

Climate Change and the Moral Responsibility to Reform International Law

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As the consequences of human-induced climate change become increasingly present and pervasive, so too must discussions concerning intergenerational justice and the fundamental principles of international law which it underpins. This paper explores the interrelatedness of these, discussing natural and human rights in relation to John Rawls' "original position" demonstrating that, contrary to what the person-affecting principle may lead us to believe, current generations have certain primordial duties towards future ones, namely the duty to preserve a planet necessary for the maintenance of fundamental human rights and, in the situation that this duty has not been fulfilled or worse, to repair the harm caused by this failure. Contemporary international law, however, institutionalizes legal responsibilities that are much less onerous than the latter of these aforementioned moral imperatives. To close this gap and cement our moral obligations in legal grounding, the Convention Relating to the Status of Refugees, the outdated yet seminal institution of international law that concerns the right of refugees, which sets forth only political and individualist definitions of the term, must be supplemented with environmental and collectivist dimensions.

Introduction

Rising temperatures, widespread tropical diseases, changing patterns of precipitation, more frequent droughts, heatwaves, tropical storms, forest fires, and rising sea levels: these are the consequences of climate change which will render large swaths of the earth's territory inhospitable. Ironically, those living today will not experience the most destructive effects of human-induced climate change. Sea levels take a very long time to respond to the warming of the earth's surface, meaning that ocean waters will continue to rise for many centuries even if global temperatures do not reach two degrees Celsius above pre-industrial levels, the level of global temperatures that scientists agree would lead to disastrous consequences. It is inevitable that climate change, which is predominantly if not entirely human-induced, will adversely affect future generations for centuries to come. From a perspective of intergenerational justice, this is morally egregious, for living generations have a responsibility to do their fair share in achieving the conditions necessary for preserving future generations' fundamental human rights. Since the

generations of humanity's past have failed to fulfill this duty, those that have inherited the benefits of this failure have also inherited the responsibility to repair the harm generated by it. In theory, such reparations entail transferring some of the material benefits of pollution onto the peoples experiencing the costs of their actions; in practice, it necessitates helping people adversely affected adapt to a changing environment by taking measures such as helping states internally resettle their populations and, when necessary, externally resettling and naturalizing them in their own countries.

Regarding the latter, however, the seminal Convention Relating to the Status of Refugees puts forward only a political and individualistic definition of refugee, meaning states have no legal responsibility to resettle those forced to migrate due to climate change, as intergenerational justice requires. To overcome this and cement our moral obligations in legal grounding, international law must be reformed in such a way that broadens the political and individualistic definition of refugee to include environmental and collective dimensions. Further, since many climate refugees will lose the political rights they were once entitled to as nationals of their respective countries, states responsible for turning these once-nationals into climate refugees have a duty to help restore their rights by naturalizing them in the country they have migrated to. To demonstrate the aforementioned, natural and human rights will be discussed in relation to John Rawls' "original position", intergenerational justice, and Derek Parfit's non-identity problem. Next, states' legal and moral responsibilities will be juxtaposed highlighting the need to reform the components of international law that relate to the definition and rights of refugees.

The Relationship Between Human Rights and Intergenerational Duties

Natural Rights and Human Rights

The notion of rights first entered society independent of human-created laws. These *natural rights* were derived from the moral standards that govern the rational nature of human beings.¹ Hence, natural rights stem from the fundamental interests that all rational humans have, such as the interest in preserving one's life or the conditions necessary to maintain it. For natural law theorists such as Thomas Aquinas, and more contemporary rights theorists such as Joseph Raz, rights and interests generate duties to not violate said rights.² For example, the right to life begets

¹ Thomas Aquinas, *On Law, Morality and Politics*, 18-21.

² Joseph Raz, "The Nature of Rights," in *The Morality of Freedom*, 165-192.

a duty to not take away someone's life, to prevent others from taking away someone's life, and to assist others in securing their life – the latter being most relevant to a discussion of climate-induced migration. Ultimately, by virtue of them being derived from inalienable human interests, natural rights and the duties they bestow are the most fundamental of rights and duties.

