvassed,¹⁴ with liability for reparations assessed by reference to gross domestic product.¹⁵ However, given the complexity of the issues involved, the doctrine of state responsibility is considered unsatisfactory, assuming relevant jurisdictional hurdles can also be surmounted. While suggestions have also been made to utilise the overly-celebrated *Alien Tort Claims Act*,¹⁶ recourse to courts in the United States (US) is also an unlikely prospect.¹⁷

Attention has increasingly turned to the position of individuals. Proposals have been made to re-conceptualise the refugee definition to accommodate environmental persecution.¹⁸ A ‘climate change refugee visa’ has been suggested for individuals displaced because of a ‘climate change induced environmental disaster’.¹⁹ A second option secretes a legal regime around the notion of ‘environmentally displaced persons’,²⁰ notwithstanding the absence of a clear correlation between migration and environmental conditions.²¹ Another alternative has been to invoke the obvious appeal of human rights.

11 Henry McGee, ‘Litigating Global Warming: Substantive Law in Search of a Forum’ (2004–2005) 16 *Fordham Environmental Law Review* 371 at 389–91.

12 *Declaration of the UN Conference on the Human Environment*, UN Doc A/CONF.48/14 (1972), reprinted (1972) 11 *International Legal Materials* 1416, principle 21 (‘*Stockholm Declaration*’); *Declaration of the UN Conference on Environment and Development*, UN Doc A/CONF.151/5/Rev1 (1992) reprinted 31 *International Legal Materials* 874 (1992), principle 2 (‘*Rio Declaration*’); *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226 at 241–42.

13 Tuiloma Slade, AOSIS Chairman, ‘Linking Science and Climate Change Policy’ (Overview Address Delivered at the Pacific Islands Climate Change Conference, Rarotonga, 3–7 April 2000).

14 James Cameron & Durwood Zaelke, ‘Global Warming and Climate Change: An Overview of the International Legal Process’ (1990) 5 *American University Journal of International Law and Policy* 249.

15 Richard Sol & Roda Verheyen, ‘State Responsibility and Compensation for Climate Change Damages: A Legal and Economic Assessment’ (2004) 32 *Energy Policy* 1109 at 1119–28.

16 Rosemary Reed, ‘Rising Seas and Disappearing Islands: Can Island Inhabitants Seek Redress Under the Alien Tort Claims Act?’ (2002) 11 *Pacific Rim Law and Policy Journal* 399.

17 Eric Posner, ‘Climate Change and International Human Rights Litigation: A Critical Appraisal’, *Chicago Working Papers in Law and Economics* No 329 (2007) at 7.

18 *Convention Relating to the Status of Refugees 1951*, opened for signature on 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954), art 1A(2).

19 Australian Greens, Migration (Climate Refugees) Amendment Bill 2007; Commonwealth, *Parliamentary Debates*, Senate, 21 June 2007, 13 (Kerry Nettle).

20 Dana Falstrom, ‘Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment’ (2001) *Colorado Journal of International Environmental Law and Policy* 1.

21 David Keane, ‘The Environmental Causes and Consequences of Migration: A Search for the Meaning of “Environmental Refugees”’ (2003–2004) 16 *Georgia International Environmental Law Review* 209 at 223.

2. A Critique of Human Rights Perspectives on Climate Change

Climate change impacts can be readily appreciated in human rights terms.²² Assuming projections hold true, the typical 'laundry list' of impacts attributed to climate change include more extreme weather events, natural disasters, hunger and malnutrition, infectious disease, loss of livelihoods and infrastructure, destroyed ecosystems and crops, poverty, saltwater intrusion, coastal erosion, social dislocation and degraded cultural sites. Sea level rise has received especial attention. In 1996, sea levels were predicted to rise 15 to 110 centimetres above current levels by 2100.²³ That assessment was confirmed in 2007, with a one metre rise potentially affecting 200 to 450 million individuals within the Asia-Pacific region.²⁴ The predicted effects of climate change implicate several human rights,²⁵ most prominently the rights to life, food,²⁶ water, health,²⁷ housing, work, culture and property. In short, climate change threatens overall human development.²⁸

There are several reasons for articulating a human rights-based approach to climate change.²⁹ First, a human 'right' protects individual autonomy and dignity against political expediency and arbitrary state power. The paradigm is considered, 'at least at a rhetorical level, the law's best response to [a] profound, unthinkable, far-reaching moral transgression' such as climate change.³⁰ The visibility of human rights would subject governments to greater scrutiny and revive stagnant environmental debates. Second, human rights and international environmental law could be complementary approaches. Environmental protection is 'a vital part of contemporary human rights doctrine' and the '*sine qua non* for numerous human rights.'³¹ Enhancing individual participation in governance is an objective common to both discourses. Thus the human rights dimension to environmental activism could be developed by emphasizing climate change impacts upon individuals. Third, human rights standards are inalienable, universal and

22 Stephen Tully, 'The Contribution of Human Rights as an Additional Perspective on Climate Change Impacts within the Pacific' (2007) 5(1) *New Zealand Journal of Public and International Law* 169.

23 Intergovernmental Panel on Climate Change (IPCC), *The Science of Climate Change, Contribution of Working Group I to the Second Assessment Report* (1996) at s. 7.5.2.

24 IPCC, *Climate Change 2007: The Physical Science Basis, Summary for Policymakers* (2007) at 2, 5.

25 Kyung-wha Kang, Deputy High Commissioner for Human Rights, 'Climate Change and Human Rights' (Address to COP of the UNFCCC and its Kyoto Protocol, Bali, 3–14 December 2007).

26 See, for example, Martin Parry et al, 'Effects of Climate Change on Global Food Production Under SRES Emissions and Socio-economic Scenarios' (2004) 14(1) *Global Environmental Change* 53.

27 See, for example UN Secretary-General, Report on Health and Sustainable Development, UN Doc E/CN.17/2001/PC/6 (2001) at 12–13; Anthony McMichael, *Climate Change and Human Health-risks and Responses*, WHO/UNEP/WMO (2003).

28 UN Development Programme, *Human Development Report: Fighting Climate Change: Human Solidarity in a Divided World* (2007/08).

29 Sara Aminzadeh, 'A Moral Imperative: The Human Rights Implications of Climate Change' (2007) 30(2) *Hastings International and Comparative Law Review* 231 at 258–264.

30 Amy Sinden, *Climate Change and Human Rights* (2008) at 3, 4 <www.ssrn.com/abstract=984266> accessed 31 October 2008.

31 *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7 at [13] (Separate Opinion of Vice-President Weeramantry).

seek to promote equality. Human rights are inviolable whereas environmental regulations can be amended.³² Finally, and at a practical level, an approach based on human rights provides a 'human face', embraces excluded or marginalised populations, encourages transparent or accountable decisions and provides sustainable outcomes.³³

The reach of human rights discourse can be illustrated by reference to the right to housing and the concept of forcible eviction. Individuals enjoy the right to live in security, peace and dignity and cannot be arbitrarily or discriminatorily evicted.³⁴ 'Forcible eviction' is defined as the involuntary removal, either temporary or permanent, of individuals, families or communities from their households and land.³⁵ Described as 'one of the most supreme injustices',³⁶ the practice is also incompatible with the rights to food and adequate living standards.³⁷ States have accordingly been called upon to eliminate forcible eviction and confer secure tenure.³⁸ When unavoidable, procedural safeguards include resettlement, legal remedies, consultation, reasonable notification and participation in decision-making.³⁹ Could the legal considerations pertaining to forcible eviction be analogised to climate change impacts upon individuals? Initial inquiries suggest that, since forcible eviction generally requires a 'taking' or compulsory acquisition of private property in the public interest by the territorial state, the 'global applicability' of a 'buy-out' option may be 'limited'.⁴⁰

The relationship between climate change and human rights is currently being studied by the Office of the High Commissioner for Human Rights. The enabling resolution recognised that the UNFCCC 'remains the comprehensive global framework to deal with climate-change issues'.⁴¹ Several states making contributions to that study confirmed that climate change was appropriately addressed through UNFCCC processes.⁴² For example, Australia reiterated that the UNFCCC is 'the primary

32 Dinah Shelton, 'Environmental Justice in the Post Modern World', in Klaus Bosselmann & Benjamin Richardson (eds), *Environmental Justice and Market Mechanisms: Key Challenges for Environmental Law and Policy* (1999) 21 at 26.

