The Distribution of Rights and Responsibilities under International Climate Change Law: An Examination of the Equity Approach advanced by African States

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Thesis Presented for the Degree of Doctor of Philosophy

in the Department of Public Law

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DECLARATION

I, Elkanah O. Babatunde, do hereby declare that this PhD thesis titled 'The Distribution of Rights and Responsibilities under International Climate Change Law: An Examination of the Equity Approach advanced by African States' is my own independent work, save for that which is properly acknowledged.

It is being submitted for the degree of Doctor of Philosophy at the University of Cape Town. It has not been submitted before for any degree or examination in any other University.

Signed:
Elkanah O. Babatunde

Date: 25 November 2021

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ABSTRACT

Mapping global climate change negotiations from 1992 to 2015, this thesis set out to examine how African states have sought to interpret the principle of equity within international climate change negotiations and the extent to which climate change treaties, from the United Nations Framework Convention on Climate Change (UNFCCC) to the Paris Agreement, have reflected these notions of equity. The thesis examined the inequality in the volume of country emissions, and the financial and technological ability of different state parties to undertake climate change action and the implication of these inequalities on the distribution of rights and responsibilities within climate change treaties.

This thesis has shown that in various negotiations pertaining to the development of climate change treaties including the Paris Agreement, African states have consistently advanced arguments about equity that reflect principles of distributive and restorative justice. In advancing this interpretation of equity, African states have argued that they should be excluded from onerous legal obligations under these treaties so that climate change action does not impede the realisation of their developmental objectives. For them to bear such responsibilities, they have been arguing, their fulfilment can only be guaranteed if there is adequate financial and technological support from developed states.

This thesis shows that there is credibility in the arguments. First, science has shown that developed states are responsible for the majority of the global emissions of greenhouse gas. It, therefore, follows that they should bear primary responsibility for addressing the consequences of such emissions. Secondly, developed states are better equipped with the finances and technology necessary for tackling climate change. To place the financial and technological responsibility for climate change on African states would be to place on them an unfair burden, which, in any case, is impossible to be borne by them; *lex non cogit ad impossibilia*.

The thesis argued, however, that the differentiation of rights and responsibilities with respect to climate change cannot apply indefinitely. There must be a ‘cut-off’ point. Developed states cannot be held perpetually liable for global emissions. As developed states’ emissions decline and that of African states and other developing states increase, the distribution of rights and responsibilities must reflect this change. The current differentiation should only apply as a transitional window for developed states to reduce their emissions and for African states to pursue development and increase their capacity to respond to climate change and its challenges.

In this transitional period, the necessary climate technologies must be viewed as global public goods from which no state should be excluded.

ABBREVIATIONS

AGN	African Group of Negotiators
AMCEN	African Ministerial Conference on Environment
AOSIS	Alliance of Small Island States
AWG-KP	Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol
AWG-LCA	Ad Hoc Working Group on Long-Term Cooperative Action under the Convention
Bamako Declaration	Bamako Declaration on Consolidating the African Common Position on Climate Change and Preparation for the United Nations Conference Sustainable Development
BASIC countries	Brazil, South Africa, India and China
Brundtland Commission	World Commission on Environment and Development
Brundtland Report	Report of the World Commission on Environment and Development: Our Common Future
CAHOSCC	Conference of African Heads of State and Government on Climate Change
CDM	Clean Development Mechanism
COP	Conference of the Parties
Durban Working Group	Ad Hoc Working Group on the Durban Platform for Enhanced Action
EU	European Union
G77	Group of 77 and China
GDP	Gross Domestic Product
GHG	Greenhouse gases
ICJ	International Court of Justice
IPCC	Intergovernmental Panel on Climate Change

Kyoto Protocol	Kyoto Protocol to the United Nations Framework Convention on Climate Change
Nairobi Declaration	Nairobi Declaration on the African Process for Combating Climate Change
NDC	Nationally Determined Contribution
OPEC	Organization of Petroleum Exporting Countries
Paris Agreement	Paris Agreement to the United Nations Framework Convention on Climate Change
PCIJ	Permanent Court of International Justice
Rio Summit	United Nations Conference on the Environment and Development
Stockholm Conference	United Nations Conference on the Human Environment
Stockholm Declaration	Stockholm Declaration on the Human Environment
UN	United Nations
UNFCCC	United Nations Framework Convention on Climate Change
US	United States of America
USD	United States Dollar
Vienna Convention	Vienna Convention on the Law of Treaties

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CHAPTER ONE

INTRODUCTION

1. INTRODUCTION

Climate change has been characterised as 'perhaps the most profound challenge ever'.[1] Scientists have shown that climate change will have huge consequences on human social, political and economic systems.[2] With the ever-increasing volume of greenhouse gases in the air,[3] climate change has become an undeniable problem for the world.

In order to avoid or at least cushion the potential consequences of climate change, mitigation efforts have emphasised the need to reduce the volume of global emissions of greenhouse gases. In other words, countries must begin to cut down on the extent of emissions within their economies. As will be shown in this thesis, developing states in particular have become concerned about the implications of these potential restrictions on their ability to pursue industrial growth and fill their huge development deficits.[4] They argue that given their need for economic growth, industrialization is a more pressing need when compared with climate change action. This concern creates a tension between the need for climate change action on the one hand and the need for development on the other hand.

In order to resolve this friction between developed states and their developing counterparts, the United Nations Framework Convention on Climate Change (UNFCCC)[5] establishes the application of equity as a guiding principle for the protection of the climate system. Like most legal principles, the meaning of equity differs from one context to another, and it has been the subject of disagreements between scholars and legal practitioners alike.

There is perhaps nowhere else in international law practice where the contention surrounding the meaning and implication of equity is as rife, yet defining, as the international law on climate change. This contention is most evident within the developed and developing states' divide in

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[1] John Dryzek, Richard B Norgaard & David Schlosberg 'Climate change and society: approaches and responses' in John Dryzek, Richard B Norgaard & David Schlosberg (eds) *The Oxford Handbook of Climate Change and Society* (2011) 1.
[2] Ibid.
[3] Jonathan Cowie *Climate Change: Biological and Human Aspects* (2007) 4.
[4] See sections 3 and 4 of chapter three.
[5] Adopted and Opened for Signature, Ratification and Accession by the General Assembly, A/RES/48/189, 20 January 1994.

global climate change negotiations. It has also become apparent in recent years that even within developing states, there are varying interest and priorities which further divide positions on the meaning and implication of equity within climate change treaties.

This thesis analyses the application of equity within the international treaties on climate change. Specifically, it examines the conception of equity adopted by African states and the extent to which these conceptions are reflected in climate change treaties. This question is explored within two major contexts: first, the contention between the need for climate change action and the need for development, and secondly, the imbalance in the contribution to global emissions and the use of equity as a tool for navigating these issues. This thesis argues that the African submissions reflect notions of equity that are steeped in distributive and restorative justice principles.

2. THE CLIMATE CHANGE PROBLEM

The knowledge of the human environment has evolved over the years. This has helped to create knowledge and awareness about the state of the atmosphere and the changes that humans are capable of effecting on the atmosphere. This knowledge improved significantly at the turn of the nineteenth century when Joseph Fourier discovered that, despite a continued supply of heat to the earth, the temperature of the earth remained relatively stable.[6] He would soon discover that the climate on earth was determined by a balance between the heat emitted from the sun upon the earth's surface and the heat released from earth back into space.[7] This knowledge was further developed when he, alongside Claude Pouillet, showed that there were particular gases, known as greenhouse gases, in the atmosphere, and their presence leads to higher temperature on the earth.[8]

Greenhouse gases absorb heat radiation, which means that an increase in the volume of these gases would cause an atmosphere that makes light and energy transmission difficult.[9] The reduction in heat radiation to space would result in a rise in the Earth's temperature. The

[6] Spencer R Weart *The Discovery of Global Warming: New Histories of Science, Technology and Medicine* (2003) 2.
[7] Bert Bolin *A History of the Science and Politics of Climate Change: The Role of the Intergovernmental Panel on Climate Change* (2007) 3.
[8] Ibid.
[9] John T Houghton, Geoff J Jenkins & Jim Ephraums *Climate Change: The IPCC Scientific Assessment* (1990) xi.

greenhouse effect thus keeps the earth warmer than it would ordinarily be.[10] The Irish polymath, John Tyndall, found conclusively that carbon dioxide, a greenhouse gas, was present in the atmosphere and its energy was transferred into the air, thus warming up the air.[11]

Towards the end of the nineteenth century, a group of scientists led by Svante Arrhenius established that humans, through the burning of coal and other fossil fuels, would increase the atmospheric concentration of greenhouse gases to such an extent that this would lead to global warming.[12] Fifty years later, Charles Keeling showed that this increase was already happening with greenhouse gases like carbon dioxide, methane, nitrous oxide, fluorocarbons and a variety of approximately 30 other gases.[13] These gases contribute in different degrees to climate change.[14]

The industrial revolution brought about consequential variations in the earth's climate. Huge volumes of greenhouse gases were expelled from factories and various industrial activities into the atmosphere.[15] For example, scientists have recorded a 30 per cent rise in the accumulation of carbon dioxide in the atmosphere since preindustrial times.[16] The rise in the volume of greenhouse gases in the atmosphere has warmed the earth at a rate that has not been seen in more than 2000 years.[17] The increase in population and economic growth have also been major drivers of this increase in greenhouse gases and half of it has occurred between 1965 and the 2000s.[18]

Total human activity-related emission of greenhouse gases has been on a continual increase since 1970, with the highest emissions in human history occurring between 2000 and 2010.[19] Climate scientists are unanimous in holding that humans activities are impacting the earth's

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[10] Ibid.
[11] Cowie (n3 above) 4.
[12] Svante Arrhenius 'On the influence of carbonic acid in the air upon the temperature of the ground' (1896) 41 *Philosophical Magazine* 237.
[13] James R Fleming *Historical Perspectives on Climate Change* (1998) 127; Weart (n5 above) 8.
[14] Tim Flannery *The Weather Makers: How we are Changing the Climate and what it Means for Life on Earth* (2006) HarperCollins e-books.
[15] Joe Romm *Climate Change: What Everyone Needs to Know* (2016) 2.
[16] Cowie (n3 above) 6.
[17] Intergovernmental Panel on Climate Change (IPCC) 'Summary for Policymakers' in Valerie Masson-Delmotte, Panmao Zhai, Anna Pirani, et al (eds) *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (2021) 6; Intergovernmental Panel on Climate Change (IPCC) 'Summary for Policymakers' in Hans-Otto Pörtner, Debra Roberts, Elvira Poloczanska, et al (eds) *Climate Change 2022: Impacts, Adaptation and Vulnerability* (2022) 11-13
[18] Romm (n15 above) 2; Thomas R Karl & Kevin E Trenberth 'Modern Global Climate Change' (2003) 302 *Science* 1719, 1720.
[19] Intergovernmental Panel on Climate Change (2021) (n17 above) 6.

climate, and anthropogenic climate change has become an 'unequivocal and a settled fact.'[20] This assertion is based on several data and evidence collected by various experts and researchers in the field over the last 20 years.[21]

The US National Academy of Sciences has also reported that climate change has become one of the scientific conclusions that have been so 'thoroughly examined and tested, and supported by so many independent observations and results, that their likelihood of subsequently being found to be wrong is vanishingly small.'[22] It is estimated that unless there are conscious efforts to limit the rate of emissions, emission levels would natural increase as human population and economic activities increase.[23]

Since climate change is a universal problem, efforts to address this problem must be global. Different states must come together to formulate international treaties and other international instruments to regulate and proffer solutions to climate change. This thesis investigates these climate change treaties and their attempt to deal with climate change while taking the historical and developmental challenges into consideration.

3. PROBLEM STATEMENT

As noted above, climate change is a global problem. Unlike other environmental problems whose consequences are primarily regional, climate change affects and impacts every state in the world irrespective of the origins of the greenhouse gas emissions. In other words, although emissions may arise in state A, the effect of such emissions on the global climate change would be felt in other states which may not have immediate geographic proximity with state A. For example, the existence of most small island states is currently under threat due to climate change-induced rise in sea levels despite the fact that these island states have very little greenhouse gas emissions.[24]

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[20] Lonnie G Thompson 'Climate change: The evidence and our options' (2010) 33 *The Behavior Analyst* 154; Romm (n15 above) 2.
[21] Mario Malina, James McCarthy & Diana Wall et al *What We Know: The Reality, Risks and Response to Climate Change* (2014) 3.
[22] National Research Council *Advancing the Science of Climate Change* (2010) 21-22.
[23] Intergovernmental Panel on Climate Change (n17 above) 8.
[24] Michael Oppenheimer, Bruce Glavovic & Tuhin Ghosh 'Sea level rise and implications for low-lying islands, coasts and communities' in Hans-Otto Portner, Debra C Roberts, Valerie Masson-Delmotte et al (eds.) *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* (2019) 328.

In 2015, the Climate Change Vulnerability Index[25] showed that seven of the 10 most vulnerable countries to climate change are within the African region.[26] In 2017, the Index revealed that four of the five worst performing countries with respect to vulnerability to climate change were in Africa and the region as a whole was the most vulnerable region to climate change.[27] Worse still, Africa now has the highest mortality rate from droughts than any other region due to the increase in weather-related disasters, like floods and droughts.[28] The Intergovernmental Panel on Climate Change (IPCC), the global authority on climate science, envisages that Africa would warm up 150 per cent faster than the rest of the world.[29] It has also been reported that agriculture fed by rain could drop as much as 50 per cent in some African states by 2020 and an 8 per cent increase in arid or semi-arid lands within the same period.[30] These statistics are proof that climate change poses a genuine problem for the African continent.

Even more significant for this study is the fact that states do not contribute equally to the global volume of emissions; the emissions of certain states are significantly more than that of some others.[31] Developed states are generally more involved in consumption patterns and industrial activities, which contribute vastly to climate change.[32] These states are accountable for over 70 per cent of global emissions while developing states are liable for only 25 per cent despite having 80 per cent of the world's population.[33] Until 2006, the United States was solely

[25] The Climate Change Vulnerability Index is a report compiled by Relief Web, a digital service of the UN Office for the Coordination of Humanitarian Affairs, showing reliable and timely humanitarian information on global crises and disasters.

[26] Maplecroft 'Climate Change Vulnerability Index 2015' available at https://maplecroft.com/portfolio/new-analysis/2014/10/29/climate-change-and-lac (accessed 14 December 2017).

[27] Verisk Maplecroft *Climate Change Vulnerability Index 2017* available at https://reliefweb.int/sites/reliefweb.int/files/resources/verisk%20index.pdf (accessed 24 October 2021).

[28] 350Africa.org '8 ways climate change is already affecting Africa' 12 December 2014 available at 350africa.org/8-ways-climate-change-is-already-affecting-africa/ (accessed 13 December 2017).

[29] Jens Christen & Bruce Hewitson 'Regional climate projections' in Susan Solomon, Dahe Qin, Martin Manning et al *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (2007) 847, 850. This is already the case with South Africa, which has, in the last 50 years, witnessed an annual temperature increase 1.5 times more than the global average of 0.65°C. Gina Ziervogel 'Climate change in South Africa- how are we tackling this?' 4 November 2015 available at www.acdi.uct.ac.za/blog/climate-change-south-africa---how-are-we-tackling (accessed 14 December 2017).

[30] Claudia ten Have 'Africa and climate change' *Our World* 6 July 2008 available at https://ouworld.unu.edu/en/africa-and-climate-change (accessed 14 December 2017).

[31] Karin Mickelson 'Leading toward a level playing field, repaying ecological debt, or making environmental space: Three stories about international environmental cooperation' (2005) 43 *Osgood Hall Law Journal* 150-154.

[32] Ibid.

[33] Jos G Olivier, Greet Janssens-Maenhout & Marilena Muntean & et al *Trends in Global CO2 Emissions: 2016 Report* (2006) 34.

responsible for about 25 per cent of global emissions, while 136 developing states put together were responsible for 24 per cent of these emissions.[34]

The African region faces serious risk from climate change but is only responsible for about 2 to 3 per cent of global emissions of greenhouse gases.[35] It takes the average American two days to emit the volume of gas that the average sub-Saharan African emits in one year.[36] In other words, an average American emits 160 times more greenhouse gas than an average African does. There is thus a huge gap between those who are answerable for most of the greenhouse emissions and those who are the most vulnerable to the consequences of climate change.

The situation is further exacerbated by the reality that states are at various levels in terms of socio-economic development and their ability to undertake climate change action. Developed states have better financial and technological competence and are better equipped to undertake climate change adaptation and mitigation efforts. Developing states, on the other hand, continue to struggle with various socio-economic challenges ranging from unemployment to food scarcity and general underdevelopment. For the latter group of states, climate change action constitutes an additional burden to existing developmental challenges. They lack the needed financial and technological resources for climate change action.

Given the difference in the emission levels of various states and their potential to respond to climate change, it is important to ensure equity and fairness in the distribution of obligations within climate change treaties. This distribution must take into cognisance the different needs and capabilities of each state party. Most importantly, these climate change treaties must ensure that the levels of responsibilities placed upon developing states do not hinder their ability to achieve their developmental objectives.

[34] J Timmons Roberts & Bradley C Parks 'Ecologically unequal exchange, ecological debt and climate justice: The history and implications of three related ideas for a new social movement' (2009) 50(3-4) *International Journal of Comparative Sociology* 393.

[35] Charles Ray 'The impact of climate change on Africa's economies' (2021) *Africa Program* available at https://www.fpri.org/article/2021/10/the-impact-of-climate-change-on-africas-economies/ (accessed 31 March 2022); United Nations Environment Programme 'Responding to climate change' https://www.unep.org/regions/africa/regional-initiatives/responding-climate-change (accessed 9 November 2019).

[36] Ibid.

4. RESEARCH QUESTIONS

This thesis examines the conception of equity as a tool for resolving, on the one hand, the inequality in the contribution of different states to global emissions, and on the other hand, the seeming clash between the need for development and the need for climate change action. This thesis seeks to understand the conception of equity adopted by African states in the negotiations of climate change treaties, how these conceptions seek to resolve these conflicts and the extent to which these treaties reflect these conceptions of equity. Specifically, this research asks the following questions:

i. What conceptions of equity are reflected in the submission of African states within various climate change negotiations?

ii. How have those conceptions addressed the contentions between the need for development and the need for climate change action?

iii. To what extent does the Paris Agreement and previous climate change agreements codify and reflect the conceptions of equity advocated by African states?

iv. To what extent does the distribution of rights and responsibilities under the final text of the Paris Agreement address the contention between climate change action and the need for development in Africa?

5. METHODOLOGY

The research for this thesis encompasses a detailed analysis of climate change treaties, *travaux preparatoires* and other relevant literature. The study largely relies on primary sources of law and where necessary secondary sources, such as journal articles, books and book chapters, working papers and reports of relevant think thanks and organizations within climate change and public international law. For empirical data on climate change, this thesis relies on the findings of the IPCC. As with most claims to knowledge, the findings of the IPCC have been criticized.[37] Likewise, responses to these criticisms have been given.[38] This research does not

[37] Bjørn Lomborg, *The Skeptical Environmentalist: Measuring the Real State of the World* (2001) 451-452.
[38] Matthew A Cole 'Environmental optimists, environmental pessimists and the real state of the world – An article examining *The Skeptical Environmentalist: Measuring the Real State of the World* by Bjørn Lomborg' (2003) 113(488) *The Economic Journal* 373–6.

engage with these debates, since the issues in contention do not affect the main questions and findings of this research.

To understand the history and adoption of equity and its various conceptions within global climate change negotiations, this thesis relies on documents such as the Common Position on the African Environment and Development,[39] the Nairobi Declaration on the African Process for Combating Climate Change,[40] Africa's Climate Roadmap: From Johannesburg through Africa to Copenhagen,[41] the African Common Position on Climate Change,[42] the reports of the Conferences of the Parties,[43] the submissions of the African Group of Negotiators at the various treaty negotiations,[44] and the submissions of individual African states and of the G77.[45] This

[39] African Common Position on Environment and Development, ECA/Env.UNCED/AfricaCom/1 October 1991 (hereinafter African Common Position on Environment and Development 1991) available at https://repository.uneca.org/bitstream/handle/10855/21853/Bib-69643.pdf?sequence=1&isAllowed=y (accessed 15 July 2020).

[40] Nairobi Declaration on the African Process for Combating Climate Change (hereinafter Nairobi Declaration) available at http://www.unep.org/roa/Amcen/Amcen_Events/3rd_ss/Docs/nairobi-Declaration-2009.pdf_ (accessed 30 November 2018).

[41] International Institute for Sustainable Development 'Africa's Climate Roadmap: From Johannesburg through Africa to Copenhagen' available at http://sdg.iisd.org/commentary/guest-articles/africas-climate-roadmap-from-johannesburg-through-africa-to-copenhagen/ (accessed 20 July, 2020).

[42] African Union Assembly of the Heads of State and Government, 12th ordinary session, 1-3 February 2009, Addis Ababa, Ethiopia, Assembly/AU Dec 236/XII Decision on the African Common Position on Climate Change Doc Assembly/AU/8 (XII) Add 6 available at https://au.int/sites/default/files/decisions/9559-assembly_en_1_3_february_2009_auc_twelfth_ordinary_session_decisions_declarations_message_congratulations_motion.pdf (accessed 5 March 2021).

[43] Report of the United Nations Conference on Environment and Development Rio de Janeiro, 2-14 June 1992 Vol. III: Statements made by Heads of State or Government at the Summit Segment of the Conference A/Conf.151/26/Rev.1 97 (hereinafter Report of the UNCED vol. III); Report of the Conference of the Parties on its fifteenth session, held in Copenhagen from 7 to 19 December 2009 Part One: Proceedings FCCC/CP/2009/11, 12-14; International Institute for Sustainable Development 'Copenhagen Highlights' 12(455) *Earth Negotiations Bulletin* 15 December 2009 available at https://enb.iisd.org/vol12/enb12455e.html (accessed 5 January 2021); Report of the Conference of the Parties on its seventeenth session, held in Durban from 28 November to 11 December 2011 Part One: Proceedings FCCC/CP/2011/9.

[44] Submission by Swaziland on behalf of the Africa Group on the Vision, Ambition and Principle under the ADP (hereinafter Submission by Swaziland on Vision, Ambition and Principle) available at https://unfccc.int/files/meetings/ad_hoc_working_groups/kp/application/pdf/adp_africangroup_050912.pdf (accessed 17 September 2018); Submission by Swaziland on behalf of the African Group under Work stream I of the ADP available at https://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_african_group_workstream_1_20131008.pdf (accessed 11 January 2019); Submission by Swaziland on behalf of the Africa Group in respect of Workstream I: 2015 Agreement under the ADP para 7 (hereinafter Submission by Swaziland in respect of Workstream I available at https://unfccc.int/files/bodies/awg/application/pdf/adp_2_african_group_29042013.pdf (accessed 14 September 2018);

[45] Submission of the Like-minded Developing Countries on Climate Change (24 September 2013) https://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_lmdc_workstream_1_and_2_20130924.pdf (accessed 10 January 2021); Submission by South Africa Durban Platform for Enhanced Action (26 April 2013) available at https://unfccc.int/files/bodies/application/pdf/adp_south_africa_workstream_1_20130427.pdf (accessed 17 September 2018); South Africa on Adaptation under the Ad Hoc Working Group on the Durban Platform for Enhanced Action 26 April 2013 (hereinafter South Africa on Adaptation under the Durban Platform) available at

study maps out the use of equity within these submissions and covers a twenty-five-year period from 1991 to 2015. The examination of these submissions helps to understand the conceptions of equity advocated for and how they address the contention between climate change action and the need for development.

In answering the questions posed in this thesis, I also undertake an analysis of the UNFCCC, the Kyoto Protocol[46] and the Paris Agreement.[47] This analysis gives insight into the allocation of rights and responsibilities under the various climate change treaties and the conception of equity revealed within these treaties. Particular focus is placed on provisions relating to climate finance, transfer of technology, emission reduction targets, and the vexed question of loss and damage within climate change treaties. The examination of these treaties also serves as an opportunity to examine any variations between what may have been negotiated in the submissions and what parties eventually agreed to.

In order to situate the arguments by African states within the broader debates on equity, it is critical to examine the various theories and justification of equity, especially within the international legal system. To achieve this purpose, this work draws extensively from the work of legal and political scholars and practitioners. Particularly, this work relies extensively on the principle of equity as distributive justice as espoused by John Rawls. The thesis also draws from Immanuel Kant's theory of justice and inequality. Reference is further made to an extensive range of peer-reviewed literature dealing with subjects such as climate justice, equity, distributive justice, restorative justice and inter- and intra-generational equity. This research aims to be a further addition to this body of work in advancing our conceptual understanding of equity, as used within the global climate change framework.

The adoption of any international agreement or treaty is usually a culmination of several years of oral and written submissions. In addition to their written submissions, states and other parties to the negotiations are allowed to make oral arguments in support of their written submissions. Although these oral presentations are expected to be an elucidation of the written ones, parties have been known to vary their written positions during oral submissions. Also, because

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https://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_south_africa_workstream_1_and_2_adaptation_20130930.pdf (accessed on 17 September 20181).

[46] Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, 2303 United Nations Treaty Series, 162 (entered into force 16 February 2005).

[47] Paris Agreement to the United Nations Framework Convention on Climate Change, 12 December 2015, T.I.A.S. No. 16-1104 (entered into force 4 November 2016).

international agreements are a product of constant and continuous negotiations and compromises, a party may eventually become amenable to a position which departs to some extent, or significantly, from its initial written submissions. The final agreed text may, therefore, not be a full representation of some of the initial positions taken by some or all the parties involved.

It is, therefore, necessary to state that the African Group, like other regions and state parties involved in these negotiations, may have varied some of their written positions during oral presentations. However, the scope of this work is limited to written submissions. There are no publicly available recordings of these meetings. Interviews could not be conducted with the relevant representatives during this research. Notwithstanding, the absence of an opportunity to examine oral representations does not prejudice the conclusions of this thesis in any substantial way.

6. SIGNIFICANCE OF THE STUDY

The significance of this study can be seen in the scientific reports which reveal that the Earth has reached its limits of carbon emissions and is thus on track for global warming, extreme weather, and other effects of climate change. These climate impacts threaten the continued existence of both humans and other fauna and flora that make up the global ecosystem. Discussions relating to climate change and equity are, therefore, significant to the continued survival of human and plant life.

Climate change has become a defining topic, and it is necessary to understand the conceptions guiding the distribution of rights and responsibilities within climate change treaties and how these conceptions address the subject of climate justice and inequality. These conceptions determine how issues such as climate finance, loss and damage and technology transfer are resolved.

The conception of equity within the climate change regime also hold consequences for the African region and the options available to it in its pursuit of development. It will also define the boundaries of (international) legality in the exploitation of natural resources for developmental purposes. For example, if it becomes consistent with the application of equity that African states bear emission reduction responsibilities, it will imply that fossil fuels which

are widely in use for the generation of electricity within the region will have to be abandoned and new means sought.

At the conceptual level, this thesis is significant as a contribution to our comprehension of what African states mean when they call for equity as a bedrock of the climate change regime. Given the pivotal position upon which Africa stands on the climate change issue, it is important to investigate the manner and approach of the region to the concept of equity. As the region most impacted by the equitable issues that climate change raises, it is critical to understand the way it defines equity in climate change. Perhaps, such clarity may convince developed states negotiators, such as Todd Stern, that even with equity in, developed states do not have to stay out.[48] Such understanding would be immensely useful in the further growth of the international law and policy on climate change. It is thus for this reason that this research seeks to unravel the conception of equity by African states.

This research also serves as a contribution to the theoretical debates on equity. It seeks to outline the exact meaning and implications of equity within the climate change regime. How should the international climate change legal framework be structured for it to be considered fair and equitable by those who feel the injustice of climate change the most?

While considerable amounts of research have focused on related issues, such as climate justice, sustainable development, and differentiation, there is a dearth of literature on the conception of equity by African states within the international law on climate change. Existing research has often adopted a broad global South/developing states approach. This thesis is, therefore, significant as an addition to the literature by enhancing our knowledge of the conception of equity by African states within the climate change regime.

The research is also a contribution to the broader debate around the applicability of equity and justice within the international legal system. Ever since John Rawls first published his treatise dealing with distributive justice, *A Theory of Justice,* in 1971, there has been an increase in the volume of work dealing with equity and justice within the international legal system.[49] These debates have ranged from an outright rejection of the applicability of equity and justice within

[48] Todd Stern was the US' lead negotiator for the Paris Agreement. It was reported that he said that 'if equity's in, we're out'. United States Department of State, 'United Nations Climate Change Conference in Durban, South Africa, Special Briefing: Todd Stern, Special Envoy for Climate Change' (13 December 2011) available at www.state.gov/r/pa/prs/ps/2011/12/17699.htm (accessed 15 February 2020).
[49] John Rawls himself later wrote *The Law of Peoples* where he addressed the applicability of equity and justice within international relations.

the international legal system,[50] to those who insist on its applicability, although based on different grounds.[51] This thesis contributes to this debate as it seeks to flesh out the justifications for applying equity and justice within international law generally, and specifically within climate change treaties.

The Paris Agreement offers a unique opportunity for fleshing out the approach to equity adopted by African states within the international law on climate change. This is, primarily, because it is the first climate change treaty where the African Group had the chance to submit representations as a group comprised solely of African states. This is unlike earlier agreements such as the UNFCCC where submissions were jointly made with the G77 plus China group. This creates a new avenue of research for understanding the principle of equity within international climate change law. Whereas under the previous submissions made within the G77, it is undiscernible how much was truly the African position, this is not the case here as the African Group consists solely of African states. This research, therefore, contributes to efforts to understand the African position on equity within the climate change regime, and specifically within the Paris Agreement negotiations.

Lastly, this work seeks to provide knowledge which will prove useful to policy makers in the further development of laws and policies directed towards addressing climate change and development in Africa. The significance of this research lies in the fact that it would improve our understanding and provide tools to strengthen the legal framework for climate change adaptation and mitigation in Africa.

7. LITERATURE REVIEW

Before the 1980s, environmental law treaties did not distinguish between different groups of states.[52] Obligations and responsibilities were not differentiated based on the developmental status of state parties. This led to a situation where developing states refused to participate in these treaties which they considered as unfair and inequitable based on the levels of natural

[50] Michael Blake ‘Distributive justice, state coercion and autonomy’ (2001) 30(3) *Philosophy and Public Affairs* 257-296; Oisin Suttle ‘Equality in global commerce: Towards a political theory of international economic law’ (2015) 25(4) *European Journal of International Law* 1047; Samuel Freeman *Justice and the Social Contract: Essays on Rawlsian Political Philosophy* (2007); Andrea Sangiovanni ‘Global justice, reciprocity, and the state’ (2007) 35 *Philosophy & Public Affairs* 3.
[51] Charles Beitz *Political Theory and International Relations* (1999); Simon Caney *Justice Beyond Borders: A Global Political Theory* (2005); Thomas Pogge *Realizing Rawls* (1989); David Miller *On Nationality* (1995); Michael Walzer *Spheres of Justice: A Defence of Pluralism and Equality* (1983).
[52] Sumudu Atapattu *Emerging Principles of International Environmental Law* (2006) 384.

resource exploitation by developed states when compared with the other states.[53] States like India and China made it obvious during the negotiations of the Vienna Convention for the Protection of the Ozone Layer that they were only going to participate if they were given incentives to do so.[54] It became clear that if developing states were to be active participants in international environmental law, there was a need to provide them with some kind of incentives and this led to the establishment of the Ozone Fund.[55]

Although Gupta contends that the differences between developed and developing states in climate change negotiation had not begun to be 'systematically applied or made explicit' during the 1991-1996 period,[56] the differences became evident very early in the development of the international law on climate change. This is seen in the provision of the UNFCCC, which clearly differentiates between the sets of rights and responsibilities to be borne by developed states and those to be borne by their developing counterparts.

This distinction was based on the economic abilities and the contribution of each group of states to climate change. Developing states could not afford the cost of environmental protection and they generally believed that they should not bear this cost since developed states were responsible for an overwhelming proportion of environmental exploitation.[57] Maurice Strong, the Secretary General of the UN Conference on the Environment and Development, had noted that developing states had other priorities like housing, employment, education and medical care and these states would not prioritize climate change.[58]

Anesu Makina points out that the conflict between the global South and the North in climate change negotiations goes beyond a mere disagreement between the haves and the have-nots.[59] It is about political control, in addition to the South's economic development.[60] In other words, this conflict speaks both to economic poverty, and to the lack of global political power by the

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[53] Ibid.
[54] David Hunter, James Salzman & Durwood Zaelke *International Environmental Law and Policy* 2ed (2002) 550.
[55] Ibid.
[56] Joyeeta Gupta 'A history of international climate change policy' (2010) 1(5) *Wiley Interdisciplinary Reviews* 639. This was the period between the Framework Convention on Climate Change and the Kyoto Protocol.
[57] Ved P. Nanda & George (Rock) Pring *International Environmental Law and Policy for the 21st Century* 2ed (2013) 41.
[58] *Report of the UN Conference on the Human Environment*, UN Doc. A/CONF.48/14 (hereinafter Stockholm Report) 45.
[59] Anesu Makina 'Managing climate change: The Africa Group in multilateral environmental negotiations' (2013) 4(1) *Journal of International Organizations Studies* 38.
[60] Ibid.

South.[61] Similarly, Radoslav Dimitrov notes that for developing states within the BASIC group, freedom of national economic development, rather than international financial and technological support is the priority.[62] Developing states expressed fears that the climate change regime may pose a threat to their developmental pursuits and thus, while Northern states generally focused on environmental aspects, their Southern counterparts focused on the development issues during negotiations.[63]

In order to resolve the disagreement between both groups of states, the UNFCCC provided that equity and common but differentiated responsibilities shall be guiding principles of the treaty. The principle of equity recognizes the distinct situation of the less developed states and emphasises that the contribution to the cost of environmental initiatives would differ according to the abilities and responsibility for climate change. This leads to the creation of different sets of responsibilities for different states based primarily on their economic condition and their contribution to climate change.[64]

As Dimitrov points out, developing states, negotiating through the G77, generally agreed that the North should bear stringent binding obligations while the South enjoy voluntary action and substantial international financial and technical support.[65] The G77 also insisted that firm legal obligations for developed states were to be a pre-condition for action by developing states.[66] As scholars have revealed, developing states emphasised the principle of common but differentiated responsibilities and the historical responsibility of developed states.[67]

Thus, while developed states sought to establish that climate change responsibility be common, developing states insisted on differentiated responsibilities.[68] Developing states emphasised that since developed states were answerable for a significant portion of global emissions, they should assume the financial and technological costs for climate change.[69] Developing states

[61] Adil Najam 'Developing countries and global environmental governance: From contestation to participation to engagement' (2005) 5 *International Environmental Agreements* 303, 305.
[62] Radoslav S Dimitrov 'Inside UN climate change negotiations: The Copenhagen Conference' (2010) 27(6) *Review of Policy Research* 804-805.
[63] Gupta (n56 above) 640 and Makina (n59 above) 338.
[64] Philippe Sands & Jacqueline Peel *Principles of International Environmental Law* 3ed (2012) 234-235.
[65] Dimitrov (n62 above) 804.
[66] Ibid.
[67] Sjur Kasa, Anne T Gullberg & Gørild Heggelund 'The Group of 77 in the international climate negotiations: Recent developments and future directions' (2008) 8(2) *International Environmental Agreements: Politics, Law and Economics* 113, 127; Dimitrov (n62 above) 804-805.
[68] Kasa, Gullberg & Heggelund (n67 above) 116.
[69] Ibid.

argue that other issues such as poverty eradication are the more urgent concerns for states of the global South.[70] They, therefore, refused to welcome new legal obligations for developing states while insisting on further commitments from developed states.

It should be noted that during this period, most developing states had negotiated collectively under the umbrella of the G77. The practice was for the G77 to phrase its position in a manner that left out all the fundamental differences of its members or smaller groups within the G77 in order to reflect a common goal.[71] While this approach may have been effective in putting forth a strong joint position at the global negotiations, it makes the G77 submissions inadequate in assessing what the specific positions and understandings of smaller blocs within the group may have been.

Gupta notes that by the 1996-2001 period, it had become obvious that there was a difference between the various states within the G77. This should not be surprising as the G77 is the biggest and most diverse group of states, with various 'converging and diverging views.'[72] OPEC states increasingly maintained standpoints focusing on the protection of the oil industry. The Association of Small Island States, on the other hand, were more focused on more stringent regulation of the climate including the issue of loss and damage. It was also during this period that the African Group of Negotiators, established in 1995,[73] began to differentiate its interests from that of the G77.[74]

Mumma believes that the African Group has been unable to communicate a clear African position on climate change.[75] He contends that more than taking a stand that indicates the concerns of Africa on climate change issues, African states have generally kowtowed to the path of the G77.[76] He points out that there are often contradictions in the Group's submissions

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[70] Joanna Depledge 'Continuing Kyoto: Extending absolute emission caps to developing countries' in Kevin A Baumert, Odile Blanchard & Silvia Llosa & et al (eds) *Building on the Kyoto protocol: Options for Protecting the Climate* (2002) 31-60.

[71] Dimitrov (n62 above) 804; Kasa, Gullberg & Heggelund (n67 above) 113–27; Pamela Chasek & Lavanya Rajamani 'Steps toward enhanced parity: Negotiating capacity and strategies of developing countries' in Inge Kaul, Pedro Conceicao, Katell Le Goulven & et al (eds) *Providing Global Public Goods: Managing Globalization* (2002) 246–262.

[72] Makina (n59 above) 40.

[73] https://africangroupofnegotiators.org/about-the-agn/ (accessed 16 February 2020).

[74] Gupta (n56 above) 643.

[75] Albert Mumma 'The poverty of Africa's position at the UNFCCC negotiations' (2001) 19(1) *UCLA Journal of Environmental Law and Policy* 198.

[76] Ibid at 199.

to climate change negotiations and conferences, detailing specifically the submissions to the Clean Development Mechanism.[77]

Nonetheless, Mumma insists that there is an African position at climate change negotiations and offers four likely elements of this position:

i. Each state has a right to its fair share of emissions (the right to emit GHGs).

ii. This share must be determined by the state's need to develop.

iii. Poor states should be free to trade in their share of emissions through the CDM without any quantitative restrictions; and

iv. States should be able to earn emission credits for emissions foregone and also for actual emission reductions.[78]

There is, however, a dearth of literature exploring the conception of equity adopted by the African region in climate change negotiations and how these conceptions address the contention between the need for development and the need for climate change action. Most of the attempts to understand the climate change regime and the treaty-making process has focused on the broader global South. The literature is replete with scholarly works on issues such as the global South,[79] the Organization of Petroleum Exporting Countries, the Alliance of Small Island States, the rise of the BASIC group,[80] and the leadership of the EU, or the developed world, in climate change action.[81] Others have also focused on the strength of persuasion which the African positions had on the rest of the negotiation process,[82] rather than the conceptualization of principles within such positions.

This thesis fills that vacuum in the literature by examining how African states, negotiating through the African Group of Negotiators, seek to interpret the principle of equity and its implications on the distribution of obligations within international climate change law.

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[77] Ibid at 199-202.
[78] Ibid at 203.
[79] Najam (n61 above) 303–21.
[80] Qi Xinran 'The rise of basic in UN climate change negotiations' (2011) 18 *South African Journal of International Affairs* 318.
[81] Sebastian Oberthür & Claire Roche Kelly (2008) 'EU leadership in international climate policy: Achievements and challenges' 43(3) *The International Spectator* 35-50.
[82] Makina (n59 above) 36; Charles Roger & Satishkumar Belliethathan 'Africa in the global climate change negotiations' (2016) 16 *Int'l Environ Agreements* 91-108.

8. CHAPTER OUTLINE

This chapter has demonstrated that this thesis will examine the conception of equity adopted by African states within the negotiations for climate change treaties from the UNFCCC to the Paris Agreement, and the extent to which these conceptions are reflected in the final texts of these treaties. This thesis will argue that the African arguments reveal a distributive and restorative justice conception of equity and these principles are reflected to various degrees in the climate change treaties from the UNFCCC to the Paris Agreement. By establishing the notions of equity held by African states, this thesis adds to the knowledge of the concept of equity within international climate change law and the broader issues of climate justice and global inequality.

Chapter two presents a historical and theoretical analysis of different conceptions of equity. This chapter focuses on three major conceptions of equity: discretionary justice, distributive justice and corrective or restorative justice. It analyses the elements and characteristics of these conceptions of equity and the suitability of each concept as a framework for understanding the arguments adopted by African states in climate change negotiations, from 1992 to 2015. This chapter lays the foundation for subsequent chapters which evaluate and categorise the submissions by African states into various conceptions of equity.

Chapter three tracks the arguments made by African states in various negotiations from the Stockholm Conference in 1972 to the adoption of the UNFCCC in 1992. It interprets these arguments and places them within the different conceptions of equity analysed in chapter two. This chapter goes further to examine the extent to which the conceptions adopted by African states are reflected in the final wording of the UNFCCC.

This chapter argues that the submissions of African states, negotiating through the G77 alliance, reveals a distributive and a restorative justice conception of equity. Although the UNFCCC does not expressly adopt a particular conception of equity, this chapter shows that the distribution of rights and responsibilities reveals a clear case of distributive justice and to a lesser extent, restorative justice. Chapter three also serves as a background for chapter four, which examines the further development and application of equity in the Kyoto Protocol.

Chapter four examines the application of equity within the Kyoto Protocol, focusing primarily on the Clean Development Mechanism (CDM). This chapter establishes that the Kyoto

Protocol addresses the contention between climate change action and the need for development by creating the CDM; a programme which allows developed states to earn emission credits while developing states benefit from the development and transfers of technology inherent in such projects. The chapter also examines some of the dissatisfaction of African states with the implementation of the CDM and their push for a more distributive and representative CDM. Overall, this chapter argues that the Kyoto Protocol presents a restorative justice conception of equity; one which places primary responsibility for climate change on states that are historically liable for the highest volume of emissions.

Chapter five contains an investigation of the negotiating history of the Paris Agreement and an examination of the final text. It examines the conception of equity adopted by African states in the negotiation of the Paris Agreement and examines the extent to which the Agreement reflects this conception. This chapter also investigates the extent to which the distribution of rights and responsibilities under the Paris Agreement addresses the contention between climate change action and the need for development in Africa.

This chapter establishes that African state parties continue to push for an interpretation of equity based on distributive justice principles: one which prioritises the inequality between different state parties and prioritises the need for development in Africa. The chapter, however, argues that although the Paris Agreement reflects a distributive justice approach to equity, the obligations as currently constituted under the Agreement, are inadequate to ensure that African states can engage in climate change action without affecting their developmental objectives. The chapter concludes with an argument that the application of equity and the differentiation of rights under climate change treaties, while necessary, cannot be static.

Chapter six presents a general summary of the whole research and the main argument of the thesis. It offers a complete narration of the major arguments advanced within the thesis. It also offers some recommendations for the application of equity in the further growth of the international law on climate change.

CHAPTER TWO

THE HISTORICAL AND THEORETICAL FOUNDATIONS OF EQUITY

1. INTRODUCTION

This chapter undertakes an analysis of some of the major conceptions of equity. It provides a theoretical foundation for the subsequent analysis of the submissions of African states in the negotiations of the various climate change treaties from the United Nations Framework Convention on Climate Change (UNFCCC) to the Paris Agreement. It helps to situate these submissions within one or more theories of equity. Particular focus is placed on the conceptions of equity as discretionary justice, distributive justice and restorative justice.

The chapter examines the history and use of equity through various legal traditions. It then proceeds to discuss the evolution of the concept within the international legal system. It traces this evolution from the ideas of discretionary justice to its use in the new international economic order and its popularization as a concept within international environmental law.

This chapter establishes that the principles of distributive and restorative justice offer the best theoretical framework for examining the African conception of equity within international climate change negotiations. Distributive justice addresses issues such as the differing levels of ability and the need for compensation, which are of relevance within these climate change treaties. Unlike the conception of equity as discretionary justice, the principle of distributive justice speaks to the issue of climate justice and the inequality in the ability of different state parties.

Additionally, restorative justice offers justification for one of the major grounds - historic injustice - upon which African states argue for the application of equity and the ends to be met by such application. A combination of both distributive and restorative justice, therefore, offers a coherent framework for understanding the submissions and arguments of African states with respect to the application of equity and for analysing the final text of these climate change treaties.

2. EQUITY: A BRIEF HISTORY

The history of equity, similar to other legal principles, does not follow a straight line or a dsitinct definition and has been described as one with 'jurisprudential complexity.'[1] Although the word equity originates from the Roman word '*aequitas*', the formulation of the concept has been influenced by various legal systems and histories.[2] The Greeks referred to it as '*epieideia*' which literally means clemency. The Chinese describe it as *Ch'iong* meaning compassion while Hindus referred to it as *Dharma*, righteousness.[3] Judaism, on the other hand, referred to it as *elohim* and *jhyh*, meaning justice and mercy. Under Islamic law, equity was represented with the term *istihsan*.[4]

The principle covers a wide range of issues and is, therefore, difficult to define.[5] Its application and meaning would depend on the context and legal system within which it is used.

2.1 Equity under the Roman law

The principle of equity became popular in Roman law via the rulings of the *praetors* (magistrates). The principle evolved as a group of procedural solutions to matters of property rights and contracts, but they were minor and used irregularly.[6] The magistrates adjusted the law by including equitable orders in their decisions.

These edicts ensured that there was redress in cases where the law was silent or inadequate. This includes cases such as where a breadwinner dies intestate, and his dependent would have had no remedy under the civil law. These judicial decision makers reconstructed the law to ensure justice even in cases where the parties may not have acted in accordance with the legal procedures and formalities that would ordinarily establish such rights.[7] Nonetheless, equity within the Roman system did not evolve past a collection of imprecise remedies imported from natural law.[8]

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[1] Sajal K Chattopadhyay 'Equity in international law: Its growth and development' (1975) 5 *Georgia Journal of International and Comparative Law* 382.
[2] Ibid at 381.
[3] Daniel P O'Connell *International Law* (1965) 5.
[4] Ibid.
[5] Chattopadhyay (n1 above) 382.
[6] Margaret White 'Equity: A general principle of law recognised by civilised nations?' (2004) 4(1) *QUT Law and Justice Journal* 103, 105; Christopher R Rossi *Equity and International Law: A Legal Realist Approach to International Decision Making* (1993) 28.
[7] White (n6 above) 105.
[8] Rossi (n6 above) 31.