It is thus not surprising that natural rights were institutionalized by international law. The non-binding Universal Declaration of Human Rights enshrined everyone's right to life, liberty and security of the person, while the Protocols to the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights rendered it binding. Such rights include, but are not limited to: the right to life and that which ensures its preservation, including the right to clean drinking-water and the right to adequate food, the former being implicitly recognized by international law while the latter being explicitly recognized in the International Covenant on Economic, Social and Cultural Rights;³ the right to an adequate living standard;⁴ the right to adequate housing;⁵ and the right to a nationality.⁶ **Human Rights and Intergenerational Duties**

However, just because current generations have inalienable human rights does not necessarily mean that they have a duty to create the conditions – hereafter referred to as '*E*' – necessary for upholding future generations' most fundamental of human rights. This idea, that living generations may have no duties towards future generations, is an extension of person-affecting principle, which posits that an act can be wrong only if it makes things worse off, or harms, some existing or future person; because different individuals would exist in the distant future if different actions were taken in the present, i.e., if *E* was versus was not adopted, not adopting *E* cannot be said to be an injustice, according to the person-affecting principle.

But surely this cannot be plausible. Moral intuition insists that a world where *E* was not adopted – a world without the conditions necessary for upholding future generations' most fundamental rights – is worse than a world where *E* was adopted, despite what the person-affecting principle may lead us to believe. How, then, to prevent voiding current generations of the duties they have towards future ones and overcome what Derek Parfit termed the non-identity problem?⁷

³ International Covenant on Economic, Social and Cultural Rights, art 11.

⁴ *Ibid*, art 11.2(b).

⁵ *Ibid*, art 11.1.

⁶ Universal Declaration of Human Rights, art 15.

⁷ Derek Parfit, "The Non-Identity Problem," in *Reasons and Persons*, 351-80.

The solution: instead of thinking of duties towards future generations as ordinary duties, which are inherently different given that the former are not duties towards particular persons as the latter, we must imagine ourselves in an “original position” under a “veil of ignorance” wherein we are denied information about what race, class, gender or generation we are to be born into so that we, mutually disinterested parties, can choose the just principles that are to govern human civilization through each stage of its advancement.⁸ In other words, not knowing what generation we are to belong, we must ask ourselves how much we would be willing to save for the succeeding generation assuming that all other generations are to save at the same rate, a form of symmetry and reciprocity that prevents weighing nearer generations more heavily than farther ones.⁹ The just principles that will necessarily be chosen, reasons Rawls, are those that require each generation to do “its fair share” in achieving conditions necessary to uphold and further just institutions, such institutions being necessary to preserve a minimal level of fundamental human rights.¹⁰ More specifically, intergenerational justice demands that generations adopt *E*.

The Undermined Duty

However, tragically, *E* has and is not being adopted. The consequences of climate change make this clear. Rising global temperatures is increasing the prevalence of “natural” disasters such as hurricanes, tropical storms, forest fires, floods, droughts and heatwaves, unpredictable precipitation patterns and, most importantly, sea level rise. All of these have and will continue to undermine people’s human rights at an increasingly prevalent rate.

The Middle East and Northern Africa region (MENA), for example, will warm significantly more than the rest of the planet. By 2050, MENA summer temperatures are expected to stay above 30°C at night and hover around 46°C during the day, and by the end of the century, midday summer temperatures are expected to exceed 50°C.¹¹ Such extreme heat, coupled with prolonged heatwaves, excruciatingly long droughts and windblown desert dust will undermine people’s right to food, water, and an adequate standard of living while causing many to die prematurely given the clear link between high temperatures and cardiovascular mortality.¹²

⁸ John Rawls, *A Theory of Justice*, 287.

⁹ *Ibid*, 289-94.

¹⁰ *Ibid*, 298.

¹¹ J. Lelieveld, et al., “Strongly Increasing Heat Extremes in the Middle East and North Africa (MENA) in the 21st Century,” *Climatic Change*: 245-260.

¹² M. Lubczyńska, et al., “Heart-Related Cardiovascular Mortality Risk in Cyprus: A Case-Crossover Study Using a Distributed Lag Non-Linear Model,” *Environmental Health*: 14-39.

In other parts of the world, rising sea levels threaten to contaminate people's drinking water and submerge their lands rendering subsistence increasingly difficult, if not impossible. Such is already happening in Bangladesh, the first large, densely populated, low-lying country beginning to feel the brunt of Mother Nature's wrath. Bangladeshis have lived through deadly hurricanes and have seen routine flooding leave behind salt deposits that render formerly fertile land barren.¹³ In a country with nearly a quarter of its land mass less than seven feet above sea level, even conservative estimates threaten to radically transform Bangladesh's borders. If sea levels rise as scientists expect, by 2050 as many as 50 million Bangladeshis will have to find new homes.¹⁴

For those living in low-lying island states such as the Maldives or the Marshall Islands, rising sea levels threaten to completely submerge their territory. Not only would this make it impossible for low-lying island states to guarantee even the most basic rights to their citizens, but given that one of the core definitions of a state set out by the Montevideo Convention is a defined territory,¹⁵ climate change may render certain states essentially extinct thereby casting the citizens of these former states into the realm of absolute statelessness.