33 Human Rights and Equal Opportunity Commission, *Human Rights and Climate Change* (2008) at 12.

34 See, for example, *International Covenant on Civil and Political Rights*, opened for signature on 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 9(1), 12(1), 17(1) ('ICCPR'); *Cyprus v Turkey* (1982) 4 EHRR 482 and (1993) 15 EHRR 509.

35 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Resolution 1991/12: Forced Evictions (1991).

36 UN High Commissioner for Human Rights, *Fact Sheet No 25: Forced Evictions and Human Rights* (1997).

37 UN Committee on Economic, Social and Cultural Rights ('CESCR') General Comment No 4 on the Right to Adequate Housing (art 11 (1)), UN Doc E/1992/23 (1992) at Annex III, [18]; CESCR, General Comment No 7: The Right to Adequate Housing: Forced Evictions, UN Doc E/C12/1997/4 (1997) at [3].

38 See, for example, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Resolution 1995/29 (1995); CESCR, Concluding Observations concerning the Dominican Republic, UN Doc E/C.12/1990/8 (1991) at [249], Panama, UN Doc E/C.12/1991/4 (1991) at [135(e)], Zimbabwe, UN Doc E/C.12/1/Add.12 (1997) at [7.3], Australia, UN Doc E/C.12/1/Add.50 (2000) at [21] and Columbia, UN Doc E/C.12/1/Add.74 (2001) at [33].

39 UN Secretary-General, Report on Guidelines on International Events and Forced Evictions, UN Doc E/CN.4/Sub.2/1995/13 (1995) at [7], [14], [16].

40 UN Secretary-General, Analytical Report on Forced Evictions, UN Doc E/CN.4/1994/20 (1994) at [164], [165].

41 Human Rights Council, Decision 7/23 on human rights and climate change (2008) at preamble.

42 See <www2.ohchr.org/english/issues/climatechange/submissions.htm> accessed 31 October 2008.

international forum for addressing international climate change action', remains 'the most relevant multilateral mechanism and has the mandate of the international community'. The United Kingdom (UK) considers that the international community should demand financial accountability from recipient developing countries and that climate change 'is not a human rights violation'. The US similarly distinguished between impairing the enjoyment of human rights and human rights violations. In its view, a human-rights orientation does not provide an 'optimal' framework for addressing complex environmental problems and is 'unlikely to be effective'. An environment-related human right does not exist, the harm attributable to violations committed by a uniquely responsible party was not identifiable and remedies are primarily provided by governments to individuals located within their territory or jurisdiction.

The conventional obligations arising from the climate change and human rights regimes are mutually reinforcing, to a point. Both are premised upon measures of interstate co-operation and assistance. However, the respective instruments have differing objectives, contrasting modes of implementation and varying obligations for states. The doctrine of human rights, as an individual-centric paradigm, pursues certain minimum guarantees. Rights are enforceable against governments, who must generally ensure civil and political rights and progressively implement economic, social and cultural ones. By contrast, state obligations under the UNFCCC are differentiated along development lines and require measures to mitigate greenhouse gas emissions and facilitate adaptation.⁴³ The regime does not contemplate any individual entitlements. For example, the *Kyoto Protocol* requires industrialised states to ensure that carbon emissions do not exceed assigned amounts and identifies reductions for achievement over a commitment period.⁴⁴ Only very recently could recognition of other concerns be tentatively reflected through the *Bali Action Plan's* call for consideration of the 'economic and social consequences of response measures'.⁴⁵

Climatic impacts in their entirety cannot be captured by human rights. Indeed, 'existing rights must be reinterpreted with imagination and rigor in the context of environmental concerns which were not prevalent at the time existing rights were first formulated'.⁴⁶ The right to property,⁴⁷ for example, has an uncertain application in the environmental context.⁴⁸ The risks arising from failure to adopt environmental protection measures have been characterised as substantive or 'procedural' violations of the right to life.⁴⁹ Indeed, gas flaring in Nigeria ceased for this reason.⁵⁰ Reliance upon

43 UNFCCC, above n7, art 4(2).

44 *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998, 37 *International Legal Materials* 22 (entered into force 16 February 2005) ('*Kyoto Protocol*') art 3(1).

45 Revised Draft Decision CP.13, UN Doc FCCC/CP/2007/L7/Rev1 (2007) at [1(b)(ii)].

46 Luis Rodríguez-Rivera, 'Is the Human Right to Environment Recognized Under International Law? It Depends on the Source' (2001) 12 *Colorado Journal of International Environmental Law and Policy* 1 at 19.

47 Universal Declaration of Human Rights, UNGA Resolution 217A(III) (1948) art 17.

48 Prue Taylor, 'From Environmental to Ecological Human Rights: A New Dynamic in International Law' (1998) 10 *Georgia International Environmental Law Review* 309 at 324.

49 Inter-American Commission on Human Rights, *Case No 7615 (Brazil)* Resolution No 12/85, OAS Doc OEA/ser.L/V/II.66, Doc10 Rev 1 (1985); *Oneryıldız v Turkey*, 2004-XII European Court of Human Rights ('ECHR') 657.

the right to health has also been favoured,⁵¹ as well as the less obvious rights to housing, privacy and family.⁵²

Climate change has also been described as a 'subtle form' of human rights 'violation', lacking any direct persecution or threat.⁵³ If so, it is axiomatic that individuals are entitled to access effective remedies. The same is also true for adverse environmental circumstances⁵⁴ where judicial and administrative proceedings 'shall be provided'.⁵⁵ However, bold statements that human rights 'may establish a legal basis for holding responsible countries that have profited from inadequate greenhouse gas regulation'⁵⁶ warrant critical scrutiny.

3. Comparing Litigation Strategies

Even if accepted as such, human rights violations are not necessarily attributable to the highest emitting states. The principal duty bearer of human rights is the host state. For example, states undertake to ensure civil and political rights to 'all individuals within its territory and subject to its jurisdiction'.⁵⁷ This includes 'anyone within the power or effective control of that State Party, even if not situated within the territory'.⁵⁸ Conventional protection 'devolves with territory' and continues to belong to individuals notwithstanding changes of government, dismemberment or state succession.⁵⁹ Derogations by that State are only permissible for public emergencies threatening the life of the nation.⁶⁰ The economic, social and cultural rights which states undertake to 'recognise' or 'ensure' are equally premised upon territoriality⁶¹ and operate within the national sphere.⁶² States must adopt targeted programmes directed at their realisation

50 *Jonah Gbemre v Shell Petroleum Development Company of Nigeria Limited et al*, Suit No FHC/CS/B/153/2005 [2005] FHCNLR (Federal High Court of Nigeria).

51 *Hlatton and Others v United Kingdom* (2001) ECHR 17 and (2003-VIII) ECHR 34 (GC); African Commission on Human and Peoples' Rights, *Social and Economic Rights Action Center for Economic and Social Rights v Nigeria*, Communication No 155/96 (2001).

52 *Lopez-Ostra v Spain* (1994) Series A No 303C at [60].

53 Mary Robinson, *Climate Change and Human Rights* <www.britishcouncil.org/nsew_mary_robinson.doc> accessed 31 October 2008.

54 World Charter for Nature, UNGA Resolution 37/7 (1982); Brundtland Commission, *Our Common Future* (1987) at 330.

55 *Rio Declaration*, above n12, principle 10.