2.2 Equity in the civil law system

The development of equity within the civil law system followed a significantly different route when compared to its development under the common law. While the common law system had allowed for 'judges-made law' under the courts of law and equity, civil law had no such equivalence. The civil law system followed a stricter code-based system of adjudication, where certain officials codified what was believed to be the law. These legal scholars, known as the Glossators and Commentators were responsible for bringing together the law in written form and guaranteeing regularity in the law.[9] Equitable standards were added to these bodies of law to ease the rigidity of the code system. This cataloguing gave these principles full effect in judicial decision making without creating two different sets of law as was the case within the common law.[10]

Since then, different civil codes have evolved, and they provide for fairness as part of the judicial decision making and thus merge the direct implementation of legal process and equitable principles.[11] There are provisions within these codes which state that where a judge is given power under an act to determine a case in line with their discretion or proper reasons, the judge must ensure that their decision conforms to 'justice and equity.' Other civil codes employ terms like 'doctrines of natural law'[12] or 'natural equity'[13] or 'doctrines of equity'.[14]

2.3 Equity under English common law

The use of equity within the common law became preeminent through the adjudication of individual cases. While the judges at no time planned to formulate a separate group of laws, equity ultimately evolved, through these cases, into 'an independent source of law… a new system of law.'[15] Equity evolved as a segment of the growth of the common law system.[16] As the medieval historian, G B Adams, explains, both equity and common law applied in different

[9] Ibid at 38.
[10] Ralph A Newman 'Equity in comparative law' (1968) 17(4) *Int'l & Comp. Law Quarterly* 830-831.
[11] Rossi (n6 above) 38-39.
[12] Section 7 of the Austrian Civil Code; Article 16 of the Argentine Civil Code; Article 21 of the French Civil Code; Article 4 of the Constituent Assembly Law of Ghana.
[13] Article 32 of the Civil Code of Colombia; Article 17 & 18 of the Ecuador Civil Code; Article 20 of the Honduras Civil Code.
[14] Article 7 of the Puerto Rico Civil Code.
[15] Gustav Radbruch 'Justice and equity in international relations' in Norman Bentwich, Antonio Sanchez de Bustamante y Sirven, Donald A MacLean et al (eds) *Justice and Equity in the International Sphere* (1936) 2.
[16] George B Adams 'The origin of English equity' (1916) XVI (2) *Columbia Law Review* 88.

cases with no clear distinction between them. The two systems – equity and common law – were applied together by the same institutions and to serve the same functions.[17]

The use of equity was an effort by the Lord Chancellor to guarantee that justice was done where common law had proven inadequate.[18] The application for equity was usually in the form of a 'petition for grace' requesting the king to intervene in order to obtain justice where it seems the common law is lacking.[19] In discharging this application, Lord Woolsey explains that 'the king ought to… mitigate the rigour of the law, where conscience hath the most force; therefore, in his royal place of equal justice, he hath constitute a chancellor, an officer to execute justice with clemency, where conscience is opposed by the rigour of law.'[20] In other words, his duty is to ensure that the rigour of the law is mitigated.

By the fourteenth century, legal claims under the common law system fell into either of three jurisdictions: the King's Bench, the Court of Common Pleas and the Court of Exchequer.[21] This led to the increasing compartmentalization of common law as the courts relied more on positive law. Equity only became a resort when neither of these three jurisdictions could provide an adequate, timely and effective remedy to a litigant.[22] Equity was the extraordinary relief available to petitioners, and the king directed all such petitions to the chancellor.

The court of equity was eventually established and given jurisdiction over equitable claims.[23] By the middle of the nineteenth century, equity was applied by a separate court with its own rules of procedure and substantive principles. It applied these rules in its attempt to bring about justice where the common law had proven unjust.[24]

The evolution of equity was also assisted by the practice of *stare decisis* which requires that court rulings should be consistent and predictable.[25] The use of *stare decisis* assisted in realizing equity as part of the legal system. In doing this, *stare decisis* also addressed a major shortcoming of equity; its vulnerability to the impulse of the decision-maker.

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[17] Ibid at 89.
[18] Richard Hedlund 'The theological foundations of equity's conscience' (2015) 4 *Oxford Journal of Law and Religion* 119, 123.
[19] Adams (n16 above) 91.
[20] William Holdsworth *A History of English Law* 3 ed (1945) 219.
[21] George T Bispham *The Principles of Equity: A Treatise on the System of Justice Administered in Courts of Chancery* (1874) 4; Adams (n16 above) 95.
[22] Rossi (n6 above) 33-34.
[23] Ibid. See also Hedlund (n18 above) 123-124.
[24] Rossi (n6 above) 34.
[25] Ibid at 36.

However, there was a separation in the administration of equity and the common law. This separation gave birth to arguments that equity was not within the ambits of the law and its application was regarded as a dependence on principles that were outside the law.[26] At best, equity was a moral claim. The notion that reliance on equity is extrajudicial continues to linger and, as will be seen below, this has affected the adoption of the principle within the international legal system.

Nonetheless, equity became a mechanism for harmonizing legal certainty, which is a necessity for social cohesion, and justice which may otherwise be impossible due to the quest for certainty.[27] In other words, equity was used to enhance justice where the desire for legal certainty may have made justice elusive. Equity rectifies situations that would have led to injustice or some form of lack of fairness as a result of the rigidity of the law and its inability to be adjusted to each case.[28] While common law takes an approach which decides rights and remedies based on a strict interpretation of the law, equity adopts a more extensive interpretation of legal rights and remedies. It considers the special situation of the litigants and the nature of their relationship in deciding the applicable remedies.

Within the different legal systems, Roman, civil or common law systems, equity was recognized as a tool for mitigating the rigidity of the law so as to ensure justice in individual decisions. The judiciary and parties to a suit often depended on equitable principles whenever it seemed that the provisions of the law were inadequate to do justice to their situation. The use of equity was not to depart from or diminish the relevance of existing law and the legal rights protected under these laws. Instead, the practice of equity was to guarantee that established laws are not hindrances to the attainment of justice in particular cases. Equity became the tool for harmonising the need for legal certainty and the desire for justice.

3. THEORIZING EQUITY IN INTERNATIONAL LAW

The use of equity within the international legal system is fraught with different conceptions. As Janis notes, it would be misleading to suppose that a word or terminology in international law has a sole or fixed interpretation.[29] The meaning and use of a concept or principle would vary and be modified through different time periods and possess various interpretations within

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[26] Ibid at 32-33.
[27] Newman (n10 above) 150.
[28] Ibid at 151.
[29] Mark W Janis 'The ambiguity of equity in international law' (1983) 9 *Brooklyn J. Int'l Law* 7.

different contexts. These varying interpretations are usually a result of the divergent legal, political, and economic systems that come together in international law. Thus, it has become impossible to give precise definitions and justifications to these terms and some of them have become buzzwords with no meaningful application in practice.[30]

This difficulty is particularly noticeable with the concept of equity.[31] As Walker and Bulkeley point out, equity 'too easily slips in its use…providing a further complication for the search for clarity in language and meaning.'[32] The complexity surrounding the application of this principle under the international legal system is worsened by the economic and social disparity among the various states and regions which make up the international legal system.[33] It is, therefore, not surprising, as will be seen below, that the meaning and theoretical justifications of equity within international law has differed from one context to another. Likewise, scholars have offered several explanations of, and justifications for, the practice of equity within international law.

These justifications can be categorised into three: equity as discretionary justice, equity as distributive justice and equity as restorative or corrective justice. This section analyses these various conceptions of equity and how they fit into the application of equity within international agreements on climate change. In adopting a conception of equity, this section favours the conception which best accommodates the contention between developed and developing states in the allocation of obligations within the global climate change regime.

3.1 Equity as discretionary justice

This section examines the conception of equity as discretionary justice. It examines its theoretical foundations and its introduction within the international legal system. The section concludes with an examination of the usefulness of this conception in understanding the application of equity within climate change treaties, especially with respect to the contesting claims between development and the need for climate change action.

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[30] Irina Velicu & Maria Kaika 'Undoing environmental justice: Re-imagining equality in the Rosia Montana anti-mining movement' (2017) 8 *Geoforum* 307.
[31] Janis (n29 above) 7.
[32] Gordon Walker & Harriet Bulkeley 'Geographies of environmental justice' (2006) 37(5) *Geoforum* 656; Anthony C Arendt *Legal Rules and international Society* (1999) 51.
[33] Peter Thacher 'Equity under change' (1987) 81 *Proceedings of the Annual Meeting (American Society of International Law)* 134.

3.1.1 Definition and justification

The current notion of equity evolved from sixteenth and seventeenth century western thinkers. Much of their thoughts had developed from the famous work of Aristotle, *Nicomachean Ethics*.[34] He explains that equity became necessary as a response to the character of positive law as a broad declaration of the law and what is permissible. While adjudication will normally be based on these broad principles, there are instances in which the application of 'an otherwise universally valid rule of law' would be unfair and unjust.[35] It implies that the broad principles do not address the justice of such peculiar instances.[36] The principle of equity, therefore, becomes a reply to instances where the general rule will deprive the litigant of justice.

Does this position then imply that equity is different from justice? Aristotle carefully explained the relationship between equity and justice. According to him, both principles were not inherently different. Aristotle explains that if equity and justice were different from each other, one would be good and the other evil and it would be eccentric to approve of equity if it is evil. In the event that equity and justice are virtuous, it implies that they are not fundamentally conflicting. Aristotle, however, explains further that even though the two concepts are virtuous, the practice of equity is superior to the practice of 'strict justice', which he defined as a rigid devotion to black-letter law.[37]

Equity permits a deviation from a general legal principle and takes a more specific judgement of what constitute justice in each case. The law is adapted to the reality of each situation, but this adaptation is done within the general notions of law and justice.[38] Equity was supplementary, and not contradictory to positive law.[39] It ensures that the ultimate objective of the law – ensuring order and justice – is achieved where the general nature of the law makes the attainment of this objective elusive. Equity thus served as the discretion of the judge to remedy the defectiveness of the law in certain instances and this concept stayed as an integral portion of the legal system.

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[34] Aristotle *Nicomachean Ethics* (Roger Crisp transl.) (2000) 99-100.
[35] Anton-Hermann Chroust 'Aristotle's conception of equity' (1942) 18 (2) *Notre Dame Law Review* 123.
[36] Rossi (n6 above) 22.
[37] Aristotle (n34 above) 99-100.
[38] Michael Akehurst 'Equity and general principles of law' (1976) 25(4) *International and Comparative Law Quarterly* 801; Chroust (n35 above) 124.
[39] Aristotle (n34 above) 6.

Equity is a necessity created by the need to avoid the injustice, which would result when general rules are applied in certain cases.[40] The legislature usually has no ability to foresee and make rules to govern such special cases and equity should be applied to achieve justice and achieve what would have been the legislator's will. In such cases, there is need to do what is right by natural law and there was no need for further justifications.[41]

Although this seems to create a tension between the law-deciding duty of the judiciary and the law-making duty of the legislator, the judge was not doing anything contradictory to the intention of the legislator, because the legislator would not have intended that an absurdity be created through the law.[42] The judge must, however, exercise equity with a standard of prudence so as to prevent needless tension between equity and the letter of the law.[43]

3.1.2 Historical origin and gradual development

Equity as judicial discretion, is the earliest expression in which the principle of equity has been used in the field of international law.[44] This conception can be traced to the practice of equity within the common law, which allowed a judge the discretion to decide a case in a manner that does justice, even if this means going outside the strict provisions of the written law. This conception was simply a carry-over of the practice of equity within the traditional legal system as states entered into agreements within the international legal system and was made popular through the practice of arbitral tribunals.

The development of equity in international law was further boosted by its inclusion in the Statute of the Permanent Court of International Justice (PCIJ Statute). Article 38 of the PCIJ Statute, succeeded by Article 38 of the Statute of the International Court of Justice (ICJ), enumerates the sources of international law to be relied upon by the court in carrying out its judicial function and states that:

> (1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
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> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> (b) international custom, as evidence of a general practice accepted as law;

[40] Rossi (n6 above) 26.
[41] Ibid at 25-26.
[42] The controversy as to whether a judge, in applying equity, is usurping legislative authority remains to date.
[43] White (n6 above) 106.
[44] Janis (n29 above) 7.

(c) the general principles of law recognized by civilized nations;

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

(2) This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

The exact purport of Article 38 with respect to the application of equity by the ICJ has been subject to different interpretations among scholars. Some scholars hold the view that equity only applies by express consent of the states involved in the dispute.[45] This contention is based on subsection 2 of Article 38, which provides for the application of '*ex aequo et bono* if the parties to a dispute agree thereto.'[46] This means that an international tribunal can only apply 'considerations of morality and fairness' when the parties to a dispute have previously consented to such application.[47] A similar conclusion was reached by the ICJ in the frontier dispute between Burkina Faso and the Republic of Mali where the court held that since the parties have not entrusted it with the power to do so, the court cannot resort to considerations of equity as morality and fairness.[48]

However, the absence of an express mention of the application of equity should not be interpreted as an exclusion of equity from the ICJ adjudicatory process. There is a need to differentiate between the two applications of equity under the statute of the ICJ. Article 38(2) provides for the application of equity *ex aequo et bono*. The adoption, by a court, of equity *contra legem* is impossible without the express agreement of the states involved in the suit.[49]

There is, however, a second sense in which equity becomes applicable, even in the absence of state consent. This is revealed in the working papers of the Committee of Jurists, where initial proposals had been made that equity be included as a source of international law but it was turned down by the representatives.[50] The conflict was majorly between legal positivism and natural law.[51] On the one hand, the jurists were concerned about being faced with a situation

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[45] Alexander Fachiri, *The Permanent Court of International Justice: Its Constitution, Procedure and Work* 2ed (1932) 104; Hersch Lauterpacht, *The Function of Law in the International Community* (1933) 313-28.
[46] Article 38(2) of the Statute of the ICJ.
[47] Hersch Lauterpacht *International Law: Collected Papers of Hersch Lauterpacht* Elihu Lauterpacht (ed) (2009) 256-257.
[48] Frontier Dispute Judgment, (1986) *I.C.J. Reports* 554, 567-568.
[49] Ibid.
[50] Permanent Court of International Justice Advisory Committee of Jurists, *Procés-Verbaux of the Proceedings of the Committee* (1920) 295-332; Article 32 of the Vienna Convention on the Law of Treaties makes it clear that such papers constitute supplementary means of statutory interpretation.
[51] Jan HW Verzijl *International Law in Historical Perspectives* (1968) 57; White (n6 above) 108.

where the court is unable to hear a case due to the inadequacy of the law on the subject matter.[52] On the other hand, they were concerned with vesting the judges with too much discretion that eroded the consensual nature of international law.[53] This dispute was resolved by adopting the phrase 'general principles of law recognized by civilized nations' in Article 38(1)(c).[54]

At the Working Committee for the Statute of the ICJ, the Belgian representative had explained that Article 38(1)(c) would imply the 'fundamental laws of justice and injustice', which was common to all states.[55] In order to allay fears about judges having unrestricted discretion, the Italian representative pointed out that the application of general rules does not give the judges jurisdiction to apply new rules but to apply already-existing general rules.[56] Lord Phillimore, representing the United Kingdom, noted that all the principles of common law were already a component of international law.[57] He also pointed out that the principles of good faith and *res judicata* constituted some of the general principles accepted by states. Justice White of the Supreme Court of Queensland explained that Phillimore's statement was an indication of his approval of equity as a possible inclusion under 'general principles'.[58]

Members of the Advisory Committee for the Statute were generally willing to accept equity as a principle of international law but were conflicted as to the precise implications and meaning of the concept as it differed in the various legal systems which they represented.[59] What was in dispute was not the inclusion of equity in international law but the precise implications or application of this concept. What they sought to exclude was not equity but an interpretation of equity that empowered judges to operate against the express agreement of states in treaties and other agreements, or an interpretation which led to a situation where the domestic understanding of equity within a state is imposed on other states.[60]

In the *Meuse* case, Judge Manley Hudson of the PCIJ explained this point of view as follows:

> principles of equity have long been considered to constitute a part of international law, and as such they have often been applied by international tribunals… Article 38 of the Statute expressly directs the

[52] Permanent Court of International Justice Advisory Committee of Jurists (n50 above) 295-332.
[53] Ibid.
[54] Article 38 (1) (c) of the Statute of the Permanent Court of the International Justice (PCIJ).
[55] Permanent Court of International Justice Advisory Committee of Jurists (n50 above) 310-311.
[56] Ibid at 315, 346.
[57] Ibid at 316.
[58] White (n6 above) 109.
[59] Ibid at 108.
[60] Tomas Rothpfeffer 'Equity in the North Sea Continental Shelf cases: A case study in the legal reasoning of the International Court of Justice' (1972) 42 *Nordic Journal of International Law* 86; Ibid at 109.

application of general principles of law recognized by civilized nations, and in more than one nation principles of equity have an established place in the legal system. The Court's recognition of equity as a part of international law is in no way restricted by the special power conferred upon it to decide a case *ex aequo et bono*, if the parties agree thereto.... It must be concluded, therefore, that under Article 38 of the Statute, if not independently of that Article, the Court has some freedom to consider principles of equity as part of the international law which it must apply.[61]

The court thus differentiated the applicability of equity under Article 38(1)(c) from the court's power to decide a case *ex aequo et bono* under Article 38(2). While the latter needs state consent to be applicable, the former applied as a general principle of law. This was restated by Judge Anzilotti who described equity as a principle that is 'so universally recognized, that it must be applied in international relations.'[62] The ICJ added in *Military and Paramilitary Activities in and against Nicaragua ([Nicaragua v United States of America]* that the universality of equity is yet to be objected to.[63]

In the *Frontier Dispute* case, the matter involved a disagreement on the precise demarcation of the territories of Burkina Faso and Mali. Mali had argued that Article 38(2) was not applicable in the suit, it urged the ICJ to rather apply 'that form of equity which is inseparable from the application of international law'.[64] In other words, Mali recognized that there was a difference between equity under Article 38(2) and equity as a general principle of law. In its submission, Burkina Faso did not raise any objections to these categorizations of the principle of equity. The ICJ held that equity was inseparable from justice and the court is at liberty to adopt an understanding of equity which would aid a correct elucidation of the law.[65]

In its interpretation, the court had adopted the classical Aristotelian notion of equity. The court employed equity in guarantying that the meaning given to the law does not result into absurdity in judicial decision making and displaying that equity had become integrated into international law distinct from *ex aequo et bono* as provided for under Article 38 (2) of the ICJ Statute. This was also the case in the *Rann of Kutch* case where the arbitral tribunal noted that equity was a

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[61] Diversion of Water from the Meuse (*Netherlands v. Belgium*) Judgment No. 25 28 June 1937 PCIJ Ser. A/B, No. 70 para 322.
[62] Ibid para 211.
[63] Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*) [1986] ICJ Rep para 269.
[64] Case Concerning the Frontier Dispute (*Burkina Faso v Mali*) ICJ Reports 1986, 22 December 1986 para 27.
[65] Ibid para 149.

part of international law, and the parties had the liberty to 'present and develop their cases with reliance on principles of equity.'[66]

Also, in the *North Sea Continental Shelf* cases, rather than decide based on a strict legal interpretation of the equidistance method of delimitation, the ICJ held that the principle was to be applied 'in accordance with equitable principles, taking into account all the relevant circumstances…'.[67] The ICJ confronted one of such in 1969 when it had to decide on an agreement between Denmark, Germany and the Netherlands on the delimitation of the continental shelf in the North Sea. It was obvious that the equidistance rule, which was ordinarily applicable, would lead to some form of injustice in this case.

The ICJ filled the gap which the equidistance rule could not address. The court made clear that none of the existing legal rules were applicable and went ahead to rule that delimitation was to be applied 'in accordance with equitable principles.'[68] In other words, the principle of equidistance could not be employed in an abstract manner but in line with what is fair and just.[69] In giving its ruling, the ICJ made a distinction between its application of equity from *ex aequo et bono* which it would have been unable to apply without the express agreement of the parties as required under Article 38(2) of the Statute of the ICJ.

The court highlighted that its responsibility to ensure justice implies that its ruling has to 'find its objective justification in considerations lying not outside but within the rules.'[70] In other words, equity does not imply that judges have the liberty to stray outside the law at will, or to apply principles that are a clear contradiction of the law. Equity is not an exercise of unrestrained discretion in determining cases and a judge is required to reach a decision which 'he feels most faithful to the values of the legal systems as a whole.'[71] Ultimately, the court held that equity was a general principle of law that is applicable by an international court.[72]

The ruling of the ICJ in the *North Sea Continental Shelf Cases* was criticized by Friedmann, who argued that 'by rejecting the criteria laid down in the convention and other documents, the

[66] The Indo-Pakistan Western Boundary (Rann of Kutch) between India and Pakistan (India, Pakistan), Award of February 19, 1968 Reports of International Arbitral Awards vol. XVII 11.
[67] North Sea Continental Shelf Case*s* (*Germany v. Denmark*; *Germany v. Netherlands*) 1969 I.C.J. para 101.
[68] Ibid.
[69] Ibid para 85.
[70] Ibid.
[71] Christopher Ford 'Judicial discretion in international jurisprudence: Article 38(1)(c) and general principles of law' (1994) 5(1) *Duke Journal of Comparative & International Law* 46.
[72] North Sea Continental Shelf Cases (n67 above) para 88.

court, in effect, was giving a decision *ex aequo et bono*, under the guise of interpretation.'[73] In other words, the court was not merely applying equity as a general principle but was making a ruling *ex aequo et bono*. Without going into the merits of this criticism, it is sufficient to note that it does not dispute that there is a sense in which an international court or tribunal can apply equitable principles, it only queried whether the present decision fell within such instances.

Janis has also criticized Judge Hudson's interpretation on the ground that it relied on a United States (US) conception of equity and cautioned against adopting, within the international legal system, a view of equity which was based on the British or US legal systems. Like Friedmann, he does not dispute that equity is applicable in the international legal sphere, in fact he concedes that it may be necessary at some point to rely on an Anglo-American conception of equity in part, but not exclusively.[74] It is thus sufficient and generally agreed among scholars of international law that 'general principles' as provided for under Article 38(1)(c) of the Statute of the ICJ refers to principles common to various domestic legal systems, and equity forms an undisputed part of these principles.

Similarly, Elihu Lauterpacht limits the utilisation of equity in the international law to the discretionary powers of a judge, and insists that the parties must be allowed to address the court on the applicable equitable rules when a judge exercises this discretionary power.[75] Equity, according to Lauterpacht, was for the purpose of enhancing an international legal system which is resilient and amenable to the disputes that may arise.[76]

Following the path of other Western scholars, Lowe rejects the applicability of equity within international law. He holds that its application is not necessary because the international law system is replete with other principles or techniques which a judicial decision maker may apply to fill whatever gaps may exist in deciding a case.[77] According to Lowe, reliance on equity as a separate source of norms is not a necessity for ensuring justice within international law.[78] He contends that the end sought by advocates of equity can be reached through an equitable

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[73] Wolfgang Friedmann 'The North Sea Continental Shelf cases: A critique' (1970) 64(2) *American Journal of International Law* 236. As it stands, it is difficult to find a case where parties have consented to the ICJ's exercise of *ex aequo et bono* under Article 38(2) of the Statute of the ICJ.
[74] Janis (n29 above) 86.
[75] Elihu Lauterpacht 'Equity, evasion, equivocation and evolution in international law' (1977-78) 33 *Proceedings and Committee Reports of the American Branch of the International Law Association* 45-46.
[76] Ibid at 46.
[77] Vaughan Lowe 'The role of equity in international law' (1988-1989) 12 *Australian Yearbook of International Law* 63.
[78] Ibid.

interpretation of the law.[79] A judicial decision maker only has to apply international law in a manner which ensures justice, and need not infuse any standards that are external to the law. Such attempts to adopt equity into the judicial decision making process is seen as an unrealistic attempt to revive natural law.[80]

Lapidoth takes this argument further by noting that the subjective nature of equity makes its application dangerous for the international legal system. She argues that the formulation of equity is subject to the decision maker's ethical background, since this environment would differ from person to person, the application of equity signifies that the inherent characteristics of the law like 'generality, clarity, certainty and predictability' will be forfeited.[81] Notwithstanding, she concludes that equity is a component of the law and should be relied upon where necessary.[82]

The inclusion of a clause allowing for the application of 'international law and equity' had become commonplace in arbitration treaties during the nineteenth and twentieth century.[83] Arbitral tribunals were permitted, in certain cases, to make recourse to something other than the strict law in reaching a decision.[84] Equity had such wide acceptance that there was a proposal for the creation of an international equity court. The court was to be saddled with the reconciliation of claims made by different parties 'by reference not merely to the strict law, but to the rule which is fair in all circumstances of the particular case.'[85]

3.1.3 Critical appraisal

One thing is clear from the literature: scholars and practitioners began to reflect extensively on the concept and role of equity in international law in the 1930s as arbitral tribunals gained prominence and with the introduction of the international courts (PCIJ and then the ICJ). Much of the conversations centred around the differentiations of equity *contra legem* (against the law), *infra legem* (within the law) and *paetra legem* (outside the law). These differences were

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[79] Ibid at 65.
[80] Martti Koskenniemi *From Apology to Utopia: The Structure of International Legal Argument* (1989) 45.
[81] Ruth Lapidoth 'Equity in international law' (1987) 81 *Proceedings of the Annual Meeting (American Society of International Law)* 138, 146.
[82] Ibid at 147.
[83] Janis (n29 above) 70.
[84] Cayuga Indians (*Great Britain v. United States*) 22 January 1926 IV *Reports of International Arbitral Awards* 173, 180.
[85] Wolfgang Friedmann *The Contribution of English Equity to the Idea of an International Equity Tribunal* (1935) vi.

generally used to differentiate when an international judge or arbitral tribunal needed state consent before equity could be applied, and when such consent was unnecessary.[86]

Some scholars have objected to the idea of ascribing judicial discretion to judges within an international system. It is believed that such application of equity gives room for the abuse of state sovereignty and the application of law without state consent.[87] This in turn opens up room for questioning the doctrinal legitimacy of the legal rules arising from such exercise of discretion.[88] This is because, in the exercise of discretion, a judge applies principles to which the state parties have not necessarily consented. Since the backbone of international law is state consent, such exercise, which is devoid of consent, raises issues of legitimacy.

However, what is more pertinent for this research is whether this theory adequately explains the dissimilarity in the conception of equity by developed and developing states, particularly African states, within international climate change law. Does the exercise of judicial discretion by international judges and arbitrators explain the contesting claims between different groups of states within global climate change negotiations? Is the kind of equity seen in international judicial decision-making the same as that which is claimed by developing states in their attempt to point to the inequality in the global distribution of wealth?

The answer is in the negative. Although equity as an exercise of judicial discretion is well established in international law, it does not explain the need for climate change treaties to take into cognizance the historical injustice, the need for development and the varying capabilities of state parties in the distribution of obligations and privileges. Equity in the present sense focuses on the process of adjudicating individual cases in a manner that avoids a specific injustice due to the absence, or inadequacy of relevant laws, rather than the structuring of a whole body of laws in a manner that ensures that injustice is avoided or corrected.

Furthermore, equity as discretionary justice is an exercise of judicial powers, rather than a legislative power. It relies on an individual adjudication of cases as a means to do justice. This conception of equity does not concern itself with the formation of laws to address issues, but on an after-the-fact administration of justice. It is reactionary, rather than proactive. Unfortunately, the nature of climate change and the necessity of taking action is such that state

[86] Janis (n29 above) 73.
[87] Ibid.
[88] Ford (n71 above) 36.

parties need to put laws in place to avoid the catastrophe rather than wait till a situation has occurred and then applying discretionary justice in the adjudication of such a case.

There is a need to structure the law in such a way that state parties can act ahead of time to prevent further damage to the earth's climate. As will be seen below, the concerns within climate change negotiations were with the actual formation of treaties and the distribution of rights and responsibilities within these agreements. Equity was not to be left to some future interpretation by a judge. Rather than procedural, the arguments centred around the creation of substantive rights and obligations for state parties to the treaties. Unfortunately, the conception of equity as discretionary justice does not give room for that.

In conclusion, the conception of equity as procedural justice is inadequate to explain the use of equity as a means for resolving contention between climate change and the need for development, given the historic injustices suffered by African states. We, therefore, examine the other senses in which equity is used within international law, their justifications and suitability for analysing the conception of equity by African states within the global climate change regime.

3.2 Equity as distributive justice

This section examines the conception of equity as distributive justice. It examines the various arguments and justifications for the application of this concept within any legal system. Particular focus is placed on the different justifications for, and criticisms against, the applicability of distributive justice in international law. The aim is to address these criticisms and establish that the principle of distributive justice applies both within the domestic system and within the international legal system.

3.2.1 Definition and justification

Distributive justice is the organization and distribution of resources within a state in a manner that ensures that the basic needs of every member of that society is met.[89] This principle favours the redistribution of rights and responsibilities within a society in a manner that ensures that the condition of the disadvantaged is improved. This redistribution is necessary even if it means that those who are well-off bear a disproportionate level of responsibility.

[89] John Roemer *Theories of Distributive Justice* (1998) 1.

Although the term 'distributive justice' has often been credited to Aristotle, he employed the term in a separate sense from that which it is commonly used today.[90] According to him, distributive justice was the distribution of resources in accordance with what each person had merited.[91] It was a system which allowed for equality by ensuring that everyone is rewarded in proportion to their merits.[92] He differentiates between distributive justice and corrective justice; a principle which states that a victim of a criminal act must receive some form of damages from the perpetuator of such acts and such compensation must be proportionate to the injury inflicted.[93]

Aristotle did not view the reallocation of wealth by the state to correct socio-economic inequality as an important part of justice.[94] Cicero, on his own part, referred to distributive justice as beneficence. While justice was fundamental and an entitlement of everyone within the society, beneficence, which Cicero referred to as 'distributive justice', only applied to relationships between friends, relatives, and fellow citizens, and not to the relationship between the state and its citizens.[95] Distributive justice was regarded as a synonym for charity.[96]

Cicero, like Aristotle, did not view the redistribution of state resources as an integral part of justice or as a duty of the state. Other scholars like Aquinas and Grotius had similar views with Cicero. These scholars differentiated between justice and benevolence or like Grotius called it, the 'law of love', and regarded the latter as having a wider scope than justice.[97]

Adam Smith was the first scholar to popularize the notion that the state had a duty of beneficence.[98] Like most scholars before him, Smith differentiates between perfect rights and imperfect rights.[99] While perfect rights are generally enforceable, imperfect rights are not. Imperfect rights are connected to distributive justice, and they refer to the claims made on us by the needs of others.[100] However, these imperfect rights vary in their strength and some of

[90] Samuel Fleishacker *A Short History of Distributive Justice* (2004) 19.
[91] David Ross & James O Urmson 'Nicomachean ethics' in Jonathan Barnes (ed) *The Complete Works of Aristotle* (1984) 3833.
[92] Ibid at 3835; Nikolas Kirby 'Two concepts of basic equality' (2018) 24 *Res Publica* 303; Fleishacker (n90 above) 19.
[93] Fleishacker (n90 above) 19.
[94] Ibid at 21.
[95] Cicero, *De Officiis* I.20–59, III. 21–28 in Fleishacker (n90 above) 20.
[96] Fleishacker (n90 above) 21.
[97] Thomas Aquinas *Summa Theologiae*, II-II, Q 61, A2 in Fleishacker (n90 above) 22.
[98] Adam Smith *Theory of Moral Sentiments* (1976) 277.
[99] Adam Smith *Of Jurisprudence* in R Meek, D Raphael and P Stein (eds) *Lectures on Jurisprudence* (1982) 9.
[100] Ibid.

them may become a 'perfect and complete obligation.'[101] It would, therefore, be expected that government would enforce the strongest of these imperfect rights.[102]

Smith maintains the position that distributive justice is beneficence but proceeds to argue that certain acts of beneficence should be enforceable under the law. With this argument, Smith had taken the idea of distributive justice beyond the general notion of the time.[103] His conception of beneficence was, however, limited to certain kinds of relationships, such as the obligation of guardians to their wards, or the obligations shared between neighbours, families and friends, but not shared with a stranger.[104]

The prevalent thinking became modified by the middle of the eighteenth century. More scholars began to take the position that the state not only had the capability but also had a duty to assist its indigent members; the state was responsible for the redistribution of resources in a way that bridged the space between the wealthy and the impoverished.[105] The political groups of that period also began to demand for the need to eradicate poverty and other forms of socio-economic injustice.[106] These dominant thoughts and political movements contributed immensely to the birth of the notion of distributive justice, as currently known.

Jean-Jacques Rousseau was one of the scholars whose work made the notion of distributive justice popular. He argued that the problem of inequality should be a legitimate concern within the political system.[107] Prior to this time, inequality was restricted to a matter for religious or moral considerations. Rousseau argued that the government had a responsibility to address extreme wealth inequality.[108] Rousseau's contribution in the evolution of the concept of distributive justice was, therefore, in querying the prevalent inequality and insisting that it was an issue not just for the moral and religious sphere but also for the political sphere.[109]

Like Rousseau, Adam Smith also questioned the idea of poverty. Smith was, however, more concerned with the impact which the difference between the wealthy and the impoverished had

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[101] Smith (n99 above) 110.
[102] Ibid at 112.
[103] Fleishacker (n90 above) 27.
[104] Smith (n98 above) 277.
[105] Fleishacker (n90 above) 53.
[106] Ibid at 54.
[107] Ibid at 57.
[108] Jean-Jacques Rousseau *Discourse on Political Economy and the Social Contract* (Christopher Betts transl 2009) 21; Fleishacker (n90 above) 56.
[109] Fleishacker (n90 above) 57-58.

on the quality of life led by the poor.[110] Smith queried the social classification which existed within the society and regarded the poor as worthy of the same dignity with others in the society; the poor equally deserved the basic necessities of life.[111] Fleischacker refers to Smith's view of the poor as, 'a dignified picture of the poor'.[112] This view paved the way for the further evolution of the notion of distributive justice and the duty of the state to ensure socio-economic equality.[113]

Another scholar that contributed significantly to the transformation of distributive justice, as currently known, is Immanuel Kant. Kant argued expressly that the state, and not private citizens, had the duty to cater for the poor in the society.[114] Kant starts his argument by emphasizing that all humans were equal and deserving of a good quality of life. Poverty, he argues, is a consequence of human injustice and it would be absent in a just society.[115]

Kant regards the natural propensity to help the needy or perform 'benevolence' as an urge, which nature has put into humans as a means of restitution for societal injustice.[116] Kant incriminates the generality of humans in this injustice, even when an individual has not directly perpetuated injustice.[117] Therefore, a gift to the poor is not gratuity, it is a reparation or return to the poor of what had been stolen through societal injustice.[118] Kant equates a society without distributive justice with one in the state of nature.[119]

Explaining the principle of distributive justice further, Kant points out that private charity generates a feeling of gratitude from the beneficiary to the benefactor.[120] The act of benevolence may never be sufficiently reciprocated and this leaves the receiver in an endless feeling of indebtedness to their giver.[121] This arrangement reinforces the prevalent inequality and classism between the wealthy and the impoverished, the regular recipients of benevolence. To avoid this indebtedness, Kant contends that assistance for the poor must be carried out by the state and should not be placed on the private citizen. This averts the feeling of indebtedness

[110] Smith (n99 above) 340-342.
[111] Ibid.
[112] Fleishacker (n90 above) 66.
[113] Ibid at 62-66.
[114] Ibid at 68.
[115] Immanuel Kant *Lectures on Ethics* (Peter Heath transl. 1997) 178-179.
[116] Ibid at 179.
[117] Ibid.
[118] Ibid.
[119] Immanuel Kant *The Metaphysics of Morals* (Mary Gregor transl. 1991) 121.
[120] Kant (n115) 179.
[121] Ibid 199.

that is created through private benevolence and also helps to preserve the self-worth of the beneficiaries.[122]

However, Gracchus Babeuf was the first to argue clearly that the reallocation of resources by the state was a necessity for justice.[123] In other words, redistributive justice was not only desirable or a duty of the state, but it was also a necessity for justice within the society. Babeuf argued that everyone had an equal right to wealth and each individual within the society should have the same access to the utilisation of the society's resources. It was, therefore, a prerequisite of justice to equalize the wealth distribution where there is a gap in the distribution of wealth.[124] For Babeuf, there was a direct relationship between reallocation of state resources and the social contract, and the goal of the social contract was to enhance equality by defending the weak against the strong members of the state.[125] Babeuf's thinking was thus reliant on Locke's social contract in explaining the concept of redistributive justice and the duty of the state. This idea was later developed by John Rawls.

In his treatise, *A Theory of Justice,* Rawls describes distributive justice, using what he calls 'the difference principle.'[126] Rawls founds his position upon the idea of equality of opportunity.[127] In other words, every individual within the state should have similar access to opportunities and the realisation of their full potentials. Fairness would be deemed present in the society if every individual's fate is dictated by the choices they make, and not by circumstances, such as birth family, over which they have no control.[128]

In this society, success or failure, wealth or poverty are a product of a person's actions and thus the result will be judged as fair and just against another individual with a different result. Success (or failure) must be deserved, and not endowed upon individuals.[129] Where this is not the case, Rawls argues that it would be just and fair to have a set of distributive rules which seeks to ensure equality among the members of the state.[130] Distributive justice does not merely connote a moral relationship but an entitlement; a right for those who have been deprived.[131]

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[122] Fleishacker (n90 above) 71-72.
[123] Ibid 75.
[124] Ibid 78.
[125] Ibid.
[126] John Rawls *A Theory of Justice* revised ed (1999) 65-66.
[127] Ibid at 68, 73.
[128] Will Kymlicka *Contemporary Political Philosophy: An Introduction* 2 ed (2001) 58.
[129] Ibid.
[130] Rawls (n126 above) 67-68.
[131] Simon Caney *Justice Beyond Borders: A Global Political Theory* (2005) 104.

The principle does seek to remedy inequality occasioned by the differences in natural circumstances.

Similar to Babeuf, Rawls asserts that differential treatment is a prerequisite, which the signatories to the social contract would have added as an operating clause of the contract.[132] This clause is added at a point where there is a veil of ignorance, and each party is oblivious of their capabilities and of each other's capabilities. They are unaware of the extent of their own abilities and are in essence unable to make selfish choices.[133] This innocence compels them to make rules that are impartial and fair to everyone. In doing this, these parties will frame principles of justice in a manner that ensures that the 'arbitrariness of the world must be corrected.'[134]

Rawls proceeds to argue that the difference principle would be included in the social contract as a tool for addressing any inequality, which may exist between members of the society.[135] This egalitarian conception gives room for the redistribution of state resources in a way that guarantees that every individual is in a better position.[136] Even if such redistribution leads to an uneven allocation of means among otherwise equal members of the society, it is a necessary social cooperation that benefits the society as a whole.[137]

Rawls explains that 'undeserved inequalities' exist within the state and must be rectified by compensating those who are disadvantaged.[138] An example of rectifying may include allocating more resources to schools of the poor.[139] Distributive justice allows an unequal distribution of obligations as a way to ameliorate existing injustice. It must be noted that the goal is not to create a society of totally equal individuals. To satisfy the ideals of distributive justice, it is enough that every member has sufficient 'means to make intelligent and effect use of their freedoms and to lead reasonable and worthwhile lives.'[140] Beyond that, there is no need for redistributive justice.[141]

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[132] Rawls (n126 above) 121.
[133] Ibid at 118, 120-121.
[134] Ibid at 122.
[135] Ibid at 65-66.
[136] Ibid.
[137] Ibid at 66.
[138] Ibid at 86.
[139] Ibid.
[140] John Rawls (1999) *The Law of Peoples* (1999) 114.
[141] Ibid.

From the foregoing, it is clear that distributive justice is that conception of equity which maintains that there is a need for the redistribution of resources in a manner that seeks to improve the conditions of those who are less advantaged. This principle has developed from the notion of benevolence to a sense of duty and a requirement of justice. Distributive justice is regarded as a core aspect of the social contract and embodies the duty of the state to ensure equality among its members.

The question then becomes whether the principle of distributive justice applies within international law. Scholars have argued both for and against the applicability of distributive justice within international law. The following subsection will outline some of these arguments and how it fits into the current research on the conception of equity and justice within the international law on climate change.

3.2.2 A critique of the applicability of distributive justice within the international legal system

The principle of distributive justice had been conceived of, and gained popularity, as an ideology governing the relationship of a state with its members.[142] However, with an increase in globalisation and the obvious disparity in the distribution of global wealth, scholars and practitioners began to examine the suitability of distributive justice in the distribution of rights and responsibilities within the international legal order.[143]

There are three main schools of thoughts on the application of distributive justice within international law. First, scholars who contend that the same distributive principles apply globally, based on our common humanity, as they do within the state (cosmopolitans).[144] Secondly, those who argue that distributive principles apply within the global sphere but contend that its application is founded on social meanings and obligations within the international community.[145] Thirdly, those who hold the view that the nature of social

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[142] Rawls later examined the application of distributive justice in the international legal system in *The Law of Peoples*. Even then, his conception of distributive justice within the international system is very limited when compared to the application of the same principle within the domestic system.

[143] The popularization of distributive justice within international law can be traced to the politics and economics of decolonization and particularly the calls for a new international economic order. Jagdish N Bhagwati *The New International Economic Order: The North-South Debate* (1977).

[144] Charles Beitz *Political Theory and International Relations* (1999); Caney (n131 above); Thomas Pogge *Realizing Rawls* (1989).

[145] David Miller *On Nationality* (1995); Michael Walzer *Spheres of Justice: A Defence of Pluralism and Equality* (1983).

cooperation in the domestic and the international sphere is different and even if distributive principles are suitable for the former, they are not fitting for the international legal order (nationalists/contractarians).[146]

This section examines these various schools of thoughts, analyses their arguments, and establishes that despite the objections, distributive justice is applicable within the international legal order and specifically within climate change treaties.

3.2.2.1 Nationalists or contractarians argument against the application of equity in the international legal system

The nationalists or contractarians argue that distributive justice is only relevant within a sovereign state, and it is non-applicable within the international legal order without a sovereign. The contractarian school traces its origins to Thomas Hobbes' conception of justice. According to this view, to ensure justice, there are certain restrictions that must be imposed upon members of a state and there must be institutions to enforce these restrictions.[147] However, only a sovereign can exercise such powers and impose restraints on individual liberties.[148] This implies that there must be a sovereign in order to achieve justice.[149] Justice, for Hobbes, was impossible without a sovereign.[150]

The exercise of sovereignty by a state gives rise to a corresponding obligation to do justice and this obligation is carried out through the state's institution.[151] Without such political relationship and institutions, there is no obligation for justice and where such relationship is do not exist, there is no obligation to create one.[152] Thus, even though the moral idea of justice is possible without a shared sovereignty, the legal obligation for justice is restricted to the sovereign space and the consequent political relationship.[153]

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[146] Michael Blake 'Distributive justice, state coercion and autonomy' (2001) 30(3) *Philosophy & Public Affairs* 257-296; Oisin Suttle 'Equality in global commerce: Towards a political theory of international economic law' (2015) 25(4) *European Journal of International Law* 1047; Samuel Freeman, *Justice and the Social Contract: Essays on Rawlsian Political Philosophy* (2007); Andrea Sangiovanni 'Global justice, reciprocity, and the state' (2007) 35 *Philosophy & Public Affairs* 3.
[147] Thomas Hobbes *Leviathan* (1651) 88.
[148] Ibid.
[149] Ibid.
[150] Ibid at 89.
[151] Ronald Dworkin *Sovereign Virtue* (2000) 6.
[152] Thomas Nagel 'The problem of global justice' (2005) 33(2) *Philosophy & Public Affairs* 121.
[153] Ibid at 121-122.

Furthering this argument, Thomas Nagel points out that there are different types of justice; certain kinds of justice are based on the sovereign relationship, while some are not.[154] Examples of justice that are immutable and not dependent on the sovereign relationship include bodily autonomy, freedom of expression and religious liberty.[155] The exact boundaries of these rights and the mechanisms for their implementation would be decided by the state relying on its laws and institutions. However, an individual does not lose any of these protections solely on the ground that they are a foreigner within a community or state.[156] This kind of rights are defined by our shared humanity.

The nature of socio-economic rights is different.[157] Nagel argues that this set of rights are 'fully associative.'[158] They emanate from a joint political relationship with others and these rights do not apply between those who do not have such a common political relationship.[159] The political system creates institutions and systems through which these rights can be enforced and protected, both against the state and against private citizens. Examples of these rights include voting rights, citizenship and access to socio-economic opportunities. These rights are governed by the sovereign relationship and those who do not belong to this relationship may be excluded from such rights.[160]

Michael Blake also disagreed with the use of distributive justice in international law. Blake explained his position using the Coercion Approach. Following a similar path as Nagel, Blakes' argument is founded on the notion that every member of the state has autonomy.[161] However, the state exercises some form of coercion and imposes restrictions on individuals.[162] This exertion of authority represents an infraction upon the individual's autonomy and must be substantiated or eliminated.[163] The legal system must, therefore, present justification for this exercise of power. However, such justification is only necessary for those who live within the grasp of that coercive authority.[164] State A does not need to justify its tax system to a member

[154] Ibid at 126.
[155] Ibid at 127.
[156] Ibid at 126-127.
[157] Ibid at 127.
[158] Ibid.
[159] Ibid.
[160] Ibid.
[161] Blake (n146 above) 266-267.
[162] Ibid at 273.
[163] Ibid 268, 272, 276.
[164] Ibid.

of state B who is not subject to such tax regulations. Distributive justice is, therefore, a necessity for justifying state coercion only to those who are subject to it.[165]

At the international level, Blake argues that the situation is not the same. While there may be some kind of coercion at the global stage, it is not the same as it is at the national level. Distributive justice is only a necessary justification for the sort of coercion practiced by the state.[166] Individuals are traditionally not subjects of international law and the coercive actions of international legal institutions are generally not directed at individual human agents.[167] Since distributive justice concerns arise as a result of the direct coercive power exercised over the individual within a state, such concerns do not arise within the international legal system in the absence of such direct coercion against the individual.[168]

He contends that distributive justice is not inconsistent with the international legal system. However, its application within this system would require a separate justification from that used within the domestic system since the criteria for a principle is determined by the context within which it is to be applied.[169] On the justification for distributive justice within international law, Blake argues for the principle of sufficiency. [170]

In explaining this concept, he distinguishes between absolute and relative deprivation.[171] Whereas absolute deprivation implies that an individual lacks sufficient resources for his wellbeing irrespective of what others may have, relative deprivation is a more subjective approach to (in)sufficiency as it is based on an aggregate of what is generally available to other members of the society.[172] While the eradication of relative deprivation may be a requirement within the domestic society, only complete impoverishment which makes reasonably dignifying living impossible falls within the purview of the international legal system.[173] The

[165] Ibid at 258.
[166] Ibid at 280.
[167] Ibid. The status of individuals as subjects of international law is increasingly changing and it is arguable that individuals are now subjects of international law. The International Criminal Court, for example, is empowered under the Rome Statute to try individuals who may have contravened the principles of international criminal law. For more on the status of individuals as subjects of international law, see Andrew Clapham 'The role of the individual in international law' (2010) 21(1) *European Journal of International Law* 25-30; Noëlle Quénivet 'The *Varvarin Case*: The legal standing of individuals as subjects of international humanitarian law' (2004) 3(2) *Journal of Military Ethics* 181-187; M Janis 'Individuals as subjects of international law' (1984) 17(1) *Cornell International Law Journal* 61-78.
[168] Blake (n146 above) 280.
[169] Ibid at 294.
[170] Ibid.
[171] Ibid at 258.
[172] Ibid at 258-259.
[173]Ibid at 293-294.

state possesses coercive powers and hence the need to place the additional burden for relative deprivation on it. Since no sovereignty or coercive powers are exercised at the international level, there is no demand upon this system to address relative deprivation.[174]

Blake's argument has been criticised on the ground that it had a restrictive view of coercive powers since the state often exercises these powers outside its borders and over individuals who may not be its members.[175] Blake's argument failed to account for the implication of this extra-territorial exercise of power on the implication of distributive justice at the international level. Similarly, Blake's theory failed to address the fact that some levels of coercion was present within the international legal system and differentiate between this kind of coercion and the sovereign powers of the state.[176]

The sovereignty approach has also been rejected on the ground that the individual, and not the state, is the basic unit for all morality.[177] Every individual is equally important no matter their nationalities, and state borders should not be the determinant for the application of distributive justice.[178] It is the effect of an approach on the individual that should determine its usefulness or acceptability.[179]

Notwithstanding the criticisms, Suttle argues that the coercion approach presents a good foundation for examining the applicability of distributive justice at the global level.[180] Suttle contends that although global cooperation has given rise to some measure of coercion at the international level, this exercise of power does not give rise to the application of egalitarian (distributive) principles. The international legal system is made up of agencies that allocate rights and responsibilities, but they do not have the same coercive powers seen within the domestic system.[181]

The global order consists of a wide range of institutions which possess joint persuasive strength but individually have only a finite degree of persuasiveness.[182] To determine the applicability of distributive principles, a more accurate approach would be to analyse each institution and

[174] Ibid at 280.
[175] Arash Abizadeh 'Cooperation, pervasive impact, and coercion: On the scope (not site) of distributive justice' (2007) 35 *Philosophy & Public Affairs* 350-351, 354-356.
[176] Ibid.
[177] Nagel (n152 above) 124.
[178] Ibid.
[179] Ibid.
[180] Suttle (n146 above) 1051.
[181] Ibid at 1052.
[182] Freeman (n146 above) 287-288.

its interactions with other institutions at the international level.[183] Suttle argues that such analysis will lead to the determination that while distributive justice may be applicable within some of these institutions, it will be inapplicable in others. [184]

In conclusion, the contractarian position is that the applicability of distributive justice is restricted to the domestic system and has no/limited application within the international legal system. The primary reason for this in- or limited applicability are the lack of a common sovereign and absence of coercive power. There is, therefore, no basis for the international legal system to concern itself with entrenching global equality.