Since climate change evidently and undoubtedly has the potential to undermine people's most fundamental human rights in such a way that humanity has yet to experience, *E* is defined as what mitigates climate change, i.e., ceasing to emit GHG by transitioning away from fossil fuels to non-pollutant renewable energy. Accordingly, doing so is the duty of current and future generations. But, given that the earth has already warmed by 1°C above pre-industrial levels and will likely reach 1.5°C within the next 20 years, according to the UN Intergovernmental Panel on Climate Change, and given that sea levels take a long time to respond to the warming of the earth's surface, the failure to adopt *E* has rendered the undermining of future generations' fundamental human rights inevitable.¹⁶

Determining Culpability

Because rights bestow duties onto others, and because the actions of humanity's past – and the inactions of our present – relatively guarantee our collective failure to uphold our duty and

¹³ Gardiner Harris, "Borrowed Time on Disappearing Land," *The New York Times*, 28 March 2014, <https://www.nytimes.com/2014/03/29/world/asia/facing-rising-seas-bangladesh-confronts-the-consequences-of-climate-change.html>.

¹⁴ *Ibid.*

¹⁵ Montevideo Convention on the Rights and Duties of States, art 1(b).

¹⁶ M.R. Allen et al., "Framing and Context," in *Global Warming of 1.5°C*, 51-52.

adopt *E*, reparations are owed. In determining who or what owes reparations to those whose fundamental human rights are undermined by our failure to adopt *E*, many argue that since autonomous agency is required for moral culpability, and since only individuals have autonomous agency, only they can be culpable for moral transgressions. However, no individual contributed to climate change on their own; on the contrary, it was the aggregative behavior of individuals, whether it be by controlling or not controlling the states and corporations that have done the polluting, that has led to climate change. This notion of collective responsibility holds entire segments of previous generations that emitted GHG responsible for not adopting *E* and undermining the fundamental human rights of subsequent generations. This, however, begs an important question: can contemporary generations be held responsible for the unjust actions of previous generations if the latter are deceased and had no way of knowing that their actions were an injustice in the first place?

In short, yes. Even though previous generations of the 19th century could not have known the consequences of industrial pollution, the decision to emit GHG bestowed an initial benefit onto them which has yielded a multiplicity of benefits currently enjoyed by the citizens and residents of the state that governs the territory where the initial benefit occurred. The benefits referred to are the tremendous increases in wealth and living standards that polluting industrialization brought about. Those residing in Canada today, for example, would not be benefiting from such relatively high living standards if Canada's previous inhabitants did not make the collective choice to undergo polluting industrialization, and if current residents did not take so long to begin the transition to non-polluting, renewable energy. Essentially, because Canada's current citizens and residents have inherited the benefits of the injustice committed by those who came before them, they have also inherited the responsibility to repair the harm caused by this injustice. Further, because only collective action can repair the harm committed by industrial-level pollution, the burden of reparations falls onto the states in which the initial benefit occurred. These states will hereafter be referred to as "reparation states."

Degrees of Culpability

A reparation state's degree of culpability – from which stems the amount of reparations owed – is not a product of how much that state has benefited from emitting GHG. Indeed, while not all states that experienced the initial benefit have remained beneficiaries over time, this does not make such states any less culpable than those that have maximized subsequent benefits. Saying

so would be implying that poor decision-making, insofar as it reduces the benefits which stem from the initial injustice, voids people of culpability and the duty of reparations; in other words, just because someone who stole another person's car lost the keys and no longer enjoys the benefits which stem from the initial injustice does not mean that the thief is any less culpable for the crime.

Likewise, a state is not solely considered a reparation state because it experienced benefits, but because these benefits imposed costs onto others. This notion, which bears resemblance to Peter Singer's 'polluter pays principle',¹⁷ holds that the extent of reparations that a state owes is dependent on how much that state contributed to climate change, presumably measured in tons of GHG emitted per capita over time. To frame it from a perspective of rights, a state's degree of culpability is determined by the extent that it undermined future generations' peremptory human rights, or failed to adopt *E*.

Culpability in Practice

Determining which states are the most culpable is not the subject of this paper, nor is determining the yardstick for measuring culpability. What is relevant, however, is that reparation states include, but are not limited to: the United States, the United Kingdom, Germany, Russia, China, India, and Canada. These states, among others, are responsible for undermining the most fundamental human rights of future – and current – generations. Among the rights these states have and continue to undermine by their inaction include future and current generations' right to clean drinking-water, right to adequate food, housing, and an adequate living standard, the right to nationality, and ultimately the right to life, all of which are rooted in international law. The states that have ratified the relevant international institution which render these human rights binding and enforceable have egregiously violated the institutions of international law that they have voluntarily bound themselves to and are thus liable to be brought before the International Court of Justice.