56 Donald Goldberg & Martin Wagner, 'Human Rights Litigation to Protect the Peoples of the Arctic' (2004) 98 *American Society of International Law Proceedings* 227.

57 ICCPR, above n34, art 2(1); UN Human Rights Committee ('UNHRC') General Comment No 3: Implementation at the national level (art 2) 1981 at [1].

58 UNHRC, General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev1/Add.13 (2004) at [10].

59 UNHRC, General Comment No 26: Continuity of Obligations, UN Doc CCPR/C/21/Rev1/Add.8/Rev1 (1997) at [4].

60 UNHRC, General Comment No 29: States of Emergency (art 4), UN Doc CCPR/C/21/Rev1/Add.11 (2001) at [2], [5].

61 *International Covenant on Economic, Social and Cultural Rights*, opened for signature on 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) arts 14, 28 ('ICESCR').

62 CESCR, General Comment No 9: The domestic application of the Covenant, UN Doc E/C12/1998/24 (1998) at [4].

‘even in times of severe resource constraints whether caused by a process of adjustment, of economic recession, or by other factors’.⁶³

Individuals adversely affected by climate change have to first identify the state to whose power or effective control they are subject. Human rights claims are generally commenced against the state upon whose territory the violation occurred (and who is typically also the state of nationality). The nationality and territoriality presumptions will insulate developed states from the human rights claims of individuals from developing states.

On similar grounds can be rejected the further suggestion that ‘international human rights law provides a basis for intervention when harm occurs solely within another state's borders’.⁶⁴ States do not generally owe human rights obligations to individuals located within and subject to another’s territorial or jurisdictional control. In the absence of express statutory language, national human rights legislation lacks any extraterritorial application.⁶⁵ Jurisdiction for civil and political rights ‘is primarily territorial’, although ‘it may sometimes be exercised outside the state territory’.⁶⁶ The *European Convention for Human Rights* reflects the ‘ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification’.⁶⁷ These occur:

- (a) where states have ‘effective control’ of another’s territory through consent or military occupation and exercise some or all public powers ordinarily exercised by territorial governments;
- (b) for diplomatic or consular agents or vessels registered in, or flying the flag of, a particular state;
- (c) in respect of acts producing effects or performed outside the territory; and
- (d) for individuals located on a state’s territory and within the jurisdiction.⁶⁸

Only (c) is sufficiently on point but raises the spectre of the effects doctrine and its specific application to climate change is yet to be judicially considered. In short, state responsibility for human rights violations occurring on another’s territory continues to depend upon orthodox considerations including whether perpetrators act under authority and/or effective control.⁶⁹

Against this preponderance of authority could be marshalled non-legally binding sources limited to specific circumstances where the extraterritorial responsibility of states is weakly-formulated and disaggregated. Yes, it may be ‘unconscionable’ to permit states to perpetrate human rights violations upon another’s territory that cannot be

63 CESCR, General Comment No 3: The nature of states parties obligations (art 2(1)), UN Doc E/1991/23 (1991) at [12].

64 Hari Osofsky, ‘Learning from Environmental Justice: A New Model for International Environmental Rights’ (2005) 24 *Stanford Environmental Law Journal* 71 at 78.

65 *Al-Skeini & Ors v Secretary of State for Defence* [2007] UKHL 26 at [26].

66 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories (Advisory Opinion)* [2004] ICJ Rep 163 at [109].

67 *Bankovic v Belgium & Ors* (2001) 11 BHRC 435 at [61].

68 *Id* at [68]–[71], [73], [80].

69 *Issa v Turkey* (2004) 41 EHRR 567 at [71], [72].

committed on its own.⁷⁰ Yes, the ‘international community’ should protect the ‘core’ content of economic, social and cultural rights for individuals located within states targeted for the application of economic sanctions.⁷¹ And yes, again, states must ‘refrain’ from policies or programs that might negatively affect the right to food for individuals residing outside their territory.⁷² But no, as commendable as the argument may be, the human rights paradigm cannot address the disjuncture between ‘victims’ and their diffuse or distant ‘perpetrators’ where ‘violations’ are only predicted rather than known and rectifiable.⁷³ A human rights-orientated litigation strategy will principally affirm the territorial responsibility of states to ensure the human rights of their nationals and fall short of the solution human rights advocates and developing country governments wish it to be.

The limitations of applying human rights within an environmental context are sought to be directly overcome by introducing a human right to a healthy environment. The persuasiveness of such a right is undermined by its many vague formulations.⁷⁴ A ‘human right to an environment of a particular quality’ is not yet embedded under international law.⁷⁵ Nor do specific conventions such as the *European Convention on Human Rights* contain a right to preserve nature as such. Instead, violations of the rights to privacy and family life can be established where the adverse effects of environmental pollution reach certain minimum thresholds.⁷⁶ Interestingly, states must provide special treatment for individuals residing within close proximity of the source, including relocation assistance if not free housing. Comparable complaints allege that a state knew of an imminent environmental risk but failed to take preventative action by reinforcing infrastructure or warning residents.⁷⁷

70 *López v Uruguay* (1981) 68 ILR 29 at [12.3]; *Celiberti de Casariego v Uruguay* (1981) 68 ILR 41 at [10.3].

71 CESCR, General Comment No 8: The relationship between economic sanctions and respect for economic, social and cultural rights, UN Doc E/C.12/1997/8 (1997) at [7].

72 UN Human Rights Commission, Report of Special Rapporteur Ziegler on the Right to Food, UN Doc E/CN.4/2005/47 (2005).

73 International Council on Human Rights Policy, *Submission to the Office of the High Commissioner for Human Rights in regard to Human Rights Council Resolution 7/23* (2008).

74 Compare *Stockholm Declaration*, above n12, principle 1 (the right ‘to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being’); *Hague Declaration on the Environment* (1989) 22 *International Legal Materials* 1308 (the right ‘to live in dignity in a viable global environment’); UNGA Resolution 45/94 (1990) (individuals ‘are entitled to live in an environment adequate for their health and well-being’); *Rio Declaration*, above n12, principle 1 (individuals ‘are entitled to a healthy and productive life in harmony with nature’); *The Draft Principles on Human Rights and the Environment*, UN Human Rights Commission, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Final Report of Special Rapporteur Ksentini, UN Doc E/CN.4/Sub.2/1994/9 (1994) at Annex 1 (the right ‘to a secure, healthy and ecologically sound environment’); *Declaration of Bizkaia on the Right to the Environment*, UN Educational Scientific and Cultural Organisation International Seminar of Experts on the Right to the Environment, UN Doc 30C/INF.11 (1999) art 1 (the right ‘to enjoy a healthy and ecologically balanced environment’). See also Adriana Fabra and Eva Arnal, *Review of jurisprudence on human rights and the environment in Latin America*, UNEP/Office of the High Commissioner for Human Rights, Seminar Paper No 6 (2002).

75 Asia Pacific Forum of National Human Rights Institutions, *Human Rights and the Environment* (2007) at 9.

76 *Fadeyeva v Russia*, Application No 55723/00, 2000-II-ECHR at [80]–[89].

77 *Budayeva v Russia*, Application No 15339/02, Decision on Admissibility (2007).

The conclusions of human rights courts and tribunals characteristically reflect an anthropocentric approach.⁷⁸ The inherent emphasis upon ‘human’ rights does not, and is not expected to, guarantee environmental stewardship. The human rights paradigm is not universally accepted as an appropriate vehicle for pursuing environmental protection objectives.⁷⁹ Their realisation, if any, is peripheral and incidental. Human rights-orientated strategies displace carbon emission reductions as the primary goal, overlook the totality of environmental impacts, tangentially address contributing causes and need not encourage renewable energy technology development. To the extent that human-induced climate change is beyond doubt,⁸⁰ should individuals automatically be entitled to demand protection from states given circumstances of their own making? Humanity flirts with extinction at the hands of Earth’s self-regulating, recycling and evolving system⁸¹ for as long as it continues to defer a greater sense of sustainable responsibility.⁸² Ecosystems, plants and species do not enjoy the same entitlements enjoyed by individuals and comparable to the assertion of ‘rights’ enforceable against states.