3.2.2.2 Cosmopolitan defence of the application of distributive justice in the international legal system

Unlike the nationalists, who argue against the application of distributive justice within international law, the cosmopolitan contends that distributive justice is applicable within international law as it is at the domestic level. This position asserts that the demand of justice is rooted in fairness, and fairness is common to all human beings, notwithstanding statehood.[185] It emphasises equal opportunity for all societies. Cosmopolitanism is hinged on the notion that humans, not states or institutions, are the primary components of justice concerns.[186]

Cosmopolitans insist there is no difference between being born into a poor society and being born into a poor family in a rich society.[187] If distributive justice is necessary within the domestic system to remedy such inequality, it follows that we owe the same duty to those who live under poor circumstances even if they live in a different state.[188] In other words, wealthy societies are under an obligation to assist poorer societies. The foundation for this duty is common humanity and cannot be restricted to those within the same nationality.[189]

The ideals of justice are applicable primarily because humans are the subject of the social contract.[190] The shared humanity is adequate justification for the applicability of distributive

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[183] Suttle (n146 above) 1053.
[184] Ibid.
[185] Nagel (n152 above) 119.
[186] Thomas Pogge 'Cosmopolitanism and sovereignty' (1992) 103 *Ethics* 48, 48-49.
[187] Samuel Black 'Individualism at an impasse' (1991) 21(3) *Canadian Journal of Philosophy* 347, 355.
[188] Ibid at 357.
[189] Ibid.
[190] David Richards 'International distributive justice' in J Roland Pennock & John William Chapman (eds) *Ethics, Economics, and the Law* (1982) 275.

justice whether under national or international law. Our common humanity is adequate and common institutions or state relations is immaterial to the application of distributive justice.[191]

Charles Beitz's argument shows the adequacy of moral personality coupled with the 'capacity to form, revise and pursue a conception of the good.'[192] Any individual who can have a conception of what is good qualifies to participate in global justice and have their interests protected.[193]

Similarly, Andrea Sangiovanni rejects the notion that coercion is a prerequisite for applying distributive justice under the global system.[194] He explains his position by pointing out that if a society is under an attack which incapacitates its law enforcement institutions and its capacity to exert coercion, such society will not fall into utter chaos.[195] A certain level of organization and public order will continue to exist within the society and the provision of crucial resources by the state will not cease. Members of the state will also continue to enter into agreements and other legal relations.[196]

If some level of order and sense of mutual order continues to exist even without a functional sovereign, there is no reason for limiting the applicability of the principles of distributive justice to the presence of coercive authority.[197] Since members of a society will maintain some level of public order and provision of crucial services, it shows that there is some other justification, other than coercion, for the application of redistributive justice within the state. The obligation for equality arises from the sense of shared community and contribution to that community, and such sense of community may exist within the domestic society or the transnational or international community.[198]

This position thus addresses the criticisms that since the international system lacks a sovereign or coercive authority, distributive justice is not applicable within the system. Sangiovanni agrees that the state needs to justify its existence by guaranteeing a category of essential goods to those within its authority.[199] However, this does not preclude the application of distributive

[191] Beitz (n144 above) 595.
[192] Ibid.
[193] Caney (n131 above) 115.
[194] Sangiovanni (n146 above) 10.
[195] Ibid.
[196] Ibid.
[197] Ibid at 11.
[198] Ibid.
[199] Ibid at 15.

justice within international law. The separation between the domestic and the international only defines the nature and contents of distributive justice at the international level which would be different from its nature and contents at the domestic level.[200]

Thomas Pogge, another cosmopolitanism scholar, explains that the applicability of distributive justice within the global order is compatible with the fundamentals of Rawls' conception of distributive justice.[201] He starts by equating nationality with other chance events like genetics, racial identity, gender and social status, which are beyond a person's control but may lead to inequality within the society.[202] Just as a person has no say in determining their genes, race, gender or class, a person has no say in determining their nationality and it is just as inescapable and with no exercise of the will as the other factors which necessitate redistribution.[203] For Pogge, nationalities should not be treated differently from other factors that lead to inequality.[204] If inequalities that are a consequence of divergence in genetics, racial identity, gender or social status are to be remedied, it means that inequalities that are a consequence of different nationalities must also be remedied.[205]

Notwithstanding all the above, some cosmopolitans have argued that it is important to have a significant level of global interdependence for distributive justice to be applicable at the international level.[206] Where such interdependence exists, the distinction between the domestic and the international sphere not only becomes blurry, but also unhelpful.[207] This further implies that a criterion of justice which is limited to domestic system or statehood would prove inadequate.[208]

The existence of interactions and interdependence across state borders makes it necessary to have a system of global justice. This concept of justice would provide a foundation for examining the global order and it would specify our moral obligation and the legal duties and rights arising from it.[209] If states are interdependent, then justice in international cooperation becomes necessary.[210] On the other hand, where states are completely autonomous and have

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[200] Ibid at 15-17.
[201] Pogge (n144 above) 240.
[202] Ibid at 247.
[203] Ibid.
[204] Ibid.
[205] Ibid.
[206] Beitz (n144 above) 151; Pogge (n144 above) 241.
[207] Beitz (n144 above) 128.
[208] Pogge (n144 above) 40.
[209] Ibid 260.
[210] Beitz (n144 above) 132.

no relationship or interdependence among each other or with people and agencies beyond their territories, then distributive justice may be non-applicable at the international level.[211]

Brian Barry, however, insists that the nature of global association required for distributive justice does not exist and even though international trade exists among states, this trade relationship is not the kind of mutually advantageous interdependence that the theory expounded by Beitz presupposes.[212] Caney, however, clarifies that all that is required for the principles of distributive justice to be applicable is a level of interrelationship and this relationship or interdependence does not have to be 'mutually beneficial or cooperative.'[213] The relationship does not have to be beneficial to every side, it is sufficient that it generates some advantage or liability, which may otherwise be non-existent.[214] The existence of this relationship, not the benefits or exploitations arising from it, is what initiates the application of distributive justice.

Beitz also asserts that distributive justice is applicable at the international level from a contractarian perspective.[215] Adopting the social contract theory, he contends that the initial social contract would have been between individuals belonging to one (global) community, and not different states.[216] This arrangement would have been necessitated by the need for interdependence and these individuals would have constituted the global society.[217] The international level would, therefore, have been the first instance where the principles of justice was applied before its application at the domestic level.[218]

In this global social contract, like Rawls' domestic social contract where the parties are ignorant of their individual abilities, each state would be ignorant of its own level of wealth and would have agreed to a 'resource distribution principle' which would allow every community to progress and cater for the primary necessities of its members.[219] The application of distributive justice would provide a guarantee to less well-off communities that the absence of resources would not hinder their capacity to meet their primary needs.[220] The adoption of this 'resource

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[211] Ibid.
[212] Brian Barry *Liberty and Justice: Essays in Political Theory Vol. 2* (1991) 194.
[213] Caney (n131 above) 110.
[214] Beitz (n144 above) 131.
[215] Charles Beitz 'Cosmopolitan ideals and national sentiments' (1983) 80(10) *The Journal of Philosophy* 594.
[216] Ibid.
[217] Beitz (n144 above) 143-153; Beitz (n215 above) 595.
[218] Beitz (n144 above) 143-153; Beitz (n215 above) 595.
[219] Beitz (n144 above) 143.
[220] Ibid at 142.

redistribution principle' would offer a framework for creating systems and structures that cater to the needs of states within the global social contract.[221] Distributive justice principles would apply in a similar way within international law as it applies at the local level.[222]

Beitz explains further that, members of this original global social contract would be oblivious of the particular domestic system to which they belong.[223] In creating rules, they would have believed that they were making regulations for the whole community of humankind.[224] There isn't two social contracts; one being domestic and a second one being global. Just one imaginary social contract exists, and it is global. Under this contract, the parties select ideals of distributive justice with no recourse to individual conditions and privileges and if there is consensus that signatories to the domestic social contract would choose distributive justice principles, same choice would be made within a global social contract.[225]

In defending the acceptance of distributive justice within the global order, Pogge points out that its rejection neglects the history of the relationship between the global North and the global South.[226] He explains that the former group of states are guilty of worldwide imperialism and commercial exploitation which is responsible to a degree for the underdevelopment currently seen in third world states.[227] Although he fails to make a claim in support of reparations for colonialism and slavery, Pogge insists that the history of colonial exploitation is enough justification for the application of distributive justice principles at the global level.[228] While it may be impossible to sufficiently rectify historical exploitations, current international systems must be formulated in a manner that enshrines justice and fairness.[229]

The lack of a global authority or institution with the power to enforce justice does not mean that distributive justice principles are not applicable at the international level. It is practically

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[221] Ibid at 141.
[222] Ibid at 141-142.
[223] Ibid.
[224] Ibid.
[225] Ibid 151. The institutional and social contract approaches to cosmopolitanism have been criticized on the ground that they fall into the same hole they attempt to fill. The argument of the cosmopolitan is targeted at ensuring that the conditions and location of birth (nationality) does not dictate an individual's prospects. However, the institutional approach falls into the same problem by basing a person's chances on international interdependence and association, a condition which is seen as equally arbitrary. Caney notes that where a person is given birth to within a community that has yet to establish any relationship or interdependence with the rest of the global community, the institutional theory implies that distributive justice would not be extended to them. Caney (n131) 112.
[226] Pogge (n144 above) 262
[227] Ibid at 262-263.
[228] Ibid.
[229] Ibid at 265.

impossible for the global order to completely adopt the Rawls' conception of distributive justice.[230] However, this does not mean that some level of distributive justice is impossible. Even within the domestic system, some ideals will continue to remain out of reach but this does not imply that the state will give up any and every attempt at doing justice.[231] This may be likened to invalidating an aptitude test because none of the students could give all the correct answers within the stipulated time.[232] Similarly, the existence of a tyrannical government within a state does not imply that we will stop aspiring to or change our conception of justice. Therefore, the lack of adequate institutions to enforce global distributive justice does not justify its rejection at the international level.[233] This lack of institution merely points out to the need to create such institutions.[234]

3.2.3 Interim conclusion

It is worth restating that the theory of distributive justice is premised on the idea that some individuals within the state are usually well-off in comparison to others. This is often because they possess some natural talents or other advantages that are not readily available to others. The poor are thus poor because of the natural state in which they have found themselves; a condition which they have not chosen. Justice, therefore, demands that rights and responsibilities within the society must be distributed in a way that narrows the inequality between the wealthy and the poor.[235]

Some scholars, as seen above, have objected to the use of distributive justice within the global community. They argue that the principle is inapplicable in the absence of a sovereign. However, the absence of a sovereign does not vitiate the application of distributive justice. The principle is founded upon the existence of an unequal society and the need to remedy this inequality. It is irrelevant whether it is a domestic or international community. All that matter is the existence of inequality. The nature of the society – domestic or international – only becomes relevant with respect to the available institutions for remedying this inequality.

The use of distributive justice at the global level connotes that the system must ensure that the inequality between wealthy states and their poor counterparts is narrowed. It aims for a global

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[230] Ibid at 260.
[231] Ibid.
[232] Ibid.
[233] Ibid at 266.
[234] Ibid at 267.
[235] Rawls (n126 above) 54.

redistribution of wealth among nations and ensures that the different wealth levels and developmental needs of different states are considered in the sharing of obligations within any international agreement.

This conception of equity fits into the contentions between developed and developing states within the UN climate change regime. It underscores the issue of inequality between states and mirrors the claims brought forward by developing states regarding the inequality between different groups of states within the global system and the implications of these on the allocation of rights and responsibilities under climate change treaties. By emphasising the differing capacities of states and the need to bridge this gap, distributive justice provides a framework that allows developing states to partake in climate change action while taking into consideration their developmental needs.

However, distributive justice fails to account for the human causes of inequality and the role of such causal factors in redistribution. Inequality is seen as a given, based on differences in natural skills and endowments. It does not take into consideration the fact that inequality is often a result of the oppressive exploitation of common resources by one group of the society to the disadvantage of other groups. Thus, while distributive justice is useful in explaining one aspect of the developed/developing states arguments in global climate change negotiations, it is inadequate to explain the historical liability of developed states for climate change.

3.3 Equity as corrective or restorative justice

This section examines another sense in which the concept of equity has been construed: restorative justice. It examines the principle of corrective justice, its elements, and its suitability as a concept for understanding the interaction between developed and developing states in global climate change negotiations. As will be seen below, the principle of corrective justice places the responsibility for remedying an inequality at the feet of those who are responsible for such inequality.

This is relevant given the weight that developing states have placed on the historical liability of developed states for climate change and the relationship between this responsibility and the need for equity in climate change agreements.[236] An understanding of this conception of equity

[236] See section 4 of chapter three and section 3 of chapter four, and section 2.2 of chapter five for a fuller discussion.

is, therefore, useful in framing the arguments of African states in climate change negotiations. The terms 'corrective' and 'restorative' justice are employed correspondingly and carry the same meaning within this thesis. This section also relies extensively on criminal justice literature.

3.3.1 Definition and justification

To understand the concept of restorative justice within the context of climate change, it is necessary to restate the nature of the climate change problem. Climate change is a result of the growth in the release of greenhouse gases into the atmosphere, and the majority of them originate from developed states, otherwise known as the global North.[237] Unfortunately, states of the global South will be disproportionately affected, and they lack the capability to tackle the consequences of climate change.[238] Climate change may, therefore, be regarded as a harm done by developed states against developing states.[239]

The question then arises as to how to remedy this climate injustice. When one person does harm against the other, what actions are necessary towards the victim and the harm-doer in order to deal with the injustice? Restorative justice answers this question by advocating for an approach that focuses on restoring and healing the victim.[240] Like Tony Marshall elucidates, 'restorative justice is a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for their future.'[241]

This means that the parties involved can directly participate in the justice process by stating their positions and collectively coming to an agreement on the injury caused, the offender's responsibility for that injury and how to restore a sense of justice between the parties.[242] Restorative processes may include the payment of compensation to the victim or to the wider society and the imposition of punishments on the offender. However, such punishment is

[237] See section 2.1 of chapter one.
[238] See section 2.1 of chapter one.
[239] The issue of intention and the state of scientific knowledge at the beginning of the industrial revolution is a different topic entirely, which this thesis does not cover.
[240] David Miers 'The responsibility of the rights of victims of crime' (1992) 55(4) *Modern Law Review* 496; John Braithwaite *Restorative Justice and Responsive Regulation* (2002) 12.
[241] Tony Marshall 'Restorative justice on trial in Britain' in Heinz Messenger & Hans-Uwe Otto (eds) *Restorative Justice on Trial: Pitfalls and Potentials of Victim-Offender Mediation – International Research Perspectives* (1992) 15–28.
[242] Michael Wenzel, Tyler Okimoto, Norman Feather et al 'Retributive and restorative justice' (2008) 32 *Law and Human Behavior* 376; Howard Zehr *The Little Book of Restorative Justice* (2002) 37.

primarily targeted towards the benefit of the victim and, where possible, the transformation of the offender.[243]

The core element of restorative justice is the deliberative process and the focus on healing the victim.[244] It brings the wrong done against the victim to the centre of the conversation, seeks to ensure that the offender understands this injury and commits to remedial action.[245] Restorative justice ensures that beyond punishing the offender, there is reparation or compensation for the victim. There are three fundamental elements of restorative justice. Firstly, an offence is regarded primarily as a conflict against the victim and the victim must remain the focus of the justice process. Secondly, the justice process must focus on reconciling and repairing the harm done against the victim. Lastly, the justice process must be a deliberative process between the parties involved in the harm and injury.

Restorative justice has become a part of the literature and discussion on remedying transnational injustices of the past with some calling for the need for reparations for injustices such as the slave trade.[246] One of the most vigorous proponents of the application of restorative justice with respect to the North-South relationship and the need for justice was Muhammed Bedjaoui, a former judge of the ICJ. In his book, *Towards a New International Order*, Bedjaoui recognises that there is a great gap in the global distribution of wealth and argues that Europe and the US are primarily liable for this gap.[247] According to him, this group of states have taken advantage of the resources of the developing world and are implicated in the high levels of inflation, hunger, unfair trade and indebtedness in the developing states.[248]

Bedjaoui argues further the current international legal system, while pretending to be neutral, has contributed to the consolidation of this prejudicial economic relations.[249] This system was European at inception and, according to him, served 'as a legal basis for the various political and economic aspects of imperialism.'[250] Bedjaoui proceeds to argue that while international

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[243] Wenzel et al (n242) 376.
[244] Donald Hermann 'Restorative justice and retributive justice: An opportunity for cooperation or an occasion for conflict in the search for justice' (2017) 16(1) *Seattle Journal for Social Justice* 71, 81; Tony F Marshall *Restorative Justice: An Overview* (1999) 5; Braithwaite (n240 above) 12.
[245] Hermann (n244 above) 81; Wenzel (n242) 377.
[246] Patricia M Muhammad 'The Trans-Atlantic Slave Trade: A legacy establishing a case for international reparations' (2013) 3(2) *Columbia Journal of Race and Law* 147.
[247] Muhammed Bedjaoui *Towards a New International Economic Order* (1979) 26-49, 119.
[248] Ibid 36. There were other scholars in that generation who rejected this claim; see Ian Little 'Economic relations with the third world - Old myths and new prospects' (1975) 22 *Scottish Journal of Political Economy* 223; Barbara Ward *The Rich Nations and The Poor Nations* (1962) 13-61.
[249] Bedjaoui (n247 above) 48-49, 63.
[250] Ibid at 50.

law cannot by itself be an instrument of change and development, it can enhance a new economic order through the creation of new legal rules and standards.[251] These rules must ensure development, which is balanced and harmonious, and ensure that all states and nations benefit.[252]

This objective can only be achieved through the adoption of equity into the international legal order.[253] Equity helps to correct inequalities and by emphasising the principle of equity, international law is able to foster a 'balanced and harmonious development.'[254] Bedjaoui stresses that the aim of such introduction of equity is to limit, and possibly, eliminate the inequality between the developed world and the poor developing states. Consequently, there is an joint duty on the part of wealthy nations to foster development and a corresponding global right to development on the part of developing states.[255]

Bedjaoui's conception of equity within international law is a clear adoption of restorative principles. He conceives of poverty and global inequality as a crime for which developed states are responsible and the international legal system must seek for ways to enhance harmony between all states. The end goal of such coming together of states must be to enhance the development of states of the global South; the victims of the exploitation by developed states.

Similarly, Haq argues that developed states should be required to give developing states the necessary support so as to enhance 'economic equity in the global context.'[256] Janis succinctly describes these ideas of equity as 'a form of distributive justice, aimed to meet the needs of developing countries.'[257]

However, some scholars disagree on this interpretation of equity and its role within the international legal system. These scholars view equity strictly within its use in judicial decision making.[258] In other words, equity is seen strictly as the discretionary power exercised by a judge to do justice in a case where positive law has made no clear provision. Equity is rejected as a concept for addressing an issue like global economic disparity. Brownlie argues that equity

[251] Ibid at 63.
[252] Ibid at 110.
[253] Ibid at 63.
[254] Ibid at 127.
[255] Ibid.
[256] Inamul Haq 'From charity to obligation: A third world perspective on concessional resource transfers' (1979) 14 *Texas International Law Journal* 389, 406.
[257] Janis (n29 above) 22.
[258] Ian Brownlie 'Legal status of natural resources in international law (Some Aspects)' (1979) 162 *Recuiel des Cours* 287.

provides 'little but disappointment as a tool for solving these sophisticated problems.'[259] Within the socio-economic context, the principle of equity, he contends, is 'no more than a bundle of impressionistic ideas.'[260]

3.3.2 Interim conclusion

The concept of equity as corrective or restorative justice offers a good theoretical framework for analysing the arguments and conceptions of equity by African nations within the international law on climate change. It emphasises the need to remedy past injustices. Unlike the Rawlsian conception of equity, this conception of equity rejects the notion that inequality is a result of differences in natural endowment. Instead, it takes the position that if injury has been done against a member of the society, the aggressor must acknowledge the harm done and seek for ways to remedy this harm.

Restorative justice provides a useful framework for understanding the use of equity within international climate change treaties. It makes the victim the central focus of the justice process. This implies that the focus is not merely to cast aspersion on developed states for past emissions or for exploitation of global resources. Instead, it is to come to terms with the consequences of these past activities and the need to remedy them.

Restorative justice is also useful as it emphasises a deliberative process in determining what amounts to just deserts or adequate remedy. It does not advocate the traditional adjudicatory process where an award is merely handed down. This helps to understand the negotiation process of the treaties and agreements as an avenue where parties come together to decide what is in the best interest of historically disadvantaged states and how to enhance future capacities.

As our examination of the *travaux preparatoires* of the UN climate change treaties will reveal, the conception of equity that African states sought was such that embraced the restorative justice principles. It placed focus on the plight of African states and the historical responsibility of developed states, both for climate change and global inequality. The negotiation process was, therefore, seen as deliberative to ensure that the history of colonialism and other forms of injustice against the global South was remedied in the distribution of rights and responsibilities.

[259] Ibid.
[260] Ibid.

This work will adopt both the distributive and restorative justice principles in explaining the conception of equity by African states. Whereas distributive justice emphasises the existing inequality between states, restorative justice provides a framework for understanding the arguments on historical responsibility within the climate change negotiations. Jointly applied, these principles lead to an interpretation of equity that ensures that African states can undertake climate change action without limiting their economic or developmental pursuit.

4. CONCLUSION

This chapter has appraised the major conceptions of equity within legal jurisprudence and their strength as conceptual frameworks for grasping the conception of equity in the international climate change negotiations and the ensuing treaties. By outlining these conceptions, this background helps us to fit the arguments of African states in international climate change negotiations within specific notions of equity. The analysis in chapters three, four and five, which situates African submissions within certain conceptions of equity, is built upon this chapter.

In all its conceptions, whether domestic or international, discretionary, distributive or restorative, equity embodies the need to do justice. Equity emphasises the need to ensure that the adjudication of a case or the codification of a law is done in a manner that ensures that injustice is not perpetuated. However, the justification and the contexts for the application of equity differs depending on which of these conceptions of equity is adopted.

Equity as discretionary justice refers to the authority exercised by the judge to determine a suit outside of the strict provisions of the law where positive law proves inadequate or where its application will occasion an injustice. It proceeds on the premise that it is impossible for the lawmaker to pre-empt every case that will arise, and it cannot be the intention of the lawmaker to occasion an injustice through the law or its absence. It, therefore, becomes incumbent upon the judge to fill such gaps in the law in a manner that ensures that justice is done even if this means relying on extra-legal principles.

As this chapter has shown, the idea of discretionary justice is inadequate in explaining the conceptions of equity advanced by African states in the negotiations of the various climate change treaties. This conception of equity does not cover the range of issues and concerns

raised in the African submissions.[261] Discretionary justice is focused on a case-by-case adjudication of facts in a manner that bridges any gaps in the law. This is inadequate for the climate change regime, where the African states argue for definitive sets of rights and responsibilities.[262]

Distributive justice, on the other hand, rests on the notion that members of the society often have different capacities and different access to primary goods. It will be unjust if certain members of the society, by virtue of their natural abilities, are significantly well-off while others lack basic necessary goods. Such a state of injustice must be remedied. Distributive justice argues for a redistribution of goods in a manner that seeks to bridge the existing wealth gap between the rich and the poor.

The distributive justice conception of equity is useful for analysing the contention between climate change action and development in global climate change negotiations. It highlights the unequal capacities of different states within the international system. While states of the global South are largely underdeveloped, states of the global wealth enjoy high levels of economic development. This, therefore, makes global inequality and the need to enhance global development central to how rights and responsibilities are shared under climate change agreements.

However, the application of distributive justice within the international legal system has been questioned on the ground that the duty to take care of the less well-off only arises due to the extent of the power exercised by the sovereign. This means that distributive justice only applies as a needed basis for the exertion of sovereign authority. Since no such power is wielded under international law, there is no room for the application of distributive justice.

This chapter has shown that this objection is false. Distributive justice does not arise out of the power of the sovereign but from the social contract and will be relevant within any community, whether domestic or international. There is a form of social contract that exists within the community of states and the goal of distributive justice is to ensure that inequality within any society is remedied. The existence of differing capabilities and thus different levels of wealth within the global community is enough reason for the application of distributive justice.

[261] Section 3.3 and section 4 of chapter three, section 3 of chapter four and section 2 of chapter five.
[262] Ibid.

Furthermore, the interdependence of states has become non-voluntary, even when it is not coercive. There is a significant measure of inter-dependence between states and drawing a sharp distinction between the international and the national, reserving distributive justice for only the latter, would lead to injustice in a world of interdependence. Distributive justice in international law becomes necessary if states must cooperate to tackle certain global issues. This principle offers a framework for examining the global order and identifying the legal rights arising therefrom.

However, the principle of distributive justice fails to fully account for the historical causes of inequality among nations. It takes inequality as a given without interrogating the human injustice which often results in inequality.

Unlike the principle of distributive justice, corrective justice does not ground the application of equity on different capacities. Instead, it argues that the duty to take care of the poor arises from the fact that their poverty is a product of injustice within the political system. In the state of nature, all humans were equal and equally deserving of dignity. Redistribution is, therefore, not an act of charity but a legal duty to remedy injustices of the past, injustices responsible for the existing inequalities. Once past injustice can be shown, an argument for restorative justice can be made. Within the present context, it implies that the history of colonialism and the inequitable use of earth's resources by developed states gives rise to a legal duty to remedy these past injustices.

The principles of distributive justice and restorative justice provide a compelling argument from which this study proceeds. Jointly applied, the principles of distributive and restorative justice address the two major areas of importance to the African region in the climate change negotiations: the matter of lack of capacity and the issue of historic injustice.

These principles provide a conception of equity that emphasises the need to address inequality between states by applying distributive principles. Even in the absence of a sovereign, redistribution is justified by the need to remedy the injustices of the past for which developed states are responsible. This past wrong gives rise to a present legal duty.

This thesis adopts the distributive and the restorative justice conceptions in explaining Africa's conception of the principle of equity as a means to solving the contention between the need for development and the need for climate action. A combination of these theories addresses the need for justice in the distribution of rights and responsibilities within climate change treaties.

Flowing from the above, the next chapter analyses the submissions of African states (arguing through the G77) in the formation of the UNFCCC and what conceptions of equity are revealed in these submissions. The chapter examines the events, report and conferences leading to the adoption of the treaty and what these tell us about the conception of equity adopted by African states in international climate change law.

CHAPTER THREE

EQUITY, DEVELOPING COUNTRIES AND THE CLIMATE CHANGE REGIME

1. INTRODUCTION

As seen from the previous chapter, the principle of equity has evolved across various jurisdictions and, depending upon the context, conveys a wide range of meanings. The conception of equity as distributive justice seeks to ensure a redistribution of goods between members of a society in order to improve the conditions of those who are deprived within that society. It focuses on the redistribution of wealth, even if it implies placing different levels of responsibilities upon otherwise equal members of the society. Similar to this is restorative justice. Like distributive justice, it recognises the unequal position among members and argues that there is a legal duty to compensate for past acts of injustice.

This chapter takes the conversation further by examining the use of equity in the evolution of the international law on climate change. Tracing the negotiations from the Stockholm Conference in 1972 to when the United Nations Framework Convention on Climate Change (UNFCCC)[1] was adopted in 1992, this chapter outlines the conception of the principle by developing states in contradistinction from those of their developed counterparts. The chapter focuses on the history of colonisation and the disproportionate contribution of developed states to climate change and how these issues have informed the conception of equity within climate change agreements.

This chapter highlights the significant difference between the conception of equity by developed states and their developing counterparts and examines how the conceptions of equity by developing states fit into the different theories examined in chapter two. The chapter closes with an examination of the UNFCCC and the conception of equity which is reflected in this text.

Overall, this chapter establishes that while developed states view equity within the agreement as a voluntary or charitable requirement based on their superior levels of financial and

[1] Adopted and Opened for Signature, Ratification and Accession by the General Assembly, A/RES/48/189, 20 January 1994.

technological capabilities, developing states view equity as a necessary requirement of justice with attendant legal duties. Developing states believe that this duty arises from the role of developed states as major emitters of greenhouse gases (restorative justice).

2. THE NEED FOR GLOBAL REGULATION OF THE ENVIRONMENT

The environment is made up of a plethora of natural resources such as air, water, soil, fauna and flora. Although these resources are durable and resilient, they are also vulnerable to human activities.[2] Human activities, such as tree felling and drainage of lakes, have the ability not only to change the state of the habitable surface of land over which they occur but to alter the general climate of an area.[3] Mary Somerville, an important nineteenth century geographer, noted that human exploitation of environmental resources has had a significant impact on the ecosystem and has the potential to cause even greater destructions.[4]

Human impact on the environment became more intense during the industrial revolution.[5] The increase in industrialization was accompanied by a rise in the emission of greenhouse gases.[6] Since then, human emissions of these gases have increased drastically and led to a significant change in the global climate.[7] This change is evidenced by the rise in average global temperature.[8] By 2015, the Millennium Ecosystem Assessment, a body of scientists convened by the United Nations (UN), revealed that 60 per cent of the Earth's ecosystem was diminishing and being used in an unsustainable manner.[9]

Unfortunately, the environmental impacts of these human activities often cut across territorial boundaries and reach beyond their initial points of origin.[10] Thus, an environmentally harmful activity conducted in state A may have effects on the environment of state B. An activity which is ordinarily deemed to be of domestic concern may, therefore, have international implications.[11] An accurate example of this was the diversion of waters from the Rio Grande

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[2] Ved P Nanda & George W Pring *International Environmental Law and Policy for the 21st Century* 2 ed (2013) 3.
[3] Charles Lyell *Principles of Geology, being an Attempt to Explain the Former Changes of the Earth's Surface, by Reference to Causes now in Operation* vol 2 (2009) 205.
[4] Mary Somerville *Physical Geography* 4 ed (1858) 493.
[5] Andrew Goudie *The Human Impact on the Natural Environment* 7 ed (2013) 216.
[6] Ibid.
[7] Ibid.
[8] Ibid at 221-222.
[9] Millennium Ecosystem Assessment 'Ecosystems and human well-being: Synthesis' (2005) available at https://www.millenniumassessment.org/documents/document.356.aspx.pdf (accessed 30 April 2018).
[10] Nanda & Pring (n2 above) 21.
[11] Philippe Sands & Jacqueline Peel *Principles of International Environmental Law* 3 ed. (2012) 3.

in the United States, which had adverse effects on communities on the Mexican side of the border.[12] A similar incidence occurred in 1988 when toxic wastes, originating from Italy, wreaked havoc on a small port town in Nigeria.[13]

Given the foregoing, it becomes apparent that international cooperation is necessary to tackle emerging environmental problems, including climate change. Individual states cannot be left to an unrestrained exploitation of environmental resources because the effects of such use will have an impact on other states. Even when a state has adopted sustainable environmental practices within its own territory, it may still be impacted by the activities of other states. This reality led to efforts, under the charge of the UN, to formulate a global framework for the regulation of different aspects of the environment.

3. EQUITY AND INTERNATIONAL ENVIRONMENTAL LAW: FROM STOCKHOLM TO BRUNDTLAND

The history of equity within climate change treaties is directly linked with the history and development of international environmental law. As the efforts towards a global regulation of the environment began, so did particular conceptions of equity begin to emerge among the different groups of states involved in this process.

Compared to other sub-fields of international law, like human rights and the use of force, the methodical development of international environmental law came rather late. Although there were treaties such as the Convention for the Protection of Migratory Birds in the United States and Canada,[14] the Washington Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere,[15] International Convention for the Regulation of Whaling,[16] the African Convention on the Conservation of Nature and Natural Resources,[17] these agreements

[12] Letter from Mexican Foreign Minister Romero to US Secretary of State WQ Gresham (12 Oct. 1984) reprinted in Foreign Relations of the United States (1894) 395 available at https://history.state.gov/historicaldocuments/frus1894/d386 (accessed 6 October 2020).
[13] Stephanie Buck 'In the 1980s, Italy paid a Nigerian town $100 a month to store toxic waste – and it's happening again' *Timeline* 26 March 2017 available at https://timeline.com/koko-nigeria-italy-toxic-waste-159a6487b5aa (accessed 3 July 2020).
[14] Charles Bevans *Treaties and Other International Agreements of the United States of America 1776-1949* (vol. 12 Treaty Series No. 628) 375.
[15] October 12, 1940 *United Nations Treaty Series* Vol. 161 (No. 485) 193.
[16] December 2, 1946, *United Nations Treaty Series* Vol. 161 (No. 2124) 72.
[17] September 15, 1968, *United Nations Treaty Series* Vol. 1001 (No. 14689) 3.

were mostly bilateral or regional and were often limited in their scope. Writing in 1973, Jan Schneider noted:

> The traditional legal order of the environment is essentially a laissez-faire system, oriented towards the unfiltered freedom of states. States are basically unhampered in exercising competence, in formulating and implementing regulations and in realizing benefits in the use and enjoyment of resources.[18]

By the 1960s, there were calls for a more systematic approach to global environmental governance.[19] In May 1968, the Economic and Social Council of the UN passed a resolution requesting for a global conference addressing 'the problems of the human environment'.[20] This resolution was moved by Sweden and highlighted the need for consolidated efforts at every stage or hierarchy of governance so as to limit and where possible, stop the damage to the environment.[21] The motion eventually led to the UN Conference on the Human Environment (Stockholm Conference).[22]

The Conference represents a significant point in the growth of the international law on the environment.[23] The Conference brought an end to the laissez-faire approach to global environmental governance by providing a framework on the environment for consideration and adoption by the members of the UN.[24] It was the first significant environmental effort that brought both developed and developing states together.[25] As will be seen below, this conference revealed the disparity in the approach of developed and developing states to the international regulation of the environment.

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[18] Jan Schneider 'New perspective in international environmental law' (1973) 82(8) *Yale Law Journal* 1659, 1671.
[19] Patricia Birnie 'The development of international environmental law' (1977) 3(2) *British Journal of International Studies* 169, 172.
[20] Economic and Social Council Official Records, 45th Session E/1226/Rev.1 available at https://library.un.org/sites/library.un.org/files/itp/1430-201404101403245060403_0.pdf (accessed 7 October 2020) (hereinafter Economic and Social Council Records).
[21] *Report of the UN Conference on the Human Environment*, UN Doc. A/CONF.48/14 (hereinafter Stockholm Report) 2, 37.
[22] Economic and Social Council Records (n20 above).
[23] Edith Weiss 'The evolution of international environmental Law' (2011) 54 *Japanese Yearbook of International Law* 4; Karin Mickelson 'The Stockholm Conference and the creation of the North-South divide in international environmental law and policy' in Shawkat Alam, Sumudu Atapatu, Carmen G. Gonzalez & et al (eds) *International Environmental Law and the Global South* (2015) 109.
[24] Stockholm Report 37; Birnie (n19) 173.
[25] Alexandre Kiss & Dinah Shelton *Guide to International Environmental Law* (2007) 35.

3.1 Preparatory works of the Stockholm Conference

The preparation for the Stockholm Conference made obvious the existing inequality among developed states and their developing counterparts and the impact of this inequality on the approach of either group of states to global environmental regulation. In preparation for this conference, the Secretary-General of the UN and the Advisory Committee on the Application of Science and Technology to Development were saddled with the responsibility to prepare a report on the major issues with which the Stockholm Conference had to engage.[26] This report was prepared in consultation with member states of the UN, specialized agencies of the UN and other stakeholders in order to reflect a wide and holistic view. Based on this report, the General Assembly adopted a resolution stipulating that:

> it should be the main purpose of the Conference to serve as a practical means to encourage, and to provide *guidelines for, action by Governments* and international organizations designed to protect and improve the human environment and to remedy and prevent its impairment, by means of international co-operation, *bearing in mind the particular importance of enabling the developing countries* to forestall the occurrence of such problems.[27] (Emphasis added).

The General Assembly recognized that the coming Stockholm Conference, while focusing on the need for governments to take action on environment issues, must establish a framework that allows international cooperation that particularly empowers developing states. Subsequently, a Preparatory Committee (the Committee) was put up to advise the Secretary-General on the preparation for the conference.

The Committee explored various issues, including the elements and components of a possible declaration on the human environment.[28] In its work, the Committee laid particular emphasis on the need to address environmental issues within 'the context of economic and social developments, taking into account the special needs of the developing countries'.[29] The Committee recognized that there was a connection between environmental issues and economic development in the global South. It was, therefore, no surprise that most of the preparatory seminars and meetings held before the conference concentrated on the connection between development and the environment.

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[26] Stockholm Report 37.

[27] UN General Assembly 'United Nations Conference on the Human Environment' A/RES/2581(XXIV) UN General Assembly, 15 December 1969.

[28] Stockholm Report 37-38.

[29] Ibid at 38.

Furthermore, the Secretary-General of the UN had set up the Panel of Experts on Development and Environment. The Panel's work laid emphasis on the importance of protecting and improving the quality of the environment taking into consideration the critical necessity for development within the global South. The Panel's report, popularly called the Founex Report, stated that:

> the major environmental problems of developing countries are essentially of a different kind. They are predominantly problems that reflect the poverty and very lack of development of their societies. They are problems, in other words, of both rural and urban poverty. In both the towns and in the countryside, not merely the "quality of life", but life itself is endangered by poor water, housing, sanitation and nutrition, by sickness and disease and by natural disasters. These are problems, no less than those of industrial pollution, that clamour for attention in the context of the concern with human environment.[30]

The Founex Report revealed in clear terms that the developing world faced a different kind of environmental problem than that which was recognised in most of the developed world. These environmental problems were not merely environmental, they reflected the depth of poverty and underdevelopment in these developing states. These environmental situations would improve if economic development improved. It, therefore, pointed to the need for the global efforts on the environment to also include these developmental challenges.

This position was later affirmed by the General Assembly in a 1971 resolution. The resolution acknowledged 'that the environmental problems generated by the condition of under-development pose a serious threat to the developing countries.'[31] Flowing from this, the General Assembly recognized that 'adequate environmental conditions can best be ensured by the promotion of development, both at the national and international levels.'[32] Connecting this to the forthcoming Stockholm Conference, the Assembly noted that the Action Plan to be adopted at the Conference must, *inter alia:*

> *(a)* Respect fully the exercise *of* permanent sovereignty over natural resources, as well as the right of each country to exploit its own resources in accordance with its own priorities and needs and in such a manner as to avoid producing harmful effects on other countries;

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[30] Report and Working Papers of a Panel of Experts Convened by the Secretary-General of the United Nations Conference on the Human Environment (hereinafter Founex Report) (1971) para 1.4 available at https://www.unedforum.org/fileadmin/files/Earth%20Summit%202012new/Publications%20and%20Reports/founex_report_on_development_and_environment_1972.pdf (accessed 8 October 2020).

[31] UN General Assembly *Development and environment*, A/RES/2849, 20 December 1971.

[32] Ibid.

> *(b)* Recognize that no environmental policy should adversely affect the present or future development possibilities of the developing countries;
>
> *(c)* Recognize further that the burden of the environmental policies of the developed countries cannot be transferred, directly or indirectly, to the developing countries;
>
> *(d)* Respect fully the sovereign right of each country to plan its own economy, to define its own priorities, to determine its own environmental standards and criteria, to evaluate its own social costs of production, and to formulate its own environmental policies, in the full understanding that environmental action must be defined basically at the national level, in accordance with locally prevailing conditions and in such a manner as to avoid producing harmful effects on other countries;[33]

An examination of these pre-Stockholm documents and reports reveals the interrelatedness of the environment and development. Some of the environmental issues suffered by the developing world were a direct consequence of its poverty and economic underdevelopment. As the General Assembly noted, economic advancement at both national and international levels was the best way to ensure global environmental protection.[34] It is impractical to detach economic development from environmental protection.

As the Founex Report reveals, the 'major environmental problems of developing countries are of a different kind'.[35] A global action plan for the environment must be designed in a manner that recognises the economic and social context within which each group of states must operate. This context will determine the kind of action to be taken and the measures for attaining the desired result. This implies that the kinds of solutions and actions targeted at environmental protection in the developing world will differ from what is adopted in developed states. It will also determine the extent of rights and responsibilities for each state party within any multilateral environmental agreement.

As far as environmental issues were concerned, developing states were at a vulnerable position within the global community. In its report, the Preparatory Committee mentioned that the kinds of environmental problems seen in developing states reflected poverty and lack of development in those communities.[36] In recognition of this, the General Assembly resolution went as far as acknowledging the sovereign right of each state to utilise its natural resources as a means to cater to its necessities and priorities and, specifically provided that no environmental policy

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[33] Ibid.
[34] Ibid.
[35] Founex Report para 1.4.
[36] Stockholm Report 38.

should compromise the current and future ability of developing states to pursue development.[37] The Assembly, thus, conceded that the global efforts at environmental preservation must not place limitations on the freedom of developing states to prioritize economic development.

Consequently, there was a second issue that became central to the pre-Stockholm discussions: the provision of financial resources to developing states to execute environmental programmes. The Panel of Expert on Environment and Development brought this out expressly in its work. The Panel noted that 'if there is a universal concern for global environmental problems, additional financial resources may become available from the developed world to combat these problems at an earlier stage in the developing countries.'[38]

In its report, the Panel went as far as proposing the creation of a Special Fund which would finance the cost of environmental issues in the developing world.[39] Similarly, the General Assembly's resolution mentioned the possibility of increasing the volume and reducing the terms of financial support to developing states for the purpose of allowing these states to implement projects with environmental significance.[40] Although none of these statements were conclusive on the issue of financial support, awareness on the need for such a support was beginning to emerge.

As will be seen below, these two issues – the right of developing states to pursue development without environmental constraints and the provision of finance from developed states – defined the Stockholm Conference and set the tone for the interaction between developed and developing states and the conception of equity in global climate change negotiations. The different reports prior to the Stockholm Conference, as seen above, helped to establish the differing levels of development and the fact that this would have implications on the apportioning of rights and responsibilities in a multilateral environmental agreement.

These reports also served as an introduction to the contesting claims between development and environmental action and demonstrated the unequal positions which developed and developing states stood regarding needs and capabilities. It was becoming clear that issues of inequality between these groups of states would be at the centre of the development of any international agreement regulating the environment. The foundation for the adoption of the principle of

[37] UN General Assembly (n31) para 4(b) and 4(d).
[38] Founex Report para 4.14.
[39] Ibid para 4.15.
[40] UN General Assembly (n31) para 8.

equity in international climate change law was being laid in these pre-Stockholm reports and processes.

3.2 Equity and the global South at the Stockholm Conference

Flowing from the above, it became clear that the Stockholm Conference would be an opportunity for participating developing states to argue for equitable issues such as historical injustice, economic underdevelopment and how these relate to the allotment of rights and responsibilities under the global environmental framework. The Conference, as will be seen below, further established that environmental action and the need for development cannot be separated.

The conference took place from 5-16 June 1972.[41] With over 1,200 delegates from 113 states and various international organisations, there were participants from across the globe.[42] Co-operation on this scale had been impossible before then, since most of the developing states, especially in Africa, were still under colonial rule. Now independent, they could participate and have a voice in international law and global politics. The Conference provided an avenue for developed and developing states to come together to adjudicate upon an issue of global importance.

Following the preparatory works outlined above, it had become clear that the environment was interconnected with development, and the developmental priorities of the global South could not be neglected in the conference. The Conference adopted 'Development and Environment' as part of its agenda. Participating states had the opportunity to make submissions on this topic and a range of other relevant issues.