With this said, whether a state has ratified the relevant international institutions is morally irrelevant. All reparation states necessarily have a duty of reparations, defined as ensuring that the human rights which are set to be undermined by human-induced climate change – which would not have been undermined were it not for the historical injustice – are upheld. In theory, this entails essentially transferring some of the material benefits of pollution onto the peoples experiencing

¹⁷ Peter Singer, "One Atmosphere," in *Climate Ethics: Essential Readings*, ed. Stephen M. Gardiner, Simon Caney, Dale Jamieson and Henry Shue (Oxford: Oxford University Press, 2000), 667-688.

the costs of humanity's past and present actions and inactions respectively; in practice, it means helping people adversely affected adapt to a changing environment by helping states internally resettle their populations when need be and, when necessary, externally resettling and naturalizing them in reparations states.

Moving Forward: Repairing the Wrong

Repairing the Wrong in Theory

It goes without saying that all states – reparation states especially – have a duty to mitigate the failure to adopt *E* by transitioning to non-pollutant renewable energy. Reparation states have a further duty to take particular measures to help the persons whose fundamental human rights will be undermined. Regarding these people, there will be two types: those that are able to remain where they are and those that are forced to migrate. The former live in countries and cities that remain livable, but where life is more difficult than it previously was. In this case, culpable states have a duty to pay financial compensation to these states and municipalities helping to implement adaptation strategies that will reduce climate change's harmful impact. Regarding the latter peoples, the people who have no choice but to migrate,¹⁸ there are two further sub-types: those that can simply migrate to another part of their country, from a low-lying part of Bangladesh to a higher-elevated part of the country, for example, and those that are forced to leave their country. In both cases, reparation states have a duty to help resettle the migrants, whether by providing financial or logistical support to countries attempting to internally resettle their population, or by helping externally resettle them in reparation states. The former of these cases poses no legal challenge, but the latter does.

This is because migrants have no right to enter, reside, and remain in a given country. Moreover, even if granted these rights, such migrants will nonetheless lack the political rights that characterize full nationals meaning they will come to embody a form of 'citizen light' or 'denizen', an inherently inferior position to that which they might have occupied if it had not been for the injustice of reparation states. Given this, and given that the migrant will not be able to reside in the place of their former home for an indefinite period, fulfilling the duty of reparations entails naturalizing the foreigner in the name of equality.

¹⁸ "No choice but to migrate" is not defined so narrowly as to mean a situation where one's decision not to migrate would mean death; rather, "no choice but to migrate" is a situation where one's human rights are undermined to the point that climate change meaningfully transforms one's ability to lead the life they used to.

Such a process of naturalization should not be dependent on fulfilling certain tests, such as a language competency tests; given the unique circumstances under which the migration occurred – it being a consequence of the injustice committed by reparation states – reparation states should seek to naturalize the foreigner almost immediately. Granted, while it might be reasonable to ask the foreigner to assimilate into his new society’s public sphere by learning its spoken languages, this should not be a pre-requisite for naturalization as learning a new language in adulthood may take years rendering the foreigner a ‘denizen’ for far too long. Ultimately, in the case of externally resettling migrants, culpable states are at the very least bound by duty to settle and naturalize migrants in their own territory granting them equal rights as nationals.

Repairing the Wrong Under Contemporary International Law

Per the Convention Relating to the Status of Refugees (CRSR), the seminal institution of international law that pertains to refugees, one can only claim refugee status if they are persons that:

owing to the well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.¹⁹

While some regional human right instruments have widened this definition,²⁰ the working definition of refugee remains a political and individualistic one. The consequence is that persons forced to migrate for climate-related reasons are not considered refugees, for they are not fleeing for fear of being persecuted but rather for their health and safety. The implications of this are significant, for states are under no obligation to admit a migrant but are under one to process the claim of a refugee. So, to ensure that reparation states’ duty to help resettle those forced to migrate for climate-related reasons is underpinned by similar fiduciary responsibilities, the CRSR must be reformed to widen the definition of refugee in such a way that legally qualifies persons forced to migrate for climate-related reasons as such.

¹⁹ Convention Relating to the Status of Refugees, art 1(a)(2).

²⁰ Cartagena Declaration on Refugees, art 3 para 3 (*emphasis mine*); Convention Governing the Specific Aspects of Refugee Problems in Africa, art 1(2); the Cartagena Declaration was seen by many as building upon the definition put forth in the “OAU Convention”, the Organization of African Unity Convention.