Human rights have now colonised the sustainable development field.⁸³ But in that context individual interests are acceptably diluted by distinctly environmental concerns. Environmental protection objectives are then further weighed against economic development priorities. Such a balancing exercise frequently arises for judicial consideration. For example, proceedings within the US can be classified according to:

(i) *Litigation Targeting High Emission Industries for Human Rights Harms*

These proceedings have to date proven unsuccessful. For example, litigation against oil, coal and chemical companies for knowingly emitting greenhouse gases in breach of a duty to avoid harming the environment and public health was dismissed because the plaintiff’s losses were attributable to a larger group not before the Court and located outside its jurisdiction.⁸⁴

US courts have also rejected claims that greenhouse gases emitted by power stations that adversely affect human health, coastal land and food supplies constitute a ‘public nuisance’.⁸⁵ That basis was also unsuccessful against automobile manufacturers where the question whether, and in what proportion, they should be held accountable for global warming costs due to the emissions their vehicles produce was found to be a political one.⁸⁶ Other cases have similarly been dismissed for non-justiciability for the reason that legislatures not courts are the appropriate fora.⁸⁷ In addition to public nuisance, the

78 See further Loukis Loucaides, ‘Environmental Protection through the Jurisprudence of the European Convention on Human Rights’ (2004) *British Yearbook of International Law* 249; Catherine Redgwell, ‘Life, The Universe and Everything: A Critique of Anthropocentric Rights’ in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (1996) at 71.

79 Michael Anderson, ‘Human Rights Approaches to Environmental Protection: An Overview’ in Boyle & Anderson, above n78 at 22–23.

80 IPCC, *Fourth Assessment Report* (2007).

81 James Lovelock, *The Revenge of Gaia* (2006).

82 Tim Flannery, ‘Now Or Never: A Sustainable Future For Australia?’ (2008) *Quarterly Essay* 31.

83 Oxfam, *Climate Wrongs and Human Rights: putting people at the heart of climate change policy* (2008).

84 *Comer v Murphy Oil*, No 1:050–CV–436 (SD Miss., 30 August 2007).

85 *State of Connecticut et al v American Electric Power Company Inc et al* 406 F Supp 2d 265 (SDNY, 2005).

86 *People of the State of California v General Motors et al* 2007 Westlaw 2726871 (ND Cal, 17 September 2007).

community of Kivalina is currently asserting that oil, coal and power companies conspired or acted in concert to suppress relevant scientific information to mislead the public. The complaint alleges that global warming is melting Arctic sea ice and damaging infrastructure, thereby forcing the village to abandon land and relocate.⁸⁸

(ii) *Litigation Targeting Regulatory Authorities Concerning Emissions Standards*

The first line of authority in this category involves corporations challenging the ability of regulatory agencies to regulate carbon dioxide emissions. Automobile manufacturers, for example, have to date failed when running this argument.⁸⁹

The second type of case involves non-governmental organisations (NGOs) or communities litigating against states. For example, one NGO established that environmental regulations applied to federal government projects that contribute to climate change.⁹⁰ Environmental impact assessments have also been adjudged inadequate.⁹¹ Threats to fishery stocks from climate change have been elevated to a relevant matter for consideration.⁹² However, the Inuit population of Northern Canada was unable to establish that US climate change policy violated their human rights.⁹³ It could not be determined whether the alleged facts ‘would tend to characterize a violation of rights’ protected by the *American Declaration of the Rights and Duties of Man*.⁹⁴

The third line of authority in this category reflects attempts by governments to remedy perceived environmental regulation deficiencies in view of apparent resistance by their federal counterparts. Emissions regulations establishing fuel economy standards will not conflict with federal law or policy in certain circumstances.⁹⁵ Federal government agencies have been required to review regulatory guidelines on whether carbon dioxide qualifies as a ‘pollutant’.⁹⁶ Similarly, the National Highway Traffic Safety Administration was ordered to assign a cost in its fuel-efficiency regulations to the known climate change-related damage caused by emissions.⁹⁷ Since injury from climate change-induced sea level rise could be established, federal regulations need not be adopted only if automobile emissions were found not to contribute.⁹⁸

87 See, for example, *Open Space Inst v American Electric Power Co*, 04–CV–05670 (SDNY, filed 21 July 2004).

88 *Native Village of Kivalina v ExxonMobil et al*, 08–CV–1138 (ND Cal, filed 26 February 2008).

89 *Green Mountain Chrysler-Plymouth-Dodge et al v Crombie et al* (Vermont, 12 September 2007).

90 *Friends of the Earth USA v Mosbacher* (ND Cal, 31 March 2007).

91 *Border Power Plant Working Group v Department of Energy* 260 F Supp 2d 997 (SD Cal, 2003) at 1028–29; *Mid-States Coalition for Progress v Surface Transportation Board* 345 F.3d 520 (8th Cir, 2003) at 549–550; *Pembina Institute for Appropriate Development v Attorney-General of Canada* 2008 FC 302 at [73]–[75].

92 *Natural Resources Defence Council v Kempthorne* 506 F Supp 2d 322 (ED Cal, 2007) at 368–70.

93 See further Juliette Niehuss, ‘Inuit Circumpolar Conference v Bush Administration: Why the Arctic Peoples Claim the United States’ Role in Climate Change has Violated their Fundamental Human Rights and Threatens their Very Existence’ (2005) 5(2) *Sustainable Development Law and Policy* 66 at 82.

94 Inter-American Commission on Human Rights, Letter from the Organization of American States to S Watt-Cloutier et al regarding Petition No P-1413-05, 16 November 2006.

95 *Central Valley Chry v Goldstone* (ED Cal, 11 December 2007).

96 *Massachusetts v EPA*, 415 F.3d 50 (DC Cir 2005) *cert. granted* (2006) WL 1725113 (US DC, 26 June 2006) (No 05–1120) and (2007) 127 S Ct 1438.

97 *Center for Biological Diversity v National Highway Traffic Safety Administration* 508 F.3d 508 (9th Cir 2007) at 547.

98 *Massachusetts v EPA* 549 US 1 (2007).

(iii) Litigation Targeting Export Credit Agencies and Financial Institutions

Export credit agencies may be required to assess the greenhouse gas implications of financing or insuring oil fields and coal-fired power plants. Providing overseas development assistance for energy projects producing carbon emissions may first require an environmental impact assessment.⁹⁹

In Australia, the downstream carbon emissions associated with fossil fuel use may be a relevant consideration for proposed industrial development projects depending upon the relevant legislation and how it is judicially construed.¹⁰⁰ For example, one environmental impact assessment was declared void for failing to take into account the carbon contribution indirectly made from burnt coal.¹⁰¹ Offsetting conditions need not be imposed upon coal mining, transportation or use¹⁰² provided these functions are ‘not likely’ to pose any significant environmental impact and greenhouse gas emissions remain merely theoretical.¹⁰³ That said, the public interest in renewable energy developments such as wind farms may outweigh any adverse effects in terms of flora, fauna, visual amenity or noise.¹⁰⁴ Such conclusions are consistent with our colleagues across the pond, with courts in New Zealand also acknowledging climate change¹⁰⁵ and permitting challenges to government decision-making, such as refusing wind farm construction, which contributes to reducing carbon emissions.¹⁰⁶

Residential development applications in Australia are also increasingly taking into consideration predicted sea level rise and storm surges. Such circumstances create an unacceptable and reasonably foreseeable risk to land and proposed dwellings.¹⁰⁷ Coastal recession is expected to erode buffer zones and cause property damage.¹⁰⁸ Thus development conditions may have to be inserted to relocate households to areas less prone to tidal inundation.¹⁰⁹ Indeed, if flooding is identified as a major project constraint, developers could be under an implied obligation to consider whether changing weather patterns occasioned by climate change increase flood risk.¹¹⁰ Local councils for their part must guard against negligence claims.¹¹¹ Although proceedings

99 *Friends of the Earth Inc v Watson* No 02–4106 (2005) US Dist WL 2035596 (ND Cal, 2005).