In their submissions, developing states focused on the fact that the human environment in 'two-thirds of the world was dominated by poverty, malnutrition, illiteracy and misery, and the urgent task facing mankind was to solve those immediate and formidable problems.'[43] Developing states explained that majority of the environmental issues faced by them are a consequence of underdevelopment as 'millions continue to live far below minimum levels required for a decent human existence deprived of adequate food and clothing, shelter and

[41] Stockholm Report, para 12.
[42] Ibid, para 13.
[43] Ibid, para 44.

education, health and sanitation.'[44] As the Prime Minister of India quipped, 'are not poverty and need the greatest polluters?'[45]

It is impossible to talk about the preservation of the environment when the humans habiting such an environment are deprived.[46] Mr Adebayo Adedeji, the representative of Nigeria, also added that 'political disunity, economic fragmentation and racial segregation are the three canker worms that are eating away the world's body politic and poisoning the atmosphere.'[47] He emphasised that even though there was only one earth, 'we certainly do not have one world economy. We have instead an economically segmented world - a world of haves and have nots.'[48]

Developing states would, therefore, rather direct their efforts to economic development. They insist that support for environmental action cannot be a reason to reduce developmental efforts, there should rather be a considerable increase in the level of developmental assistance.[49] The success of any environmental programme was to be determined by its ability to boost the quality of life of those living in poverty.[50] Without reducing the existing space between rich and poor states, there could be no improvement in the human environment.[51] The Chinese delegation particularly noted that:

> … no country whatsoever should undermine the interests of the developing countries under the pretext of protecting the environment. Any international policies and measures for the improvement of the human environment should respect the sovereignty and economic interests of all countries and conform to the immediate and long-range interests of the developing countries.[52]

These submissions confirmed that it was impossible to separate the need for global environmental action from the need for economic growth in developing states. There are existing inequalities in the global distribution of wealth, and it is impossible to take collective action on the environment without directing some of that collective action to the issue of poverty and under-development in the developing world. It is impossible to talk about a

[44] Ibid, para 70.
[45] Indira Gandhi 'A special report: What happened at Stockholm v. what they said' (1972) 28(7) *Bulletin of the Atomic Scientists* 35, 36.
[46] Ibid.
[47] Adebayo Adedeji 'Deeds vs intentions' (1972) 28(7) *Bulletin of the Atomic Scientists* 53.
[48] Ibid.
[49] Stockholm Report, para 44.
[50] Ibid, para 47
[51] Ibid, para 44.
[52] Tang Ke 'The case of China' (1972) 28(7) *Bulletin of the Atomic Scientists* 55.

framework for a sustainable global environment without considering how to improve the quality of life of the individuals within that global environment. For such people, to improve their environment is to enhance their standard of living.

Furthermore, the representatives of developing states highlighted their historically disadvantaged position in comparison with most of the developed world. These states had suffered from the unfair utilisation of their natural resources by developed states.[53] These exploitations were primarily carried out through multinational companies without recourse to sustainable practices.[54] Developing states, therefore, contended that the real conflict was between 'conservation and reckless exploitation by developed states.'[55]

Developed states were also guilty of the exploration of international marine resources in a manner that had direct negative impacts on developing states.[56] The representative of the Philippines, for example, reported that the state's rich marine resources were being drained by developed states using 'sophisticated technological instruments to track down and harvest in excessive quantities schools of fish and other marine creatures.'[57] These explorations were carried out with no regard for the ecological cycles and balances.[58] In her address, the Prime Minister of India, Indira Gandhi, noted:

> Many of the advanced countries of today have reached their present affluence by their domination over other races and countries, the exploitation of their own masses and their own natural resources. They got a head start through sheer ruthlessness, undisturbed by feelings of compassion or by abstract theories of freedom, equality or justice…The riches and labour of the colonized countries played no small part in the industrialization and prosperity of the West.[59]

In making this claim, developing states were pointing out the fact that there was inequality in the level of utilisation of natural resources by various states and this inequality favoured developed states. When compared to developing states, developed states got a head start in the

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[53] Ibid; Gandhi (n45); Helena Z. Benitez 'Only one Earth: For whom?' (1972) 28(7) *Bulletin of the Atomic Scientists* 56.
[54] Tumai Murombo 'Regulating mining in South Africa and Zimbabwe: Communities, the environment and perpetual exploitation' (2013) 9(1) *Law, Environment and Development Journal* 31, 48; Samson Omofonmwan & Lucky Odia 'Oil exploitation and conflict in the Niger-Delta region of Nigeria' (2009) 26(1) *Journal of Human Ecology* 28; Richard Drayton 'The wealth of the West was built on Africa's exploitation' *Guardian* 20 August 2005 available at https://www.theguardian.com/politics/2005/aug/20/past.hearafrica05 (accessed 30 October 2021).
[55] Gandhi (n45).
[56] Stockholm Report, para 45.
[57] Benitez (n53) 55-56.
[58] Ibid.
[59] Gandhi (n45).

pursuit of economic development.[60] The general rhetoric was, therefore, that the paramount environmental issue faced by developing states was poverty caused by developed states' profiteering from their natural resources. Developed states were culpable in the global degradation of environmental resources and both groups of states cannot be saddled with the same level of responsibility. The unequal contribution of each group of states to the environmental problem must be considered in developing a global framework on the environment. To do otherwise would be an injustice to developing states.

Flowing from this, developing states pushed for the relaxation of the conditions of trade between developed and developing states.[61] Existing international trade conditions were regarded as protectionist trade barriers, which hindered the potential for developing states to partake in global trade on fair conditions.[62] Developing states warned against the possibility of an increase in the price of goods coming from developed states.[63] They feared that this act of environmental neo-protectionism would be a way for developed states to shift the cost of new environmental policies to developing states.[64] This would imply that developed states enjoyed the benefits of environmental exploitation while developing states continued to bear the cost of such exploitations.

These positions reflect a desire by developing states not only to ensure justice and fairness within international environmental law but to use it as a means for addressing some of the other global inequality issues, such as unfair global trade practices and the inequality in the distribution of global wealth. By pointing out the possibility of transferring the cost of environmental action, developing states sought to ensure that developed states do not exploit their stronger economic positions to further entrench poverty and inequality in developing states.

Despite the foregoing, developing states generally acknowledged that environmental concerns cannot be neglected.[65] They only insisted that environmental actions must be considered in the light of national developmental needs. The prevailing position among developing states was not a rejection of environmental action. It was rather an insistence on the developmental

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[60] Ibid.
[61] Stockholm Report, para 47.
[62] Ibid.
[63] Ibid.
[64] Ibid; Louis B Sohn 'The Stockholm Declaration on the Human Environment' (1973) 14 *Harvard International Law Journal* 423, 469.
[65] Gandhi (n45) 38; Benitez (n53).

priorities of states of the global South, the existing imbalance between developed and developing states and the culpability of developed states for environmental damage.

Developing states were unwilling to agree to any commitments which would restrict the exploitation of their environmental resources for developmental purposes. The eradication of poverty and the pursuit of economic development was a bigger priority for developing states, and it defined not only their participation in global environmental law but also their conception of equity and fairness within the system.

Overall, the position of developing states not only reveals the connection between development and the environment, but also highlights the need for justice within any international agreement on the environment. The inequality in the distribution of global wealth implies that states do not have equal economic capacity, and it behoves them to create laws that distribute rights and responsibilities in a manner that does not further entrench these inequalities. Instead, these laws must be targeted at narrowing this gap. As much as possible, these agreements must foster a redistribution of wealth in a manner that ensures that the conditions of those who are worse-off are improved.

At the end of the Conference, three texts of significant importance were adopted: the Action Plan, the Stockholm Declaration on the Human Environment and the Resolution on Institutional and Financial Arrangements.[66] Although these agreements did not have the status of a treaty and none of them expressly used the term 'equity', these documents set the pace for the subsequent growth of international environmental law generally and highlighted some of the important inequality questions which became central in the international agreements on climate change. These agreements are, therefore, important markers in understanding the history and development of equity within climate change treaties.

3.3 Developing countries and the Stockholm Declaration

As earlier stated, a major outcome of the Stockholm Conference was the Stockholm Declaration on the Human Environment (Stockholm Declaration).[67] This Declaration made way for the further evolution of principles of international environmental law. In the Declaration, states put together general principles some of which now have legal significance

[66] Stockholm Report 3, 6, 29.
[67] UN General Assembly, *United Nations Conference on the Human Environment*, 15 December 1972, A/RES/2994.

within international environmental law jurisprudence. The Declaration, therefore, represents the first attempt to have a methodical approach to international environmental law.[68] As will be shown below, the Declaration planted the seed for the introduction, 20 years later, of the principle of equity in the UNFCCC.

3.3.1 Economic development and environmental action

The Declaration captured some of the positions and agitations of developing states with regard to justice within the international legal order governing the environment. Specifically, the argument of developing states with respect to their developmental challenges and its relationship with the environment was captured in the preamble to the Stockholm Declaration. The Declaration acknowledged:

> In the developing countries most of the environmental problems are caused by under-development. Millions continue to live far below the minimum levels required for a decent human existence, deprived of adequate food and clothing, shelter and education, health and sanitation. Therefore, *the developing countries must direct their efforts to development*, bearing in mind their priorities and the need to safeguard and improve the environment.[69] (Emphasis added).

Principle 9 provides:

> Environmental deficiencies generated by the conditions of under-development and natural disasters pose grave problems and can best be remedied by accelerated development through the transfer of substantial quantities of financial and technological assistance as a supplement to the domestic effort of the developing countries and such timely assistance as may be required.[70]

A joint reading of the preamble and Principle 9 reveals that state parties affirm the connection between economic development and environmental problems in developing states. A state suffering from a low standard of living and inability to provide necessities, such as housing, food, clothing, education, health, etc. will have insufficient capacity to respond to emerging environmental issues. If developing states face unique development challenges that limit their ability to respond to global environmental issues, it becomes necessary that allowances be made for them in the allocation of rights and responsibilities under international environmental law. The Stockholm Declaration takes this vulnerability into account in the development of its

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[68] Viet Koester 'From Stockholm to Brundtland' (1990) 20(1) *Environmental Policy & Law* 14.
[69] Para 4, preamble to the Stockholm Declaration.
[70] Principle 9 of the Stockholm Declaration.

rules and principles on the human environment and thus sets the tone for the further development of international environmental law.

In creating this link, the Stockholm Declaration recognises the developmental priorities of developing states. It concedes that this group of states must continue to focus on meeting their critical needs like the feeding, housing, schools, medical facilities and sanitary ware. The Declaration gives room for developing states to prioritize economic growth and development. It is in effect an acknowledgment that global environmental regulation cannot be expected to progress if the needs and concerns of developing states are not taken into account. Without solving the problems of underdevelopment and lack of decent living conditions, an attempt to solve global environmental issues will merely lead to more global injustice.

The need for environmental action not to stand as an impediment to the pursuit of development by developing states was also emphasised in Principle 11 of the Declaration. It provides:

> The environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries, nor should they hamper the attainment of better living conditions for all, and appropriate steps should be taken by States and international organizations with a view to reaching agreement on meeting the possible national and international economic consequences resulting from the application of environmental measures.[71]

As previously mentioned, developing states have historically borne the brunt of global development and currently suffer huge development deficiencies. It is, therefore, important that environmental policies do not become an additional barrier to their developmental efforts. Where possible, these policies should be formulated in a way that boosts, rather than impairs, the developmental pursuits of developing states. Where environmental policies have unavoidable economic consequences for developing states, Principle 11 is to the effect that the parties involved must seek for a way to cushion such consequences. An environmental policy must not negatively impact potential of developing states to pursue development whether now or in the future.

Principle 21 also upholds the right of states to make use of resources within their territory in line with national policies and priorities. It provides that states possess 'the sovereign right to exploit their own resources pursuant to their own environmental policies.'[72] This principle,

[71] Principle 11 of the Stockholm Declaration.
[72] Principle 21 of the Stockholm Declaration.

which was advocated by a joint proposal of Brazil, Egypt and Yugoslavia, recognized that the authority of a state to utilise the resources within its territory is one of the basic components of sovereignty.[73] It is, therefore, not surprising that the Declaration upheld this right as a way to reassure developing states that they continue to have the freedom to explore their resources in pursuit of economic development. Global environmental protection was not a form of neo-colonialism to keep the global South underdeveloped. This right is, however, subject to the duty to make sure that such exploitation of resources does not harm other states.[74]

Conclusively, it becomes clear that the Declaration acknowledges the vulnerable position of developing states, their developmental priority, and the need for this to shape and govern the global regulation of the environment. The Declaration leaves intact the right of developing states to utilise their resources for developmental purposes, maintains that global environmental policies must not affect the developmental potentials of these states and where such impacts are unavoidable, parties must reach an agreement on how to cushion such effects.

3.3.2 Financial and technological support

The allocation of financial and technical resources to developing states was another issue of concern contained in the Stockholm Declaration. The preamble to the Declaration affirms that 'international co-operation is needed in order to raise resources to support the developing states in carrying out their responsibilities in this field.'[75] Thus acknowledging the need for global support to aid developing states in the achievement of global environmental objectives.

In furtherance of this, the Declaration provides that considerable amount of financial and technical support be made available to developing states. Principle 9 of the Declaration provides:

> Environmental deficiencies generated by the conditions of under-development and natural disasters pose grave problems and can best be remedied by *accelerated development through the transfer of substantial quantities of financial and technological assistance* as a supplement to the domestic effort of the developing countries and such timely assistance as may be required.[76] (Emphasis added).

[73] Sohn (n64) 487.
[74] Principle 21 of the Stockholm Declaration.
[75] Para 7, preamble to the Stockholm Declaration.
[76] Principle 9 of the Stockholm Declaration.

State parties recognize that the capacity of developing states to pursue economic growth and environmental action is limited by low levels of development. It is therefore necessary that global efforts be geared towards building the capacity of developing states. This can only be done through the provision of technological and financial support. Developing states cannot be expected to undertake environmental action without technological and financial transfer from developed states.

Furthermore, there are additional costs which states envisage will become necessary due to the incorporation of environmental action in development plans. As stated in the Declaration, states must ‘adopt an integrated and co-ordinated approach to their developmental planning so as to ensure that development is compatible with the need to protect and improve environment’.[77] Such integrated approach to development would, however, imply additional costs to the developing states.

The Declaration, therefore, goes further to provide that extra international technical and financial support be made available to developing states. This additional support will be used to defray the additional costs incurred in adopting environmentally friendly developmental plans. This ultimately ensures that no additional burden is placed on developing states.

3.3.3 Equity in the Stockholm Declaration

An examination of the Stockholm Declaration reveals an agreement that recognises the inequality between developed and developing states. The Declaration acknowledges the underdevelopment and vulnerable position of developing counties and goes further to highlight the need for those who are better off (developed states) to contribute to ensuring an improvement in the conditions of their developing state counterparts.

Although the Declaration falls short of an express acknowledgement of the injustices of the past, its recognition of the inequality between different groups of states serves as a precursor to the introduction of distributive justice into international law on the environment. The Declaration provides that states who have had the advantage of financial and technological advancement have an obligation to further the advancement of those who are underdeveloped, at least to the extent that such assistance are relevant for environmental protection.

[77] Principle 13 of the Stockholm Declaration.

The position taken by state parties in the Declaration is akin to the notions of equity as distributive justice. It emphasises the existing inequality in the society and the need for the distribution of rights and responsibilities to be targeted towards a correction of this inequality. It is a requirement of justice to compensate those who have been deprived of access to basic necessities. And it is towards this end that some of the provisions of the Declaration are targeted: improving the access of developing states to basic necessities by ensuring that they have the opportunity to pursue development.

While the Stockholm Declaration is not a legally binding agreement and consequently possess no binding force, it remains relevant in understanding the development of equity within climate change treaties. It represents one of the first global attempts at codifying the contention between economic development and environmental action on the one hand, and the inequality between developed and developing states on the other hand. The approach adopted under the Declaration toward this contention defined much of the later development of equity within international environmental law broadly speaking, and the international law on climate change specifically.

Even though the word equity was not at the centre of these discussions, and neither equity nor distributive justice was expressly mentioned in the Declaration, it was the beginning of what later culminated in the principle of equity and common but differentiated responsibilities. The Declaration sought a redistribution of resources between poorer states and their rich counterparts. It recognizes that it would be unjust to place the same level of obligations on both groups of states. This differentiation of responsibilities is further necessitated by the historically disadvantaged position of developing states in comparison with developed states. It became apparent by the end of the Stockholm Conference that an international framework on the environment, which did not take into cognisance the developmental needs of developing states would be regarded as inequitable.

3.4 The Brundtland Report

Ten years after the Stockholm Conference, it became evident that most of the global environmental challenges continued to persist. Closely linked to the problem of global environmental deterioration was the question of poverty in the global South and how to enhance their development without worsening the condition of the environment. In order to strategize on how to enhance global cooperation for sustainable development, the UN created

the World Commission on Environment and Development (Brundtland Commission).[78] The Brundtland Commission had a duty:

> (a) to propose long-term environmental strategies for achieving sustainable development by the year 2000 and beyond;
>
> (b) to recommend ways concern for the environment may be translated into greater co-operation among developing countries and between countries at different stages of economic and social development and lead to the achievement of common and mutually supportive objectives that take account of the interrelationships between people, resources, environment, and development;
>
> (c) to consider ways and means by which the international community can deal more effectively with environment concerns; and
>
> (d) to help define shared perceptions of long-term environmental issues and the appropriate efforts needed to deal successfully with the problems of protecting and enhancing the environment, a long-term agenda for action during the coming decades, and aspirational goals for the world community.[79]

In summary, the Brundtland Commission was saddled with the responsibility to recommend ways in which states at different levels of developmental growth could collaborate towards the common goals of economic development and environmental protection. The Commission drew more than half of its membership from developing states and held public hearings around the world to get the view of a wide range of interested and affected parties.[80] The Commission's work was eventually published as the *Report of the World Commission on Environment and Development: Our Common Future* (Brundtland Report).[81]

Following previous works and agreements, like the Stockholm Declaration, the Brundtland Report recognized the connection between environmental issues and development.[82] The Commission explained in its report that the 'environment does not exist as a sphere separate from human actions, ambitions, and needs'.[83] Since the environment is our habitat, and development is our attempt at improving our condition within that space, the two phenomena

[78] UN General Assembly 'Process of preparation of the environmental perspective to the Year 2000 and beyond' Resolution A/38/161 19 December 1983.
[79] Ibid para 8.
[80] World Commission on Environment and Development *Report of the World Commission on Environment and Development: Our Common Future* (1987) 3 (hereinafter Brundltand Report).
[81] Ibid.
[82] Ibid.
[83] Ibid.

are inseparable.[84] It is, therefore, naïve to defend the environment in isolation from human needs and concerns.

With respect to development, the Brundtland Commission cautioned against defining development simply as 'what poor nations should do to become richer' and thereby making development an issue dedicated solely to development specialists.[85] Although the world has witnessed significant developmental leaps, 'the same process that have produced these gains have given rise to trends that the planet and its people can no longer bear.'[86] Many industrial activities have a direct negative consequence on the environment which is supposed to sustain them.[87] These economic activities put additional pressure on already limited environmental resources and lead to the impoverishment of many people and the destruction of the environment.[88]

The Brundtland Report describes this pressure and the accompanying destruction as the 'failures of development and failures in the management of our human environment.'[89] This failure has led to a widening of the wealth inequality between rich and poor states while at the simultaneously destroying the human environment.[90] The Report emphasised that the role of the developed world in international rule-making and their excessive use of the global ecological capital has resulted in the impoverishment of states of the developing world.[91]

The Stockholm Report explained that there are often losers and winners in the association between development and the environment.[92] The monopolistic control of resources by certain players in the international community led to the excessive exploitation of limited resources to the detriment of others who do not share in this control.[93] The losers in the conflict between development and environment are, therefore, those who bear a disproportionate amount of the costs of development.[94] They suffer more from the damage done to the human health, environment and ecosystem than they enjoy the benefits of industrial activities, which are the causes of this damage. On a global scale, these environmental 'losers' are the late-comers to

[84] Ibid.
[85] Ibid.
[86] Ibid at 8.
[87] Ibid.
[88] Ibid at 8, 35.
[89] Ibid.
[90] Ibid.
[91] Ibid at 10.
[92] Ibid at 41.
[93] Ibid.
[94] Ibid.

the industrialization process. They do not enjoy the benefits of low-cost supplies like developed states did.[95]

Industrialized states are also able to transfer the environmental cost of production.[96] These costs are transferred through export prices and borne by consumers in the importing state, usually in the developing world.[97] Unfortunately, developing states are unable to do the same with their own exports and such costs are borne domestically.[98] This inequality is made possible by unfair international trade policies that favour developed states, while exploiting developing states.[99] For instance, industrial states adopted policies around the production of cane sugar and beet sugar, which cost developing states about $7.4 billion in revenue.[100] Given their industrial advantage, these wealthier nations are therefore in a better financial and technological position to adjust to the implications of climate change.[101]

The Brundtland Report was not the first to provide a link between economic development and environmental concern. The connection between both phenomena had been highlighted at the Stockholm Conference and the preparatory works before the conference. The Brundtland Report was, however, novel in the kind of connection that it drew between development and the environment. Earlier works had focused on the fact that the priority of developing states was economic development rather than environmental concern. In the face of limited resources, developing states cannot be expected to focus on environmental issues at the absence of their developmental goals.

The link between environment and development was focused on environmental issues caused by under-development in the third world.[102] Poverty and need were regarded as the greatest polluters and greatest environmental problem of the developing world.[103] Upon this basis, they held the view that there can be no separation of development from environmental protection in the global discourse. Developing states are not able to undertake environmental action in the

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[95] Ibid.
[96] Ibid at 69.
[97] Ibid.
[98] Ibid.
[99] Ibid at 69-70.
[100] Ibid.
[101] Ibid at 41.
[102] Principle 9 of the Stockholm Declaration.
[103] Gandhi (n45).

absence of developmental support. They emphasised that in order to promote environmental action in these states, developed states must provide support for economic growth.

However, the Brundtland Report established a causal relationship between industrial growth in developed states and global environmental degradation.[104] It is not merely that certain states could not afford the cost of environmental action or had environmental problems that were a consequence of under-development. It is the fact that economic growth in certain states is the reason for the degradation of the quality of the global environment and the inability of certain states to protect their environment and improve their quality of life.

The Brundtland Report draws a causal relationship between the environment and development broadly speaking, and between development in industrialized states and underdevelopment and environmental degradation among developing states. Industrialization has created a system of development winners and environmental losers. The early comers to development have been the winners and their development is directly implicated in the poverty and environmental degradation in developing states. This creates a system of global inequality.

This state of inequality between different groups of states is both the earth's main environmental problem, and its main developmental problem.[105] Unlike the arguments emanating from Stockholm, the Brundtland Report showed that linking environmental action with developmental action was not merely necessary for the developmental priority of developing states, the connection was necessary because of the environmental effects of industrialisation in the developed world on their developing counterparts and the resulting injustice and inequality. It is unproductive to direct efforts towards environmental problems without having a comprehensive plan to tackle issues of 'world poverty and international inequality.'[106] The Report showed that we can no longer speak separately of an environmental disaster, or a developmental disaster. These issues are interconnected and must be viewed as one.[107]

The Brundtland Report served as a basis for much of the negotiations that were to take place five years later at the United Nations Conference on the Environment and Development and planted the seeds that led to the adoption of equity in the UNFCCC. The Report outlined the

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[104] Brundtland Report 8.
[105] Ibid at 10.
[106] Ibid at 8.
[107] Ibid at 9.

causal link between global environmental degradation and the industrialization of the developed world. States were not equal in the extent of their liability for environmental problems and in their capability to mitigate and adapt to its effects. It became apparent that it would be inequitable for both developed and developing groups of states to bear equal responsibilities for climate change. The Brundtland Commission, therefore, succeeded in laying out a foundation for equity in the climate change regime.

The Report emphasised the need for international cooperation in order to assist developing states.[108] It highlighted the unfair international trade practices and the need to correct these practices.[109] The Report also pointed out the need for the World Bank and other international development organisations to improve financial flows and transnational investments to developing states to improve the development goals of these states.[110] The Brundtland Report recommended that the policies for finance and technology transfer must be improved.[111]

3.5 Interim conclusion

The Brundtland Report moved the equity conversation a little further than it had been in the Stockholm Conference and the Stockholm Declaration. Stockholm had made it clear that there were high levels of poverty in developing states, and this would impede the ability of these states to undertake any serious environmental action. The submissions preparatory to, and at, the Stockholm Conference had also revealed that the nature of environmental problems in the developing world were such that were caused by the high levels of poverty and underdevelopment. It was thus on this basis that the environment and development could not be separated.

As seen above, the Brundtland Report goes further to establish a link between the high levels of industrialization in developed states and the impoverishment of the developing world. In other words, it was not merely that developing states had a development deficit or that their environmental problems were a result of their high levels of poverty, but that their poverty and the global environmental problem were a direct consequence of the economic practices of developed states. It thus emphasised a causal relationship between development in the global

[108] Ibid at 19.
[109] Ibid.
[110] Ibid at 19, 63.
[111] Ibid at 68, 78.

North and poverty in the global South; an issue which soon became central to climate change negotiations.

Having established that there was a causal relationship between industrialization in the developed world and underdevelopment in the global South, it would have been commendable if the Brundtland Commission had gone further to argue that this relationship creates a legal duty on the developed nations to take responsibility for environmental action in the developing world. The Commission failed to do so. This was, however, to become a central argument in justifying and defining the principle of equity within climate change treaties.

4. DEVELOPMENT OF THE CLIMATE CHANGE REGIME

As shown above, it is evident that issues of equity had become prevalent in global environmental discussions even before global climate change regulation. There was a conflict between the need for environmental action on the one hand, and the need for development on the other hand. This contention divided states into two major categories: developed states and developing states. Developed states had historically been responsible for a disproportionate use of the earth's resources while developing states were now experiencing low levels of development and the need to improve their socio-economic conditions.

This contention, as will be shown below, became even more defining regarding the specific environmental issue of climate change. Developing states emphasised their need for development and the historical responsibility of developed states for the climate change problem. These issues, they argued, make equity a necessity in determining how rights and responsibilities are shared within any climate change agreement.

The preparation for the adoption of the first climate change agreement commenced seriously in 1989 when the General Assembly passed a resolution recognising the continued decline in the quality of the environment, the universal nature of the climate change problem and the necessity of global collaboration in order to tackle this problem successfully.[112] Through this resolution, the General Assembly requested 'as a matter of urgency, a framework convention on climate.'[113]

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[112] UN General Assembly 'United Nations Conference on Environment and Development' Resolution A/RES/44/228, 85th Plenary Meeting, 22 December 1989.

[113] UN General Assembly 'Protection of Global Climate for Present and Future Generations of Mankind' Resolution A/RES/44/207 of 22 December 1989.

The proposed conference was to be an opportunity for states to provide 'strategies and measures to halt and reverse environmental degradation.'[114] This reversal was to be achieved through national and international efforts and through a promotion of sustainable development in all states.[115] The conference ushered in the UNFCCC and marked the beginning of the international law on climate change.

It became apparent during the preparatory work for the Rio Summit that the conference would need to address the connection between development and the environment and the implications of this for developing states; an issue which had taken centre stage during the Stockholm Conference and echoed by the Brundtland Report. The General Assembly was conscious of this and appropriately named the Conference as the United Nations Conference on Environment and Development (Rio Summit).[116] The General Assembly set up the Preparatory Committee (Committee). The Committee had the responsibility to set up organizational sessions in preparation for the summit.[117] The Committee had sessions dedicated to matters like financial support, transfer of technology and the international economic system.[118]

Unfortunately, states could not agree on several substantive issues such as atmospheric protection, high sea fishing, biotechnological safety, transfer of technology, institutional arrangements, poverty and consumption and financial resources.[119] It was not until the final session of the Committee that states were able to reach some consensus on a set of guiding principles. Still, a few issues remained unresolved as at the time of the Rio Summit.[120] The Summit was hosted by Brazil in Rio de Janeiro from 3 to 14 June 1992. With 178 national delegates in attendance, there were representatives from both the developed and developing world.[121]

4.1 Africa and the Rio Summit

African states had the opportunity to participate in the Rio Summit as independent states and present their positions on the emerging climate change regime. This position revealed the

[114] Ibid part I, para 3.
[115] Ibid.
[116] Ibid.
[117] Ibid.
[118] Lorraine Elliott *The Global Politics of the Environment* 2 ed (2004) 16.
[119] Ibid 17.
[120] Ibid.
[121] Report of the United Nations Conference on Environment and Development Rio de Janeiro, 2-14 June 1992 Vol. II: Proceedings of the Conference A/Conf.151/26/Rev.1 (Vol. II) 1-3, 23, 24 (hereinafter Report of the UNCED vol. II).

matters that were important to them and how they conceived of specific issues within the climate change discourse. African states, being under the colonial domination of Europe, did not have the opportunity to partake in the treaties formulated in the earlier days of international law.[122] With global climate change negotiations, African states had the opportunity to participate and put forward their arguments.

The Noordwijk Ministerial Conference of 1989 was one of the first opportunities for African states to formulate a joint position on climate change.[123] This ministerial conference, with 15 African states in attendance, served as a preparatory meeting for the region to consolidate a joint stance towards the Rio Summit.[124] The need to present a shared African viewpoint on climate change was also tabled before the OAU Summit of Heads of States in June 1991.[125] A follow-up conference, the Regional African Ministerial Preparatory Conference for the Rio Summit was held a month later in Cairo.[126] Series of meetings ensued afterwards. With the joint efforts of the OAU and the Economic Commission for Africa, African states adopted the African Common Position on the African Environment and Development (Common Position) at the Second African Regional Ministerial Conference for the UNCED in Cote d'Ivoire.[127]

The Common Position maintained that economic development was a priority for African states. The focus of these states was on upgrading the standard of living and reducing the level of poverty.[128] The Position further states that mass poverty, huge foreign debts, lack of appropriate technology and scientific knowledge and 'the reverse flow of financial resources hinders the regions' capacity to take part in global efforts on the environment and climate change.'[129]

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[122] Despite Africa's exclusion from the Westphalia treaties, some scholars have insisted on Africa's role as a key player in the evolution of international law. See Yasuaki Onuma 'When was the law of international society born? – An inquiry of the history of international law from an intercivilizational perspective' (2000) 2 *Journal of the History of International Law* 1; Jeremy Levitt *Africa: Mapping New Boundaries in International Law* (2008) 2.

[123] Ruth Gordon 'Climate change and the poorest nations: Further reflections on global inequality' (2007) 78 *University of Colorado Law Review* 1581.

[124] Ibid.

[125] Charles Roger & Satishkumar Belliethathan 'Africa in the global climate change negotiations' (2016) 16 *International Environment Agreements* 94.

[126] Ibid.

[127] African Common Position on Environment and Development ECA/Env.UNCED/AfricaCom/1 October 1991 (hereinafter African Common Position on Environment and Development 1991) available at https://repository.uneca.org/bitstream/handle/10855/21853/Bib-69643.pdf?sequence=1&isAllowed=y (accessed 15 July 2020).

[128] African Common Position on Environment and Development 1991 para 19; Roger & Belliethathan (n125 above) 92-95; Ewah Eleri 'Africa and climate change' *SAEEP Working Paper No. 6* 14.

[129] African Common Position on Environment and Development 1991 para 147(c); Eleri (n128 above) 14.

The Common Position highlighted the relationship between global warming, drought and desertification and urged that urgent actions be taken to prevent the further desertification of the Sahara and Kalahari deserts.[130] African states proposed the development of a Green Plan which would ensure reforestation and increase emission sinks.[131]

Overall, the Common Position provided the foundation for the region's expectation at the Conference and its hopes for the UNFCCC.[132] It stated that the approaches to the Rio Summit must be anchored on the following:

a. institution building and human capacity to implement its Environmental and Development Agenda;

b. The imperative of popular participation and full democratization at all levels of governance, the decision-making process and programme implementation;

c. Economic empowerment of the region as whole, particularly of individual countries and social groups, especially women and people at grassroots level by allowing them to participate more effectively in matters of environment and development; additionally, access to credit and development investment to promote the principle of equity is also imperative; this is required if growing mass poverty and the problem of human resources development are to be effectively addressed;

d. The effective co-ordination of development and environment programmes and policies at the sub-regional and regional levels.

African states took the position that since climate change arose as a result of historical emissions, most of which are traceable to industrial activities and economic growth of developed states, developed states are to spearhead climate change action and bear the associated costs. The developmental needs of developing states should not be sacrificed for environmental preservation.[133] For African states, these notions of restorative justice had to define the negotiations at the Rio Summit.

At the Rio Summit developing states needed to come together in order to be able to exert considerable influence on the negotiations. Additionally, these states were largely confronted with the same set of issues, and it was, therefore, practical for them to form coalitions around

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[130] African Common Position on Environment and Development 1991 para 160.
[131] Ibid.
[132] Eleri (n128 above) 13-14.
[133] Marc Williams 'The third world and global environmental negotiations: Interests, institutions and ideas' (2005) 5(3) *Global Environmental Politics* 61.

these issues.[134] Some of these issues included the need for development and favourable international trade practices, financial and technology transfer, and the need for historic justice.[135]

Eventually, African states participated in the Rio Summit through the Group of 77 and China (G77). The G77 was the primary coalition through which most developing states made their submissions to the Summit.[136] Most of these positions reflected the positions of African states.[137] A major area where both groups agreed, almost fully, was with respect to the promotion of equity in the UNFCCC.[138] The G77 conception of equity is revealed in their position on the following issues.

4.1.1 Developmental needs and climate change action

Given their state of under-development and poverty, developing states emphasised that economic growth and a capacity to meet their basic needs remained priorities. As the Jamaican delegate explained, 'poverty breeds pollution; pollution entrenches poverty. The result is a suffocating stranglehold of environmental degradation and human injustice.'[139] Increasing poverty would usually lead to increase in environmental degradation.[140] Poverty was viewed both as a cause and as a consequence of environmental degradation.[141]

Developing states argued that their priorities are economic growth and poverty eradication.[142] They made it clear that the poor, hungry and diseased would not divert resources for survival to the preservation of the environment.[143] Developing states held the view that what was at

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[134] Albert Mumma 'The poverty of Africa's position at the UNFCCC' (2000) 19(1) *UCLA Journal of Environmental Law and Policy* 199.
[135] Outside of the G77, African states also belonged to groups such as the Alliance of Small Island States, the Organization of Petroleum Exporting Countries, the Coalition of Rainforest Nations, the Least Developed Countries Group, the Like-Minded Developing Countries and the BASIC Group with South Africa as its only African member.
[136] The G77 is a group of countries founded in 1964 with an initial membership of 77 developing countries. Its current membership stands at 134 countries. New Zealand was initially a member but has now left the group; see https://www.g77.org/doc/ (accessed 12 November 2020).
[137] Adil Najam 'Dynamics of the southern collective: Developing countries in desertification negotiations' (2004) 4(3) *Global Environment Politics* 128, 133; Eleri (n128 above) 14. A major exception on the agreement between the G77 and African states was when the G77 took a weaker position on desertification.
[138] Williams (n133 above) 61.
[139] Report of the United Nations Conference on Environment and Development Rio de Janeiro, 2-14 June 1992 Vol. III: Statements made by Heads of State or Government at the Summit Segment of the Conference A/Conf.151/26/Rev.1 97 (hereinafter Report of the UNCED vol. III).
[140] Ibid at 186-187.
[141] Ibid.
[142] Ibid at 21, 35.
[143] Ibid at 187.

stake for them, as poor states, was not just their quality of life but life itself.[144] Environmental preservation, for such people, was a concern for the future and could wait when compared to the immediate need to survive.

The link between environmental protection and economic development implies that global cooperation is necessary to address both issues.[145] The protection of the environment and developmental needs are two sides of the same coin, which cannot be dissociated from each other.[146] It will be impossible to successfully address the problems of the environment unless the problem of global poverty is solved.[147] Since environmental degradation in developing states is a development problem, it follows that proposed solutions must combat poverty and promote development. Environmental preservation is not undertaken for its own sake but as a way to achieve an end: the advancement of the living conditions of all humankind.[148] It is, therefore, important to create a new foundation for global cooperation and this foundation 'must include the acceptance of the need for the South to develop.'[149] The Conference had to contribute to eliminating mass poverty to promote the full involvement of the developing world in the global efforts to preserve the climate system.[150]

4.1.2 Unfair global trade practices

Additionally, developing states pointed out the need to address additional matters, like debt-relief and global trade practices, in order to reduce the existing financial burdens on developing states.[151] They argued that the adoption of market mechanisms that enhance fair terms of interdependence between the economies of developed and developing states were a necessity for developmental growth and had implications for the ability to undertake environmental protection.[152] Unfair international trade practices deepen the state of poverty and underdevelopment and compels developing states to pursue unsustainable exploitations of their resources, which even then only meets some basic needs.[153]

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[144] Ibid.
[145] Ibid at 35, 177.
[146] Ibid at 178.
[147] Ibid at 21-22, 101, 103-104.
[148] Ibid at 187.
[149] Ibid at 22.
[150] Ibid at 190.
[151] Ibid at 20, 36.
[152] Ibid at 179.
[153] Ibid at 69, 205.

If they are not dealt with, the adverse effects of trade protectionism, low commodity prices and prohibitive taxes and tariffs will serve as barriers and negatively affect the economic growth of developing states and their capacity to tackle environmental challenges.[154] Developing states must be economically viable if they are to contribute to the global efforts to safeguard the environment.[155] The creation of a new and equitable global economic order was, therefore, essential for enhancing global cooperation in the area of sustainable development.[156]

4.1.3 The transfer of finance and technology

Having argued that they were in a state of poverty, developing states contended for the transfer or provision of financial and technological support from developed states as a necessity if they were expected to undertake climate change action. While developing states acknowledged the need to intensify research on climate change and the link between energy and development, they maintained that these activities will require time and major investments that many developing states were unable to provide.[157] Spending on climate change action, without additional support, implied that funds which were already inadequate would be further split and thus lead to lesser funds for development. To enhance climate change action, without adversely affecting developmental efforts, there must be substantial allocation of funds and resources to developing states.[158]

Developing states argued that it is incumbent upon developed states to provide them with necessary resources for climate change action.[159] Developed states have a responsibility to support developing states and to help them implement developmental policies and sound environmental management.[160] They maintained that while all states have a collective duty for climate change, the extent of specific rights and responsibilities must be differentiated.[161]

This position was based on two major premises. First, they argued that developed states are primarily liable for the intercontinental degradation of the environment.[162] While all nations contributed to environmental degradation in one way or another, developing states maintained

[154] Ibid at 68, 98.
[155] Ibid at 205.
[156] Ibid at 69, 117, 205.
[157] Ibid at 19, 22.
[158] Ibid at 19-20, 22, 97.
[159] Ibid at 46, 69.
[160] Ibid at 81.
[161] Ibid at 81, 161.
[162] Ibid.

that developed states were responsible, through industrialization and patterns and levels of consumption, for most of the environmental degradation witnessed globally.[163] Poor states use an insignificant portion of the earth's resources and contribute very minimally to the pressure on global resources. They contribute the least to the production and consumption of the products responsible for most of the environmental destruction.[164] These products are often beyond the reach and purchasing power of most of the world's poor. As Senegal submitted, two-fifths of the population of the earth own less than 4 per cent of its resources, while 20 per cent enjoy over 80 per cent of these resources.[165]

Since developed states are liable for a higher percentage of global pollution, developing states argued that they should also assume greater responsibilities for environmental preservation.[166] These developed states have a duty to assist states of the developing world in taking action to protect the environment from further degradation.[167]

Secondly, developing states argued that developed states are wealthier and have more advanced technologies for environmental protection. They should, therefore, provide developing states with 'new and additional funds and transfer technologies of environmental protection … to help the latter improve their own environment and participate in the protection of the global environment.'[168] This will benefit both developing as well as developed states.

4.1.4 Interim conclusion

Going into the Rio Summit, the position of African states reflected that the improvement of their economies remained their top priority. They made it clear that they would not focus on the climate change problem at the expense of urgent economic imperatives. African states believed that this position was justified by the fact that developed states had the advantage of unrestricted use of the Earth's resources and had prospered as a result. Furthermore, this unrestricted use of environmental resources was now responsible for climate change. This, therefore, necessitated the inclusion of equity as a guiding principle to determine the extent rights and responsibilities under the proposed climate change treaty.

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[163] Ibid at 81, 161.
[164] Ibid at 188.
[165] Ibid at 177.
[166] Ibid at 36, 161.
[167] Ibid at 24, 161.
[168] Ibid at 36.

In their joint submissions with the G77, African states pointed out that the inclusion of equity within the climate change agreement would serve as an acknowledgment of the developmental necessities and priorities of developing states. This would further imply that developing states were allowed to pursue development without the constraint of climate change obligations. They would be exempted from obligations such as emission cuts and where they had to undertake a responsibility, such responsibilities must be accompanied by the necessary financial or technological support. Developing states were not willing to divert existing funds meant for development to environmental or climate change purposes.

Closely related to this was the issue of unfair global trade practices. These unfair practices were believed to be one of the causes of the lack of development in the developing world. Seeing that development is closely related to the environment, these practices must be abolished or at least the terms of doing trade with developed states should be eased in order to allow for more fair terms of trade. This would in turn improve the chances and speed of development for the global South. Developing states thus argued that this matter was closely associated with the conception of equity within the climate change treaty.

The most contentious implication of equity, as argued by developing states, was the transfer of finance and technology from developed states to their developing counterparts. This was closely linked with the historical responsibility of developed states for climate change and the poverty levels of developing states. In other words, since developed states are liable for climate change and developing states cannot afford the cost of climate change action, developed states should transfer the financial resources and technological support needed for climate change efforts in the developing world.

As expected, developed states disagreed with this conception of equity. While these states conceded that they had superior levels of financial and technological resources, they rejected any form of historical responsibility for climate change and the legal duties flowing from such responsibility. The absence of a uniform conception of equity among the states meant that the final text of the UNFCCC was not a perfect reflection of any of these positions.

The next section analyses the UNFCCC and examines the principle of equity as adopted by parties. More specifically, the section scrutinizes the extent of rights and responsibilities adopted in the convention and how these obligations reflect the principle of equity, as argued

by developing states. It probes whether the UNFCCC can be said to be a true reflection of equity.

5. THE UN FRAMEWORK CONVENTION ON CLIMATE CHANGE

This section examines the final wording of the UNFCCC, the allocation of rights and responsibilities under this treaty and the degree to which this allocation conforms to the conception of equity advocated by developing states.

By the close of negotiations at the Rio Summit, parties adopted the UNFCCC, which provided expressly for equity as a guiding principle for the implementation of its provisions. This treaty came into force on 21 March 1994 and has since become the flagship international agreement on climate change. It is the first multilateral environmental treaty to be negotiated by practically all the states within the UN. The agreement is one which contains, as Philippe Sands explains, 'something for almost all of the negotiating States but leaves none entirely satisfied.'[169]

The UNFCCC creates certain guiding principles to serve as pointers to the interpretation of the Convention and aid state parties in the actualization of the objectives of the Convention.[170] Prominent among the principles laid out in article 3 of the Convention is the principle of equity. Article 3 (1) of the UNFCCC provides:

> The Parties should protect the climate system for the benefit of present and future generations of humankind, *on the basis of equity* and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.[171](Emphasis added).

This provision makes equity a central principle upon which the remaining provisions of the agreement shall be interpreted. Although both developed and developing states seem to agree on the need for equity and differentiation of responsibilities within the Convention, their conception and justification of this principle differs. As seen from the history of climate change negotiations from the Stockholm Conference to the Rio Summit, developing states relied,

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[169] Philippe Sands 'The United Nations Framework Convention on Climate Change' (1992) 1(3) *Review of European, Comparative & International Environmental Law* 270.

[170] Article 3 of the UNFCCC. While principles embody legal standards, they are general in nature and do not embody any specific commitment or action. Principles serve as a guide for the interpretation of other provisions of the treaty which may seem ambiguous or contentious. These principles will prove particularly useful in the interpretation of provisions on the reduction of emissions, provision of financial resources and the transfer of technology within the UNFCCC. Daniel Bodansky 'The United Nations Framework Convention on Climate Change: A commentary' (1993) 18 *Yale Journal of International Law* 501; Ibid at 272.

[171] Article 3(1) of the UNFCCC.

primarily, on the historical contributions of developed states to global emissions and argue for notions of restorative and distributive justice. For them, the existing inequalities between developed and developing states imply that both groups of states would bear different sets of responsibilities under the UNFCCC.

Developing states hold the view that since developed states are liable for the majority of greenhouse gas emissions, it follows that these states should also bear primary responsibility for the cost of solving the problem. This restorative conception of equity identifies the role of different actors in creating the problem and argues that the treaty must apportion rights and responsibilities in accordance with the contributions to the problem. Consequently, states with historically higher levels of emissions will take on higher levels of responsibilities under the treaty.

As seen above, developing states also pushed for the notions of distributive justice in their interpretations of equity.[172] They sought to employ the UNFCCC as a tool not just for addressing a crucial environmental problem but for tackling issues of historical injustice and the gap in the global distribution of wealth. It was, therefore, argued that the allocation of obligations under the climate change treaty had to ensure that developing states could improve their economic circumstances.[173]

Since developed states have more advanced economies and higher technological capacities, they are better positioned to take on climate change responsibilities. This is not only desirable; it is a requirement of equity and justice. This conception of equity creates a link between environmental concerns and economic development and gives developing states the opportunity to take part in the global efforts to preserve the climate system without taking on additional financial burdens.

Developing states, therefore, argued that these considerations should serve as a guide for the distribution of rights and responsibilities under the UNFCCC. Since principles are open-ended, their exact implications are only known by examining other rights and responsibilities in the agreement. The following subsections will examine some of the rights and responsibilities created under the UNFCCC and the extent to which these rights reflect the conception of equity by developing states.

[172] Section 4.1 above.
[173] See section 4.1.1 above.

5.1 Preamble to the UNFCCC

The preamble to the UNFCCC is one of the sections of the treaty that reflects the conception of equity and lays the foundation for the remaining provisions.[174] The preamble sets out the general background, aims and objectives of the treaty and highlights some of the points of concern and agreements of the parties. It, therefore, offers an opportunity to understand the position of the UNFCCC on central issues such as equity and its meaning and justification within the treaty.

In its preamble, the Convention acknowledges that:

> the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs.

With this, the UNFCCC starts off by acknowledging one of the grounds upon which developing states' conception of equity within the regime is based; the historical responsibility of developed states for the global emission of greenhouse gases. By recognizing the disproportionate levels of emissions by developed states, the preamble sets the tone for the application of restorative justice within the UNFCCC. It will not be equitable to ask that developing states, who are only answerable for a negligent amount of greenhouse gas emissions to be saddled with the same sets of obligations as developed states under the Convention.

However, the initial submission by the G77 reveals a more stringent provision.[175] Developing states had sought for a provision directly linking the acknowledgement of historical responsibility for climate change with duties and obligations under the Convention.[176] Relying on the main responsibility principle, developing states argued that developed states should take on the primary responsibility for tackling climate change, since this problem is a consequence of developed states' overconsumption.[177] However, the final wording of the preamble only captures the first half of the argument – historical responsibility – without linking it with the

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[174] Generally, the purpose of a preamble in an international treaty is to set the tone and outline the context of the treaty. See article 31(2) of the Vienna Convention on the Law on Treaties; Max Hulme 'Preambles in treaty interpretation' (2016) 164 *University of Pennsylvania Law Review* 1296; György Haraszti *Some Fundamental Problems of the Law of Treaties* (1973) 107.
[175] Government of the People's Republic of China 'Beijing Symposium on Developing Countries and International Environmental Law' 12-14 August 1991 (hereinafter Beijing Symposium) cited in Bodansky (n170 above) 479.
[176] Bodansky (n170 above) 498.
[177] Beijing Symposium.

present liability for tackling climate change. The Convention, thus, recognizes the factual claim about climate change without linking it with any legal duty.