Widening the definition of refugee to encompass not only political and individual dimensions but also environmental and collective ones would achieve this end. Such a definition was put forward in 1984 in the Cartagena Declaration on Refugees, where refugees are defined as those that “have fled their country because their lives, safety or freedom have been threaten by generalized violence, foreign aggression, internal conflicts, *massive violation of human rights or other circumstances which have seriously disturbed public order*”.²¹ This definition implicitly recognizes the environmental and collective dimension of being a refugee allowing for entire regions of persons to be legally considered as such. Since successfully undertaking the duty of reparations becomes more likely if international law were to be reformed in this way, reparations states have a corollary duty to reform international law in this way and to bind themselves to it.

However, even once the definition of refugee is enlarged to encompass what would otherwise be considered climate migrants, unjust inequality between recently resettled climate refugees and nationals will persist. For example, according to the CRSR, “a refugee shall enjoy [...] the same treatment as nationals” regarding access to national courts, the right to association, the right to public education, the right to wage-earning employment and the right to social security;²² but, regarding the right to housing, for example, refugees are accorded “treatment as favorable as possible and, in any event, *not less favourable than that accorded to aliens generally in the same circumstances*”.²³ *De facto*, refugees have even less rights relative to nationals than as is described above.

Moreover, even though the CRSR dictates that states that have admitted a refugee shall “as far as possible facilitate the assimilation and naturalization of refugees”,²⁴ their naturalization is not inevitable. Since naturalization is what ensures that climate refugees have the same rights as nationals, which is what the duty of reparations mandates, the CRSR must be amended further to place states under a greater legal obligation than already exists to naturalize climate refugees. This, however, requires legally distinguishing between political and environmental refugees, which essentially creates a hierarchy of refugees which, while appearing objectionable, is justified given the circumstances.

Conclusion

²¹ Cartagena Declaration on Refugees, art 3, para 3 (*emphasis mine*).

²² *Supra* note 17, art 15-17; 22; 24(1)(b).

²³ *Ibid*, art 21 (*emphasis mine*).

²⁴ *Supra* note 17, art 34.

Despite what the person-affecting principle may lead us to believe, primordial principles of justice – principles of intergenerational justice more specifically – demand that living generations do their fair share in achieving the conditions necessary for preserving a minimal level of fundamental human rights. In short, justice requires generations to adopt *E*; but, *E* has not been adopted. The actions of previous generations – and the inactions of current ones – have undermined the protection of future generations’ most fundamental rights. Reparations are thus in order, and it is certain segments of contemporary generations – granted, those who are the relatively least responsible for human-induced climate change – that are duty-bound to see to them. Indeed, because certain segments of contemporary generations have inherited the benefits of their predecessors’ injustice, which has and will continue to impose tremendous costs onto others, they have also inherited the duty of reparations. Since such reparations can only be carried out through collective action, it is the states that govern the territory where the initial injustice was committed that is responsible for carrying the reparations out. In other words, these states – so-called reparation states – have a duty to right the wrong.

Fulfilling this duty must take multiple forms. First, all states – reparation states especially – have a duty to transition to non-pollutant renewable energy. The responsibilities of reparation states go further, however. They must help people whose fundamental human rights are set to be undermined by climate change adapt to a changing environment by providing states with financial compensation to help internally resettle them and implement adaptation strategies; and, when peoples are forced to leave their countries entirely, must externally resettle and naturalize them in their reparation states.

Regarding the latter situation, once resettled, culpable states must ensure that these persons do not embody a form of ‘citizen light’ or ‘denizen’, which they would if they were to be considered as foreigners for a significant duration of time; instead, culpable states must grant their new arrivals with the rights of nationals by naturalizing them. But, because international law institutionalizes legal responsibilities that are much less onerous than this moral duty of reparations, and because culpable states are significantly less likely to fulfill their duty of reparations if they are not legally bound to do so, the CRSR should be reformed in such a way that both enlarges the definition of refugee to include those forced to migrate for climate-related reasons and places states under a duty to naturalize said refugees. This means drawing on the 1984 Cartagena Declaration on Refugees, which can add environmental and collective dimensions to

the political and individualistic and definition put forth in the CRSR. Finally, because ratifying this would-be newly-reformed CRSR makes fulfilling the duty of reparations more likely, culpable states have a duty to do just that. However, rather unfortunately, in our era of *realpolitik* where states act only in accordance with their national interests, culpable states fulfilling their duties is likely to remain a dream that those steadfast in the pursuit of justice hope, one day, becomes a reality.

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