100 *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* [2007] FCA 1480 at [49].

101 *Gray v Minister for Planning* (2006) 152 LGERA 258 at 298, distinguished in *Drake-Brockman v Minister for Planning* (2007) 158 LGERA 349 at [131].

102 *Xstrata Coal Queensland Pty Ltd v Queensland Conservation Council* [2006] AML 207/2006 ENO 208/2006.

103 *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for Environment & Heritage* [2006] FCA 736.

104 *Taralga Landscape Guardians Inc v Minister for Planning & RES Southern Cross Pty Ltd* [2007] NSWLEC 59 at [352]. See also *Perry & Ors v Hepburn Shire Council & Ors* (2007) 154 LGERA 182 at 189.

105 *Environmental Defence Society Inc v Auckland Regional Council & Contact Energy Limited* [2002] NZRMA 492.

106 *Genesis Power Ltd v Franklin District Council* [2005] NZRMA 541; *Genesis Power Ltd v Greenpeace New Zealand Inc* [2008] 1 NZLR 803.

107 *Gippsland Coastal Board v South Gippsland Shire Council* [2008] VCAT 1545.

108 *Northcape Properties Pty Ltd v District Court of Yorke Peninsula* [2008] SASC 57.

109 *Charles & Howard Pty Ltd v Redland Shire Council* (2007) 159 LGERA 349.

110 *Walker v Minister for Planning* (2007) 157 LGERA 124 at [166]; *Minister for Planning v Walker* [2008] NSWCA 224 at [39], [56].

111 Jan McDonald ‘A risky climate for decision-making: the liability of development authorities for climate change impacts’ (2007) 24 *Environmental Planning Law Journal* 405 at 412–415.

have yet to commence in human rights terms, car manufacturers have been held to account for misleading and deceptive advertising.¹¹²

What can one make of this brief survey? First, human rights-based litigation strategies have not been an unqualified success. Environmental litigation does not have inherently better prospects. Obstacles faced by human rights advocates and environmental litigants alike include evidentiary burdens (establishing causation, attribution and environmental harm or personal injury), meeting jurisdictional or admissibility thresholds (such as standing or exhausting local remedies), questions of substantive liability (particularly for private actors) and applicable defences (including judicial abstention doctrines such as non-justiciability). However, environmental approaches pinpoint attainable objectives (enhancing regulation), are initiated against primarily non-state actors and are underpinned by more wide-ranging legal foundations (for example, tort or administrative law). Compared to litigation strategies based on human rights, environmental litigation also confronts climate change issues more directly. Although outcomes are piecemeal, incremental and unlikely to prevent climate change, environmental litigation provides a vehicle for venting local community concerns, increasing public awareness and prompting executive action.¹¹³ However, future jurisprudential developments turn upon any given forum's receptivity in terms of substantive law or procedural requirements and the judicial willingness to counterbalance competing public policy considerations when interpreting legislation.

The pros and cons of one particular litigation strategy over another does not by itself indicate that the human rights paradigm lacks valuable contributions for addressing climate change. Viewing environmental conditions through a human rights lens usefully reframes the issues and an appreciation of the challenges. However, advocates of human rights should not overstate its potential. Arguments centred on human rights can be countered quite effectively in human rights terms as fossil fuel use continues to facilitate the realisation and enjoyment of human rights. Global warming will open maritime transportation routes and enable territorial access. Thus, climate change may ultimately effect a redistribution of the identity, location and quality of human rights benefits. Going one step further, is there a danger that a human rights orientation could distort intergovernmental debates and impede practical solutions?

4. Identifying an Appropriate and Effective Remedy

If human rights violations could be established, what would be an appropriate 'remedy'? The van Boven principles are a useful synthesis of international practice.¹¹⁴ Compensation is appropriate for violations of civil and political rights¹¹⁵ as well as several economic, social and cultural rights including housing, food, water, health and

112 *Australian Competition and Consumer Commission v GM Holden Ltd* [2008] FCA 1428 at [10], [16].

113 The Hon Justice B Preston, NSW Land and Environment Court, 'Climate Change Litigation' (Paper presented to Judicial Conference of Australia Colloquium, Gold Coast, 11 October 2008) at 25.

114 UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights, UN Doc E/CN.4/Sub.2/1996/17 (1996).

work.¹¹⁶ Reparations must be proportional to the gravity of the violation and the harm suffered, with individuals restored to the *status quo ante* whenever possible.¹¹⁷ Adequate reparation includes restitution or rehabilitation and measures of satisfaction including apologies, memorials, guaranteed non-repetition, legislation and punishment. Collective reparations should be extended to groups of victims, including those suffering environmental damage.¹¹⁸

A. Compensation

While compensation may be accepted in principle, the circumstances in which such a remedy is appropriate and how far compensation extends is disputed. In relation to the first issue, it is suggested that victims are free to accept compensation, either monetary or in-kind, in lieu of restitution.¹¹⁹ An alternate view permits compensation only where individuals knowingly and voluntarily opt not to return or where their original housing no longer exists.¹²⁰ In respect of the second, alternative accommodation or land could be sufficient.¹²¹ Broader suggestions propose compensation encompassing abandoned households, lost investments and resettlement difficulties.¹²² Still broader suggestions recommend including all lost property, alternative land, housing and reimbursed relocation costs.¹²³

The conceptual and practical obstacles associated with obtaining financial compensation for climate-induced human rights violations amounts to a distraction from the polluter pays principle, a point more likely to be driven home by environmental protection strategies and sustainable development agendas. Furthermore, states are currently committed to expenditure on adaptation initiatives, development assistance and monitoring climatic conditions. The costs of adaptation and mitigation measures will

115 UNHRC, General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev1/Add.13 (2004) at [16].

116 CESCR, General Comment No 4: The right to adequate housing (art 11 (1) of the Covenant), UN Doc E/1992/23 (1992) at [17]; CESCR, General Comment No 7: The right to adequate housing (art 11(1)): forced evictions, UN Doc E/1998/22 (1998) at Annex IV, [13], [17]; CESCR, General Comment No 12: The right to adequate food (art 11), UN Doc E/C.12/1999/5 (1999) at [32]; CESCR, General Comment No 15: The right to water, UN Doc E/C.12/2002/11 (2002) at [55]; CESCR, General Comment No 14: The right to the highest attainable standard of health, UN Doc E/C.12/2000/4 (2000) at [59]; CESCR, General Comment No 18: The right to work, UN Doc E/C.12/GC/18 (2006) at [48]. See also the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1997) at [23].

117 UN Human Rights Commission, Resolution 2005/35, Annex, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law* (2005) at [15], [19].

118 UN Special Rapporteur Theo van Boven, Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final Report, UN Doc E/CN.4/Sub.2/1993/8 (1993) at [16]–[25].

119 CESCR, General Comment No 4 on the right to housing, above n116 at [17].

120 UN Special Rapporteur Pinheiro, Final Report on Housing and property restitution in the context of the return of refugees and internally displaced persons, UN Doc E/CN.4/Sub.2/2005/17/Add.1 (2005) at [69].

121 UN Human Rights Commission, Resolutions 1993/77 (1993) and 2004/28 (2004).

122 UN Centre for Human Settlements (Habitat), *Evaluation of Relocation Experience* (1991) at 28.

123 UN Secretary General, Comprehensive Guidelines on Development-Based Displacement, Expert seminar on the practice of forced evictions, UN Doc E/CN.4/Sub.2/1997/7 (1997) at Annex, [24], [27]–[28].

not, and are not intended to, reflect the full compensation payable. No allocations have yet been made as a contingency for impairing the enjoyment by individuals of their human rights.