Even at that, it is a significant acknowledgment of the different relationships that states have with climate change and paves the way for the further application of equity in the rest of the treaty. By acknowledging the role of developed states in the climate change problem, it gives room for a restorative justice interpretation of the concept of equity; an interpretation which developing states pushed for vehemently during the negotiations.

5.2 Differentiation: bedrock of equity under the UNFCCC

The application of differentiation became one of the central manifestations of the application of equity in the UNFCCC. It reflects the arguments around the difference in the economic capabilities between developed states and their developing counterparts and the implication of such difference in how rights and responsibilities are distributed. The inclusion of differentiation in the treaty, therefore, serves as an embodiment of a conception of equity within the UNFCCC.

The preamble and article 3(1) establish the principle of differentiation as a guiding principle of the UNFCCC. Article 3(1) provides that state parties 'should protect the climate system… on the basis of equity and in accordance with their *common but differentiated responsibilities and respective capabilities.* Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof' (emphasis added).

This provision connotes two things. It implies that notwithstanding their developmental status, all state parties are jointly responsible for climate change action. The preservation of the climate system must not be regarded as the duty of only a group of states. All states, whether developed or developing, share in the general obligation to reduce the accumulation of greenhouse gases in the air and must take steps to preserve the climate system. The climate system remains a global common for which every state party to the Convention must bear responsibility. This ensures that the efforts of all states are maximized for the benefit of the climate system notwithstanding their developmental status.[178]

[178] Chen Zhou *The Legal Barriers to Technology Transfer under the UN Framework Convention on Climate Change: The Example of China* (2019) 31.

In line with the common responsibility of states, article 4(1) of the UNFCCC creates obligations that are common to all state parties. These responsibilities consists of the maintenance of national record of greenhouse gas emissions and sinks; adoption of national climate change mitigation and adaptation programmes; scientific and technical exchange; forest, oceans and ecosystems management; and the incorporation of climate change into social, economic and environmental policies.[179] These responsibilities are qualitative, rather than quantitative.[180]

The second purport of article 3(1) is that while all parties are encouraged to give some focus to climate change, they are not obligated to take on the same set of obligations. The exact role to be played by each state is differentiated. This means that even though all state parties may share some general responsibility, the extent of specific obligations would differ from one state party to another. This difference would be dictated by the capability or level of development of each group of states. It follows that state parties with higher levels of technological and financial resources would take on more obligations and stronger commitments under the Convention. This helps to ensure that climate change responsibilities do not become an additional burden for developing state parties.

Differentiation, therefore, serves as a direct application of equity in order to enhance co-operation between developed and developing states. It serves as a strong statement of the parties' commitment to substantive equality within the Convention.[181] The concept emanates from the broader principle of equity and increases the likelihood of participation by developing states.[182] Differentiation acknowledges the far-reaching inequalities between the priorities of developed and developing states.[183] The application of differentiation, thus, helps to achieve some level of equality among state parties, by bridging the gap created by their unequal needs and capabilities.

However, developed and developing states view differentiation from two different perspectives. For developing states, it is an admission of the historical, moral, and legal liability

[179] Article 4(1) of the UNFCCC.
[180] Bodansky (n170 above) 505.
[181] Zhou (n178 above) 31; Idil Boran 'Principles of public reason in the UNFCCC: Rethinking the equity framework' (2017) 23 *Science & Engineering Ethics* 1253, 1257.
[182] Anita Halvorssen *Equality among Unequals in International Environmental Law Differential Treatment for Developing Countries* (1999) 3-4.
[183] Jutta Brunnee & Charlotte Streck 'The UNFCCC as a negotiation forum: Towards common but more differentiated responsibilities' (2013) 13(5) *Climate Policy* 592.

of developed states to bear the burden for climate change given their volume of emissions.[184] They view differentiation with a restorative justice lens. Developed states, on the other hand, view differentiation as a consequence of their higher levels of financial and technological capabilities. It reflects their ability to pay as against the view of developing states that there is a responsibility to pay.[185]

The principle is couched in terms that make it difficult to ascertain which of these conceptions is adopted by the Convention. As earlier mentioned, the acknowledgment of historic emissions in the preamble is not linked with the responsibility to pay for or lead climate change action. Neither does the Convention connect differentiation in article 3 with an acknowledgement of historical emissions. It, however, seems that the inclusion of the phrase 'respective capabilities' to the principle of common but differentiated responsibilities, signifies that differentiation is linked to their ability to pay, rather than a historical responsibility.[186]

In furtherance of the principle of differentiation, the Convention creates three classes of state parties: Annex I, Annex II and developing states.[187] Although there are general provisions that apply to all state parties, there are specific or additional obligations which only apply to states classified as Annex I and II state parties.[188] Specifically, these duties pertain to the duty to report, the duty to reduce emissions and the transfer of finance and technology.[189]

In conclusion, differentiation in the UNFCCC is a reflection of the principle of equity. It guarantees that the differing capabilities of state parties remains a determinant factor in deciding how rights and responsibilities are shared. While developing states had viewed differentiation from a restorative justice lens, the wording of article 3 is more in support of a distributive justice conception. Differentiation is linked to the respective capabilities of state parties rather than historical responsibility.

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[184] Karin Mickelson 'South, North, international environmental law, and international environmental lawyers' (2000) 11 *Yearbook of International Environmental Law* 70.

[185] Ibid.

[186] The significance and implication of this difference in perspectives has become more obvious with the growth in the emission levels and wealth of certain developing countries, such as China, India, Brazil and South Africa. If differentiation is based on historical emissions, it means that these countries continue to be excluded from substantive climate change responsibilities. If, however, it is based on the ability to pay, then these countries must now begin to take on substantive responsibilities under international climate change law. This contention ultimately led to the collapse of the Kyoto Protocol to the UNFCCC and defined the Paris Agreement.

[187] Annex I and II to the UNFCCC.

[188] Article 4(2) - (6) of the UNFCCC.

[189] Article 4(2) - (6) of the UNFCCC.

5.3 Emission reduction targets and timetables

As earlier stated, the imposition of emission reduction obligations was one of the central issues in the negotiation of the UNFCC and one of the areas that the application of equity would prove very significant. It speaks directly to the argument that developed states had used up a disproportionate amount of the global atmospheric space. It is, therefore, important to examine how the UNFCCC distributes emission reduction targets and the implication of this distribution on the conception of equity and the resolution of the seeming clash between development and the need for climate change action.

Given the inequality in the historical emissions of different state parties, the question that confronted the parties at the negotiation was: whose emissions should be reduced? Should it be emissions from developed state parties or their developing counterparts? Or must all state parties undertake emission cuts, notwithstanding their level of development or historical emissions? And what does the UNFCCC's answers to these questions reveal about equity.

Developing states were unwilling to accept any commitment to limit their emission of greenhouse gases. They argued that this restriction would only serve as an impediment to their industrialisation and economic process.[190] Considering the fact that they were newcomers to industrialisation and had a relatively low level of historic emissions, developing states considered this to be unfair. In recognition of this, the UNFCCC excludes developing states from any quantitative limits.[191] Article 4(2) (a) of the UNFCCC provides:

> The developed country Parties and other Parties included in Annex I commit themselves specifically as provided for in the following:
>
> > (a) Each of these Parties shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs.

The provision of article 4(2)(a) implies that developed states have a responsibility to adopt national policies targeted at reducing the level of emissions originating from their states. This will imply, among other things, ensuring that certain industry practices are abandoned for more sustainable and climate-resilient practices. This provision only applies to developed state

[190] Statement of India, 6 Feb 1991 at Report of the UNCED vol. III (n139 above) 4; Statement of Uganda in Report of the UNCED Vol. III (n139 above) 24.

[191] Bodansky (n170 above) 506.

parties. Developing states are not under an obligation, under the Convention, to reduce their levels of emissions. This implies that developing states can focus on industrial growth without the limitations imposed by emission reduction obligations. The Convention, thus, recognises and protects the position of developing states and their priority for economic growth. It gives room for developing states to adopt policies and practices focused on economic and industrial growth irrespective of the implications on their emission levels.

However, even for developed states, the obligations and limits contain no clear targets and timetables. Within international environmental negotiations, the term 'targets and timetables' usually refer to specific quantitative and legally binding commitments.[192] The adoption of targets and timetables for greenhouse gas emissions has been referred to as one of the most controversial provisions in the entire negotiation of the UNFCCC.[193]

Two major standards have dominated the discussions on targets and timetables: a per capita target and a gross domestic product (GDP) target.[194] A per capita target takes into consideration the population of a state in determining the level of emissions, which such state should be allowed. This principle works in favour of states with relatively large populations, especially when this population is compared to their level of emissions. Developing states would benefit from this kind of application. The GDP target, on the other hand, would favour states with efficient use of energy.[195] These states are able to show that their levels of emissions are 'justified' by their high levels of production. This method would favour developed states since developing states seem to be less efficient in GDP terms.[196]

Calculating emission targets per capita is more equitable since emissions are allocated by population. It recognizes that 'every human has an equal right to use the atmospheric resource'.[197] It also ensures that states who have used more than their proportionate share of atmospheric space pay for it. Adopting this principle would mean that most industrialized states with their higher-than-average emission levels would need to reduce their emissions significantly. Developed states were, however, unamenable to this position. The various developed states offered different sets of standards. These standards varied in the level of

[192] Ibid.
[193] Ibid 512.
[194] Michael Grubb 'The greenhouse effect: Negotiating targets' (1990) 66 *International Affairs* 71-72; Bodansky (n170 above) 512.
[195] Grubb (n194 above) 82; Bodansky (n170 above) 512.
[196] Grubb (n194 above) 83.
[197] Ibid.

austerity which they projected, the range of gases provided for, the emphasis placed on net or gross emissions and the mode of implementation.[198]

Ultimately, the Convention adopted an approach that provided for a general target and timetable without setting a per capita or GDP standard for each state. Developed state parties jointly adopted a target to return to their 1990 emission levels.[199] The timetable for reaching this target is, however, ambiguous. Article 4(2)(a) provides that developed states recognize that a return to their 1990 emission levels by the end of 2000 would be instrumental to the required change in longer-term emission trends.[200] It acknowledges that reaching the target by the year 2000 will enhance a positive outcome but does not state in unequivocal terms that developed parties have a duty to reach this target by that year.

The provision is further modified by stating that this 'timetable' is to take into consideration the variations in each parties' 'starting points and approaches, economic structures and resource bases, the need to maintain strong and sustainable economic growth, available technologies and other individual circumstances, as well as the need for equitable and appropriate contributions by each of the parties to the global effort'.[201] As though this were not enough, the commitment on emissions reduction targets and timetables is further weakened by article 4(6) of the Convention, which gives 'a certain degree of flexibility' to states referred to as 'economies in transition'.[202]

Thus, although article 4(2)(a) seeks to create a legal obligation on developed parties to adopt national policies to reduce their emissions, the provision is modified to the extent that it is doubtful if any legal obligation remains. Article 4(2)(b) sets a target of returning to 1990 emission levels but developed states are given so much leeway in article 4(2)(a) that there is no provision obliging them to achieve the target.[203] As Daniel Bodansky notes, when it comes to the 'quasi-target and quasi-timetable, the Convention uses less obligatory language. The target is phrased as an 'aim' and the verbs used to characterize the timetable are all descriptive rather than imperative.'[204]

[198] Bodansky (n170 above) 515.
[199] Article 4(2)(b) of the UNFCCC.
[200] Article 4(2)(a) of the UNFCCC.
[201] Article 4(2)(a) of the UNFCCC.
[202] Article 4(6) of the UNFCCC. Economies in transition were countries in Eastern Europe who had suffered some economic downturn in the 1980s.
[203] Bodansky (n170 above) 516.
[204] Ibid.

It is, however, important to note that the UNFCCC does not saddle developing states with any emission reduction responsibilities. As seen in article 4(2)(a), the 'starting point' of each state party is taken into account in placing emission reduction obligations on them. Since developing states have a very recent starting point of emissions, they have no current obligations to limit emissions. The UNFCCC thus protects the rights of developing states to the utilisation of their fair share of atmospheric space in pursuit of development. This distributive justice conception of equity ensures that the climate change treaty does not impose restrictions that will have an impact on the right or ability of this group of states to achieve their developmental objectives.

5.4 Obligation to transfer finance and technology

The transfer of finance and technology represents one of the central ways in which the conception of equity is reflected in the UNFCCC. This obligation reflects the need to ensure that support for developing states is incorporated into the sets of obligations created in a climate change treaty like the UNFCCC. As will be seen in this subsection, the requirement for financial and technological transfer from developed to developing states seeks to ensure that developing states are able to undertake climate change action without jeopardizing resources ordinarily meant for developmental projects.

5.4.1 Transfer of finance

The inclusion, within international environmental agreements, of a clause for the transfer of financial resources from one group of states to another is relatively new. Earlier environmental treaties, like the Vienna Ozone Convention of 1985, and the Montreal Protocol of 1987 contained no strong provision on the transfer of financial resources. Towards the end of the 1980s, developing states refused to agree to any limitations on their use of ozone-depleting substances except such limitations were accompanied by additional funds and technology from developed states.[205] By 1990, the Multilateral Fund for the Implementation of the Montreal Protocol was set up to assist developing states with the transition to ozone-friendly

[205] David Caron 'Protection of the stratospheric ozone layer and the structure of international environmental lawmaking' (1991) 14 *Hastings International & Comparative Law Review* 761.

technologies.[206] Contributions to this fund were voluntary and administered primarily by the World Bank, the UN Environment Programme and the UN Development Programme.[207]

This progress gave momentum to the UNFCCC negotiations. The transfer of finance and technology became one of the most controversial matters during the treaty talks. Developing states argued that climate change obligations constitute additional burdens on their limited capacity, and they would only agree to such responsibilities if accompanied by additional financial resources.[208] These financial resources must cover the cost of compliance with the Convention.[209] On their part, developed states agreed to the provide financial resources if developing state parties would take on some obligations, establish national institutions to implement these obligations and that the transfer of funds would take place through a finance mechanism such as the Global Environment Facility.[210]

There were, however, disagreements on how these funds were to be generated. There had been initial proposals for establishing an automatic mechanism for generating finance through levies such as carbon tax, emissions fees, etc.[211] This was turned down by developed states. Ultimately, the parties agreed that the financial resources would come via 'bilateral, regional, or other multilateral channels.'[212] The transfer of funds would serve two purposes: (1) pay for the cost incurred by developing states in their execution of the provisions of the Convention; and (2) support vulnerable developing states with the cost of climate change adaptation.[213]

Another issue of relevance was whether the provision of finance by developed states should be made voluntary or compulsory. Developing states contended that the provision of financial

[206] Decision II/8, Second Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer UNEP/OzL.Pro.2/3 29 June 1990, United Nations, *Treaty Series,* vol. 1598 available at https://treaties.un.org/doc/source/docs/unep_Ozl.Pro_2_3-Eng.pdf (accessed 6 December 2020).
[207] Armin Rosencranz & Antony Scott 'Bringing the developing world on board' (1990) 20 *Environmental Policy & Law* 201.
[208] Report of the Third Session of the WMO/UNEP Intergovernmental Panel on Climate Change, Washington, DC 5–7 February 1990 at 8.
[209] Ibid.
[210] Bodansky (n170 above) 524.
[211] Proceedings, World conference, Toronto, Canada 27-30 June 1988: The Changing Atmosphere: Implications for Global Security (Conference Statement) reprinted in 'Selected international legal materials on global warming and climate change' (1990) 5(2) *American University International Law Review* 516.
[212] Article 11(5) of the UNFCCC.
[213] Bodansky (n170 above) 523.

support had to be a mandatory requirement, while developed states argued that it was voluntary.[214]

Parties also struggled to agree on whether a specific or minimum amount should be set by the Convention. Initial proposals employed phrases like 'adequate financial resources', 'financial resources, additional to the ones that are disbursed for development' to assist developing states with climate change action.[215] Developing states had also proposed that developed states commit a fixed percentage of their gross national product to climate change finance for developing states.[216] Alternatively, they recommended that developed states make contributions of specified amounts based on a UN scale of assessments.[217]

Eventually, parties agreed that the provision of finance be made mandatory but did not provide a specific amount of funding.[218] Instead, article 4(3) provides that developed states 'shall provide new and additional financial resources to meet the agreed full costs incurred by developing country Parties in complying with their obligations under Article 12, paragraph 1.'[219] Although the exact meaning of the phrase, 'new and additional financial resources' is unclear, it is generally understood to mean that funds given under the Convention must be new and not diverted from existing developmental aid.[220]

These financial resources should also cater to the 'full incremental costs' spent by developing states in discharging their obligations under the Convention.[221] Developed state parties shall also 'take into account the need for adequacy and predictability in the flow of funds and the importance of appropriate burden sharing' in providing finance and technology to developing states.[222] These four factors – newness and additionality, accessibility, adequacy and predictability – have been defined as the basis upon which the legal framework on climate

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[214] Article IV(2)(2)(a) Consolidated Working Document in *Report of the Intergovernmental Negotiating Committee for a Framework Convention on the Work of Its Fourth Session,* (1992) U.N. GAOR INC/FCCC, 4th Sess., U.N. Doc. A/AC.237/15.
[215] Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of its Fourth Session held at Geneva from 9 to 20 December 1991 (hereinafter Report of the INC 4th session) available at https://unfccc.int/documents/921 (accessed 6 December 2020).
[216] Stanley Johnson *The Earth Summit: The United Nations Conference on Environment and Development* (1993) 452.
[217] Article 1(T), Montreal Protocol Parties: Adjustments and Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer, June 29, 1990, 30 I.L.M. 537 (hereinafter London Amendments).
[218] Article 4(3) of the UNFCCC.
[219] Article 4(3) of the UNFCCC.
[220] Bodansky (n170) 526.
[221] Article 4(3) of the UNFCCC.
[222] Article 4(3) of the UNFCCC.

finance is established under the UNFCCC.[223] Overall, the general language used gives room for each developed state to decide the frequency and size of its financial transfer to developing states.

It is significant to take notice of the fact that the provision of finance under the UNFCCC covers three different spheres: (1) transfers to assist developing states with complying with their reporting obligations; (2) transfers to assist developing states with complying with further provisions of the Convention on issues like mitigation, research, information exchange, training, and public awareness; and (3) transfers to assist particularly vulnerable developing states with climate change adaptation efforts.[224]

The third category had arisen from concerns by vulnerable developing states, particularly members of the Alliance of Small Island States. This group of states was concerned about the extra cost of adaptation measures and went as far as proposing an insurance fund to cover such costs.[225] In other words, if climate change mitigation efforts turn out to be ineffective or inadequate and there are effects of climate change with which we must live, who bears the cost of living with and adapting to such effects? This includes the costs associated with measures like building sea walls, producing heat and drought-resistant crops, reduced agricultural yields, diseases, flooding, etc.[226]

Parties were unable to agree on how to apportion responsibility for such costs. Instead, focus was placed on climate change mitigation. This shift in focus has been attributed to the fact that the most vulnerable states are relatively small and offered little to no incentive to developed states in exchange for financial transfers compared to larger states like China, India, and Brazil.[227] The latter also have higher levels of potential emissions. It, therefore, seemed that the transfer of finance and technology to these bigger developing parties for mitigation would be more significant to global climate change than supporting adaptation in small island states. In other words, while adaptation efforts would serve the local island states, mitigation support to larger developing states would, arguably, have more global effects.[228]

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[223] Hao Zhang 'Implementing provisions on climate finance under the Paris Agreement' (2019) 9 *Climate Law* 23.
[224] Article 4(3) – (4) of the UNFCCC.
[225] Report of the INC 4th session (n215 above).
[226] Bodansky (n170) 528.
[227] Ibid.
[228] Ibid.

Nevertheless, article 4(4) of the Convention represents some victory for small island states. It provides that 'developed country Parties and other developed Parties included in Annex II shall also assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects.' This serves as an additional protection for developing states that have peculiar circumstances that make them more vulnerable to climate change. While developing state parties are to receive funds to meet their obligations under article 4(1) of the Convention, vulnerable developing states will receive additional support towards the expenses incurred for climate change adaptation. The Convention is, however, quiet on the exact limits of such assistance.

5.4.2 Transfer of technology

Like the transfer of financial resources, the transfer of technology was equally relevant in fleshing out equity within the UNFCCC. It speaks directly to the capacity of developing states to confront climate change challenges and to switch from existing non-sustainable technologies to environmentally friendly ones without putting too much strain on their existing resources. The provision of the UNFCCC on technology transfer, therefore, offers an opportunity to understand how the treaty addresses the issue of enhancing the capability of developing states to address climate change.

The transfer of technology is not new in international relations. It had initially developed as part of the calls in support of a new international economic order.[229] Countries of the global South who had just become independent contended that developed states had an obligation towards their former colonies to bridge the void in the global distribution of wealth.[230] They maintained that this duty could be discharged by transferring technologies to developing states on favourable terms.[231] The Declaration on the establishment of the New International Economic Order pushed for global solidarity among states for the purpose of sharing technology, which would in turn reduce the wealth inequality between developed and

[229] Gaetan Verhoosel 'Beyond the unsustainable rhetoric sustainable development: Transferring environmentally sound technologies' 11 *Georgetown International Environmental Law Review* (1998) 49.
[230] Colin Alberts 'Technology transfer and its role in international environmental law: A structural dilemma' 6 *Harvard Journal of Law and Technology* (1992) 63; Ibid at 50.
[231] Verhoosel (n229 above) 50.

developing states.[232] The transfer of technology also received recognition in the UN Convention on the Law of the Sea[233] and in the Convention on Biodiversity.[234]

If developing states must undertake climate change action, they must have access to climate technologies and at reasonable cost. The transfer of technology, therefore, became one of the central provisions of the UNFCCC.[235] Initial proposals, championed by developing states, had requested for the transfer of technology on 'concessional and preferential terms… and assured access' to developing states.[236] In line with the duty to be at the forefront of combating climate change, article 4 (5) provides:

> The developed country Parties and other developed Parties included in Annex II shall take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other Parties, particularly developing country Parties, to enable them to implement the provisions of the Convention.

This provision is to the effect that developed states are to supply developing state parties with the necessary technological resources for fulfilling their obligations within the Convention. The transfer of technology has various aspects. This includes 'direct purchases, licensing, franchising, foreign direct investment, joint ventures, sub-contracting, cooperative research arrangements, exchange of scientific and technical personnel, science and technology conferences/trade shows/exhibits, open literature, information exchange mechanisms, and official development assistance.'[237] An effective transfer of technology will therefore include various key players, including governments and private stakeholders, to ascertain that the needed technology is transferred.

The transfer of technological resources assists developing states in pursuing their developmental objectives while protecting the climate system.[238] It prevents a situation where efforts directed at preserving the climate system becomes an additional burden or an

[232] Article 4(p) of the Declaration on the establishment of a New International Economic Order adopted by the General Assembly during its 6th special session, 9 April – 2 May 1974, A/RES/3201(S-VI) UN A/9559.
[233] Articles 202 and 203 of the United Nations Convention on the Law of the Sea 10 December 1982 U.N. Doc. No. A/CONF.62/122.
[234] Article 16(1) of the United Nations Convention on Biological Diversity 5 June 1992 31 I.L.M. 818.
[235] Statement of Ghana on behalf of G-77 *Set of Informal Papers Provided by Delegations, Addendum 15,* INC/FCCC, 4th Sess., Provisional Agenda Item 2 (1991) U.N. Doc. A/AC.237/Misc. I/Add.15 3.
[236] Development and International Economic Cooperation: Environment, Draft Resolution submitted by the Chairman United Nations General Assembly A/44/862 Forty-fourth session Agenda item 82(f), reprinted in Center for International Environmental Law 'Selected international legal materials on global warming and climate change' 5(2) *American University International Law Review* (1990) 513, 627.
[237] Friedrich Soltau *Fairness in International Climate Change Law and Policy* (2009) 197.
[238] Alberts (n230 above) 65.

impediment to the industrial growth of these states. This provision gives a practical expression to the connection between, and the interrelatedness of, environmental protection and economic development. With the transfer of technology, developing states can adopt efficient use of energy and enhance a climate-friendly path to development.[239] By offering finance and technology to developing states, state parties are able to foster collective climate change action and ensure economic growth for developing state parties.[240]

Financial and technology transfer is directly related to the provision of article 3 on equity and differentiated responsibilities. This approach considers the comparative difference in the capacity of state parties to tackle the climate change problem and places emphasis on those who have the capabilities to bear the cost. It redistributes rights and responsibilities in a way that guarantees that existing inequalities are not further entrenched. Instead, the transfer of finance and technology ensures that an additional burden is not placed on those who already struggle to meet basic developmental needs. Developing states should continue to focus their resources on meeting their overriding needs for socio-economic growth.[241]

It is necessary to note that developed states are, generally, opposed to the transfer of technology. Instead, they argue for technology cooperation.[242] Developed states view technologies and the patents surrounding them as matters for the private sector and protected under intellectual property rights.[243] It is, therefore, not surprising that there is a slight difference in the wording of article 4(3) dealing with the transfer of finance, and article 4(5) on the transfer of technology. While article 4(3) is direct and provides that 'developed country parties…*shall provide* new and additional financial resources', article 4(5) is couched in more general terms that make the obligation less mandatory. Article 4(5) notes that 'developed country parties… *shall take all practicable steps to promote, facilitate and finance, as appropriate*, the transfer of, or access to, environmentally sound technologies' (emphasis mine). In other words, the Convention does not require that an actual transfer must take place. It is sufficient that efforts were made. This is worsened by the absence of any implementation mechanism for the provision of technology under the Convention.[244]

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[239] Zhou (n178 above) 2.
[240] Verhoosel (n229 above).
[241] Article 4 (7) and 3(2) of the UNFCCC.
[242] Bodansky (n170 above) 530.
[243] Soltau (n237 above) 197; Verhoosel (n229 above) 50.
[244] Although the Convention creates a subsidiary body for scientific and technological advice, this body has no responsibility to ensure the transfer of technology to developing state parties.

The use of the term 'as appropriate', makes the transfer of technology a relative obligation.[245] It has been noted that such framing gives room for individual states to decide how they want to implement a given provision.[246] It leaves the provision opened to the discretion of the contracting party and creates legal uncertainty with respect to the extents or limits of such obligation.[247] The fulfilment of the obligation to transfer technology is made dependent on the 'appropriate' situations in each state, which may include the state of its technological development, the socio-political situation within the state, national law, etc.[248] Once any of these conditions is absent, it becomes easy for a developed state party to claim that the circumstances are not appropriate for the transfer of technology and thus avoid their obligation under the Convention.

In order to further entrench the transfer of finance and technology to developing states, article 4(7) of the Convention states:

> The extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties.

This provision conditions the fulfilment by developing state parties of their obligation upon a successful transfer of finance and technology by developed state parties. In other words, the commitments of developing states under the Convention only arises when developed states fulfil their duty to assist developing states with necessary finance and technology. Without these resources, developing state parties are under no obligation to carry out their responsibilities under the Convention. Such obligations remain non-binding and the need for economic development will remain the issue of greatest significance to developing states. It is, therefore, important that developed states maintain a sense of global solidarity in the provision of finance and technology necessary for climate change action in the developing world as this would enhance climate change adaptation and mitigation globally.

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[245] Zhou (n178 above) 43.
[246] Myron H. Nordquist, Satya Nandan & Shabtai Rosenne *United Nations Convention on the Law of the Sea 1982: A Commentary vol. IV* (1982) 63.
[247] Verhoosel (n229 above) 59.
[248] Zhou (n178 above) 43; ibid at 65.

Even in the absence of article 4(7), a developing state party would be entitled to suspend its commitments under the Convention in the absence of the transfer of finance and technology by developed state parties. Article 60(2) of the Vienna Convention on the Law of Treaties (Vienna Convention) states that 'a material breach of a multilateral treaty by one or more of the parties entitles the other parties… to suspend the operation of the treaty in whole or in part or to terminate either in the relations between themselves and the defaulting state, or as between all parties.'[249]

What then is a material breach? Article 60(3) (b) of the Vienna Convention describes material breach as 'the violation of a provision essential to the accomplishment of the object or purpose of the treaty.'[250] Since developing state parties will be limited in their ability to undertake their responsibilities without financial and technological assistance, it follows that the failure to transfer finance and technology is a material breach of the terms of the UNFCCC. Developing state parties would therefore be entitled to suspend their obligations, relying on article 60(2) of the Vienna Convention.

Gaetan Verhoosel has, however, cautioned that the answer may not be so easy.[251] This is because, as earlier seen, the obligations on finance and technology transfer are couched in words that make it difficult to ascertain the extents of these obligations and thus determine when there is a breach. How do you decide that there has been a breach of the provision for financial transfer when the Convention gives no minimum sum as the benchmark for financial transfer to developing states? Although the Convention uses words like 'new and additional' and 'incremental' with reference to the transfer of funds, the history of the Montreal Protocol shows that state parties rarely agree on the meaning of these terms.[252]

In conclusion, the provision for the transfer of finance and technology from developed to developing states serves as an expression of the principle of equity in the UNFCCC. It serves as a guarantee that the historical responsibility and present capabilities of signatory states play a role in the allocation of obligations under the treaty. However, the Convention fails to couch this obligation in concrete terms. The wordings of the Convention are intentionally vague and make it difficult to ascertain when there has been adequate compliance. It is, therefore,

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[249] Article 60(2) of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 United Nations Treaty Series 331, 346.
[250] Article 60(3)(b) of the Vienna Convention.
[251] Verhoosel (n230 above) 61.
[252] Ibid.

unsurprising that there has been a significant disparity between the number of agreements and policies promising transfer of finance and technology and the actual volume of finance and technology that has been transferred.

5.5 Assessing equity under the UNFCCC

The distribution of rights and responsibilities in the UNFCCC reveals a distributive justice conception of equity. This conception emphasises that given their superior capacities, developed states should take higher levels of responsibility in order to support states with lower levels of capabilities. This is demonstrated in such obligations such as emission reduction targets, transfer of finance and technology and an express statement declaring that rights and responsibilities shall be differentiated between developed and developing states. While developed states are expected to take on some substantial responsibilities, developing states do not take on most of these responsibilities. Even when they do, developing states are allowed more flexibility in implementation. In place of strict obligations, developing states enjoy certain privileges under the Convention, such as climate finance and the transfer of technology.

Additionally, the UNFCCC interprets the principle of equity in a manner that ensures that climate change responsibilities do not constitute any hindrance or constraint on the developmental objectives of developing states. This is seen in the exclusion of developing states from emission targets and the relaxed obligation to report on the growth in their national emission levels. This gives developing states the leeway to pursue industrial growth without any concern for the legal implications of such industrialization on their emission levels.

Similarly, the application of equity within the UNFCCC is such that seeks to ensure that developing states receive support for climate change action. This is most obvious in the provision of finance and technology by developed states to their developing counterparts. This ensures that developing states are provided with resources needed for them to engage in climate change action within their states and to carry out their obligations under the treaty.

While the above may represent some victory for developing states, it is worthy of note that developed states agreed to some of these provisions based on reasons different from that adduced by developing states. As seen from discussions above, developed states rejected the notion that they had a duty based on their historical emissions. Developed states insisted that their leadership role in climate change action is based on their higher financial and

technological capacities and not on any notions of restorative justice.[253] Thus, even though the preamble acknowledged the historical emissions of developed states, no link was created between this historic wrong and the present liability for climate change.

The attempt to emphasise that equity is based on wealth, rather than historical emissions, is also seen in the phrasing of article 3. In expressing the application of equity and differentiation, the provision states that the Convention shall be implemented 'on the basis and in accordance with their common but differentiated responsibilities and *respective capabilities*' (emphasis added). This stresses that capabilities, and not emission levels, determine their leadership within the climate change regime. It represents an acceptance of the principles of distributive justice within the UNFCCC. It acknowledges the unequal position of the different state parties and concedes that obligations should be shared in a way that seeks to improve the state of those who have poorer economies.

The addition of the phrase 'respective capabilities' also gives developed states the allowance to modify the terms of equity in the future. As will be seen in later chapters, this has proven to be important and controversial, as certain developing states like China, Brazil, India, and South Africa have begun to emerge as strong economies with higher capabilities.

Overall, the UNFCCC reveals a conception of equity that draws a clear line between developed states and their developing counterparts and the obligations to be undertaken by each group of states. Developed states undertake higher levels of responsibility. They are obliged to undertake emission reductions within their economies and offer financial and technological support to the developing states. This reflects a distributive justice conception of equity: rights and responsibilities are allocated on the basis that certain members of the society are less well-off, and the stronger members of the society must assist them.

It is, however, more difficult to conclude that the treaty embraces a restorative justice conception of equity. While the UNFCCC acknowledges the historical responsibility of developed states for climate change, it does not link this responsibility with the obligations created within the treaty. Therefore, even though there are elements of restorative justice in the way the Convention distributes rights and responsibilities, a refusal to connect the 'wrong' with

[253] Mickelson (n184 above) 70.

the rights created makes it difficult to conclude that the treaty also embraces a restorative justice conception of equity.

6. CONCLUSION

This chapter set forth to map the conception of the principle of equity adopted by developing states in the processes (conferences and reports) leading to the formation of the UNFCCC and the extent to which the final text of the UNFCCC reflects that position. This question was approached by analysing the various submissions and reports that preceded the UNFCCC and the final wording of the UNFCCC.

The chapter reveals that developing states argue for an idea of equity which takes into consideration the developmental priorities of developing states. In other words, while developing states recognise the need for climate change action, such action must not limit or divert the resources or options available for development. The sets of rights and responsibilities to be adopted by developing states, they argue, must be such that does not restrict their ability to exploit their natural resources or lead to the diversion of existing resources for climate change action.

In defending this argument, developing states emphasise two major issues. Firstly, developed states are historically liable for a disproportionate portion of global emissions, which are the leading cause of climate change. Secondly, developing states lack the necessary financial and technological resources necessary for undertaking climate change action. It, therefore, follows that developed states must bear the primary responsibility for climate change action and where developing states are saddled with responsibilities, these responsibilities must be backed with the needed resources.

This position reveals both a distributive and a restorative justice conception of equity. It relies on the existing gap in the distribution of global wealth and emphasises the need for those states that are better off to assist states that lack the adequate resources for their own survival. It also relies on restorative justice principles, which stresses that when a wrong has been committed, the wrongdoer must be made to acknowledge such a wrong and the parties must, through a deliberative process, find ways to assist the victim. In this case, climate change is regarded as the wrong and developed states, given their responsibility for the majority of global emissions, as the wrongdoers. The distribution of rights must, therefore, be in such a manner that ensures

that developing states, who must now also grapple with the impact of climate change, are provided with the necessary support.

The conception of equity within the UNFCCC is revealed in the sets of rights and responsibilities created under the treaty. The treaty expressly recognises the historical responsibility of developed states for the majority of global emissions of greenhouse gases and provides that obligations be differentiated between developed and developing states. This differentiation is revealed in the limitation of emission reduction targets to developed states and in the provision that developed states provide their developing counterparts with necessary financial and technological resources for carrying out their obligations under the treaty.

The UNFCCC reflects a distributive justice conception of equity to the extent that it provides that developed states transfer funds and technological resources to developing states. It recognises that developed states are better off, with respect to financial and technological resources, and obliges them to assist their counterparts who are less well-off. It seeks a global redistribution of the available resources for climate change action.

It is, however, more difficult to establish a restorative justice conception of equity within the UNFCCC. The treaty recognises the historical responsibility of developed states for climate change and saddles them with obligations targeted at assisting developing states. However, the UNFCCC does not make a direct connection between the historical liability for climate change and the obligations to transfer finance and technology to developing states. It is, therefore, unclear whether this obligation arises solely from developed states' superior financial and technological capabilities (distributive) or as a form of remediation arising from their role in bringing about the climate change problem (restorative) or based on both conditions.

Having established the conception of equity within the UNFCCC, the next chapter maps out the subsequent development of equity within the UNFCCC framework after 1992. It seeks to analyse whether new conceptions of the principle have evolved and how these principles have been reflected in subsequent climate change instruments. Additionally, while the arguments in this chapter have focused on the broad group of developing states,[254] the next chapter focuses squarely on African states, negotiating through the African Group of Negotiators.

[254] As explained earlier, this is because African states negotiated in the Rio Summit under the auspices of the G77 bloc.

CHAPTER FOUR

EQUITY BEYOND 1992: KYOTO, CDM AND THE PARIS NEGOTIATIONS

1. INTRODUCTION

In enhancing our understanding of the conception of the principle of equity by African states and the extent to which this conception is reflected within the international law on climate change, chapter three established that in the development of the international regulation of climate change and up to the adoption of the United Nations Framework Convention on Climate Change (UNFCCC),[1] African states argued for a distributive and a restorative justice conception of equity. This is evident in their insistence on a treaty that ensures that poorer states are provided with the necessary financial and technological support and that states who are responsible for the majority of emissions should take primary responsibility for climate change action.

It has also been established that while the UNFCCC reflects a clear adoption of distributive justice principles, its position on restorative justice is less clear. The UNFCCC does acknowledge the historical responsibility of developed states for climate change and differentiates between the obligations they bear and that borne by developing states. However, the Convention does not go as far as basing this differentiation on the role of developed states as the major emitters of greenhouse gases.

This chapter examines the development of the conception of equity by African states after the adoption of the UNFCCC. This chapter starts by examining the establishment of the African Group and the history of the positions of the Group concerning the Clean Development Mechanism under the Kyoto Protocol. Overall, this chapter maps out the development of equity by African states from 1995 till the conference of the parties held in 2011.

This chapter demonstrates that African states continue to argue for a conception of equity which is rooted in the disparity between the needs of, and the level of resources available to, developing states in comparison with their developed counterparts (distributive justice). From

[1] United Nations Framework Convention on Climate Change, opened for signature 9 May 1992, 1771 United Nations Treaty Series 107 (entered into force 21 March 1994).

the Kyoto Protocol to the various mechanisms established under the UN climate change framework, African states have sought to ensure that climate change obligations do not impair their developmental opportunities or result in a redirection of resources from developmental efforts to climate change action. Where climate change obligations exist, African states insist that it must be accompanied with the necessary financial and technological support.

Despite these arguments, this chapter shows an increased hesitation on the part of developed states to yield to a conception of equity that focuses on historical responsibility and shields all developing states from climate change obligations. This ultimately led to the collapse of the Kyoto Protocol and the efforts towards another binding legal instrument which, state parties hoped, would better resolve the disagreements on the distribution of rights and responsibilities within the international law on climate change.

2. EQUITY IN THE KYOTO PROTOCOL

2.1 Introduction

This section explores the Kyoto Protocol to understand the post-UNFCCC development of the principle of equity, how the conception of the principle by African states has evolved and how the Protocol addresses or reflects the principle of equity. It examines the Kyoto Protocol and how it contributes to the evolution of the principle of equity within international climate change law with particular focus on the Clean Development Mechanism (CDM). The CDM was one of the major frameworks developed under the Kyoto Protocol and reflects the need to merge climate change action and the need for development in developing states. The rationality and the justifications for the CDM are, therefore, useful in understanding how the perception of states have progressed since the UNFCCC was adopted in 1992.

2.2 The Kyoto Protocol

The Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol)[2] is the first legally binding instrument that attempts to flesh out the provisions and principles of the UNFCCC. Adopted in 1997, this Protocol established specific obligations for

[2] Kyoto Protocol to the United Nations Framework Convention on Climate Change 11 December 1997, 2303 United Nations Treaty Series, 162 (entered into force 16 February 2005).

state parties which were to last from 2008-2012 and was later extended to 2020.[3] It is an attempt by state parties to create specific rights and responsibilities that seek to give life and meaning to the primary goal of the UNFCCC: 'the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.'[4]

The first Conference of the Parties to the UNFCCC (COP) was held in 1995 and it became apparent to state parties that the objectives of the Convention would not be reached through the use of voluntary targets, as contained in the Convention.[5] The voluntary system allowed state parties a high level of discretion with respect to how to meet the UNFCCC targets, and their efforts proved to be insufficient for reaching the objective of limiting human-induced emissions to 1990 levels by 2010.

State parties to the UNFCCC agreed, through the Berlin Mandate, to create a legally binding agreement to reinforce the dedication of Annex I parties (developed states and economies in transition) under article 4(2)(a) and (b) of the UNFCCC.[6] It was an agreement targeted at ensuring the achievement of the core obligations to lower emissions and furnish developing states with climate finance. The Ad Hoc Group on the Berlin Mandate was set up to coordinate the deliberation process for this agreement. This process culminated in the adoption of the Kyoto Protocol at the third Conference of the Parties held at Kyoto, Japan in 1997. To achieve its objective, the Kyoto Protocol creates three major provisions.

Firstly, the Kyoto Protocol creates legally binding quantified emission targets for Annex I states.[7] These states had a responsibility to make sure that their joint emissions are reduced to not less than 5 per cent lower than 1990 levels during the first commitment period (2008-2012).[8] Individually, these states were given separate targets. States within the European Union had to reduce their emissions by 8 per cent, the United States by 7 per cent and Japan by 6 per cent. New Zealand, Ukraine and Russia only had to stabilize their emissions (no reduction

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[3]Article 3(1) of the Kyoto Protocol; Article 1 (C) the Amendment to the Kyoto Protocol pursuant to its Article 3, paragraph 9 (Doha Amendment) Decision 1/CMP.8; Radoslav Dimitrov 'The Paris Agreement on climate change: Behind closed doors' (2016) 16(3) *Global Environmental Politics* 3.
[4] Preamble to the Kyoto Protocol; Article 2 of the UNFCCC.
[5] Decision 1/CP.1 'The Berlin Mandate: Review of the Adequacy of Article 4, Para 2(a) and (b), of the Convention, including Proposals related to a Protocol and Decisions on Follow-up' reprinted in *Report of the Conference of the Parties on its First Session*, held at Berlin from 28 March to 7 April 1995 Part Two: Action taken by the Conference of the Parties at its First Session FCCC/CP/1995/7/Add.1, 4.
[6] Ibid.
[7] Article 3 of the Kyoto Protocol.
[8] Article 3(1) of the Kyoto Protocol.

needed but no increase allowed). Australia, Iceland and Norway were given room to grow their emissions slightly by 8, 10 and 1 per cent, respectively.[9]

Secondly, to achieve their emission targets, the Kyoto Protocol required that states had the option to create carbon sinks.[10] These sinks would be in the form of activities such as land use change and forestation that help to soak up some of the carbon contents in the atmosphere.[11]

Thirdly, state parties could use a range of market-based instruments, which include joint implementation,[12] international emissions trading,[13] and the clean development mechanism[14] to achieve their targets under the Kyoto Protocol. While the first two mechanisms encourage emissions-saving projects between developed state parties, the clean development mechanism is focused on emission-reduction projects between developed and developing states and will be the primary theme of this section in examining the Kyoto Protocol's approach to equity between developed and developing states.

It is significant to note that the Kyoto Protocol was, primarily, an agreement between developed states. The Berlin Mandate had included a statement that the agreement (Kyoto Protocol) would contain no new commitments for developing states.[15] The Protocol, thus, contains no obligations for developing states. Instead, it encourages developed states to fulfil their obligations to developing states under Article 4(1) of the UNFCCC.[16]

The Kyoto Protocol makes a single reference to 'differentiated responsibilities' while the word 'equity' is never used throughout the agreement. Notwithstanding, the exclusion of developing states from the obligations of Kyoto Protocol is an expression of equity. The exclusion of developing states from any responsibility ensures that they do not take on additional responsibilities which they may not be adequately equipped to bear, or which may constrain their developmental efforts.

Since the Kyoto Protocol only creates one set of responsibilities, this chapter will not go into a detailed analysis of those responsibilities. Other than the implications of excluding developing

[9] Annex B to the Kyoto Protocol.
[10] Article 3(3) of the Kyoto Protocol.
[11] Article 3(3) of the Kyoto Protocol.
[12] Article 4 of the Kyoto Protocol.
[13] Article 17 of the Kyoto Protocol.
[14] Article 12 of the Kyoto Protocol.
[15] Article 2(b) of the Berlin Mandate.
[16] Article 10(c) and 11(2)(b) of the Kyoto Protocol.

states from these responsibilities, an analysis of these responsibilities does not offer much in understanding how equity is conceived in the differentiation of rights between developed and developing states.

The analysis of equity in this section will, therefore, focus on the CDM, a mechanism created under the Protocol to ensure that developed state parties meet their emission reduction targets while enhancing developmental capacity in developing states. Established under article 12 of the Kyoto Protocol, CDM gives room for developed and developing states to collaborate on an emission reduction project. An examination of the CDM, therefore, offers an opportunity to understand the Protocol's approach to equity.

2.3 The Clean Development Mechanism

This section analyses the CDM, and the extent of rights and responsibilities created therein, how these obligations help to deal with the seeming clash between climate change action and the need for development and their implication on the conception of equity within the Kyoto Protocol.

In 1997, Brazil proposed the CDM. The mechanism would create a clean development fund and offer some sort of climate credits to the developed states who contributed towards the fund.[17] The CDM was subsequently created under article 12 of the Kyoto Protocol.[18] The CDM was devised to boost climate change cooperation between developed and developing states and seeks to achieve two purposes: (1) to support sustainable development projects within developing states; and (2) to help developed states meet their emission reduction commitments.[19]

In line with its first objective – support for sustainable development projects in developing states – the clean development mechanism has become synonymous with the transfer of technology from developed to developing states.[20] Developed states with relatively high costs of reducing their emissions are allowed to fund emission reduction projects in a developing state with a lower reduction cost and such efforts are credited, fully or partially, to the state

[17] Anil Agarwal 'A Southern perspective on curbing global climate change' in Stephen H. Schenider, Armin Rosencranz & John O. Niles (eds) *Climate Change Policy: A Survey* (2002) 381.
[18] Kyoto Protocol.
[19] Article 12(2) - (3) of the Kyoto Protocol; Srikanth Subbarao & Bob Lloyd 'Can the Clean Development Mechanism deliver?' (2011) 39 (3) *Energy Policy* 1600.
[20] Heleen de Coninck, Frauke Haake & Nico van der Linden 'Technology transfer in the Clean Development Mechanism' (2007) 7(5) *Climate Policy* 444.

providing the funds.[21] The amount of emission reduction achieved by such project in the developing state is credited to the developed state sponsoring such project.

This creates a system that facilitates a no-cost or low-cost transfer of finance and technology from industrialized states to developing states.[22] In doing this, the mechanism creates a win-win situation where both developed and developing states benefit from such projects. Climate change action is achieved while bringing some development into the host state of such projects.

To be eligible for a CDM project, both the donor and the host states must have ratified the Kyoto Protocol.[23] Additionally, the host state must establish a Designated National Authority that evaluates the project's consistency with the national sustainable development goals and objectives.[24] The project will be overseen by an executive board and must conform to the rules and guidelines set by the Conference of the Parties.[25] The project in question must result in emission reductions, which are an addition to reductions that would have taken place without the project.[26] The mechanism has been defined as 'innovative' in its attempt to curb the reduction in emissions globally.[27]

2.3.1 Africa and the CDM

Having examined the main aim of the CDM, this section analyses how the CDM affects African states and the extent to which it caters for the concern around capacity and responsibility for climate change and what that reveals about the conception of equity in the Kyoto Protocol.