The unlikely prospect of financially compensating individuals for human rights violations is strengthened by increasing attention given to the economic repercussions of climate change.¹²⁴ Potentially severe macroeconomic or fiscal challenges include reduced output and productivity for the agricultural, fishery and tourism industries.¹²⁵ A 'high island' within the Pacific could experience average annual economic losses of US\$23 to 52 million by 2050 whereas a 'low island' might lose US\$8 to 16 million.¹²⁶ For all coastal states, sea level rise and periodic flooding will damage household assets and accelerate building degradation.¹²⁷ Human settlements accordingly require climate-resilient infrastructure such as seawalls offering protection from coastal erosion.¹²⁸ In the short term, community-orientated practical solutions directed at property protection are more likely to attract financial support.

B. Relocation

In extreme cases, the environmental damage resulting from climate change could render entire states uninhabitable, thereby imperilling the right to life and compelling affected populations to abandon their territories. Population displacement produces severe long-term hardship, which include unemployment, economic marginalisation, homelessness, food insecurity, increased mortality, socio-cultural fragmentation, educational deprivation and ethnic discrimination.¹²⁹ It infringes upon multiple human rights,¹³⁰ including the rights to family and privacy.¹³¹ 'Forcible' population transfers, involving governmental participation in moving individuals because of political, economic or other processes, amount to gross human rights violations.¹³² The practice can result from 'induced degradation of the environment calculated to cause migration away from specific areas'.¹³³ An appropriate response would involve preserving human rights,¹³⁴

124 UK Treasury, *The Economics of Climate Change* (2006) at ch 5 <www.hm-treasury.gov.uk/independent_reviews/stern_review_economics_climate_change/sternreview_summary.cfm> accessed 31 October 2008 ('the Stern Review').

125 International Monetary Fund, *Factsheet on Climate Change, the Environment and the Work of the IMF* (2008).

126 John Hay et al, *Climate Variability and Change and Sea-Level Rise in the Pacific Islands: A Resource Book for Policy and Decision-makers, Educators and other Stakeholders* (2005) at 45.

127 Ross Garnaut, *Climate Change Review* (2008) at ch 11.

128 IPCC, *Climate Change 2001: Impacts, Adaptation and Vulnerability, Contribution of Working Group II to the Third Assessment Report of the IPCC* (2001) at [7.5.4].

129 Michael Cernea, 'Risks, Safeguards and Reconstruction: A Model for Population Displacement and Resettlement' in Michael Cernea & Chris McDowell (eds), *Risks and Reconstruction: Experiences of Resettlers and Refugees* (2000) at 11–55.

130 UN, *Legal Aspects Relating to the Protection Against Arbitrary Displacement*, UN Doc E/CN.4/1998/53/Add.1 (1998).

131 UNHRC, *Viens re Hopu and Bessert v France* (1998) 3 *Australian Indigenous Law Reporter* 144 at [3.2].

132 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Preliminary Report on the human rights dimensions of population transfer, including the implantation of settlers and settlements, submitted by Awn Shawkat Al-Khasawneh and Ribot Hatano, UN Doc E/CN.4/Sub.2/1993/17 (1993) at [14].

133 UN Special Rapporteur Awn Shawkat Al-Khasawneh, *Freedom of Movement: Human Rights and Population Transfer*, UN Doc E/CN.4/Sub.2/1997/23 (1997) at [11].

resettlement¹³⁵ and/or offering compensation,¹³⁶ for which the damage would be quantifiable in terms of lost land, property, income and social security benefits.¹³⁷

International law already offers partial guidance on questions of relocation, for which it must be said the trend is set against mass transferral. Under international humanitarian law, for example, occupying powers are prohibited from altering a population's demographic composition by denying means of subsistence, confiscating land, limiting household preferences or encouraging departure.¹³⁸ Under international criminal law, deportation, defined as a forcible population transfer effected through unlawful expulsion or other coercive act, is punishable as a crime against humanity.¹³⁹ It has also been suggested that economic development which causes forcible relocation qualifies as genocide.¹⁴⁰ Although that proposition is questionable, it is sufficient to note that victims of crime are entitled to restoration of lost infrastructure and reimbursed relocation costs 'whenever [environmental] harm results in the dislocation of a community.'¹⁴¹

Could relocation offer a remedy to communities adversely affected by climate change that is appropriate from a human rights perspective? Where forcible relocation occurs, giving rise to an obligation upon states to resettle individuals on land 'of similar or better quality', guarantee the right of return and respect the right to choose a residence, the remedy is ordinarily limited to locations within territorial boundaries.¹⁴² Fair compensation could be provided as an alternative.¹⁴³ Once again, the territorial state remains responsible for providing either remedy.¹⁴⁴ Nevertheless, for states preparing for submergence, including Tuvalu, it is suggested that they relocate to their neighbours whilst maintaining their sovereignty, enforcing exclusive economic zones and retaining their seat in the General Assembly.¹⁴⁵ However, relocation can be attacked on two

134 Preliminary Report, above n132 at [46].

135 UN Human Rights Commission, The human rights dimensions of population transfer, including the implantation of settlers, UN Doc E/CN.4/Sub.2/1993/17 (1993) at [46].

136 UN Special Rapporteur Awn Shawkat Al-Khasawneh, Progress report on the human rights dimensions of population transfer including the implantation of settlers, UN Doc E/CN.4/Sub.2/1994/18 (1994) at [137].

137 David Vine, 'The Impoverishment of Displacement: Models for Documenting Human Rights Abuses and the People of Diego Garcia' (2006) 13(2) *Human Rights Brief* 21 at 23.

138 *Legal Consequences of the Construction of a Wall*, above n66 at [122], [133].

139 *Rome Statute of the International Criminal Court*, opened for signature on 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) arts 7(1), 7(2).

140 Stefanie Roos, 'Does International Law Curtail Development-Induced Displacement Through the Prohibition of Genocide and Ethnocide?' (2002) 9(3) *Human Rights Brief* 14.

141 UNGA Resolution 40/34 (1985) *Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985) at [10].

142 Organisation of American States, Report on the situation of human rights of the Nicaraguan population of Miskito origin, OAS Doc OAS/Ser.L/V/11/62, Doc 10, Rev3 (1983) at 21; *Maria Mejia v Guatemala*, Inter-AmCHR OAE/Ser.L/V/II.95 Doc 7 Rev (1997) at 370; *Mayagna (Sumo) Awas Tingni Community v Nicaragua* [2002] AILR 12 at [167].

143 UN Special Rapporteur on Adequate Housing, The Right to Adequate Housing, UN Doc E/CN.4/Sub.2/1995/12 (1995) at [168]; CESCR, General Comment No 2 on International technical assistance measures (art 22), UN Doc E/1990/23/Annex III (1990) at [6].

144 Bjorn Patterson, 'Development-Induced Displacement: Internal Affair or International Human Rights Issue?' (2002) 12 *Forced Migration Review* 16.

fronts: first as contrary to 'international standards of justice' and second as violating human rights.¹⁴⁶

Climate change warrants 'a radically different framing to bring about global justice'.¹⁴⁷ In particular, small island states contribute 'negligible' carbon emissions but face 'devastating' consequences from climate change.¹⁴⁸ Several states face 'partial or virtually total inundation by future rises in sea level...over the next century and beyond'.¹⁴⁹ The President of the Maldives, for example, noted the 'painful' irony that 'my country is amongst the least contributors to environmental degradation; but it would certainly be amongst the most helpless in dealing with the potential catastrophic effects of climate change'.¹⁵⁰ The international community has thus been called upon to provide effective and timely support.¹⁵¹

The principle of just terms compensation could be expected to require the prompt provision of land and resources of a comparable quality suitable for the present needs and future development of these states. Such an outcome is reputedly the product of the UNFCCC, the Rio Declaration, general international legal principles and relevant judicial dicta.¹⁵² However, 'justice' is used in several senses, particularly in the UNFCCC context.¹⁵³ Island states themselves do not favour relocation.¹⁵⁴ The option requires integrating populations into other states and ensuring their continued socio-economic survival. Accordingly the prospect of abandoning state territory and relocating populations has not yet been sufficiently incorporated into UNFCCC negotiations, notwithstanding sea level rise projections being contemplated for some time.¹⁵⁵

The extinction of states was previously considered a 'far-fetched and purely hypothetical' scenario.¹⁵⁶ The same conclusion cannot be made today, with climate change threatening the continued existence of some states. Their disintegration, together

145 Brad Crouch, 'Tiny Tuvalu in save us plea over rising seas' *Sunday Mail* (5 October 2008) <www.news.com.au/adelaidenow/story/0,22606,24440703-5006301,00.html> accessed 31 October 2008.

146 Jon Barnett and Neil Adger, 'Climate Dangers and Atoll Countries', Tyndall Centre for Climate Change Research, Working Paper No 9, University of East Anglia (2001) at 9.

147 Mary Robinson, 'Climate Change and Justice', Barbara Ward Lecture, Chatham House, London (2006) at 3–4 <www.realizingrights.org/pdf/Barbara_Ward_Lecture_12-11-06_FINAL.pdf> accessed 31 October 2008.

148 UN Secretary-General, Progress in the implementation of the Programme of Action for the Sustainable Development of SIDS, UN Doc E/CN.17/1999/6 (1999) at [30].

149 IPCC above n128 at [19.3.4.1].

150 Maumoon Gayoom, President of Maldives, Speech to the UN, 24 June 1996.

151 UNGA Resolution 44/206 (1989) on possible adverse effects of sea-level rise on islands and coastal areas, particularly low-lying coastal areas (1989) at preamble, [2], [3].

152 IPCC, *Climate Change 1995: Economic and Social Dimensions of Climate Change*, Contribution of Working Group III, Summary for Policymakers (1996).

153 International Council on Human Rights Policy, *Climate Change and Human Rights: A Rough Guide* (2008) at 55–59.

154 Jouni Paavola and Neil Adger, 'Justice and Adaptation to Climate Change', Tyndall Centre for Climate Change Research, Working Paper No 23, University of East Anglia (2002) at 10.

155 See, for example, Coastal Zone Management Subgroup of the IPCC Response Strategies Working Group, *Global Climate Change and the Rising Challenge of the Sea* (1992).

156 Alfred Soons, 'The effects of a rising sea level on maritime limits and boundaries' (1990) 37(2) *Netherlands International Law Review* 207 at 229–30.

with the regional dispersal of affected populations, heralds the loss or fragmentation of distinct national identities, cultural heritage and social organizations. Statehood classically requires *inter alia* a defined territory and a permanent population.¹⁵⁷ Territory can be lost through natural means including maritime submergence.¹⁵⁸ Islands are distinguishable from ‘rocks which cannot sustain human habitation or economic life of their own’.¹⁵⁹ However, relocating populations may equally alter boundary delimitations in some circumstances.¹⁶⁰ Individuals may consequently lose their right to a nationality and be cast adrift upon an uncertain obligation for states to prevent statelessness.¹⁶¹ Since the loss of international legal personality ‘has major repercussions in international law’, such assessments require ‘the greatest caution’.¹⁶²

Relocating affected populations, and the many consequences thereof, is not without precedent. For example, in 1916 the United Kingdom annexed Banaba or Ocean Island, incorporating it within a protectorate currently known as Kiribati. The British Phosphate Commission (BPC), composed of English, Australian and New Zealand governments, was established to conduct phosphate mining. By 1927 the Australian Governor-General observed:

As all the phosphate on Ocean Island will eventually be required it appears to Commissioners advisable that steps should be taken to secure another island or islands for the use of the Banabans when Ocean Island is no longer inhabitable and the Commissioners have expressed their willingness to co-operate in this matter.¹⁶³

In 1945, the BPC purchased Rabi Island from Lever’s Pacific Plantations Pty Ltd to resettle the Banabans under Fijian supervision. A Trust Fund provided modest annuity payments.¹⁶⁴ However, the Banabans sought compensation in 1971 on the basis of inadequate housing and food and denial of the right to return. The UK High Court rejected a breach of any fiduciary duty but called upon the government to conclude appropriate arrangements in recognition of its moral culpability.¹⁶⁵ Banabans could continue to retain title to Ocean Island.¹⁶⁶

Another example, also involving the UK, was the establishment in 1965 of the British Indian Ocean Territory (BIOT), separating the Chagos Islands from colonial Mauritius.

157 *Montevideo Convention on the Rights and Duties of States* (1933) 165 LNTS 19, art 1.

158 Surya Sharma, *Territorial Acquisition, Disputes and International Law* (1997) at 142.

159 *UN Convention on the Law of the Sea*, opened for signature 10 December 1982, 1834 UNTS 3 (entered into force 16 November 1994) art 121.

160 *Case Concerning the Frontier Dispute (Burkina Faso v Republic of Mali)* [1986] ICJ Rep 554 at [61], [114].

161 UNGA Resolution 55/153 (2001) concerning Articles on the nationality of natural persons in relation to the succession of States (2001) preamble.

162 European Community Conference on Yugoslavia, Badinter Arbitration Commission (‘Badinter Commission’) *Opinion No 1* (1991) 92 ILR 162 at [1] and *Opinion No 8* (1992) 92 ILR 199 at [2].

163 Gerard Hindmarsh, *One Minority People: A Report on the Banabans* (2002) s3.

164 Jon Fraenkel, *Minority Rights in Fiji and the Solomon Islands: Reinforcing Constitutional Protections, Establishing Land Rights and Overcoming Poverty*, UN Doc E/CN.4/Sub.2/AC.5/2003/WP.5 (2003).

165 In the High Court of Justice (Chancery Division) [1973] R No 2013.

166 *The Constitution of the Republic of Kiribati*, art 119(1).

The indigenous Ilois population, denied recognition as a permanent population, was relocated between 1971 and 1973 to enable an American military base on Diego Garcia. In 2000 Chagossians asserted that their human rights were violated through forcible relocation. The UK courts found that their expulsion was not conducive to good governance.¹⁶⁷ However, compensation claims were rejected.¹⁶⁸ A subsequent Order in Council revoking the right of return and declaring the islands uninhabitable¹⁶⁹ was declared null and void.¹⁷⁰ A further order abolishing the right of abode and restricting rights of entry and residence was adjudged unlawful.¹⁷¹ While parallel proceedings in the US were dismissed, it was left undecided whether the executive owed a duty of care toward the Chagossians, or whether its actions in depopulating the islands had to comport with a certain minimum protection level.¹⁷² Chagossians also sought to assert their right of return before international fora.¹⁷³ The UN Human Rights Committee, noting that the UK accepted the illegality of its actions, called for this right to be rendered 'practicable' 'to the extent still possible' and to consider paying compensation for its denial over a prolonged period.¹⁷⁴

These examples illustrate that, while relocation is incompatible with some human rights but not others, the range of practical remedies which a human rights approach might suggest are limited. Impacts upon individuals include interrupted access to health services, overburdened sanitary facilities, greater vulnerability to disease and psychological strain. Relocation is considered one of 'the most threatening short-term effects of climate change on human settlements'.¹⁷⁵ Several human rights would be temporarily interrupted or abandoned so as to realise others. For example, relocation 'may not be appropriate' to ensure cultural rights.¹⁷⁶ Human dignity may also be affected by lower living standards.¹⁷⁷ Although individuals should not relinquish their right of return,¹⁷⁸ climate change would be one of the few circumstances where deprivation of that right is reasonable.¹⁷⁹ Alternatively, the right could be suspended, together with

167 *The Queen (ex parte Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] 1 QB 1067 at [57].