The CDM is a market-based mechanism for emissions trading.[28] This implies that the distribution of projects is determined by the size and functionality of a state's market and its potential for profits.[29] This distribution has been to the advantage of states with a good

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[21] Article 12(2) of the Kyoto Protocol; Nordic Council of Ministers, *Joint Implementation as a Measure to Curb Climate Change: Nordic Perspective and Priorities* (1995) 8; Ewah Eleri 'Africa and climate change' *SAEEP Working Paper No. 6* 11.
[22] Ruth Gordon 'Climate change and the poorest nations: Further reflections on global inequality' (2007) 78 *University of Colorado Law Review* 1611.
[23] Rule 31 of the Modalities and Procedures for a Clean Development Mechanism as Defined in Article 12 of the Kyoto Protocol Decision 17/CP.7 FCCC/CP/2001/13/Add.2 (hereinafter Modalities and Procedures for CDM).
[24] Rule 29 of the Modalities and Procedures for CDM.
[25] Article 12(4) of the Kyoto Protocol.
[26] Article 12(5)(c) of the Kyoto Protocol; Rule 30(d) of the Modalities and Procedures for CDM.
[27] Charlotte Streck 'New partnerships in global environmental policy: The Clean Development Mechanism' (2004) 13(3) *Journal of Environment and Development* 296.
[28] Agarwal (n17 above) 381.
[29] Gordon (n22 above) 1609; Lira Benites-Lazaro & Celio Andrade 'Clean Development Mechanism: Key lessons and challenges in mitigating climate change in mitigating climate change and achieving sustainable development' in *Reference Module in Earth Systems and Environmental Sciences* (2019).

investment climate and strong institutions capable of supporting joint implementation efforts.[30] Developing states with functional economies are disproportionately favoured as sites of CDM projects without regard to other factors such as geographic spread or economic and developmental needs. Unfortunately, most African states lack these features. Projects assigned under the scheme, thus, went to stronger developing states, very few of which were African.[31]

Furthermore, since African states are only liable for a negligible percentage of global greenhouse gas emissions, it follows that the region presents very few opportunities for emission reduction. This is because, for a CMD project to earn the donor state carbon emission credits, the project must achieve reductions below a certain baseline.[32] Since there are few high-emitting industrial activities in the African region, the emission reduced by a project in an average African state may not be enough to meet the baseline.[33] States with high volumes of industrial activities, such as China or Brazil, are more 'lucrative' since they will earn a donor state more carbon emission reduction credits. This arrangement deprives poorer developing states of the opportunity to benefit from the much-needed low-cost access to sustainable technology, which the CDM provides.

2.3.2 Equity in the Kyoto Protocol

Flowing from the above, it is evident that the Kyoto Protocol, through the CDM, addresses the seeming clash between climate change action and the need for development by creating a mechanism where developed states support developing ones with financial and technology support through the establishment of climate-friendly projects within developing states. On the one hand, this solves the need of developing states for finance and technology while on the other hand, it creates climate credits for developed states and contributes towards their emission reduction targets. This approach emulates distributive justice principles where rights and responsibilities are distributed in line with the different needs and capabilities of the parties.

A project under the CDM is targeted not only to enhance emission reduction, but also to provide a much-needed developmental project to the recipient developing state. While the developed state sponsoring the project takes the climate credits on such project, the host state benefits

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[30] Martina Jung 'Host Country Attractiveness for CDM Non-Sink Projects' (2005) *HWWA Discussion Paper No. 312*, 4.
[31] Gordon (n22 above) 1614.
[32] Ibid.
[33] Jung (n30 above) 4.

from the developmental advantage and the technological transfer provided by such projects. This way, both sets of objectives are achieved without necessarily jeopardizing one for the other.

The Kyoto Protocol also presents a clear case of restorative justice. It's unilateral approach to the distribution of climate change responsibilities effectively ensures that only developed states bear the financial and technological cost for addressing climate change. It takes action completely off the hands of developing states and rests them solely with developed states. Even among developed parties, the quantified emission reduction responsibility of each developed state party is matched with its historical emissions.[34]

As discussed in chapter two, restorative justice emphasises the need for a solution-seeking process that is deliberative and focused on the victim.[35] The Kyoto Protocol follows this principle by ensuring that the resolution of the climate change problem does not neglect developing states that are the most at risk from the impacts of climate change. Instead, it ensures that the solutions to climate change are infused with developmental advantages which will benefit these developing states.

The fact that the CDM requires that each host state must have a Designated National Authority, which analyses the consistency of each proposed project with the national sustainable development objectives, ensures that the CDM projects are not mere dumping grounds for outdated technology. Each CDM project is expected to be a result of a deliberative process between the Designated National Authority and the developed state sponsoring the project. This process helps to ensure that these projects are consistent with each host state's developmental and environmental objectives while achieving the global climate change ambition.

In conclusion, the Kyoto Protocol, through the CDM, applies both a distributive and a restorative justice conception of equity. It ensures that the differing needs and capabilities of each state party dictates the extent of their rights and responsibilities. It also ensures that the responsibility for climate change action is placed primarily at the feet of those who are historically accountable for climate change. In doing this, the Protocol merges climate change

[34] Article 3 and annex B of the Kyoto Protocol.
[35] See section 3.3.1 of chapter two.

action and the need for development together by ensuring that climate change action also caters for some of the developmental needs of the host states.

3. AFRICAN COMMON POSITION POST-CDM

Beyond the Kyoto Protocol, the COPs were one of the means through which state parties to the UNFCCC sought to amplify and give further clarity to the provisions of the Convention, like the principle of equity. These conferences helped to further buttress the contents of the Kyoto Protocol and address issues that the Protocol may have omitted or addressed inadequately. These conferences also served as a precursor to the second protocol under the UNFCCC. They offer an occasion to understand the further evolution of equity in international law on climate change, how the principle has evolved since it was first adopted in the UNFCCC, and how this eventually culminated in the Paris Agreement.[36] The following paragraphs, therefore, examine some of the key demands in the various Common Positions and policy documents submitted by African states and what the conception of equity reflected in these documents.

The first COP took place in 1995 at Berlin, Germany. From this conference to the third COP held at Kyoto, Japan, the efforts of state parties were directed at the formulation and adoption of the Kyoto Protocol. Subsequently, the African Group made very limited contributions to the Conferences of the Parties. There was a significant turnaround in 2006 at COP12, which held in Nairobi, Kenya. Since the Kyoto Protocol and its Clean Development Mechanism have already been discussed above, this section will focus on Africa's contribution to the conferences of the parties from 2006 to the processes that resulted in the adoption of the Paris Agreement.

In preparation for COP12, a meeting of African negotiators and climate experts was held in September 2006.[37] They met under the auspices of the African Ministerial Conference on Environment (AMCEN) and these deliberations developed into the African Common Position on Climate Change. This policy document was to inform the position of the African Group and of individual African states during global climate change negotiations, particularly the COP. It

[36] The Paris Agreement will be extensively considered in chapter five.
[37] Fatima Denton *Africa's Journey in the Global Climate Negotiations: A Synthesis Report for Policy Makers* (2015) 5.

covered a variety of issues like adaptation, CDM, deforestation, climate finance and technology transfer.[38]

Subsequent to the AMCEN held in 2006, African states adopted *Africa's Climate Roadmap: From Johannesburg through Africa to Copenhagen* in 2008.[39] This was followed by series of other meetings held by the African Group in Naivasha, Abuja, Dakar, Bonn, Johannesburg, Accra and Algiers. On 29 May 2009, at the third special session of AMCEN, African states adopted the Nairobi Declaration on the African Process for Combating Climate Change (Nairobi Declaration).[40]

3.1 The Nairobi Declaration

This section looks at the Nairobi Declaration and its contribution to the African position on equity within the global climate change discourse. The Nairobi Declaration was to serve as the bedrock for Africa's position at the next Conference of the Parties.[41] The Nairobi Declaration outlines the primary obstacles faced by the African negotiators at the global climate change platforms. It highlights the climate change issues that are of utmost importance to the region. These include adaptation, capacity building, finance, technology development and transfer, and solicits for increased support in these areas.[42]

The Nairobi Declaration starts out in article 3 by providing that equity and the principle of common but differentiated responsibilities and respective capabilities shall be the basis upon which African states will take part in the global negotiating process for climate change. Article 3 states clearly that:

> the key political messages from Africa to inform the global debate and negotiating process, in terms of both of the commitments that it seeks from the international community, and also of the actions that

[38] The African Common Position on Climate Change available at https://www.un.org/esa/sustdev/csd/csd15/statements/africa_cc.pdf (accessed 4 January 2021).

[39] International Institute for Sustainable Development 'Africa's Climate Roadmap: From Johannesburg through Africa to Copenhagen' available at http://sdg.iisd.org/commentary/guest-articles/africas-climate-roadmap-from-johannesburg-through-africa-to-copenhagen/ (accessed 20 July 2020).

[40] Nairobi Declaration on the African Process for Combating Climate Change (hereinafter Nairobi Declaration) para 4, 15 available at http://www.unep.org/roa/Amcen/Amcen_Events/3rd_ss/Docs/nairobi-Declaration-2009.pdf_ (accessed 30 November 2018).

[41] Para 2 to the Nairobi Declaration.

[42] Para 4 of the Nairobi Declaration.

> African countries can take themselves, *should be based on the established principles of equity and common but differentiated responsibilities and respective capabilities;*[43] (Emphasis added).

This strong emphasis on equity reveals that members of the African Group see the principle as a fundamental principle which must guide the creation of climate change treaties and the basis for all distribution of rights and responsibilities. Consequently, African states called upon developed states to honour their commitments under the UNFCCC to provide new and additional funding for developing states.[44] Additionally, the Declaration called for an expansion of the eligible group of states for carbon credits and other international financial incentives for climate action.[45] This was to ensure that weaker economies, especially within Africa, would have access to market-based mechanisms such as the CDM, which was hitherto structured in a manner that only benefitted the stronger developing state economies.

The Nairobi Declaration also called for the support of African states through the provision of necessary finance, technology, and capacity-building.[46] This support must be 'measurable, reportable and verifiable'.[47] The procedure for accessing such financial and other supports must be simplified and made easily accessible to African states.[48]

The Nairobi Declaration restates the African position on CDM and the necessity of making sure that the distribution of project under the CDM are geographically equitable.[49] The distribution of CDM projects in a way that focuses on market dynamics without recourse to regional distribution will disproportionately cut out the majority of African states from such developmental projects and this would fall short of the principle of equity, as argued by African states. CDM projects, they argue, must be distributed in a manner that ensures that they are not concentrated within a particular region or within a few states to the detriment of other regions with less stable markets.

Paragraph 13 of the Nairobi Declaration provides:

> To reaffirm that Africa, in the context of environmental justice, should be *equitably compensated for environmental, social and economic losses* and to emphasise that *Africa requires substantially scaled-up*

[43] Para 4, 15 of the Nairobi Declaration.
[44] Para 9 of the Nairobi Declaration.
[45] Para 7 of the Nairobi Declaration.
[46] Para 12 of the Nairobi Declaration.
[47] Para 12 of the Nairobi Declaration.
[48] Para 14-16 of the Nairobi Declaration.
[49] Para 4 of the Nairobi Declaration.

> *finance, technology and capacity-building* for adaptation and risk management in accordance with the obligations of the Annex I Parties under the Kyoto Protocol to the Convention; (Emphasis added)

This provision restates two of the major arguments that were at the centre of the negotiations leading to the UNFCCC. First, that developing states were at a historically disadvantaged position when compared with their developed state counterparts and should, therefore, receive compensation for the environmental, social and economic losses. Secondly, and flowing from the first, there was a need to support African states with necessary finance and technology to undertake climate change action.

Overall, the Nairobi Declaration represents a restorative justice conception of equity. African states, through this Declaration, argue for the differentiation of responsibilities on the basis that the African region was suffering loss due to climate change and this loss was to be compensated for by those who are primarily responsible for climate change. The Declaration restates that the historical loss and continued lack of capacity justified the creation of an obligation on the part of those who have benefitted from this exploitative past.

3.2 The Common African Position on Climate Change 2009

To further develop the African position, the Conference of African Heads of State and Government on Climate Change adopted the Common African Position on Climate Change in 2009.[50] The Common Position was built on the Bali Action Plan (the Plan).[51] It emphasised issues such as adaptation, mitigation and the transfer of finance and technology.[52] This position informed Africa's arguments at the 15th Conference of the Parties held in Copenhagen, Demark. During this conference, state parties to the UNFCCC were expected to adopt a framework for climate change mitigation beyond 2012 (the end of the first period of the Kyoto Protocol).[53] It was, thus, very significant and a turning point in the evolution of the international law on climate change.

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[50] African Union Assembly of the Heads of State and Government, 12th ordinary session, 1-3 February 2009, Addis Ababa, Ethiopia, Assembly/AU Dec 236/XII Decision on the African Common Position on Climate Change Doc Assembly/AU/8 (XII) Add 6 available at https://au.int/sites/default/files/decisions/9559-assembly_en_1_3_february_2009_auc_twelfth_ordinary_session_decisions_declarations_message_congratulations_motion.pdf (accessed 5 March 2021).

[51] Bali Action Plan FCCC/CP/2007/6/Add.1 available at https://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf#page=3 (accessed 4 January 2021).

[52] Para 1 of the Bali Action Plan, FCCC/CP/2007/6/Add 1 1, Decision 1/CP 13.

[53] IISD Reporting Services – 'Upcoming meetings' available at https://web.archive.org/web/20091212101150/http://www.iisd.ca/upcoming/linkagesmeetings.asp?id=5 (accessed 4 January 2020).

As noted above, the Common African Position was premised on the Bali Action Plan adopted by the Conference of the Parties held in Bali in 2007. The Plan was a roadmap to promote 'the full, effective and sustained implementation of the Convention through long-term cooperative action'.[54] It focuses on four major areas: adaptation, mitigation, technology and financing.[55] The adoption of the Plan was based on the following previous demands: the exclusion of developing states from substantive duties under the Kyoto Protocol and the provision of adaptation and mitigation finance to developing states.[56] The Bali Action Plan recognised that climate change action in the developing world would only be equitable if it incorporated developmental objectives within its framework.

Adaptation was another issue of importance in the Common African Position. The Common African Position sought to address the region's vulnerability and the need for international cooperation to enhance the region's adaptation capacity.[57] The position proposed an Adaptation Action Programme, which would be country-driven and the funds available had to be predictable and additional to existing development funds. The African Position set the target for adaptation funds at $67 billion per year by 2020.[58] This is slightly lower than the World Bank target of $75 to $100 billion for the same period.[59]

On the issue of finance, African states demanded financial support as recompense for the natural, economic and social resource that had been lost due to climate change.[60] In this Position, African states re-stated the historical liability of developed states for climate change and requested that these states contribute not less than 1.5 per cent of their GDP to climate change finance in developing states.[61] Financial obligation, according to the African position, was not an act of charity or an obligation arising only from the superior capacity of developed states. It was a duty arising from the need to do justice by compensating African states for the

[54] Para 1 of the Bali Action Plan.
[55] Para 1 of the Bali Action Plan.
[56] Jean-Christophe Hoste 'Where was united Africa in the climate change negotiations?' February 2010 *Africa Policy Brief* 1-2.
[57] Werner Scholtz 'The promotion of regional environmental security and Africa's common position on climate change' (2010) 10 *African Human Rights Law Journal* 14.
[58] Ibid.
[59] http://beta.worldbank.org/content/economics-adaptation-climate-change-studyhomepage (accessed 5 January 2021).
[60] Common African Position 2009 available at https://au.int/sites/default/files/documents/30876-doc-executive_council_decision_500_-_july_2009_engl.pdf (accessed 5 March 2021).
[61] Hoste (n56 above) 1.

loss suffered from a problem caused by developed states. The objective was to do restorative justice by making up for the harm caused.

The African Common Position maintained that the principle of equity and common but differentiated responsibilities, as enshrined in the UNFCCC, must be observed. The differences in the contributions of states and in their capability to address climate change was important and should determine the distribution of rights and responsibilities. In line with this, the Position provided that developed states should limit their greenhouse emissions by at least 40 per cent less than 1990 levels by 2020, and 80-95 per cent below 1990 levels by 2050.[62] The Position expressly stated that the African region would reject any attempt by developed states to defer the date for reduction of developed country emissions.[63]

On the future of international climate change law beyond 2012, African states, arguing through the Common African Position, insisted on maintaining two separate tracks of negotiation. One to develop a framework for the second phase of the Kyoto Protocol and a second negotiation track to develop another legal instrument (a second protocol) under the UNFCCC. This separation would ensure that developing states continue to benefit from the strict differentiation between developed and developing state parties provided under the Kyoto Protocol.[64] Benefits such as finance and technological transfer and the absence of emission reduction obligations were non-negotiables for the region.

Moving forward, the African position was clear. They argued for exemption from any stringent obligations in the future climate change agreement. Instead, African states were to have rights to necessary finance and technology from their developed counterparts. African states cite the historical responsibility of developed states for climate change as justification for taking up such liability. This restorative justice conception was to be the basis for the negotiation of African states in the (then) forthcoming COP 15 in Copenhagen, Denmark, where parties were to deliberate on a climate change framework after 2012 (the expiry date of the Kyoto Protocol).

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[62] Ibid at 3.
[63] Anwar Tsega 'Africa in global climate change conference: Analysing its position and challenges' (2016) 4(1) *International Journal of African Development* 9.
[64] Hoste (n56 above) 1-2.

3.3 Conference of the parties (COP) 15

Having formulated the African position examined above, African state parties attended the COP 15 prepared to argue for continued differentiation of rights between developed and developing states. Since the tenure of the Kyoto Protocol was coming to an end in 2012, the conference was critical to the further evolution of an international agreement on climate change.

Debates had centred around two major questions: should the tenure of the Kyoto Protocol be lengthened to include a second commitment period? Or should parties adopt a new, and more comprehensive, agreement which will bring in non-Kyoto Protocol state parties and place responsibilities on both developed and developing states, unlike the Kyoto Protocol which addressed only developed states?[65] Consequently, what will be the content and extent of rights created in either of these instruments?

In preparation for a second commitment period under the Kyoto Protocol, parties set up the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP) in 2005.[66] On the other hand, the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention (AWG-LCA) was created in 2007 to develop an extensive legal framework for climate change, which would come into effect at the expiration of the Kyoto Protocol.[67]

The job of these working groups was expected to come to a conclusion at the Copenhagen Conference with the adoption of an agreement that would be amenable to all state parties. Unfortunately, this was not to be the case. Despite meeting five times within 2009 and an admonition by the COP in 2008 that the AWG-LCA go into full negotiation mode, parties were unable to reach an agreement. They merely repeated their positions in meeting after meeting

[65] Report of the Conference of the Parties on its fifteenth session, held in Copenhagen from 7 to 19 December 2009 Part One: Proceedings FCCC/CP/2009/11, 12-14.
[66] Consideration of Commitments for Subsequent Periods for Parties included in Annex I to the Convention under Article 3, para 9, of the Kyoto Protocol Decision 1/CMP.1 in *Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its first session*, held at Montreal from 28 November to 10 December 2005 Part Two: Action taken by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol at its first session FCCC/KP/CMP/2005/8/Add.1 at 3.
[67] Bali Action Plan Decision 3.

and were unable to narrow down these differences by the beginning of the Copenhagen Conference.[68]

These differences were multiple. Developed states with Kyoto emission targets were unwilling to take on new targets if other major emitters, including and especially China and the United States, did not accept emission targets.[69] More broadly, there was an increasing concern that certain developing states had witnessed substantial growth in their economies and should now be subject to responsibilities similar to developed state parties. Developing states, on the other hand, supported the introduction of both a second commitment period and the introduction of a new legally binding agreement under the UNFCCC.[70] With the exception of small island states, developing states, however, insisted that this new agreement may not place emission reduction targets or any hard obligations on developing states.

For Africa, the Nairobi Declaration and the African Common Position on Climate Change provided the terms for the region's participation at COP15.[71] To register their insistence on continued differentiation of rights and responsibilities, African states boycotted the negotiations when it seemed to them that developed states were going to kill the Kyoto Protocol by refusing to adopt a second round of commitments.[72] African states had been in favour of an agreement that imposed a 40 per cent emission reduction on developed states and they walked out when it seemed that this demand was not going to be met.[73] Negotiations only resumed after the European Union promised to devote 60 per cent of the period left in the Ad hoc Working Group on Further Commitments for Annex I parties under the Kyoto Protocol (AWG-KP) to talk about developed states' commitments under the Kyoto Protocol.[74]

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[68] Daniel Bodansky 'The Copenhagen Climate Change Conference: A postmortem' (2010) 104(2) *American Journal of International Law* 234.
[69] Ibid.
[70] Ibid.
[71] For the first time, the African Group had more submissions than the G77 coalition and this translated into greater influence on the negotiations. Charles Roger & Satishkumar Belliethathan 'Africa in the global climate change negotiations' (2016) 16 *International Environment Agreements* 100. The Group's mandate at the conference was 'to ensure that resource flow to Africa is not reduced'; see African Union Assembly of the Heads of State and Government (n50).
[72] International Institute for Sustainable Development 'Copenhagen Highlights' 12(455) *Earth Negotiations Bulletin* 15 December 2009 available at https://enb.iisd.org/vol12/enb12455e.html (accessed 5 January 2021).
[73] Ibid.
[74] John Drexhage 'The Barcelona Negotiations on Climate Change: Where the spirit is willing?' *IISD Commentary* November 13, 2009, available at https://www.iisd.org/articles/barcelona-negotiations-climate-change-where-spirit-willing (accessed 5 January 2021).

The African consensus, however, became weakened when the Ethiopian Prime Minister, representing the Conference of African Heads of State and Government on Climate Change (CAHOSCC), single-handedly deviated from the African Common Position and submitted the Joint Appeal of France and Ethiopia Representing Africa, for an Ambitious Copenhagen Accord.[75] The appeal was a new proposal and was significantly different from the initial African Common Position. This difference was most obvious in climate finance. Whereas the Common Position had proposed the sum of $67 billion as annual compensation for climate change, this new appeal set the target at $10 billion per annum.[76]

Overall, the African position that emerged from COP15 was one which maintained that, while state parties may formulate a new agreement, this agreement must reflect the difference in the contribution of state parties to global emissions and the difference in their financial and technological capacities. In other words, state parties who have contributed less to global emissions should not be saddled with the same responsibility as those with relatively low emissions. Instead, African state parties should be compensated for the loss that they have incurred or may incur within the environmental context. This position did not depart much from previous positions that the African group and other developing state parties had held before then.

3.4 Copenhagen Accord

Since state parties at COP15 were unable to reach an agreement on a new legal instrument beyond the first commitment period of the Kyoto Protocol, 29 of these state parties adopted the Copenhagen Accord.[77] These states included Ethiopia (on behalf of the African Group) and South Africa. The signatories to the Copenhagen Accord also included all the major greenhouse gas emitters and representatives of vulnerable and least developed states. It must, however, be noted that the Copenhagen Accord was a political statement and was not legally binding.

The Copenhagen Accord recognises the vulnerability of the African region and emphasises that developed states would assist developing states in undertaking adaptation activities by

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[75] Scholtz (n57 above) 23.
[76] Leigh Phillips 'Africa lowers climate cash demands to boost Copenhagen deal chances' *EU-Observer* 17 December 2009. The Ethiopian Prime Minister, Meles Zenawi, was accused of giving into pressure from developed states. Surprisingly, the AU Assembly again endorsed him to lead the African delegation for COP 16 and COP 17.
[77] Lavanya Rajamani 'Neither fish nor fowl' available at http://www.india-seminar.com/2010/606/606_lavanya_rajamani.htm (accessed 5 January 2021).

providing ‘adequate, predictable and sustainable financial resources, technology and capacity building.’[78] More specifically, developed states commit to providing new and additional funding of about $30 billion between 2010 and 2012.[79] These funds will cover both adaptation and mitigation efforts with Africa being given priority for adaptation funding. The Accord sets a long-term financial commitment by developed states in the amount of $100 billion per annum by 2020.[80]

In addition, the Copenhagen Accord provided for the setting up of the Copenhagen Green Climate Fund, which is now known as the Green Climate Fund (the Fund).[81] The Fund serves as the institution for the implementation of the financial system envisaged under the UNFCCC. An influence of the African Group on the Copenhagen Accord was the establishment of the High-Level Advisory Group on Climate Change Financing,[82] a proposal which had initially been opposed by strong members like the United States.[83] The Copenhagen Accord also established a technology mechanism, one of the requests of the African Common Position.[84] Overall, the Accord represents some progress in outlining the needs and concerns of African states within the global climate change regime. It focuses on the need to compensate states within the region for losses suffered due to climate change. This is seen in the insistence on adaptation funds and emission reduction targets.

While the Accord represents some progress in the demand for financial compensation by African states, the commitment made by developed states in the Accord was significantly lesser than what was proposed in the African Common Position. For example, the request for $67 billion per annum in adaptation funds was reduced to $10 billion while the initial proposal of $200 billion in mitigation funds by 2020 was replaced by $100 billion. Parties were also unable to agree on the subject of emission reduction by developed states, a position over which African Group had staged a walkout.

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[78] Para 3 of the Copenhagen Accord https://unfccc.int/process-and-meetings/conferences/past-conferences/copenhagen-climate-change-conference-december-2009/copenhagen-climate-change-conference-december-2009 (accessed 5 January 2021).
[79] Para 8 of the Copenhagen Accord.
[80] Para 8 of the Copenhagen Accord.
[81] Para 10 of the Copenhagen Accord
[82] Para 9 of the Copenhagen Accord.
[83] Roger & Belliethathan (n71 above) 100-101; The Guardian ‘US embassy cables: US urges Ethiopia to back Copenhagen climate accord. Resource document *The Guardian* 2 February 2010 available at http://www.theguardian.com/world/us-embassy-cables-documents/246644 (accessed 22 July 2020).
[84] Para 11 of the Copenhagen Accord.

It is significant to note that although the Copenhagen Accord was initially negotiated on the assumption that it would be sanctioned as a COP decision, the Conference of the Parties neither authorized nor adopted the Copenhagen Accord.[85] The COP only 'takes note of the Copenhagen Accord.'[86] In the words of the Executive Secretary of the UNFCCC, to take note of the Accord 'is a way of recognizing that something is there, but not going so far as to associate yourself with it.'[87] Since it is not a COP decision, it follows that the Accord cannot be implemented as part of the UNFCCC's institutional architecture. Unfortunately, the Accord does not have its own operational architecture or normative core.[88] This implies that the Accord is at best a declaration of wishes with no operational force or implementation mechanism.

Nonetheless, the Copenhagen Accord offers a glimpse into the thinking of state parties on a various climate change issues like equity and its implications on the allocation of rights and responsibilities. Flowing from the above, it is evident that state parties acknowledge the vulnerability of the African region and the need for developed state parties to provide support to enable African states to engage in climate change action without jeopardize existing developmental objectives. This is most obvious in the creation of the Green Climate Fund and the commitment of developed states to the provision of new and additional funding to assist with mitigation and adaptation efforts in developing states.

3.5 Conference of the Parties (COP) 17

Having failed to reach an agreement in COP15 and the subsequent COP 16 held in Cancun, COP17 became the next conference in which parties deliberated on the further growth of international climate change law. It was also another opportunity for African states to present a joint position on climate change. The conference was described by the then President of South

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[85] Rajamani (n77 above).

[86] Copenhagen Accord Decision 2/CP.15 FCCC/CP/2009/11/Add.1 available at https://unfccc.int/sites/default/files/resource/docs/2009/cop15/eng/11a01.pdf (accessed 5 January 2021).

[87] Jacob Werksman 'Taking note of the Copenhagen Accord: What it means' *World Resources Institute Blog* 20 December 2009 available at https://www.wri.org/blog/2009/12/taking-note-copenhagen-accord-what-it-means (accessed 5 January 2021).

[88] Rajamani (n77 above).

Africa as the 'African Conference of Parties'[89] and held in Durban, South Africa from 28 November to 11 December 2011.[90]

In anticipation of COP17, the African Ministers for the Environment converged for the Fourth Special Session of the African Ministerial Conference on the Environment and jointly ratified the Bamako Declaration on Consolidating the African Common Position on Climate Change and Preparation for the United Nations Conference Sustainable Development (Bamako Declaration).[91] The Bamako Declaration was a consolidation of the 2009 African Common Position on Climate Change and became the foundation for African negotiations at COP 17.[92]

This Declaration emphasised the role of developed states in providing financial resources for African state parties to undertake climate change mitigation and adaptation.[93] It restated that African states would only implement their obligations under the UNFCCC to the extent which developed states fulfilled their duty to assist developing parties with finance, technology and capacity building.[94]

Like the COP15, one major issue held sway at the conference: whether to lengthen the Kyoto Protocol for a second commitment period or to create a new agreement which would include commitments by both developed and developing states. Africa's position on this gridlock was quite significant. The African Group of Negotiators did not agree with developed states that there should be no second commitment period. They also broke ranks with the G77 by supporting a new comprehensive agreement for all state parties.[95] In addition to this, the African Group supported the adoption of a second Kyoto commitment period.[96] This dual

[89] Opening Address by His Excellency, Jacob Zuma at the Official Opening of COP17/CMP 7 available at https://unfccc.int/process/conferences/pastconferences/durban-climate-change-conference-november-2011/statements-and-resources/further-statements-and-news-in-connection-with-cop-17--cmp-7 (accessed 20 November 2018) 4.
[90] Report of the Conference of the Parties on its seventeenth session, held in Durban from 28 November to 11 December 2011 Part One: Proceedings FCCC/CP/2011/9.
[91] Assembly/AU/Dec.363-390(XVII).
[92] Bamako Declaration on the Environment for Sustainable Development available at http://climate-justice.info/wp-content/uploads/2011/11/Bamako-Declaration.pdf (accessed 22 July, 2020).
[93] Para 14-15, 18 of the Bamako Declaration.
[94] Bamako Declaration on Consolidating the African Common Position on Climate Change and Preparation for the United Nations Conference Sustainable Development (Rio+20) para 11. A similar provision had been made in article 4(7) of UNFCCC.
[95] John Vidal & Fiona Harvey 'African nations move closer to EU position at Durban climate change talks' *The Guardian* 8 December 2011.
[96] Ibid.

position meant that the strict differentiation under the Kyoto Protocol could continue to apply to developed state parties while a new legal instrument was being negotiated.

Overall, the position taken by the African Group in the Bamako Declaration and COP17 does not depart significantly from its earlier arguments which focuses on the role of historical emissions and differing capacities in how obligations are shared between state parties. However, unlike in COP 15 African states did not phrase financial obligations from developed states as compensation for past emissions. Much of the focus was on extending the Kyoto Protocol commitment period and laying the foundation for a new agreement under the UNFCCC.

3.6 Interim conclusion

The conceptualisation of equity by African states and its implications on rights and responsibilities under climate change treaties cannot be said to have fully emerged. Nonetheless, certain trends and common themes come through in the Nairobi Declaration, the Common African Position and the negotiations during the conferences of the parties.

African states insist that based on historical emissions, developed states should carry on with their leading role in climate change action. This responsibility is couched as a compensation for the loss which African states, among other developing states, have suffered due to the exploitative activities of the developed world. In other words, climate change is regarded as a tort arising from the actions of the developed states and these states should, therefore, be liable for the costs associated with climate change. This responsibility serves as a form of restorative justice ensuring that developing states are compensated from the resulting loss of atmospheric space and other consequences of climate change.

Furthermore, this conceptualisation of equity and justice within the UNFCCC framework emphasises the need of the 'victim'. In other words, climate change responsibilities could not be distributed among state parties without due recourse to the loss suffered by some regions of the world due to the activities of other regions. The developmental needs and objectives of African state parties must, therefore, be determinant factors in the distribution of climate change responsibilities. They insist that the climate change framework must be built in a manner that compensates African states for the loss suffered and gives room for them to pursue their overriding developmental imperatives.

The foregoing has been some of the highlights of the African Group's attempt to give meaning to the principle of equity and fairness in the distribution of rights and responsibilities under the climate change regime. Although the African Group gained more visibility, the positions did not change significantly. As shown above, the arguments insist on compensation for past emissions and the need to ensure that climate change does not lead to a widening of the existing gap in the global distribution of wealth.

4. CONCLUSION

This chapter has investigated the development of the principle of beyond the UNFCCC in 1992, with particular focus on the African position and how this position has evolved since the first Conference of the Parties. To address this, this chapter has examined the Kyoto Protocol and the CDM created under the Protocol, the Nairobi Declaration and the Common African Positions on Climate Change. These submissions have offered an understanding into the conceptualisation of equity by African states beyond the negotiations for the UNFCCC.

As mentioned earlier, the position of Africa on a variety of climate change issues, including the conceptualisation of equity remains inchoate, and sometimes, inconsistent. However, this chapter reveals that the conception of equity leading to the Kyoto Protocol does not depart significantly from the position in the UNFCCC – a distributive justice approach. A strong insistence on the differing capabilities of state parties and the need for those who possess superior financial and technological capacity to take on the primary responsibility for climate change action.

Closely related to this distributive justice conception is the need to bridge the huge developmental deficit among African states. African states insist that their overriding priority continue to be the eradication of poverty and other developmental objectives and climate change action cannot override this. Any imposition of climate change responsibility, they argue, must be accompanied by the necessary finance and technology to carry out such responsibility. Climate change responsibility without an accompanying developmental support was rejected by African state parties.

It is, therefore, not a surprise that the Kyoto Protocol contains a strict unilateral distribution of obligations. The Kyoto Protocol was, practically speaking, an agreement between developed states alone. The protocol placed no duties on developing states. Not only did developed state

parties undertake emission reduction, but they also committed to new and additional financial resources to offset the climate change costs incurred by developing state parties.

It is significant to restate that the Kyoto Protocol recognises both the role of developed states as the primary emitters of greenhouse gas and the developmental needs of developing states. This recognition offers a basis for reaching the conclusion that the Protocol provides a basis for both distributive (needs based) and restorative (compensation based on past injuries) justice conception of equity. Ultimately, the Protocol protects the right of developing state parties to pursue their developmental objectives by ensuring that they are not subject to climate change responsibility which would conflicts with their developmental objectives. Instead, developed parties are to provide developing state parties with the necessary support for discharging their responsibilities under the UNFCCC.

One of the strongest indicators of the Protocol's commitment to ensuring that climate change action provided developing states with developmental opportunities was the CDM. This mechanism ensured that the discharge of emission reduction obligations by developed states provided developmental benefits to developing states. CDM projects helped to merge climate change action with developmental objectives.

In further development of the international law on climate change, state parties met yearly to flesh out various provisions under the UNFCCC framework. As revealed earlier in this chapter, African states, negotiating through the African Group of Negotiators, developed various policy papers outlining their positions. In summary, these positions reveal a conceptualisation of equity that emphasises restorative justice principles.

In these position papers, African states view climate change and its consequences as a wrong for which developing states, especially African states, are entitled to compensation. African states argued that developing states should be compensated for the resulting loss suffered from the exploitative activities of developed states. The provision of such financial and technological support would allow for African states to engage in climate change action without jeopardizing their developmental objectives. They viewed equity as a tool not only for ensuring compensation for loss within the environmental context but also for ensuring that climate change action is merged with the developmental needs of the African region.

Efforts to further develop the climate change framework led to the creation of the Ad Hoc Working Group on the Durban Platform for Enhanced Action at the 17th Conference of the

Parties. This working group was saddled with the responsibility to prepare a new legal instrument on climate change. Among other things, this instrument was to address the allocation of rights and responsibilities under the climate change regime and the implication of equity and differentiation on this distribution. The next chapter examines the negotiations leading up to this instrument and the extent to which equity is codified in the final text of this instrument, which became known as the Paris Agreement.

CHAPTER FIVE

EQUITY AND CLIMATE JUSTICE IN THE PARIS AGREEMENT

1. INTRODUCTION

This thesis set forth to examine the conception of equity by African states within the international law on climate change and the extent to which their conception is reflected in the United Nations Framework Convention on Climate Change (UNFCCC) and its protocols. Chapter three has shown that leading up to the adoption of the UNFCCC, African states, arguing through the Group of 77, adopted both a restorative and a distributive justice approach to the conception of equity and its implication on how obligations are shared under the proposed treaty.

African states argue that since developed states are emit a disproportionate percentage of t greenhouse gases, they should take primary responsibility for climate change action (restorative). Additionally, African states argue that based on the imbalance in the distribution of global wealth, it is obligatory for developed states as the richer members of the international community to undertake the financial and technological cost of climate change action (distributive).

These arguments have been sustained since the UNFCCC was adopted in 1992. The Kyoto Protocol entrenches a restorative justice conception of equity. The Protocol is thus designed to guarantee that the extent of a state party's obligations is dependent on its position as a major emitter of greenhouse gases and its quantified emissions as provided in Annex B of the Protocol. It also provides compensation to developing states in the form of new and additional financial resources.

The African Group maintained their focus on a restorative justice principle from the Nairobi Declaration to the Common African Positions. African states argued that climate change and its consequences were a loss for which African states were entitled to compensation from those who were responsible for the majority of past emissions. This would further ensure that climate change action does not negatively impact the region's developmental objectives.

Having established the position of African states on the interpretation and application of equity in the UNFCC and the Kyoto Protocol, this chapter examines the latest climate change treaty,

the Paris Agreement on Climate Change. This chapter analyses the conception of equity that African state parties sought to bring into the Paris Agreement, the degree to which the Paris Agreement demonstrates this conception and how the Paris Agreement seeks to deal with the connection between climate change action and the developmental deficit within the African region.

This chapter also analyses the significant changes and differences in the conception of equity in the Paris Agreement when compared with preceding climate change agreements, the UNFCCC and the Kyoto Protocol. Particular attention is placed on issues such as the categorisation of states using annexes, the conditionality of developing states' obligation on the transfer of finance and technology from developed states and the introduction of the phrase 'in the light of different national circumstance' to the application of equity under the Paris Agreement.

2. THE PARIS AGREEMENT

2.1 Introduction: Why another protocol?

As earlier mentioned, the climate change regime adopts a framework approach to international law making. This implies that while the UNFCCC lays out the primary ambition of state parties on climate change, the Convention leaves room for subsequent agreements to flesh out the necessary obligations and details for achieving these objectives. It was in the light of this that state parties adopted the Kyoto Protocol in 1997.[1]

Despite the efforts of state parties under the Kyoto Protocol, a significant gap continued to exist between the level of compliance with the Kyoto Protocol and the volume of emission reduction needed to reduce global average temperature to the desired levels.[2] This gap was compounded by the fact that states, with significant emission levels, had either opted out of the Kyoto Protocol or threatened to do so. The United States never signed the Protocol, while Canada

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[1] The Koyo Protocol entered into force on 16 February 2005 and its first commitment period came into an end on 31 December 2012. In 2012, state parties agreed through the Doha Amendment to extend the Protocol for a second commitment period from 2003 to 2020; see para 4 of the Amendment to the Kyoto Protocol pursuant to its Article 3, paragraph 9 (Doha Amendment) Decision 1/CMP.8.

[2] Decision 1/CP.17 Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action (hereinafter Decision 1/CP.17 available at http://www.ciesin.columbia.edu/repository/entri/docs/cop/FCCC_COP17_dec01.pdf (accessed 18 January 2021).

withdrew its ratification. Other major emitters like Japan, Russia and New Zealand refused adopt new targets after the expiration of the first commitment period.

It was apparent that the existing application of equity under the Kyoto Protocol was no longer acceptable to state parties. The strict, almost penal distribution of responsibilities between only developed states needed to be revisited since certain developing states had now emerged as strong economies with large volumes of emissions. The basis for the prevalent distributive justice approach was the significant difference between the financial and technological capabilities of developed and developing states. With the new economic status of these developing states, the justification for distributive justice was becoming mute.

Equally, the application of the restorative justice principle had become less clear with these emergent economies. The primary focus, under this principle, was to determine climate change responsibilities based on the role of a state as a major emitter of greenhouse gases. With these new major emitters, the recurring question became whether distribution of responsibilities should factor in recent emissions or only historical emissions. This would have implications for both the distribution of climate change responsibilities and the association between climate change action and the need for development.

It, therefore, became clear that there was a need for a new agreement which would redefine the application of equity and also include all parties and foster the execution of the objectives of the Convention.[3] Meeting in Durban, South Africa, parties adopted Decision 1/CP.17, establishing the Ad Hoc Working Group on the Durban Platform for Enhanced Action (the Durban Working Group). This subsidiary body had the responsibility to 'develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties.'[4] The work of the Durban Working Group was to be concluded in 2015 and produce an agreement that would be applicable to every state party and become effective upon the expiration of the second Kyoto commitment period in 2020.

2.2 Negotiating history of the Paris Agreement

This section outlines the negotiating history of the Paris Agreement. It investigates the submissions of the African Group of Negotiators to the Durban Working Group from its

[3] Ibid.
[4] Ibid at para 2.

establishment to the adoption of the Paris Agreement. This section analyses the position of the African Group on specific issues within the new climate change agreement and what these positions reveal about their conception of the principle of equity.

The first session of the Durban Working Group opened in May 2012 and began the work that eventually led to the Paris Agreement. African states were represented in various groups like the Group of 77 and China (G77), the Least Developed States (LDC) Parties, the African Group, the Coalition for Rainforest Nations and the Central African Forests Commission. South Africa is also a member of the BASIC group (Brazil, South Africa, India and China). Apart from the African Group and the Central African Forests Commission, the membership of the other groups is a mix of both African and non-African states. This analysis will, therefore, focus on the submissions of the African Group and of specific African states, where necessary.

2.2.1 General framework

The Durban Working Group started its work by drawing out the conceptual framework for the new agreement. In this phase, the Durban Working Group sought to formulate a common understanding of the key issues and shape the central components of the new agreement.[5] In order to do this, state parties were invited to make submissions on the vision, ambition and principles which would govern the new agreement.

In response, the African Group submitted that the proposed legal agreement must seek to be fair, effective and conform to the principles of the UNFCCC.[6] In order to achieve this, the agreement must be consistent with principles such as historical responsibility, equity, differentiation, primacy of national needs and the developmental priorities of developing states.[7] Explaining further, African states contend that differentiation must be applied to commitments on emission reduction, finance and technology.[8]

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[5] Ibid.
[6] Submission by Swaziland on behalf of the Africa Group on the Vision, Ambition and Principle under the ADP para 3 (hereinafter Submission by Swaziland on Vision, Ambition and Principle) available at https://unfccc.int/files/meetings/ad_hoc_working_groups/kp/application/pdf/adp_africangroup_050912.pdf (accessed 17 September 2018).
[7] Ibid para 4; Submission by Swaziland on behalf of the African Group under Work stream I of the ADP para 7b available at https://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_african_group_workstream_1_20131008.pdf (accessed 11 January 2019).
[8] Para 5 Submission by Swaziland on Vision, Ambition and Principle.

In upholding the principle of equity and the need for differentiation, developing states, including South Africa and other African states, argued that the new agreement cannot interfere with the principles, provisions and annex provided for in the UNFCCC.[9] They insisted that the new agreement negotiations must not 'replace, rewrite, restructure, renegotiate, nor reinterpret' these provisions and such provisions must be kept under the new agreement.[10]

African state parties maintained that the new agreement must be a tool which gives effect to 'the right to equitable access to sustainable development.'[11] Equity in the agreement had to be more than a cosmetic addition, it must inform all the operations of the Agreement by applying to both general and specific commitments of the various state parties.[12] The African Group proposed that the final text should include the phrase that the agreement 'shall be implemented on the basis of'.[13] This inclusion ensures that equity is used in mandatory terms

However, this proposal was rejected by the European Union and the Umbrella Group[14] on the ground that the exact meaning of the word 'equity' remains uncertain and this would create the need for an annex such as that contained in the UNFCCC and the Kyoto Protocol.[15] They view the annex-based differentiation adopted in both earlier agreements as 'static and unresponsive to evolving economic realities.'[16] Instead, they argued for the use of descriptive language stating that the Agreement should 'reflect' equity rather than the mandatory 'be on the basis

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[9] Submission of the Like-minded Developing Countries on Climate Change (24 September 2013) https://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_lmdc_workstream_1_and_2_20130924.pdf (accessed 10 January 2021).
[10] Ibid.
[11] Submission by South Africa Durban Platform for Enhanced Action (26 April 2013) available at https://unfccc.int/files/bodies/application/pdf/adp_south_africa_workstream_1_20130427.pdf (accessed 17 September 2018).
[12] Submission by Swaziland on behalf of the Africa Group in respect of Workstream I: 2015 Agreement under the ADP para 7 (hereinafter Submission by Swaziland in respect of Workstream I available at https://unfccc.int/files/bodies/awg/application/pdf/adp_2_african_group_29042013.pdf (accessed 14 September 2018); Submission by Swaziland on the Vision, Ambition and Principle.
[13] Article 2(2) of the Draft Paris Outcome FCCC/ADP/2015/L.6Rev.1.
[14] The Umbrella Group is a negotiation group consisting of Belarus, Kazakhstan, Russian Federation, Ukraine, Australia, Canada, Iceland, Japan, New Zealand, Norway, USA and Israel; see UNFCCC 'Party groupings' available at https://unfccc.int/process-and-meetings/parties-non-party-stakeholders/parties/party-groupings (accessed 3 November 2021).
[15] Lavanya Rajamani 'Ambition and differentiation in the 2015 Paris Agreement: Interpretative possibilities and underlying politics' (2016) 65 *International and Comparative Law Quarterly* 508.
[16] Lavanya Rajamani & Emmanuel Guerin 'Central concepts in the Paris Agreement and how they evolved' in Daniel Klein, Maria Pia Carazo, Meinhard Doelle et al (eds) *The Paris Agreement on Climate Change: Analysis and Commentary* (2017) 82.

of' equity advocated for by the African Group.[17] Eventually, parties settled for the expression that the 'Agreement will be implemented to reflect equity.'[18]

It is noteworthy that the African Group, reiterated in its submissions to the Durban Platform, that differentiation must be one of the basic components of the new agreement and this agreement must recognize development as a priority for developing states.[19] Where it becomes imperative for developing states to shoulder responsibilities, the African Group emphasised that such commitments would only be to the extent that financial and technological support is received from developed states, in accordance with article 4(7) of the UNFCCC.[20] There should be no obligations without corresponding financial or technological support.

Similarly, South Africa submitted that poverty eradication was a priority and the new agreement had to have 'clear co-benefits to participation,'[21] Therefore, there was to be no constraints on the attempt of third world states to eradicate poverty or pursue industrialization.[22] The treaty was to also contain incentives targeted towards the economic growth of developing states, especially those in Africa.[23] The agreement was, therefore, to include a legally binding provision obligating developed states to provide 'measured, reported and verified' financial, technological and other capacity-building efforts to developing states.[24]

These submissions reveal an insistence by African states that equity must remain a guiding principle of any climate change agreement and must determine the distribution of rights and responsibilities between state parties. Importantly, this conception of equity must allow for African states to focus on the most important matter to them - development and poverty eradication. New climate change obligations must not add to the existing financial burdens or limit the available pathways to industrialization. Where climate change responsibilities exist,

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[17] Draft Paris Outcome, Proposal by the President Draft decision -/CP.21, Version 2 of 10 Dec 2015 17 available http://unfccc.int/resource/docs/2015/cop21/eng/da02.pdf (accessed 10 January 2019).
[18] Article 2(2) of the Paris Agreement.
[19] Submission by Swaziland in respect of Workstream I (n12 above) Para 1-2, 10; Submission by Sudan on behalf of the African Group 'Elements of the draft negotiation text under the ADP available at https://unfccc.int/files/bodies/application/pdf/adp_w1_elements_africangroup.pdf (accessed 22 January 2021).
[20] Para 11, 12(d) Submission by Swaziland on Vision, Ambition and Principle.
[21] South African on Adaptation under the Ad Hoc Working Group on the Durban Platform for Enhanced Action 26 April 2013 (hereinafter South African Submission on Adaptation) available at https://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_south_africa_workstream_1_and_2_adaptation_20130930.pdf (accessed on 17 September 2018).
[22] Ibid 2.
[23] Ibid 1.
[24] Ibid.

they must be accompanied by the necessary financial and technological support from developed state parties.

2.2.2 Climate finance and technology transfer

Climate finance and technology transfer remains another area where equity continues to have a huge significance. The provision of financial and technological support serves as an avenue for states with higher levels of capacity to assist those with less capacity. It is, therefore, not surprising that its inclusion in the new agreement and its relationship to the application of equity proved contentious.

In their submission, the African Group emphasised that responsibilities under the new climate change agreement must not prejudice the developmental pursuits of African states.[25] Of particular concern was the possibility of diverting existing developmental funds into climate change mitigation efforts. Relying on article 4(7) of the UNFCCC, they argued that climate change commitments imposed on developing states had to be supported by 'a commitment on finance and technology transfer by developed countries.'[26]

African states submitted that the new agreement had to clearly state the contributions to be made by various sources to climate finance and include a 'robust provision and support' for the transfer of technology for developing states.[27] The African Group believed that developed states had to draw out a clear outline for enhancing the provision of finance and technology.[28] It was not enough to merely set a target, the new agreement had to ensure the actualization of this objective.[29] Developed states were expected to provide coherent pathways to meet the $100 billion per year target by 2020.[30] This provision was to serve as an incentive for developing

[25] Submission by South Africa on Durban Platform for Enhanced Action available at https://unfccc.int/files/bodies/application/pdf/adp_south_africa_workstream_1_20130427.pdf (accessed 25 January 2021).

[26] Submission by Sudan on behalf of the African Group 'ADP Intervention on Finance' 10 June 2014 (hereinafter Submission by Sudan on ADP Intervention on Finance) available at https://unfccc.int/files/bodies/awg/application/pdf/adp2-5_submission_by_sudan_on_behalf_of_the_african_group_finance_20140610.pdf (accessed 22 January 2021); Submission by Swaziland on behalf of the African Group under Workstream I of the ADP 08 October 2013 (hereinafter Submission by Swaziland under Workstream I) available at https://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_african_group_workstream_1_20131008.pdf (accessed 26 January 2021).

[27] Para 4, 8 Submission by Swaziland in respect of Workstream I (n12 above); para 1, 10 Submission by Swaziland under Workstream I (n26 above).

[28] Para 12(d) Submission by Swaziland on Vision, Ambition and Principle.

[29] Para 7b Submission by Swaziland under Workstream I of the ADP (n26 above).

[30] Submission by Sudan on ADP Intervention on Finance.

states to adopt a climate-friendly path to development. These funds were to be 'NEW and Additional'.[31] In other words, climate finance was to be in addition to, and not a replacement of, existing developmental funds.

In its individual submission, South Africa emphasised that the provision of finance and technology to developing states was to be done in line with the peculiar needs and vulnerabilities of each state.[32] These funds were to be scalable, and the 2015 agreement was to grant legal capacity and financial resources to the Green Climate Fund. This, it was argued, would have ensured that the Fund was ran efficiently and with as much autonomy as possible.[33] Like the submission of the African Group, South Africa also insisted that developed states were to make explicit commitments for the realization of the US$100 billion target by 2020.[34]

On the transfer of technology, the African Group submitted that this was a necessity for the achievement of the ambition gap.[35] African states emphasised the urgent need for developmental partnerships between developed and developing states through the technology mechanism of the framework Convention.[36] They emphasised that this transfer was the 'clear basis for adaptation obligations…' to be undertaken by developing states in general and African states in particular.[37]

To ensure the successful transfer of technology under the new agreement, the South African submission contained a provision for the transfer of licenses and sub-licenses for relevant technologies to developing state parties.[38] South Africa also proposed a 'no-incidence arrangement'.[39] The purport of this arrangement was to secure the economic advancement of developing states from any negative effect of change in production patterns due to climate change action.[40] Unfortunately, there was no further elaboration on this arrangement and how

[31] Ibid.
[32] South African Submission on Durban Platform (n25 above).
[33] South African on Adaptation under the Ad Hoc Working Group on the Durban Platform for Enhanced Action 26 April 2013 available at https://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_south_africa_workstream_1_and_2_adaptation_20130930.pdf (accessed on 17 September 2018).
[34] Submission by South Africa on Durban Platform.
[35] Para 10 Submission by Swaziland on Vision, Ambition and Principle.
[36] Ibid.
[37] Robert Falkner 'The Paris Agreement and the new logic of international climate politics' (2016) 92(5) *International Affairs* 1117.
[38] Submission by South Africa on the Determination and Communication of Parties' Intended Nationally Determined Contributions (May 2014) 6 available at https://unfccc.int/files/bodies/application/pdf/adp_indc_southafrica.pdf (accessed 3 November 2021).
[39] Ibid at 5.
[40] Ibid.

it was supposed to work. Unsurprisingly, this clause never made it to the final draft of the agreement.

Speaking on how to assess the success of the implementation of the agreement, South Africa proposed that such assessment must focus, among other things, on the verification of financial and other necessary support to developing states.[41] The extent of support provided and received by developing states must be verifiable and shown to be adequate. In other words, in assessing the success or failure of the agreement, a cardinal point would be how well it had been able to provide support to developing states. It will be insufficient to assess the Agreement only by its ability to ensure a reduction in global emission, the success of the Agreement and the global climate change regime would be measured by its ability to ensure a balance between climate change action and development in developing states.

Flowing from the above, it is clear that African states argued for the inclusion of equity in the allocation of obligations within the proposed agreement. In practical terms, this meant that they would receive financial and technological support for climate change action from developed states. African states justified this application on the basis that the region continues to face overwhelming developmental deficits and poverty eradication remains the primary focus of African states. Climate change action must be aligned with socio-economic development.[42] They, therefore, argued that it would be inequitable to saddle African states with climate change responsibilities without corresponding support. This support would come in the form of new and additional funding and the transfer of necessary technology.

2.2.3 Emission reduction targets

Emission reduction represents another issue where the application of equity is most obvious. State parties must develop a framework for determining how to distribute the global reduction target among themselves. Issues like which state parties should undertake emission reduction targets and by how much often bring to the surface underlying issues of fairness and equity and the impact of emission reduction on the industrialization process of state parties.

[41] Ibid at 8.

[42] Para 4-5, Submission by Sudan on behalf of the Africa Group: Elements of the draft negotiation text under the ADP available at https://unfccc.int/files/bodies/application/pdf/adp_w1_elements_africangroup.pdf accessed 26 June 2021.

In its submission, the African Group made clear that in achieving emission reduction targets, the 2015 agreement must be based on both science and equity.[43] This means that the agreement would recognize the scientific need to reduce global emissions but the specific contribution of each state party to the achievement of the global emissions target would be based on equity. In other words, while science would determine the global emissions goal, equity must define how that goal is distributed among state parties. For African states, this distribution must ensure that emission targets are not placed on states whose developmental needs imply that their energy consumption and thus emission rates will continue to grow.[44] Such states were seen as 'late-comers' to industrialization and they must be given the benefit of using their fair share of the atmospheric space.

Similarly, the South African submission explained that targets and commitments were necessary to mobilize sufficient ambition for the Agreement.[45] However, specific commitments are to be nationally determined but within a multilaterally agreed framework.[46] Each state party would individually determine the degree to which it will restrict its emissions but with the aim of contributing, and in proportion to, a jointly agreed global target.

The South African submission provided two different sets of criteria for determining the extent of responsibilities for each state party.[47] The first criteria applied to developed states and included an obligation to reduce emissions. The second criteria, which applied to developing state parties, provides that this group of states are to be allowed some growth in their level of emissions in order to give room for industrialization. For developing states, their respective national needs and circumstances will be an overriding issue in deciding the extent of their commitment towards the global goal.[48]

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[43] Para 7, Submission by Swaziland on behalf of the African Group on adaptation in the 2015 Agreement available https://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_african_group_workstream_1_adaptation_20131008.pdf (accessed 14 September 2018).
[44] Para 4, 8 Submission by Swaziland in respect of Workstream 1; Para 6(b) of the Submission by Swaziland on Vision, Ambition and Principle available at https://unfccc.int/files/meetings/ad_hoc_working_groups/kp/application/pdf/adp_africangroup_050912.pdf (accessed 21 January 2021).
[45] South African Submission on Mitigation under the Ad Hoc Working Group on the Durban Platform for Enhanced Action (hereinafter South African Submission on Mitigation) 1 available at https://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_south_africa_workstream_1__mitigation_20130930.pdf (accessed 3 November 2021).
[46] Ibid.
[47] South African Submission on Durban Platform (n25 above).
[48] Ibid.

However, the South African submission also provided that developing states had to ensure that their emissions began to decline from 2020-2030.[49] Even then, the new agreement must provide incentives to enable developing states transition into low carbon development pathways.[50] There must be provisions ensuring that developing states are able to enjoy benefits linking 'climate action with economic and social development opportunities and also linked with finance, technology and capacity-building support.'[51] For African states, climate change responsibilities needed to be integrated with the economic development.

The African position on the issue of emission reduction target was that the responsibility must be shared in line with equity, and provision be made for the need for African states to correct their developmental deficits. This implies that African states must be allowed their fair share of the atmospheric space and no emission reduction obligations must be imposed upon them. Their status as developing states must influence the distribution of the emission reduction targets among state parties.

2.2.4 Adaptation

Another major issue brought to the fore by African states, particularly South Africa, was the need to give adaptation the same priority as mitigation.[52] Much of the focus of global climate change discourse had been on mitigation: the scaling down of emissions in order to reduce the intensity or delay the onslaught of climate change. Adaptation, on the other hand, is an acknowledgement of the fact that certain parts of the world have already begun to deal with the effects of climate change, and they must be adequately equipped to tackle these impacts.

Adaptation is particularly important for the African region. As already stated, the continent has begun to be impacted and will be the region worst affected by the consequences of climate change. Coupled with the general lack of technological capacity on the continent, it becomes imperative that climate change action within the African region must focus on adaptation by equipping the states in the region.

[49] South African Submission on Mitigation (n45 above) 3. It is contradictory that the South African submission had set the decline period at 2020-2030 since the Paris Agreement only becomes operational at the expiration of the second Kyoto commitment period in 2020. The implication of this is that if the South African proposal had been accepted into the Paris Agreement, it would have been tantamount to setting emission reduction targets for developing countries right at the inception of the Agreement.
[50] Submission by South Africa (n47 above) 2.
[51] South African Submission on Mitigation (n45 above) 3.
[52] Ibid 1.

In framing a strategic framework on adaptation, South Africa proposed that the framework had to emphasise the reduction of vulnerability and the building of resilience in developing states against climate shocks and more long-term effects of change in climatic conditions.[53] South Africa submitted that ensuring such protection for developing states must be a common commitment by all Parties.[54]

Furthermore, South Africa argued that the new agreement must not only contain references to adaptation, the agreement had to also ensure that the means for such adaptation is made accessible to those who need it.[55] These means include finance, technology and capacity building.[56] A proposal was also made for the transfer of between five to seven billion USD per year by 2015 from developed states to developing states for the purposes of adaptation.[57]

Like the position on matters like climate finance, transfer of technology and emission reduction, the position on adaptation seeks to ensure that the vulnerable position of African states determines the extent of rights and responsibilities created in the new agreement. The focus remains on the differentiation of responsibilities based on the different needs of state parties, distributive justice.

2.3 Interim conclusion

As examined above, African states, negotiating through the African Group, explained that the general framework of the proposed climate change agreement must be one which is built upon the principle of equity. They emphasised that equity remains relevant in the allocation of rights and duties within any climate change treaty. Fundamentally, this implies that different levels of obligations will be placed upon different state parties or groups of states. State parties could not be saddled with the same levels of responsibilities.

In practical terms, the application of equity was to be reflected within the issue of climate finance and technology transfer. African state parties insisted that the supply of climate finance and technology to developing state parties must remain a part of the climate change agreement.

[53] South African Submission on Adaptation under the Ad Hoc Working Group on the Durban Platform for Enhanced Action 2 available at https://unfccc.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_south_africa_workstream_1_and_2_adaptation_20130930.pdf (accessed 3 November 2021).
[54] Ibid 1-2.
[55] Ibid 1.
[56] Ibid 2.
[57] Ibid 3.

Not only that, but that the new agreement must ensure that the obligations imposed upon African states must be backed up by corresponding financial and technological support to carry out such obligations. This will ensure that climate change responsibilities do not lead to the diversion of existing developmental funds into climate change action. Ultimately, this provision (climate finance and technological transfer) is to protect the developmental objectives of African state parties.

Additionally, African states sought to protect their access to atmospheric space by insisting that emission reduction obligations be limited to developed state parties. They argued that given the need for African state parties to increase their current levels of industrialization, it follows that their energy consumption and, thus, their levels of emissions would increase. Despite the global emission reduction goal, African states must be allowed to increase their emissions to meet up with their developmental goals. They proceed that while science must determine the global emission reduction targets, equity must define the distribution of this target among various state parties, and this implies that no emission reduction targets should apply to African state parties.

The submission by African states also reveals an emphasis on adaptation and not just mitigation. This represents another application of equity within the proposed agreement wherein African states sought to place focus on an issue of importance to the region. This focus on adaptation, like finance and technological transfer, sought to ensure that the new agreement favoured developing state parties and ensured that they garnered adequate support for issues that had significance for the African continent.

The African position on the issues examined above – general framework, climate finance, technology transfer, emission reduction and adaptation – reveal a common theme: the overriding priority of African states is their ability to pursue development and the need to have access to a fair share of the atmospheric space. This priority must determine the distribution of rights and responsibilities and what is fair and equitable in the proposed agreement.

Overall, the African submissions to the Durban Working Group reveal a distributive justice conception of equity. This conception is premised on the fact that state parties within the UNFCCC are at different levels of development and capabilities, and, therefore, the extent of each parties' rights and obligations must be consistent with their needs, priorities and levels of development. This conception is targeted at ensuring that the new agreement gives enough

room for African states to pursue their developmental objectives. This is further achieved by ensuring that the kinds of rights and responsibilities saddled upon these states are such that protect their access to a fair share of atmospheric space while ensuring that they are provided with adequate financial and technological resources to carry out their climate change obligations.

The focus is on the need for international climate change treaties and mechanisms to take the economic and developmental needs of African states into cognizance in the distribution of obligations. Overall, these arguments reveal a distributive justice approach to equity. They emphasise the need to ensure that the allocation of obligations within the treaty does not widen the existing wealth inequity between rich and poor countries. This goal is to be achieved even if it implies placing different levels of responsibilities on members of the society. Similarly, an unequal distribution of obligations among otherwise equal members of the international legal system will be permitted, and is a requirement of equity, in order to correct existing inequalities.

This implies that the unequal distribution of rights under climate change regime is not only desirable but is a prerequisite of equity within international climate change law. Obligations are to be shared in a way that guarantees that the industrialization and economic growth of developing states are achieved. This gives allowance for African states to continue to pursue their developmental objectives while undertaking climate change action.

3. EQUITY IN THE PARIS AGREEMENT

On 12 December 2015, negotiations were concluded, and the Paris Agreement was adopted at the Conference of Parties held in Paris, France. This section analyses the Paris Agreement and the degree to which the African conception of equity is reflected in the specific rights and obligations created in this agreement. This section also examines how the conception of equity adopted in the agreement tackles climate change action and the need for development.

Following the pattern in the UNFCCC and the Kyoto Protocol, the Paris Agreement recognises equity as a guiding principle in the pursuit of its objectives.[58] The preamble provides that the Agreement is to be informed by 'the principle of equity and common but differentiated responsibilities and respective capabilities.'[59] Similarly, article 2 states that the Paris

[58] Preamble to the Paris Agreement, 'Decision 1/CP.21 Adoption of the Paris Agreement' (29 January 2016) FCCC/ CP/2015/10/Add.1, Annex (Paris Agreement).
[59] Ibid.

'Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.'[60]

The preamble and article 2(2) are to the effect that the duties contained in the Agreement are founded on the dual principles of equity and differentiation.[61] The Paris Agreement also provides for equity within the context of mitigation,[62] global stocktake,[63] access to sustainable development, etc.[64] It was the inclusion of this principle, coupled with the provision on capacity-building, that ensured that African states, negotiating through the African Group of Negotiators, became amenable to the Agreement.[65]

However, an acknowledgment of the principle of equity is not enough. It would be insufficient to have equity as a mere cosmetic addition to the Paris Agreement. The inclusion of this principle must be accompanied with rights and responsibilities with respect to the provision of finance and technology and other factors necessary for undertaking climate change action while not jeopardizing developmental pursuits.

The practical application of equity is reflected in provisions on climate finance, emission reduction, mitigation and adaptation, technology transfer, capacity development, reporting and transparency mechanisms, etc.[66] These provisions are examined in the following subsections. The approach taken here is to analyse these obligations and their implications on the conception of equity adopted within the Paris Agreement. The Paris Agreement does not distinguish between African state parties and other developing states, the analysis will therefore focus on rights and obligations as they apply to developing states; the category to which African state parties belong. Where necessary, the provisions applicable to the Least Developing States (a group with some African members) will also be analysed.

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[60] Article 2 of the Paris Agreement.
[61] It is important to note that the Paris Agreement generally adopts a bottom-up approach. This implies that while the agreement creates general objectives and targets, it is left to each state to decide its national contribution to such objectives. This implies that although general obligations are created by the Agreement, the specific level of commitments to be undertaken by individual state parties with respect to certain obligations are nationally determined.
[62] Article 4(1) of the Paris Agreement.
[63] Article 14 of the Paris Agreement.
[64] Preamble to the Paris Agreement.
[65] Submission by Swaziland under Workstream (n26 above) I.
[66] Submission by Swaziland under Workstream (n26 above) I.

3.1 Climate finance under the Paris Agreement

The provision in article 5(3) of the UNFCCC for the transfer of climate funds to developing states remains one of the most traditional expressions of the principle of equity within the UNFCCC and continues to be central to climate change treaties. It is, therefore, unsurprising that climate finance has been described as a 'central cross-cutting feature' of the Paris Agreement.[67] It proved to be a deal breaker during the negotiations.[68]

3.1.1 Developed state parties' obligation

Article 9(1) of the Paris Agreement provides that 'Developed country Parties *shall provide financial resources* to assist developing country Parties with respect to both mitigation and adaptation *in continuation of their existing obligations under the Convention*' (emphasis added).[69] This provision builds upon article 4(2) of the UNFCCC, which obligates developed state parties to provide climate funds to aid developing states parties in carrying out their commitments under the UNFCCC. Without a doubt, the provision of article 9(1) of the Paris Agreement creates an obligation for developed states to transfer the necessary financial resources for climate change action to developing states.

Beyond creating this obligation, the Paris Agreement provides very little clarity on how the obligation would be enforced against developed state parties. It provides no clarity on the total sum to be raised, how it would be raised and the amount or frequency of contribution from each developed state. It is left for each state party to nationally determine how they choose to carry out this financial obligation. Although article 9(5) of the Agreement provides that

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[67] Rajamani (n14 above) 513.

[68] Michael Doelle 'The Paris Agreement: Historic breakthrough or high stakes experiment' (2016) 6 *Climate Law* 13. Although there is yet to be an agreed definition of what constitutes climate finance, it is generally understood to mean the transfer of finance from developed to developing countries for climate change purposes, especially in discharging developing parties' obligations under the UNFCCC framework. Alexabder Zahar *Climate Change Finance and International Law* (2017) 23; Hao Zhang 'Implementing provisions on climate finance under the Paris Agreement' (2019) 9 *Climate Law* 21, 22. These funds are usually public finance or other funds mobilized through the public sector in discharge of developed state parties' obligations under the UNFCCC. The UNFCCC's Standing Committee on Finance defines climate finance more broadly as finance that 'aims at reducing emissions and enhancing sinks of greenhouse gases and aims at reducing vulnerability of, and maintaining and increasing the resilience of, human and ecological systems to negative climate change impacts'; see UNFCCC Standing Committee on Finance, *2014 Biennial Assessment and Overview of Climate Finance Flows Report* (UNFCCC 2014) available at https://unfccc.int/files/cooperation_and_support/financial_mechanism/standing_committee/application/pdf/2014_biennial_assessment_and_overview_of_climate_finance_flows_report_web.pdf (accessed 5 February 2021) 5. This interpretation includes funds from various sources whether public or private, and includes local, national, and transnational sources that are directed towards climate change action.

[69] Article 9(1) of the Paris Agreement.

developed states must report on all quantitative and qualitative efforts made at supporting developing states with climate finance, it does not provide any standard against which to measure such efforts.

However, the provision of article 9 of the Paris Agreement is supplemented by paragraphs 53 to 65 of the Paris Decision.[70] Specifically, paragraph 54 provides that the existing joint target of $100billion per annum from 2020 be sustained until 2025 when a new sum will be agreed upon by the parties.[71] In other words, the joint quantified target is set at $100 billion till 2025. Since Article 9(3) of the Agreement provides that further mobilizations of climate finance must be an improvement on prior efforts, it implies that the new sum to be agreed in 2025 must be higher than the current target of $100 billion (USD).

It is significant to note that since the sum is provided for in the Paris Decision, and not the Agreement itself, the targeted sum is not legally binding and this weakens the persuasive force of the financial commitments created under the Agreement.[72] It is not surprising that the Independent Expert Group on Climate Finance, a group of experts commissioned by the UN, found that the current trajectory of climate finance from developed states is insufficient to reach the '$100 billion by 2020' target.[73] This ultimately highlights the need for a binding commitment which states will feel more obligated towards.

Without legally binding qualitative and quantitative standards, there is no yardstick against which to measure the performance of developed state parties in this regard. It becomes very convenient for a developed state to peg their commitment at a low sum. In the absence of a quantitative standard, such a course of action cannot be said to be a breach of the Paris Agreement even though it fails to contribute significantly to the target sum of $100 billion. While a once-off payment is not advocated here, it would be more consistent with the goals of

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[70] Decision 1/CP.21 available at https://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf (accessed 23 March 2021).

[71] Para 53 Decision 1/CP.21.

[72] The 'decision' is one of the means usually adopted by the Conference of Parties for the resolution of differences. The inclusion of a provision in a decision does not necessarily confer it with a legal character and its legality will often depend on the specific 'legal hook' used. However, the Decision has a generally lower profile when compared to a Protocol. Susan Biniaz 'Comma but differentiated responsibilities: Punctuation and 30 other ways negotiators have resolved issues in the international climate change regime' (2016) 6 *Michigan Journal of Environmental & Administrative Law* 59.

[73] Independent Expert Group on Climate Finance *Delivering on the $100 billion Climate Finance Commitment and Transforming Climate Finance* 21 December 2020 available at https://www.un.org/sites/un2.un.org/files/100_billion_climate_finance_report.pdf (accessed 11 February 2021).

the Agreement if the contribution of developed state parties was set at a minimum standard per annum. This will ensure that parties do not set insufficient standards for themselves.

It is not enough to merely include a duty to provide climate finance without provisions ensuring its adequacy and access to such funds. Without such provisions, the obligation to provide climate finance does not fulfil the requirements of equity. There is merely a provision which states that developing states will be entitled to climate finance without clear paths for actualizing this right.

In conclusion, article 9 creates a clear legal duty for developed state parties to provide climate finance to their developing counterparts. This provision is supplemented by the Paris Decision, which sets the quantifiable target at $100 billion per annum by 2025. However, the provisions of the Agreement give little clarity on how to achieve this objective and the extent of each developed party's obligation. The Paris Agreement gives too much leeway for developed state parties to renege on their financial obligations.[74] Thus, while there is a legal obligation for the provision of climate finance, the practicality of enforcing this obligation is doubtful.

3.1.2 African state parties' obligation

The Paris Agreement creates no binding obligation for African states, or developing states generally, to contribute to global climate funds. It positions African states as beneficiaries of climate finance rather than saddle them with obligations which they may be unable to bear given their developmental imperatives. This is compatible with the principle of equity as sought for by members of the African Group of Negotiators. This notion of equity ensures that developing state parties can pursue climate protection without diverting funds which were meant for developmental projects within their respective states.

However, the Paris Agreement takes a shift from the traditional positions provided for in the UNFCCC and the Kyoto Protocol. With respect to financial resources, article 9(2) of the Paris Agreement states that 'other parties are encouraged to provide or continue to provide such support voluntarily.'[75] This implies that while developed states have the obligation to lead the provision of climate finance to developing states, the Agreement urges states which are not

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[74] It is, therefore, not surprising that developed state parties are not on a trajectory to meet the $100 billion target. Independent Expert Group on Climate Finance *Delivering on the $100 billion Climate Finance Commitment and Transforming Climate Finance* December 2020, 21 available at https://www.un.org/sites/un2.un.org/files/100_billion_climate_finance_report.pdf (accessed 11 February 2021).
[75] Article 9(2) of the Paris Agreement.

traditionally categorised as developed states to contribute to climate finance. In doing this, the Paris Agreement widens the class of donor states to include state parties who may have the capacity to do so even if they are technically not seen as developed states.

It is necessary to note that the Agreement uses the word 'encouraged' as opposed to 'shall' which is used with respect to developed state parties. This implies that while developed states are obliged to supply climate finance, the provision of climate finance by non-developed states is voluntary. The Paris Agreement thus creates two categories of donor states: obligatory donors and voluntary donors. The only set of state parties obliged to provide climate funds are developed states. They retain the responsibility to provide financial resources and lead the mobilization of climate finance for developing states.[76]

The inclusion of a non-developed states class of donors represents a constant dispute between developed state parties and some of the developing state parties. Developed states had argued that the Convention (and the Kyoto Protocol) had become inequitable by placing substantive obligations on only developed states while exonerating developing states, including those with relatively large economies, from any form of obligation.[77]

These arguments, as seen above, were based on the fact that some of these developing states had begun to have high emissions and enough financial capacity to fund climate change action.[78] This controversy had led to the withdrawal of major developed states, such as the US, Canada, Russia, Japan and New Zealand from the Kyoto Protocol and ultimately led to its failure.

The provision in article 9(2) for an 'other parties' group of donors served as a compromise for ensuring that the class of donors is broadened to include developing states who have the necessary financial capacity. It, however, does this without putting these states in the same group as developed states who have higher levels of historical emissions and must thus take the lead in climate change action, including the provision of climate finance.

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[76] Article 9(3) of the Paris Agreement.

[77] Sandrine Maljean-Dubois 'The Paris Agreement: A new step in the gradual evolution of differential treatment in the climate regime' (2016) 25(2) *Review of European Community and International Environmental Law* 151-152; Mary Bortscheller 'Equitable but ineffective: How the principle of common but differentiated responsibilities hobbles the global fight against climate change' (2010) 10(2) *Sustainable Development Law & Policy* 49-50.

[78] See section 2.1 of this chapter; Daniel Bodansky 'The Paris Climate Change Agreement: A new hope?' (2016) 110(2) *American Journal of International Law* 288, 292; Zhang (n67 above) 27-28.

What does this imply for African state parties? An analysis of the history of the negotiation of the Paris Agreement shows that the provision for an 'other parties' group of donor states is targeted towards state parties with emerging economies. Neither the Paris Agreement nor any of its supporting documents provide a definition of, or clarity on how these other parties are to be determined. While a majority of African state parties would not fall within the 'other parties' categorization, it is unclear whether bigger economies such as South Africa, Nigeria, Egypt and Algeria will fall within this category. Either way, it is not a significant issue since these 'other parties' are not obligated to make such contributions. As developing states, African state parties have a right, under the Paris Agreement, to global climate funds and need not take on any obligations as donor states.

In conclusion, the Paris Agreement protects the position of African states and other developing state parties as beneficiaries of climate finance under the Paris Agreement. However, the Agreement provides fewer guarantees compared to earlier treaties like the UNFCCC and the Kyoto Protocol. The fulfilment of developing state parties' obligations is no longer conditional upon the receipt of financial support from developed state parties. To the contrary, African states are on a trajectory to being climate donors themselves as their financial conditions improve. Overall, other than the stronger economies of Africa, African state parties will continue to enjoy privileges under the Agreement as recipients of climate finance.

3.1.3 Implications for equity

The provision on climate finance reveals a huge decline in the move towards a more equitable climate regime. Although climate finance was not adequately provided for under the UNFCCC, the position under the UNFCCC provided a greater legal guarantee for developing state parties when compared with the position in the Paris Agreement.

It is important to restate some of the significant changes in the Paris Agreement with respect to climate finance. Firstly, although the Agreement states that the use of annexes in the UNFCCC shall apply *mutatis mutandis* to the Agreement,[79] it makes no reference to these annexes. All its provisions, and especially the provisions on climate finance render the UNFCCC annexes redundant. Secondly, the inclusion of voluntary financial support by 'other parties' initiates the amalgamation of all state parties irrespective of their developmental stage and further thins the lines between developing state parties and their developed counterparts.

[79] Article 23 of the Paris Agreement.

Thirdly, the Paris Agreement removes the provision of finance as a precondition for developing states' obligations.

Furthermore, the Paris Agreement departs from the UNFCCC by removing the phrase that climate finance shall be 'new and additional'. The inclusion of this phrase in the UNFCCC was to ensure that climate finance was distinct from, and not a replacement of, existing financial obligation which a developed state may already have towards a developing state. As seen in chapter three, developing states had feared that in an attempt not to provide climate finance, developed states would divert existing developmental assistance into climate finance. In order to guard against this, the UNFCCC specifically stated that climate finance would be 'new and additional.' With the absence of this phrase in the Paris Agreement, developed states may conveniently substitute developmental funds with climate finance rather than provide funds that are new and additional to existing developmental assistance.

Additionally, the Paris Agreement is quiet on the issue of historical responsibility for climate change. It refuses to acknowledge the fact that developed states had used up a disproportionate share of the global atmosphere and were largely responsible for the problem of climate change. This silence implies that it becomes difficult to make an argument for the application of restorative justice. Since this principle is based on the recognition of the role of a player as a wrongdoer and the need to compensate the victim(s) of such wrongdoing, the first step in its application is the acknowledgment of the wrong done. Unfortunately, the Paris Agreement refuses to directly acknowledge the role of developed state parties in the climate change problem.

It is also worthy of note that while the UNFCCC states that the degree to which developing states will successfully carry out their obligations under the Convention will be determined by the extent to which developed parties fulfil their obligation to transfer finance and technology,[80] the Paris Agreement contains no such clause. In other words, the provision of climate finance is not a pre-condition for developing parties to fulfil their commitments under the Paris Agreement. The obligations of developing states are independent of the duty of developed states to provide climate finance.[81]

[80] Article 4(7) of the UNFCCC.
[81] Article 4(5) and 9 of the Paris Agreement.

By removing the connection between the transfer of finance and climate change obligations, the Paris Agreement substantially weakens the link that African states seek to establish between climate change action and the provision of support in order to ensure that action does not impede developmental objectives. This removal implies that, irrespective of the availability of finance from developed states, African states and their developing counterparts are expected to dip into their existing and often insufficient funds to undertake climate change action. Not only will this affect their ability to undertake climate change action, but it also reduces the pool of funds available for developmental projects.

In conclusion, even though the Paris Agreement states that developed states shall provide climate finance to their developing states, the provision of the Paris Agreement on climate finance falls short of the conception of equity advanced by African states. It is neither restorative nor distributive. It does not integrate the finance provisions with the need for development. As seen above, it fails to make adequate provision to ensure that climate change action does not impose additional financial burdens on African states. It fails to guarantee that the finance received will be new and additional to, rather than a replacement of, existing developmental funds. The Agreement places climate change responsibilities on developing state without ensuring that these obligations are tied to climate finance.

3.2 Transfer of technology

The transfer of technology is another major area where the application of equity can be seen. Technological innovations is central to the search for solutions to the climate change problem. Unfortunately, there is an unequal distribution in the spread of technological resources across the world. These energy-efficient technologies are primarily developed and located in developed states.[82] Not only do these states own the much-needed technologies, but they also determine if, and how quickly, these technologies will spread across the world.[83] Seeing the connection between climate change mitigation and energy-efficient technologies, it becomes imperative that these technologies be made accessible to different states around the world so as to enhance the global climate change ambition.

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[82] Chen Zhou 'Can intellectual property rights within climate technology transfer work for the UNFCC and the Paris Agreement?' (2019) 19(1) *International Environmental Agreements* 108.
[83] Ibid.

The advanced technological stage of the developed state parties compared to their developing state counterparts is one of the main pillars upon which African states have hinged their conception of equity. They argue that since developed state parties are more equipped with the technological innovations necessary to combat climate change, it becomes a necessary requirement of justice for this group of states to assist their developing counterparts with the technology necessary for climate action.[84] There is evidence that suggests that technology transfers increase the incentives for participation in multilateral environment agreements.[85]

The objective of technology transfer is to identify and meet the technology needs of developing states by making climate technology innovations available in these developing states.[86] As the former Executive Secretary General of the UNFCCC, Christiana Figueres noted, the global community already has the majority of the technology and capital needed to tackle climate change.[87] The main challenge is with the distribution of these technologies across different nations of the world. Technological transfer, therefore, focuses on how to distribute these technologies across the world, specifically from developed to developing states.

The Intergovernmental Panel on Climate Change (IPCC) explains technology transfer as 'a broad set of processes covering the flows of know-how, experience and equipment for mitigating and adapting to climate change amongst different stakeholders.'[88] These stakeholders often consist of governments, private sector entities, financial institutions, NGOs, research institutes, etc. The transfer of technology 'comprises the process of learning to understand, utilize, and replicate the technology, including the capacity to choose it, adapt it to local conditions, and integrate it with indigenous technologies'[89]

Unfortunately, this all-embracing interpretation of technology transfer by the IPCC is not widely accepted. Developed states seem to view technology transfer as the 'exclusive sale of technology hardware, possibly accompanied by some basic operational skills, to other

[84] Chukwumerije Okereke & Philip Coventry 'Climate justice and the international regime: Before, during, and after Paris' (2016) 7 *WIRES Climate Change* 845.
[85] James Shephard 'The future of technology transfer under multilateral environmental agreements' (2007) 37(7) *Environmental Law Reporter* 10548.
[86] Shikha Bhasin, Gabriel Blanco & Sophy Bristow et al *Climate Technology in Context: Synthesis Report on Climate Technology and Development* (2014) 4.
[87] NPR 'U.N. Chief: Paris Convention Represents "Turning Point"' Climate Policy' *Special Series: Heating Up* 23 November 2015 available at https://www.npr.org/2015/11/23/457139688/u-n-chief-paris-convention-represents-turning-point-in-climate-policy (accessed 4 December 2015).
[88] Intergovernmental Panel on Climate Change *Methodological and Technological Issues in Technology Transfer* (2000) 432.
[89] Ibid.

countries.'[90] Unlike the IPCC and developing states who argue for free access to climate technology, developed states reject the view that technological innovations are public goods to be made available to all states. Insisting on the intellectual property rights over these technologies, they reject their non-commercial transfer to developing states. The United States congress, for example, gave out a statement expressly declaring that the new climate agreement must not infringe upon the exercise of American intellectual property rights.[91] This disagreement over what constitutes, and the extent of, technological transfer and its implications for climate change action and development in Africa has made the issue central to the application of equity within Paris Agreement.

3.2.1 Developed state parties' obligation

Article 10(1) of the Paris Agreement states that 'Parties share a long-term vision on the importance of fully realizing technology development and transfer in order to improve resilience to climate change and to reduce greenhouse gas emissions.'[92] It acknowledges the connection between climate change resilience and the development and transfer of technology and encourages collaborations among different stakeholders of technology including governments, the private sector, financial institutions and non-governmental organisations so as to accelerate the production and distribution of these technologies.[93] However, neither article 10 nor any part of the Paris Agreement creates an obligation for technology transfer. The closest that the Agreement comes to a definitive obligation to transfer technology is where it notes that parties 'shall strengthen cooperative action on technology development and transfer.'[94]

Similarly, article 10(6) provides: 'Support, including financial support, shall be provided to developing country Parties for… cooperative action on technology development and transfer at different stages of the technology cycle…'.[95] However, this provision is silent on whose responsibility it is to provide this support. This is weak when compared to the obligatory

[90] Heleen de Coninck & Ambuj Sagar *Technology in the 2015 Paris Climate Agreement and Beyond* (2015) 6.
[91] Keith Maskus *Differentiated Intellectual Property Regimes for Environmental and Climate Technologies* (2010) 7, 29.
[92] Article 10(1) of the Paris Agreement.
[93] Article 10(1) of the Paris Agreement; article 6(8)(b), article 10(6) of the Paris Agreement; Zhou (n82 above) 111.
[94] Article 10(2) of the Paris Agreement.
[95] Article 10(6) of the Paris Agreement.

language used in the UNFCCC, which requires that developed states 'shall take all practicable steps to promote, facilitate and finance' the transfer of technology to developing state parties.[96]

The Paris Agreement also fails to provide any guidelines on how technological cooperation, which it recognises as important, is to be implemented. Issues such as what qualifies as technological cooperation and the parameters for such cooperation are left unresolved. As noted by Coninck and Sagar, 'the prescriptiveness and precision of wording in Article 10 is such that no party can be held to any specific action.'[97] Such loophole and vagueness by the Paris Agreement leaves room for developed state parties to avoid responsibility or limit the extent of their compliance with this provision. This has the eventual result of undermining the operationalization of the principle of equity within the Agreement.

Nonetheless, since the UNFCCC is still operational, its provisions on technology transfer remain applicable to state parties to the UNFCCC and the Paris Agreement. Under the Vienna Convention on the Law of Treaties, where not expressly repealed, the provision of an earlier treaty will apply if it is compatible with the new treaty.[98] The Paris Agreement recognizes the significance of, and the necessity to strengthen cooperation on technology development and transfer. It is, therefore, not incompatible with the Paris Agreement to apply the provisions of the UNFCCC obliging developed parties to transfer climate technologies to developing states. This will help to achieve the objectives of article 10 of the Paris Agreement.

Additionally, the Paris Agreement adopts the Technology Mechanism previously set out under the UNFCCC.[99] The Agreement also creates the framework which is expected to serve as an overarching guidance for the Technology Mechanism in promoting and facilitating the development and transfer of technology.[100] The Subsidiary Body for Scientific and Technological Advice was given the responsibility to elaborate on the technological framework and how it would operate.[101] All these show a continued willingness to ensure international cooperation in the area of climate technology.

Article 10(6) also requires that the conference of the parties provide, in its global stocktake, information related to technological transfer given to developing states. In other words,

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[96] Article 4(3) of the UNFCCC.
[97] de Coninck & Sagar (n90 above) 266.
[98] Article 30(3) of the Vienna Convention on the Law of Treaties.
[99] Article 10(3) of the Paris Agreement.
[100] Article 10(4) of the Paris Agreement.
[101] Para 67, Decision 1/ CP.21.

developed states should give an account of efforts taken to intensify the transfer of technology to other states. It is hoped that this method of accountability will serve as a push factor to ensure that developed states undertake some form of technology transfer to developing states.

In conclusion, the Paris Agreement recognises the need for global cooperation in technology development and transfer but creates no distinct obligation for developed states to transfer technology to their developing counterparts. Unlike the provision in article 9, which expressly requires the provision of climate finance by developed states, article 10 makes no similar requirement with respect to technology. Nonetheless, the provisions of the UNFCCC on the transfer of climate technology from developed to developing states remains applicable, since it is consistent and compatible with the Paris Agreement.

3.2.2 Implications for equity

As earlier mentioned, the unequal distribution of climate technologies remains one of the central issues of equity for African states. These technologies are largely situated in developed states and developing states may only get them through commercial purchase which are often expensive. The purchase of climate-friendly technology thus constitutes an additional financial burden on these states, already burdened by the need to meet their basic socio-economic needs.

Unfortunately, the Paris Agreement fails to create any clear obligation on the transfer of technologies from developed to developing states. At best, the provisions of article 10 are aspirational rather than obligatory. It recognises the need for technology development and transfer but does not obligate developed state parties to cooperate with or transfer technology to their developing counterparts. This is unlike the UNFCCC, which requires that developed states should take every possible measure to advance and fund the transfer of, and access to, environmentally sound technologies.[102]

The Paris Agreement thus fails to reinforce the principle of equity as regards technology transfer within international climate change law. It fails to acknowledge the position of developing states as vulnerable states given their lack of capacity and limited responsibility for global emissions and does not seek for ways to bridge the developmental gap so as to strenghten global climate change ambition. Overall, the provisions on technological transfer within the

[102] Article 4(5) of the UNFCCC.

Paris Agreement does very little to ensure that climate change action for developing states is integrated into the need for development.

3.3 Mitigation (emission reduction targets)

Since climate change is a result of increased greenhouse gas emissions, climate change mitigation conversations have emphasised the need to reduce the volume of global emissions. This conversation has centred around issues such as the volume of emission reduction to be targeted globally and how this global goal is to be distributed among different states of the world. The distribution of emission reduction has always been an issue given its implications on the industries within a state and the availability of climate- friendly technologies which could replace current less environmentally efficient technologies.

As shown above, the African Group of Negotiators argued that given their current developmental needs, African states must be spared emission reduction responsibilities. They explained that the region has a huge development and industrialization deficit, and their current emission levels must be allowed to rise to meet such developmental needs.[103] Since African states have had low levels of emissions historically, they insist that they should be allowed their fair share of atmospheric space and be given a longer time to peak their emissions.[104]

The Paris Agreement, therefore, had to provide a way not only to achieve the global emission reduction targets but to ensure that this global goal is distributed equitably among the different state parties.

The Paris Agreement provides that parties have an obligation to undertake ambitious efforts to slow the rise in the global average temperature.[105] To achieve this purpose, parties would need to limit the level of greenhouse gas emissions in the atmosphere. Parties are, therefore, saddled under article 4 with the responsibility to set nationally determined contributions (NDCs).[106]

3.3.1 Developed state parties' obligations

The Paris Agreement creates both global and individual goals with respect to emission reduction. Setting out the global goal, article 2(1)(a) provides that global average temperature

[103] See section 2.2.3 of this chapter.
[104] See section 2.2.3 of this chapter.
[105] Article 2 and 3 of the Paris Agreement.
[106] Article 4(2) of the Paris Agreement.

shall be kept ‘well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognising that this would significantly reduce the risks and impacts of climate change.’[107] Individual nations are, however, given the choice to decide the extent of their contributions to the global goal.[108]

Unlike the UNFCCC and the Kyoto Protocol, the Paris Agreement contains a more inclusive outlook to emission reduction. Article 4(2) provides that ‘[e]ach Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve.’[109] The responsibility for emission reduction applies to every state party and not only developed state parties. By using the word ‘shall’, it implies that the provision has binding force, and all parties are expected to submit their NDCs.

However, it is anticipated that developed states will remain at the forefront of reaching the global emission reduction goal. Article 4(4) provides that they should do this ‘by undertaking economy-wide absolute emission reduction targets.’[110] In other words, while every state party has a responsibility to take some measure to ensure the reduction of global average temperature, developed states should bear the primary responsibility for achieving the global objective. Developed states are, therefore, encouraged to undertake emission reduction efforts in the various sectors of their economies.

The adoption of the word ‘should’ rather than ‘shall’ implies that developed states are not legally bound to carry out these emission cuts. Initial proposals had used mandatory language stating that developed states ‘shall continue to take the lead’.[111] This was opposed by developed states, especially the United States, which argued that such provisions would make it impossible for domestic ratification.[112]

It is also necessary to state that the Agreement does not create a quantifiable goal or target for each party. In other words, developed state parties, or any party at all, do not have a duty to restrict their emissions to a specific quota. While the Paris Agreement sets a global target of ‘holding the increase in the global average temperature to well below 2^0C above pre-industrial

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[107] Article 2(1)(a) of the Paris Agreement.
[108] Article 4(1) and (2) of the Paris Agreement.
[109] Article 4(2) of the Paris Agreement.
[110] Article 4(4) of the Paris Agreement.
[111] Adoption of the Paris Agreement, Proposal by the President, UNFCCC Conference of the Parties, Draft decision-/CP.21, FCCC/CP/2015/L.9 (12 December 2015) article 4.4 https://unfccc.int/resource/docs/2015/cop21/eng/ l09.pdf (accessed 10 February 2021).
[112] Harald Winkler ‘Mitigation (Article 4)’ in Klein et al (n16 above) 151.

levels', each state is left to decide its national target. It is a bottom-up approach. As Winkler notes, the provision of the Paris Agreement on emissions reduction is short on many important details.[113]

In conclusion, the Paris Agreement places the responsibility to ensure a reduction in the global average temperature on all state parties. Every signatory, whether developed or developing, shares in this obligation. However, developed states are expected to take the lead in these emission reduction attempts and undertake economy-wide emission reduction targets. Even at that, the Paris Agreement does not go as far as to create clear obligations for developed states to reduce their emissions, it says they 'should', rather than 'shall' do so.

3.3.2 African state parties' obligations

As stated above, the Paris Agreement provides that all state parties shall undertake responsibility for the reduction of the level of global emissions.[114] This implies that, broadly speaking, African states also have a responsibility under the Paris Agreement to make efforts targeted at contributing to the global emission reduction goals. This means that African states should also begin to seek ways to reduce their emissions or remove such emissions through sinks.

However, the Paris Agreement acknowledges the developmental needs of developing states and provides that emission peaking, and cuts, will take a lengthier period for developing states.[115] They have no obligation to undertake immediate emission reduction efforts. Their current emissions can remain steady or increase in line with their developmental needs and they would not be seen as breaching any provisions of the Paris Agreement.

This must, however, not be mistaken for an outright lack of obligation. African states may set less ambitious, and longer targets, but cannot refuse to set a target. As seen in the second part of article 4(4), developing states should focus on mitigation efforts and gradually advance to reducing their emissions in all sectors. This implies that although African states are allowed a longer duration before their emission levels must begin to drop, they are required to have emission reduction goals even if the timeline for such goals is further in the future.