168 *Chagos Islanders v Attorney General & Her Majesty's British Indian Ocean Territory Commissioner* [2003] EWHC 2222 (QB).

169 UK House of Commons, *Hansard*, Debates, 7 July 2004, cols 271–295 and 16 September 2004, cols 1455–1471.

170 *Chagos Islanders v Attorney General & Anor* [2004] EWCA Civ 997.

171 *The Queen (ex parte Bancoult) v Secretary of State for Foreign & Commonwealth Affairs* [2006] EWHC 1038 (Admin).

172 *Bancoult v McNamara* 370 F. Supp 2d 1 (D.D.Cir, 2004) & 445 F.3d 427 (DC Cir, 2006).

173 UN Human Rights Commission, Report of the Working Group on Indigenous Populations on its Seventeenth Session, UN Doc E/CN.4/Sub.2/1999/19 (1999) at [63].

174 UNHRC, Concluding Observations on the UK, UN Doc CCPR/CO/73/UK (2001) at [38] and UN Doc CCPR/CO/73/UKOT/Add.1.

175 IPCC, *Potential Impacts of Climate Change*, Report of Working Group 2 (1990) at [2.2.3].

176 UNHRC, Concluding Observations concerning Chile, UN Doc CCPR/C/79/Add.104 (1999) at [22]; *Lämsman et al v Finland*, Communication No 671/1995, UN Doc CCPR/C/58/D/671/1995 (1995) at [10.3]; *Apirana Mahūika et al v New Zealand*, Communication No 547/1993, UN Doc CCPR/C/70/D/547/1993 (2000) at [9.5].

177 Wolfgang Sachs, 'Climate Change and Human Rights', World Economy & Development In Brief, Special Report No 1 (2007) <www.wdev.eu> accessed 31 October 2008.

178 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Report by Chairman-Rapporteur Eide, UN Doc E/CN.4/Sub.2/1991/45 (1991) at 5.

restitutio in integrum, for as long as the circumstances compelling flight persisted. Adequate alternative housing, as well as monetary compensation, could be required where relocating communities is unavoidable.¹⁸⁰ Relocating distressed individuals should not be inhumanely delayed until such a point is reached. Importantly, voluntary relocation avoids any characterisation as ‘forcible population transfer’, caps the fiduciary responsibilities of host states and may effect a waiver or elimination of compensation claims. Resettlement is preconditioned by the principle of free, prior and informed consent in the absence of national security reasons, emergency situations including natural disasters, legitimate public health grounds and personal safety.¹⁸¹

In short, relocation as a specific human rights remedy for meeting the challenges associated with climate change will itself impair the exercise of specific rights. An illustration of that proposition involves that of self-determination.¹⁸² The exercise of that right would not entitle states to establish themselves upon the territory of another. While states are free to merge with each other, the right to self-determination does not permit action, including establishing new states, which impair the territorial integrity of existing ones or threaten intergovernmental stability.¹⁸³ The right does include meaningful prior consultation and participation in governmental decision-making,¹⁸⁴ provided that there is no intervention into the internal affairs of the territorial host.¹⁸⁵ Relocated individuals would be entitled to exercise minority rights,¹⁸⁶ albeit a poor alternative to independent statehood, particularly if host states may have contributed to that circumstance. However, the right to self-determination ‘is not a static concept, but rather an evolving right’ that includes ‘the continuing right of peoples to decide how they should be governed’.¹⁸⁷ Thus, limited territorial autonomy on specified terms could result from arrangements freely agreed between all concerned parties.¹⁸⁸ To that end, the free and genuine expression of a people’s will¹⁸⁹ coincides with joint participation in resolving environmental issues.¹⁹⁰

179 UNHRC, General Comment No 27: Freedom of movement (art 12), UN Doc CCPR/C/21/Rev1/Add.9 (1999) at [21].

180 High Court of the Eastern Circuit in Copenhagen, *Decision on the Forcible Transfer of the Population of Thule* (1999); Danish Supreme Court, *Decision on the Forcible Transfer of the Population of Thule* (2003) <www.inuit.org/index.asp?lang=eng&num=257> accessed 31 October 2008; Canadian Royal Commission on Aboriginal Peoples, *Report on the High Arctic Relocation of 1953–55* (1994) at 163–4.

181 UN Development Programme, Questionnaire on how the principle of Free Prior and Informed Consent is understood and applied by UN Programmes, Funds and Agencies, UN Doc E/C.19/2004/11 (2004).

182 *UN Charter* (1945) ATS No.1, arts 1(2), 55; *ICESCR*, above n61, art 1; *ICCPR*, above n34, art 1.

183 Badinter Commission, Opinion No 2 (1992) 92 ILR 167; UNGA Resolution 50/6 (1995) on a *Declaration on the Occasion of the UN’s 50th Anniversary* (1995) at [1]; *Reference re Secession of Quebec* [1998] 2 SCR 217 at [127].

184 Inter-American Court of Human Rights, *Maya Indigenous Communities of the Toledo District, Belize*, Report No 40/04 (2004) at [154].

185 UNHRC, General Comment No 12: The right to self-determination of peoples (art 1) (1984) at [6].

186 UNGA Resolution 47/135 (1992) *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*; UNHRC, General Comment No 23: The rights of minorities (art 27), UN Doc CCPR/C/21/Rev1/Add.5 (1994) at [3.2].

187 UN Human Rights Commission, Working Group on the Draft Declaration, Self-Determination: The Australian Position, UN Doc E/CN.4/1995/WG.15/2/Add.2 (1995) at [8].

188 UN Committee on the Elimination of Racial Discrimination, General Recommendation No XXII (49) on the Right to Self-Determination (1996) at [11].

Finally, one cannot overlook the permanent sovereignty over natural resources as one aspect of the right to self-determination.¹⁹¹ Extreme climatic conditions may not extinguish a state's territorial claims but only preclude the benefits of access. Thus, former states could retain ownership and control over fishing stocks, minerals and other resources. Indeed, compensation could also be payable for their 'spoliation'.¹⁹² These resources could underpin a permanent capital trust fund used to facilitate the orderly resettlement of affected individuals, acquire land and support other modalities of inter-state co-operation.

Conclusion

Reframing climate change impacts in human rights terms usefully emphasizes individual-centric considerations, invites comparisons with concepts familiar to that discourse and complements other strategies. However, a human rights orientation will ultimately affirm the primary responsibilities of those states with territorial or jurisdictional control over affected individuals without necessarily enhancing the environmental obligations of other states. Such an approach, compared with environmental protection strategies, only indirectly reduces carbon emissions and cannot ensure environmental stewardship. Additional challenges, including identifying a violation, a perpetrator and an appropriate remedy, should provoke further thought by human rights advocates. Financial compensation is unlikely whereas relocation relinquishes certain substantive rights (for example, to return), emphasizes others (particularly procedural entitlements) and can impair their full enjoyment (particularly in relation to self-determination). Resettlement is not a 'just' solution from the perspective of both human rights and nation states but may be an inevitable one.

189 UN Special Rapporteur Espiell, *The Right to Self-Determination: Implementation of UN Resolutions*, UN Doc E/CN.4/Sub.2/405/Rev1 (1980) at [65]; *The Western Sahara Case (Advisory Opinion)* [1975] ICJ Rep 12 at [58]–[59].

190 *Rio Declaration*, above n12, principle 10.

191 UNGA Resolution 1803 (XVII) (1962) concerning *Permanent Sovereignty over Natural Resources* (1962) at [1].

192 *African Charter on Human and Peoples' Rights*, opened for signature 26 June 1981, 21 *International Legal Materials* 58 (entered into force 21 October 1986) art 21. Governments may be able to maintain ownership of national assets notwithstanding lack of effective control over former territory: *Gydnia Ameryka Linie Zeglowne Spolka Akcyjna v Boguslawski* [1953] AC 11.