[113] Ibid.
[114] Article 4(1) of the Paris Agreement.
[115] Article 4(1) of the Paris Agreement.

In conclusion, the Paris Agreement creates no emission reduction obligations for African states. While they share a general sense of responsibility for achieving the global target and ensuring a reduction in the global average temperature, they do not have to undertake economy-wide emission reductions. African states, like other developing states, are allowed a longer period before they need to ensure that they peak their emission levels. For now, they are allowed to increase their emissions as may become necessary in order to meet their developmental needs.

They must, however, show that they will make progressive moves towards emission reductions in their various states. The only set of developing states exempted outrightly from showing any commitment towards emission reductions are the least developed states and the small island states.[116] These groups of states may devise policies, plans and actions for reducing their emissions peaks and cuts but are not legally bound to do so under the Paris Agreement. The Paris Agreement obliges them instead to focus on mitigation efforts.[117]

3.3.3 Implications for equity

The obligation to reduce emissions under the Paris Agreement reflects a distributive justice conception of equity. The responsibility to reduce global emissions is shared among state parties in accordance with their needs. Different groups of states undertake different levels of obligations in line with their level of development. While developed states are encouraged to lead with economy-wide emission reduction targets, their developing counterparts are allowed longer period to peak their emissions while the least developed group of states have no obligation to submit any emission reduction strategies or plans.

This distribution brings the obligation of each group of states in line with its developmental needs. This is specifically stated in article 4(3), which states that each party's national contribution shall reflect their different national circumstances. It recognises that it would be unfair to place the same emission obligations on all parties without due regard to the fact that certain states have needs that would require them to increase their emission levels.

In conclusion, an examination of the Paris Agreement's distribution of emission reduction obligation reveals a distributive justice conception of equity. Obligations are distributed according to the needs of each group of states and is aimed at ensuring that the condition of

[116] Thirty-three of Africa's 54 countries, over 60 per cent, belong to this group.
[117] Article 4(4) of the Paris Agreement.

those who are less well-off is improved. Although the Paris Agreement creates a general responsibility for all state parties to participate in mitigation and emission reduction efforts, specific responsibility is distributed in line with a state's developmental and national needs.

3.4 Loss and damage

The idea of loss and damage has been pioneered in climate change negotiations by the Alliance of Small Island States (AOSIS).[118] It was first introduced in 1991 during the negotiations for the UNFCCC. AOSIS had recommended the establishment of an global insurance scheme that would provide compensation to vulnerable islands and other low-lying developing states for any loss and damage caused by rise in sea levels.[119] Ultimately, parties to the Convention did not come to an agreement on the proposal.

Loss and damage was re-introduced into the Convention framework through the Bali Action Plan[120] and eventually into the Paris Agreement. Some developed states, like the United States and Australia, sought to exclude or at the most put loss and damage under adaptation. However, the AOSIS and other like-minded parties insisted that loss and damage be handled as a separate subject matter with its own peculiar set of cross-cutting issues.[121]

From the first serious debate on loss and damage at the 2013 conference of the parties held in Warsaw to the culmination of negotiations in Paris, it remained a thorny issue. When it was brought up in Paris, it was regarded as a 'red line' issue and threatened the whole negotiations.[122] It was believed by the parties that an insistence on creating a legal duty on loss and damage will create a deadlock and it would have been impossible to finalise the Paris Agreement by the end of the conference.[123] State parties were unable to agree on how to determine and fix liability for climate-induced losses to a state. In order to move ahead and

[118] Timothee Ourbak & Alexandre Magnan 'The Paris Agreement and climate change negotiations: Small islands, big players' (2018) 18 *Regional Environmental Change* 2203; Doelle (n68 above) 12.
[119] Negotiation of a Framework Convention on Climate Change, Elements related to Mechanisms, A/AC.237/WGII/CRP.8 (17 December 1991) para 1 available at http://unfccc.int/ resource/docs/a/wg2crp08.pdf (accessed 8 February 2021).
[120] Decision 1/ CP.13, Bali Action Plan, FCCC/ CP/ 2007/ 6/ Add.1 (14 March 2008) (Bali Action Plan) 3– 6.
[121] Alliance of Small Island States, 'Paris must show global solidarity to tackle climate change', 29 November 2015, cited in Michael Burkett 'Reading between the red lines: loss and damage and the Paris Outcome' (2016) 6 *Climate Law* 118, 122; Pacific Island Development Forum Secretariat 'Suva Declaration on Climate Change' 4 September 2015 available at http://pacificidf.org/wp-content/uploads/2016/02/ecopy-Declaration.pdf (accessed 5 December 2019).
[122] Peter Christoff 'The promissory note: COP21 and the Paris Climate Agreement' (2016) 25(5) *Environmental Politics* 778-779.
[123] John Upton 'Paris Pact may hinge on "Loss and Damage" dispute' *Climate Central* 11 November 2015 at www.climatecentral.org/news/dispute-threatens-paris-climate-agreement-19666 (accessed 5 December 2019).

adopt the Paris Agreement, further discussion on loss and damage liability was postponed to a later time in the future.[124]

The application of the principle of loss and damage helps to ensure that there is a mechanism in place to prepare for and address harm resulting from climate change.[125] It is targeted towards addressing the effects of climate change which were not avoided or have become unavoidable.[126] Or as Burkett puts it, loss refers to 'climate-related impacts for which restoration is not possible while damage refers to negative impacts for which restoration is possible'.[127] These include extreme weather, gradual disasters (like ocean acidification, desertification and sea-level rise) and non-commercial losses (like loss of cultural heritage and displacement), to mention just a few.[128]

The problem of, and the likelihood of loss and damage is worsened by limited funding and technology and the lack of institutional capacity to deal with the impact of climate change. This leads to a situation where poorer states are unable to avoid or mitigate the negative effects of climate change which would have been possible for wealthier and more equipped states.[129] These climate change impacts often affect a significant portion of the economic activities of these states and further destroy their economy and constitute serious obstacles to meeting their developmental needs.[130]

Developing states, mostly those from the Alliance of Small Island States (AOSIS), have therefore argued that some form of compensation be paid to states at risk for loss and damages that will be suffered because of climate change. Their argument reflects the belief that developed states have a moral and legal duty to assist these states in their adaptation efforts.[131] It is believed that since these poor and vulnerable states have a disproportionately low contribution to climate change, there is an ethical obligation for those with high emissions to assist them in adapting to these impacts.[132]

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[124] Christoff (n122 above) 778-779.
[125] Koko Warner, Sonke Kreft, Michael Zissener & et al *Insurance Solutions in the Context of Climate Change-related Loss and Damage* Policy Brief No. 6 (2012) 11.
[126] Burkett (n121) 119.
[127] Ibid at 120-121.
[128] Ibid at 119.
[129] Ilona Millar, Catherine Gascoigne & Elizabeth Caldwell 'Making good the loss' in Michael Gerrard & Gregory Wannier (eds) *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (2013) 437.
[130] Burkett (n121 above) 119.
[131] Ibid at 120.
[132] Ibid.

3.4.1 Developed state parties' obligations

Article 8(1) of the Paris Agreement acknowledges 'the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage.'[133] In doing this, the Agreement concedes that certain climate impacts, such as the loss of small island nations, will be difficult or impossible to eliminate or adapt to. It is, therefore, necessary to put mechanisms in place for protecting such vulnerable states.[134]

Article 8(3) urges parties to 'enhance understanding, action and support… on a cooperative and facilitative basis with respect to loss and damage associated with the adverse effects of climate change.'[135] In other words, parties must collaborate to address the loss and damage issues arising from climate change. In furtherance of this, the Paris Agreement brings the Warsaw International Mechanism for Loss and Damage within the purview of the Conference of the Parties and gives the conference the powers to enhance and strengthen the mechanism.[136] This inclusion of loss and damage seeks to ensure that vulnerable communities are assisted to better cope with a disaster for which they are least responsible.[137] This was the earliest inclusion of the provision on loss and damage not only in a climate change treaty, but in an international agreement.[138]

However, the Paris Agreement falls short of creating legal responsibility for loss and damage. The notion of creating liability and compensation for loss and damage was expressly rejected in the Paris Decision, which clearly provides that the provisions of article 8 of the Paris Agreement on loss and damage 'does not involve or provide a basis for any liability or compensation.'[139] It forecloses the ability of vulnerable states to pursue claims for loss and damages suffered because of climate change.[140]

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[133] Article 8(1) of the Paris Agreement.
[134] Elizabeth Burleson 'Paris Agreement and consensus to address climate change' 20(8) *American Society of International Law Insights* available at https://www.asil.org/insights/volume/20/issue/8/paris-agreement-and-consensus-address-climate-challenge (accessed 4 December 2019).
[135] Article 8(3) of the Paris Agreement.
[136] Article 8(2) of the Paris Agreement.
[137] Burkett (n120 above) 119
[138] Burleson (n133 above).
[139] Para 52 of Decision 1/CP.21.
[140] Darren Hoad 'The 2015 Paris Climate Agreement: Outcomes and their impacts on small island states' (2016) 11(1) *Island Studies Journal* 318.

While the Paris Agreement contains a clear call for parties to rally over loss and damage, this provision is not linked with the Convention's financial mechanism neither does the Agreement establish a distinct financial mechanism for loss and damage. It is, therefore, unclear whether actions to address loss and damage would qualify for funding under the Convention's Green Climate Fund. In other words, how will loss and damage be funded?

Linda Siegle is of the view that an inclusive explanation of the provisions of the Paris Agreement on financial mechanism would include loss and damage.[141] Previous decisions of the parties have already created a relationship between the obligation of developed states to assist vulnerable states, and the financial support for loss and damage.[142] These existing decisions could provide a basis for ensuring that existing financial mechanisms cover loss and damage.[143]

In conclusion, the Paris Agreement recognises the significance of loss and damage and urges members to support and cooperate with each other on loss and damage suffered from climate change. However, the Agreement does not go as far as creating an obligation or responsibility for loss and damage. No developed state party has a legal duty under the Paris Agreement to provide finance, technology or any form of support to another member state facing loss and

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[141] Linda Siegle 'Loss and damage (Article 8)' in Klein et al (n16 above) 229.
[142] Ibid at 230.
[143] Other scholars have argued that there are existing principles within international law such as the no-harm principle, the polluter-pay principle, the prohibitions against, and compensation for transboundary harm, which already provide for the kind of liability and compensation that loss and damage seeks to cover. Millar, Gascoigne and Caldwell (n129 above) 438; Christophe Schwarte & Will Frank 'The International Law Association's legal principles on climate change and climate liability under public international law' (2014) 4 *Climate Law* 201, 202, 205-207, 209-210. While this may be true, and such liability or compensation remain relevant for the climate change regime, it is distinguishable from the kinds of liability and compensation sought for under climate change. First, for liability (and compensation) to arise under the stated principles, it must be traceable to a specific state or countries. In the *Trail Smelter Arbitration*, for example, the United States was able to trace the air pollution within the Columbia River valley to a Canadian smelter - see Trail Smelter Arbitration (United States v. Canada) UN Reports of International Arbitral Awards, 16 April 1938 and 11 March 1941.
Unfortunately, the nature of climate change makes this impossible. It is unlike any other environmental hazard, which may easily be traceable to a specific activity in a specific state. Greenhouse gases from a state join a global pool of gases in the atmosphere and it is from this global pool that climate change and its impacts occur. It will therefore be impossible for a state to determine whether the climate change-induced loss and damage it suffers is a result of emissions in state A, B or C. The existing legal principles are, therefore, inadequate. They present a burden of proof that is insurmountable for purposes of loss and damages under climate change. Secondly, the creation of rights and responsibilities on loss and damage ensures that the needed support structure in terms of institutions and finance is created ahead of time. With the existing environmental law options, an affected state will need to go through the courts or other adjudicatory systems and get a favourable decision before compensation is granted. This method is, however, unrealistic for climate change where action needs to be taken timeously and often before the catastrophe has struck.
Related to this is the additional cost of legal action to these countries, which are already poor and lack adequate resources to take up legal action against powerful countries in world courts, which are generally believed to act in favour of these developed countries. The existing principles, while relevant, are thus inadequate and create insurmountable challenges if they are to be applied to loss and damage under climate change.

damage from climate change. All that the Agreement does is to encourage such cooperation, but parties are not obliged.

3.4.2 Implications for equity

As it currently stands, the provision for loss and damage under the Paris Agreement is a very weak attempt at entrenching equity within the Paris Agreement. This section of the Paris Agreement, therefore, fails to establish a restorative justice conception of equity. There is no acknowledgement of the role of developed states in the harm which these states, primarily small island states, would face as a consequence of climate change. Neither does the provision create an obligation that those responsible for the majority of historical emissions must compensate those who must now suffer the consequences. The provision merely recognises the need to support and collaborate but fails to distribute any right or responsibility in this regard.

Furthermore, the provision on loss and damage cannot be said to represent distributive justice principles. The provision does not distinguish between states at different developmental levels. There is no requirement that the responsibility for loss and damage should be in line with each state party's level of financial and technological capacity. The Agreement only encourages cooperation and support without ensuring that those with lower levels of capacity are provided with the additional levels of support which they may require due to their low developmental status.

Despite the foregoing, the inclusion of loss and damage is in itself a move towards ensuring equity within the Paris Agreement. The states who are primarily in need of the global cooperation on loss and damage are small island states and other less developed states. In other words, this provision draws attention to a need that primarily affects developing states. It is hoped that subsequent climate change agreements will build on this and flesh out a full structure of rights, responsibilities, and the necessary financial and technology support that these vulnerable states need.

Overall, no clear conception of equity is evident in the provision on loss and damage. It entrenches neither distributive nor restorative justice principles. The provision does not distinguish between state parties with different levels of capacity or developmental needs and the implication of these differences on their responsibility for climate change loss and damage. The provision also fails to provide some form of remedy for states who now face serious harm

due to climate change despite only having a very negligible contribution to the volume of global emissions.

The inclusion of Article 8 in the Agreement indicates that state parties are open to a further development of the Warsaw International Mechanism in a manner that increases action and support for loss and damage, even if this occurs on a voluntary basis.[144] But as it stands, the Paris Agreement provides very little on the legal repercussions of equity with respect to loss and damage. It remains to be seen how equity, as entrenched within the climate change regime, will tackle the economic and non-economic effects of climate change loss and damage in vulnerable states.

3.5 Interim conclusion

The conception of equity within the Paris Agreement is ambiguous and filled with significant gaps. Nonetheless, the distribution of rights and responsibilities within the agreement provides an opportunity to assess its overarching conception of the principle of equity; a position revealed in provisions on issues such as climate finance, transfer of technology, emission reduction and loss and damage.

The Paris Agreement creates clear provisions on climate finance. Developed states have a clear duty to transfer finance for the purpose of climate change mitigation and adaptation in developing states. This is in continuation of their obligation under article 4 of the UNFCCC and ensures that state parties with less financial capacity to undertake climate change action are provided with necessary support. Additionally, the Paris Agreement creates a new class of climate donors, unknown to earlier climate change treaties. It encourages 'other parties' to keep up any existing support to states in need on a voluntary basis. The Paris Agreement makes no connection between responsibility for historic emissions and the provision of climate finance.

The Paris Agreement also acknowledges the necessity for global collaboration for the purpose of development and transfer of climate friendly technology. However, the Agreement does not create a distinct duty which obliges developed state parties to provide developing states with the required technology for climate change mitigation and adaptation. In other words, the Paris Agreement points out the necessity for technological cooperation without creating any

[144] Emma Lees 'Responsibility and liability for climate loss and damage after Paris' (2016) 17(1) *Climate Policy* 3.

obligation for technology transfer from one state party to another. This provision fails to take into consideration that state parties have different capacities for the development of technology and there was a need to protect those parties by expressly providing for the transfer of technology. Where technology transfer is based on strictly commercial terms, climate change action would constitute an additional burden on these developing state parties.

Emission reduction targets is another issue of significance to the conception of equity within the Paris Agreement. The Agreement contains a clear differentiation of obligations between developed and developing state parties. The Agreement starts by providing that all state parties, irrespective of level of development, share in the global responsibility to ensure that the average global temperature was stabilised. However, the extent of individual responsibilities is dependent on the status of a state as developed or developing. Developed state parties are saddled with taking the lead in global emission reduction efforts by taking up emission targets. Developing states, on the other hand, were allowed a longer duration to peak their emissions. This distribution gives room for developing state parties to pursue their developmental objectives without any restraint from emission reduction obligations.

The last issue examined in this section is loss and damage. Its inclusion in the Paris Agreement is a first time for a climate change treaty. This represents some progress in an attempt to ensure some sort of restorative justice in order to support (small island) state parties that are most vulnerable to the consequences of climate change despite their very minimal contribution to global emissions. Unfortunately, the Agreement does not go as far as creating specific obligations on developed state parties to support any of these parties vulnerable to climate change induced loss and damage. The Paris Agreement, therefore, falls short of establishing equitable principles in the provision on loss and damage.

Flowing from the above, it is obvious that the conception of equity adopted in the Paris Agreement varies significantly from what the African state parties had sought for during the negotiations. The Paris Agreement contains no recognition of the culpability of developed states for the majority of historical emissions, which have now led to climate change. The Agreement is silent on this important fact, which is the basis of most of the positions the African state parties hold. Having ignored this responsibility, the Paris Agreement does not distribute rights and obligations in a way that ensures that the climate change 'injustice' and the imbalance in the distribution of the costs and benefits of climate change. The provisions of the

Agreement are not targeted at compensating those who must bear the consequences of climate change even though their contributions to global emissions is comparatively low.

However, the position of the Paris Agreement on distributive justice is more nuanced. Although the Paris Agreement is not primarily focused on ensuring that the climate change action in developing state parties is well aligned with their developmental imperatives, it contains a few provisions that protect the status of certain parties as developing states. In other words, some of the provisions of the Paris Agreement, like those on climate finance and emission reduction, differentiate between developed and developing states. In doing so, this ensures that developing states are given certain leverages that will strengthen their capability to pursue climate change action and ensure that climate change responsibility does not constitute an additional burden to their economies. A provision such as that on emission reduction also ensures that these developing states, including African state parties, are able to pursue development without climate change responsibilities standing in their way.

Overall, it has been established that the Paris Agreement does not adopt a restorative justice conception of equity. It does not acknowledge the liability of developed states for the majority of emissions, neither does it seek to provide compensation for state parties that must now face the consequences of climate change regardless of their insignificant levels of emissions. However, the Paris Agreement does adopt some distributive justice principles. This is revealed in the provisions on climate finance and emission reduction, wherein the protocol differentiates between developed and developing states and seeks to ensure that developing states are provided with the necessary support for enhancing their capability to undertake climate change action and guarantee that climate change responsibilities do not constitute an additional burden or obstacles to their developmental objectives.

4. FROM RIO TO PARIS: CHANGING CONCEPTIONS OF EQUITY

The conceptualization of equity began with the first multilateral treaty on climate change, the UNFCCC, and the principle continues to be a part of climate change treaties up to the Paris Agreement. As this thesis has shown, African states have sought to ensure that the application of equity within these climate change treaties bridge the gap between the need for socio-economic development and the need for climate action. They conceive of equity as a mechanism for making sure that climate change action does not limit their developmental pursuits.

As seen in chapters three and four, and section three of this chapter, the UNFCCC, the Kyoto Protocol, and the Paris Agreement have all adopted the principle of equity as revealed in the distribution of rights and responsibilities within each of these treaties. However, the conception of this principle within the Paris Agreement differed in some major ways when compared to the UNFCCC and the Kyoto Protocol.

The approach of the UNFCCC and the Kyoto Protocol reflects both a distributive and a restorative justice conception of equity. Rights and responsibilities were distributed on the basis that developed states possess greater financial and technological capacity in comparison to their developing state counterparts. These agreements also recognized that developed states bear historical responsibility for the majority of past emissions and should, therefore, take on the primary obligations on climate change action. This allocation of responsibilities ensured that climate change obligations did not constitute any restrictions on the ability of developing states to pursue industrialization, and provided compensation, albeit unenforceable, for African states, and their developing counterparts affected by the consequences of climate change despite their low levels of historic and current emissions of greenhouse gases.

Although the Paris Agreement recognizes the principle of equity and differentiates between the responsibilities of developed and developing state parties, the application of this principle takes on a new slant within the agreement. First, the principle of equity is couched differently from how it is couched in the UNFCCC. Article 2 states that the Paris Agreement 'will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, *in the light of different national circumstances*' (emphasis added). This article adds a proviso - in the light of different national circumstances – to the application of equity and differentiation.

This proviso was introduced in the US-China Joint Announcement on Climate Change in November 2014.[145] It became known as the Lima qualifier when it found its way into Decision 1/CP.20 at the Conference of the Parties hosted in Lima, Peru. In that decision, state parties expressed their 'commitment to reaching an ambitious agreement in 2015 that reflects the principle of common but differentiated responsibilities and respective capabilities, *in light of*

[145] White House, 'US-China Joint Announcement on Climate Change' 11 November 2014 available at https://obamawhitehouse.archives.gov/the-press-office/2014/11/11/us-china-joint-announcement-climate-change#:~:text=The%20United%20States%20intends%20to,reduce%20its%20emissions%20by%2028%25 (accessed 11 February 2021).

different national circumstances' (emphasis added).[146] It became apparent thereafter that the Lima qualifier would be included in any differentiation of rights and responsibilities under the Paris Agreement.[147]

State parties had included the phrase, 'in the light of different national circumstances', to emphasise a departure from the annex-based classification of states into developing and developed states. This phrase was seen by developed state parties, weary of the sharp differentiation in the UNFCCC and Kyoto Protocol, as a means to increase the number of considerations for determining the applicability of differentiation between state parties.[148] This meant that equity and differentiation under the Paris Agreement would not apply as static principles or based on a broad classification of a state as developed or developing. Rather, the application would be dynamic and change as the national circumstance of a state changed. The result is that since national circumstances are always evolving, the application of equity with respect to each particular state would also evolve with time. The Lima qualifier, they believe, gave room for a more flexible and evolutionary application of equity and differentiation compared to the rigid annex-based system of the UNFCCC.[149]

The Paris Agreement is also mute on the matter of historical responsibility or the role of past emissions. Unlike the UNFCCC and the Kyoto Protocol, which expressly acknowledges that developed states are liable for the majority of historical emissions,[150] the Paris Agreement makes no mention of historical responsibility. Current national circumstance, rather than historical levels of emissions, is made the primary factor in the distribution of rights and obligations in the Paris Agreement. Present economic realities now take pre-eminence over historical responsibility. This represents a shift from the restorative justice conception of equity contained in the UNFCCC.

The Paris Agreement also departs significantly from the leadership paradigm seen in the UNFCCC and the Kyoto Protocol. This is seen primarily in the provision on climate finance. Developed states no longer have the sole responsibility to provide climate finance. The role of

[146] UNFCCC, Decision 1/CP.20. Lima Call for Climate Action (UN Doc. FCCC/CP/2014/10/Add.1 2 February 2015) para 3.
[147] Rajamani (n15 above) 508.
[148] Doelle (n68 above) 1.
[149] Maljean-Dubois (n77 above) 153-154.
[150] Preamble to the UNFCCC.

non-developed state parties in providing climate finance was acknowledged and protected in the Agreement. This extends the class of climate donors.

Developed states had argued for the broadening of the class of donors since that would be a more accurate indication of the evolving economic realities of different state parties.[151] This position was turned down by stronger developing states who feared that they would be included in the class of donors despite the fact that they were 'new-comers' to industrialization.[152] Eventually, parties agreed on the term 'other parties', and these other parties were under no obligation to provide climate finance. They are only 'encouraged' to contribute.

Therefore, the Paris Agreement creates a group of 'other parties' that are urged to donate voluntarily towards climate finance. The Agreement does so while keeping the customary UNFCCC classification wherein developed state parties have a responsibility to transfer climate finance to their developing counterparts. This voluntary class of donors will include non-developed state parties that had hitherto been within the definition of beneficiaries of climate finance. Although the Agreement differentiates between voluntary financial assistance by other parties and the binding obligation of developed states, it is nevertheless a significant shift from prior provisions on climate finance and does away with retribution as a basis for equity in climate finance.

This is buttressed by Article 9(3), which states that '[a]s part of a global effort, developed state parties *should* continue to take the lead in mobilizing climate finance from a wide variety of sources, instruments and channels… (emphasis added).' The provision makes use of the word 'should', rather than 'shall.'[153] Although it has been opined that the use of should, rather than shall, may have been a product of political necessity,[154] there is general consensus in international law jurisprudence that, while *shall* connotes bindingness, *should* does not. This suggests that developed states were unwilling to be solely liable for the mobilization of climate finance.

This use of words, coupled with the lack of quantitative provisions for developed states on climate finance, gives room for developed state parties to shed themselves of any concrete

[151] Ralph Bodle, Lena Donat & Matthias Duwe 'The Paris Agreement: Analysis, assessment and outlook' 2016 10(1) *Carbon and Climate Law Review* 5, 11.
[152] Rajamani (n15 above) 508.
[153] The Agreement also makes use of the word 'should' in article 4(4) with respect to emission reduction targets.
[154] Alexander Zahar 'The Paris Agreement and the gradual development of a law on climate finance' (2016) 6 *Climate Law* 75, 78.

responsibility towards developing state parties.[155] It represents a departure from the principle of historic responsibility, which had driven the distribution of obligations in the earlier days of the global climate change regime. What is relevant for this research is the clear indication from developed state parties that the application of equity and the consequent distribution of responsibilities must follow current economic and emission realities.

Furthermore, the Paris Agreement also does away with the annex-based classification used in both the UNFCCC and the Kyoto Protocol. Under these earlier agreements, state parties usually fell within a classification as determined in the annex to these agreements and such classification determined the extent of their rights and responsibilities. In the Paris Agreement no such annexation exists, and this further establishes the idea that equity shall apply in accordance with the changing national circumstances of parties, rather than a fixed categorisation of state parties.

An examination of the Paris Agreement thus reveals a clear departure from the UNFCCC and Kyoto Protocol model of equity. It rejects a restorative justice conception of equity by avoiding any allusion to developed states' historical responsibility for climate change, neither does it provide clear guidelines that oblige cooperation between developed and developing states. The differentiation of rights and responsibilities is not based on the historical emissions of any of the parties.

In place of this, the Paris Agreement favours a conception of equity that focuses on the current realities of state parties. It thus contains provisions that require developed state parties to provide climate finance to their developing counterparts and gives allowance for these developing parties to have a longer period to peak their greenhouse emissions. This ensures that climate change action does not constitute an additional burden on these states and merges climate change responsibilities with developmental imperatives, which may require that a developing state continues to increase their emission rates. Although imperfectly, this represents a distributive justice conception of equity. It seeks to ensure that those who are better off bear more responsibility in order to improve the condition of the less well-off states.

[155] Joyeeta Gupta 'The Paris Climate Change Agreement: China and India' (2016) 6 *Climate Law* 180-181.

5. AN ALTERNATIVE APPROACH TO EQUITY

Flowing from the discussion in this thesis, it is evident that the application of equity continues to be a bone of contention between state parties from the UNFCCC to the Paris Agreement. The aim of equity, as argued by African state parties, is to ensure that the allocation of rights and responsibilities within a climate change treaty does not restrict the developmental objectives of African states and ensures that they receive adequate support for climate change action. As seen from the previous section, this argument is fraught with problems and is generally unacceptable to developed states.

First, the African arguments do not adequately address the implication of intellectual property rights on the transfer of technology. Oftentimes, the patents over these technologies are held by private companies and not governments. To tackle this, there must be more public-private partnership within climate change treaties. Private technology companies must be given the opportunity to become part of the treaty negotiations and become signatories to these climate change treaties. In this way, there is a more direct link between the developers of these technologies and African states in desperate need of these technologies.

There is also a need to begin to view these technologies as global public goods. Public goods are products that benefit everyone or the lack of which has the potential to affect everyone.[156] They are non-rivalry and non-excludable.[157] Global public goods benefit more than one group of states. In their very nature, public goods are non-excludable and the benefits that accrue from them must be shared by every member of the community. No state should be prevented from enjoying such goods since its enjoyment improves the quality of life for everyone.

It is within this context that climate technologies must be viewed. The availability of these technologies across the world would be beneficial to the global community at large. To deny African states access to these technologies on financial grounds is to jeopardise the wellbeing of future generations and global climate resilience.

Furthermore, it is untenable that the African arguments seek to exclude African state parties from all responsibility for climate change. While this may seem acceptable in the interim due

[156] Scott Barrett *Why Cooperate? The Incentive to Supply Global Public Goods* (2007) 1; Inge Kaul & Donald Blondin 'Global public goods and the United Nations' in Jose Antonio Ocampo (ed) *Global Governance and Development* (2016) 36.

[157] Inge Kaul & Ronald U Mendoza 'Advancing the concept of public goods' in Inge Kaul, Pedro Conceicao, & Katell le Goulven et al (eds) *Providing Global Public Goods: Managing Globalization* (2002) 80.

to their relatively low emissions, it is unsustainable. Emission trends have shown that there are now new high emitters and, conversely, traditionally high emitters are beginning to reduce their emissions. For example, 85 per cent of emissions in 1985 was produced in Europe and the US. However, the rise in emissions across the world, particularly in Asia, has reduced that number to about 33 per cent.[158] Asia is now responsible for 53 per cent of these emissions.[159] China has overtaken the US as the state with the highest level of emissions.[160] With the introduction of renewable sources of energy, traditionally high emitting states like Portugal, France and the UK now have emission levels that are close to the global average.[161]

This implies that with a rise in industrialization in Africa, the region has the potential to become a major emitter while the emissions of erstwhile major emitters reduce or at least stabilise. South Africa, for example, has consistently ranged within the top 15 emitters globally.[162] Given this trend, the African arguments against substantial responsibility is untenable. In the next 50 years, states within Africa could be some of the world's major emitters given the region's high dependence on coal and other fossil fuels.

It is, therefore, necessary that sustainable practices be introduced at an early stage of Africa's industrial development. The African continent presents an opportunity to implement development sustainably from the very beginning. To shield African states from responsibility is to give room for another major carbon emitter to arise. Africa need not add its own quota to the already high volume of global emissions.

Notwithstanding, one cannot overlook the immediate developmental needs of African states and their lack of financial and technological capacity to adopt green technologies in place of the cheaply available, but non-sustainable, means of production. How then should equity be conceived of within a climate change treaty? How should rights and responsibilities be distributed without jeopardising the growth of the Africa region?

The application of equity within climate change treaties needs to align with distributive justice principles. In other words, it must seek to narrow the gap between different state parties and

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[158] Hannah Ritchie & Max Roser 'CO_2 emissions' Our World in Data available at https://ourworldindata.org/co2-emissions?country= (accessed 27 September 2021).
[159] Ibid.
[160] Ibid
[161] Ibid.
[162] Carbon Footprint by Country 2021 available at https://worldpopulationreview.com/country-rankings/carbon-footprint-by-country (accessed 27 September 2021). There are nine developing countries in the list of the top 20 emitters for 2021.

their abilities to respond to climate change. The application of distributive justice advocated for in this thesis must be differentiated from its application within the domestic system. While the purpose of distributive justice within the domestic legal system is to redistribute primary goods or establish a more equal society, distributive justice within a climate change treaty must be targeted at achieving global climate resilience.

It is necessary to further differentiate between this application of equity and its application in the quest for a new international economic order, a movement which was prevalent in the 1970s and 80s.[163] Both interpretations rely on the inequality perpetuated by the international legal, political and economic systems and the need to remedy some of these injustices. However, while the new international economic order is aimed at ensuring a redistribution of global wealth, distributive justice within climate change must be targeted at the achievement of global climate change resilience. The primary objective of equity in this sense is to ensure capacity building, which will enhance climate change adaptation in developing states and in turn contribute to global climate change mitigation efforts.

This application of equity and distributive justice principles is comparable to Rawls' duty of assistance as enunciated in his treatise, *The Laws of Peoples*.[164] He identifies some states as burdened societies and these states lack the 'human capital and know-how, and often, the material and technological resources needed to be well-ordered.'[165] He contends that 'well-ordered' societies are an obligation to assist the burdened states and bring them within the 'society of well-ordered Peoples.'[166]

It is, however, necessary to make some distinctions from Rawls' duty of assistance. First, the primary focus of Rawls' duty of assistance is on the political organisation of the society rather than the economic empowerment of that society. For Rawls, the duty to assist flows from a more politically organised society to one that is less organised. He further argues that a well-ordered society need not be a wealthy one and the way to assist a 'burdened society' is not necessarily through the provision of economic capital.[167] Rawls then differentiates between

[163] See section 3.2 of chapter two.
[164] John Rawls *The Law of Peoples* (1999) 106.
[165] Ibid.
[166] Ibid.
[167] Ibid at 106-107.

distributive justice and the duty of assistance on the ground that, while distributive justice has no cut-off point, the duty of assistance does.[168]

What is useful for the current analysis is the fact that states within the global system are not always equal and some societies lack the necessary resources required to be *well-ordered*. When this is the case, a duty arises on the part of those states that possess the necessary resources to assist those who do not have these resources. This not only serves the 'burdened' states, but also improves the general condition of the global community of states. Within the climate change discourse, this will not only enhance the capacity of states being supported, it will also enhance global climate change ambition.

The application of distributive justice within the international law on climate change must, however, have a cut-off point. Differentiation of obligations cannot apply in perpetuity. The impracticality of such application can already be seen in the post-Kyoto Protocol negotiations where developed state parties began to withdraw from the agreement and argued that developing states must take on more substantive obligations under any climate change treaty. What then should be the cut-off point of this duty of assistance? At what point does the duty to assist cease?

The application of the duty of assistance ceases at the point where the state being assisted has become equipped enough to undertake climate change action or reasonably collaborate with other states. Since the objective of the duty of assistance is the development of institutions that guarantees that the assisted state can stir its own course, a cut-off point is reached once this end is achieved.[169] This duty does not create a relationship where developed states are perpetually liable for developed states parties. Rather, it guarantees that some measure of assistance is provided for states which lack the capacity to aspire to some global objective; in this case, climate change action. It does not establish a relationship of permanent dependence; it is only an avenue for improving the capacity of beneficiary states to undertake climate change mitigation and adaptation.

Since the availability of resources is important to the capacity of any state to respond to climate change, capacity building must be at the centre of the application of equity. The duty of assistance does not imply that developed states have a responsibility to bring developing states

[168] Ibid.
[169] See similar arguments with respect to political order in Rawls (n164) 111.

to developed status. The primary responsibility to enhance their economic capacity must remain with the state governments, rather than the international community. All that is needed is to assist in capacity building by providing necessary finance and technology to the extent necessary to build resilience or adapt to climate change. The ability to adapt to climate change must remain the litmus test for the level of assistance needed and the point at which the duty of assistance ceases.

This benchmark helps to avoid the argument that climate change is being used as an instrument for addressing global inequality. The kind of inequality that the climate change regime must concern itself with is that which relates to liability for climate change and vulnerability to climate change. Climate change treaties are not a blank cheque to be used for all inequality or historic injustice issues. Such injustices would only be relevant to the extent that they affect a state party's vulnerability to climate change. Although this will invariably have some developmental benefits for developing state parties, such benefits are merely ancillary to the main objective: global climate change resilience.

Additionally, equity within the climate change regime must be conceived as a norm that seeks to remedy past inequality in the use of atmospheric space, while enhancing current capacity. In other words, the application of equity and the differentiation is founded upon the need to compensate those who have not had the same use of the atmospheric space (emissions) but must now share in the consequences of an over-use of that space. This helps to reduce the imbalance in the distribution of the costs and benefits of climate change.

Practically, this argument means that developed states will take on concrete responsibilities to provide African states with the needed financial and technological resources to take on the climate change challenge. Climate finance and agreement over the intellectual property rights of climate change technologies must form part of an obligatory provision within the climate change treaty. Developed parties must also intensify collaborative efforts with African states in order to increase home-grown technologies that will help African states to enhance their climate change readiness.

6. CONCLUSION

This chapter has established that the conception of equity within the Paris Agreement is focused on current needs and capabilities rather than historical responsibility. This chapter examined

the African submissions to the Durban Working Group, the distribution of rights and responsibilities within the Paris Agreement and what this distribution reveals about the Agreement's conception of equity. The African submissions, through the African Group of Negotiators, reveal an insistence on the fact that climate change responsibilities must not constitute additional burden to or interfere with the developmental objectives of African states. Any agreement that places the same levels of responsibility on African state parties as it does on other developed parties would be deemed to be inequitable.

The conception of equity adopted in the final text of the Paris Agreement is revealed in the way it distributes rights and responsibilities. Some of these obligations include climate finance, transfer of technology, emission reduction and loss and damage. An examination of these provisions reveal that the Paris Agreement adopts a distributive conception of equity. It distributes rights and responsibilities in a manner that focuses on the (current) capabilities of the different state parties. This conception of equity implies that as the socio-economic conditions of state parties evolve, so must their responsibilities.

This represents a change from the positions in the UNFCCC and the Kyoto Protocol, which exempts developing states from any substantive obligations and focuses on the role of developed states as the historical emitters of greenhouse gases. This change was due to the fact that certain developing states had begun to emerge as major emitters and with enough capability to address the consequences of climate change. This new position has the ultimate effect of watering down some of the obligations that had been included in previous climate change treaties and weakens the protection that had been provided to developing states.

While provisions on climate finance continues to be a part of the Agreement, it is couched in vague and general terms, making compliance by developed parties more unlikely. Although developed state parties are required to take the lead on climate finance, the Paris Agreement extends the class of donors to other parties. Unlike the UNFCCC, the provision of climate funds is not tied to the obligation of developing state parties. This implies that it is no longer a requirement that developing states must receive financial and technological support before they can be held liable for their commitments under the Paris Agreement.

Similarly, the Paris Agreement leaves open the issue of technology transfer. While it recognizes the need for and encourages cooperation for the transfer of technology, the Agreement fails to oblige developed states to transfer the necessary climate innovations to developing states. The

shift in the application of equity is also evident in the emission reduction obligation. While the Agreement sets out a global objective targeted at bringing global average temperature to at least 2°C above pre-industrial levels, developed state parties have no individual target under the Agreement. It is left to each state party to decide its own emission goals.

This chapter concludes by offering an alternative approach to the concept of equity under the climate change regime. It recognizes the concern of developed states that equity has the potential of giving developing state parties a blank cheque, which renders developed states perpetually responsible for developmental challenges faced by developing states. This approach to equity helps to ensure that accountability is entrenched in the application of equity without making developed states perpetually liable under the climate change regime.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

1. INTRODUCTION

Mapping global climate change negotiations from 1992 to 2015, this thesis set out to examine how African states have attempted to interpret the principle of equity within international climate change negotiations and the extent to which climate change treaties, from the United Nations Framework Convention on Climate Change (UNFCCC) to the Paris Agreement, have reflected these notions of equity. The thesis examined the inequality in the volume of state emissions, and the financial and technological ability of different state parties to undertake climate change action and the connotations of these inequalities on the distribution of rights and responsibilities within climate change treaties from an African perspective.

There is a dearth of scholarship analysing the conception of equity adopted by African states within global climate change negotiations. This thesis fills the gap by providing an understanding of what African states mean when they call for equity as a bedrock of climate change treaties. This research enhances our knowledge of the conception of equity within the international law on climate change and contributes to existing literature on broader climate change issues like climate justice, sustainable development and the inequality in the distribution of climate change costs and benefits.

This thesis has shown that in various negotiations leading to the adoption of climate change treaties including the Paris Agreement, African states have consistently advanced arguments about equity that reflect principles of distributive and restorative justice. In advancing this interpretation of equity, African states have argued that they should be excluded from onerous legal obligations under these treaties so that climate change action does not impede the realisation of their developmental objectives. For them to bear such responsibilities, they have been arguing, their fulfilment can only be guaranteed if there is sufficient financial and technological aid from developed states.

This thesis shows that these arguments have credibility. First, science has shown that a disproportionate percentage of global emissions originate from developed. It, therefore, follows

that they must take on primary responsibility for confronting the consequences of such emissions. Secondly, developed states are better equipped with the finances and technology necessary for tackling climate change. To place the financial and technological responsibility for climate change on African states would be to place on them an unfair burden, which is in any case impossible to be borne by them; *lex non cogit ad impossibilia*.

The thesis argues, however, that the differentiation of obligations with respect to climate change cannot apply indefinitely. There must be a 'cut-off' point. Developed states cannot be held perpetually liable for global emissions. As developed states' emissions decline and that of African states and other developing states increase, the distribution of rights and responsibilities must reflect this change. The current differentiation should only apply as a transitional window for developed states to reduce their emissions and for African states to pursue development and increase their ability to tackle climate change and its challenges. In this transitional period, the necessary climate technologies must be viewed as global public goods from which no state should be excluded.

2. SPECIFIC FINDINGS

This thesis has established that the arguments of African states in climate change treaty negotiations reflect distributive and restorative justice notions of equity and they have remained generally consistent from the UNFCCC to the Paris Agreement. As chapter three has shown, these arguments are an attempt by African states to ensure that climate change action is fused with the need for development; the ability of African states to address issues such as poverty, food supply and general underdevelopment.[1] Chapter three, four and five have examined the varying extents to which these notions of equity are reflected in the UNFCCC, the Kyoto Protocol and the Paris Agreement respectively.

[1] See section 3 and 4 of chapter three.

2.1 What conceptions of equity have African states advocated for within the various climate change treaties?

In order to understand the attempt by African states to resolve the seeming contention between climate change action and the need for development, this thesis examined the conception of equity adopted by African states. The thesis has shown that African states, negotiating from 1992 to 2015 for climate change treaties from the UNFCCC to the Paris Agreement, adopted a conception of equity that emphasised both distributive justice and restorative justice principles.[2] In other words, they argued that the distribution of responsibilities within these treaties must account for the difference in historical emissions and the different capabilities of state parties. As seen in chapter three, four and five, African states insist that climate change action must not lead to a widening of the gap in the distribution of global wealth or fail to do justice to those who must now face the consequences of climate change despite low levels of emissions.[3]

As discussed in chapter two, distributive justice emphasises the inequality between various members of the state and the need to narrow this gap even if it means placing different levels of responsibility on otherwise equal members of society.[4] Flowing from this, developing states have argued that the sharing of rights and responsibilities between parties to the climate change agreement must be determined by the difference in their financial and technological capacity.[5] They have argued that anything short of this will worsen the developmental gap between developed and developing states.

The second approach taken by African states in the interpretation of the principle of equity is restorative justice. As shown in chapter two, the principle of restorative justice emphasises a deliberative process, which includes an acknowledgement of wrong by the aggressor and a course of action or compensation that is focused on 'healing' the victim.[6] Within the climate change context, the application of this principle is seen in the arguments by the African Group of Negotiators, which stresses the historical responsibility of developed states for the majority of

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[2] See section 5.5 of chapter three, section 2.3.2 and 3.6 of chapter four, section 3.5 of chapter five.
[3] See section 5.5 of chapter three, section 2.3.2 and 3.6 of chapter four, section 3.5 of chapter five.
[4] See section 3.2 of chapter two.
[5] See section 3.3.1 and 3.3.2 of chapter three.
[6] See section 3.3 of chapter two.

global emissions and consequently the need for these developed states to bear primary responsibility for climate change action.[7]

As the region most at risk of climate change despite minimal contribution to global emissions, African states regard themselves as victims of a problem created by industrialization in developed states.[8] Consequently, African states argue that developed states should bear the cost of climate change action and provide developing states, as the 'victims', with compensation.[9] This compensation is in the form of technological and financial support necessary to carry out climate change mitigation and adaptation efforts within African states.[10]

As this thesis has shown, the negotiations leading to the Paris Agreement focused more on distributive justice principles than restorative justice arguments.[11] African states emphasize that developed states possess superior financial and technological capability to address climate change and should, therefore, take on the primary responsibility.[12] Flowing from this, African states maintain that climate change responsibilities must not put additional financial burdens on African states and thus impede their developmental objectives.[13]

2.2 How have those conceptions of equity addressed the contentions between the need for development and the need for climate change action?

As explained in chapter three, African states were concerned that climate change obligations would restrict their ability to pursue industrialization.[14] Their arguments, therefore, sought for ways to ensure that the need for development was infused in the climate change negotiations. As chapters three, four and five have shown, the distributive and restorative justice arguments adopted by African states were directed at ensuring that they would not be saddled with strict climate change obligations, which would adversely affect their ability to pursue industrialization.[15]

[7] See section 4 of chapter three.
[8] See section 3.1 and 3.2 of chapter three.
[9] See section 4.1 of chapter three.
[10] See section 4.1.3 of chapter three.
[11] See section 2.2 of chapter five.
[12] See section 2.2.2 of chapter five.
[13] See section 2.2.2 of chapter five.
[14] See section 3.3.1 of chapter three.
[15] See section 4.1 of chapter three; section 3 of chapter four; section 2.2 of chapter five.

The distributive justice conception of equity merges climate change action and the need for development by providing for different sets of responsibilities for developed state parties and their developing counterparts.[16] In this distribution of responsibilities, African states participate in climate change action through the financial and technological assistance received from developed states.[17] This is seen in programmes like the Clean Development Mechanism (CDM) and the Green Climate Fund and other forms of financial support, which may accrue to African states in the discharge by developed states of their obligation to transfer technological and financial resources to developing states.[18] These programmes are designed to establish development projects within developing states. While the sponsoring developed states get the carbon credits for such projects, the host states benefit from the developmental opportunities inherent in the project.[19] This ensures that both climate change action and development are fused into one.

This thesis has equally shown that climate change action and the need for development is merged in the provision of the UNFCCC and its Protocols, obliging developed states to provide financial resources necessary for the transfer of various climate technologies.[20] It ensures that African states are able to adopt sustainable means of production in their industrialization process. As seen in chapter four, African states are able to access these environment-friendly technologies through the Technology Mechanism.[21] This will increase the pace of development while ensuring sustainability.

The conception of equity adopted by African states thus provide a framework which ensures that African states are able, with the support of developed states, to undertake climate change action without interfering with their developmental objectives.

[16] See section 5.2 of chapter three; section 3 of chapter five.
[17] See section 5.5 of section three; section 2.3.2 of chapter four; section 3.1 and 3.2 of chapter five.
[18] See section 2.4 and 3.4 of chapter four.
[19] See section 2.3 of chapter four.
[20] See section 5.4.2 of chapter three; section 2.3 of chapter four and section 3.2 of chapter five.
[21] See section 3.4 of chapter four; section 3.2.1 of chapter five.

2.3 To what extent have the climate change treaties, from the UNFCCC to the Paris Agreement codified and reflected the conceptions of equity advocated by African states?

As earlier mentioned, African states have advocated for a combination of distributive and restorative justice conceptions of equity. Although none of the climate change treaties have expressly adopted either principle, the application of these principles is seen in the various provisions and manner in which rights and responsibilities are distributed in these treaties.[22]

As shown in chapter three, the UNFCCC contains a clear application of the distributive justice principle.[23] This is reflected in article 3 and 4 of the UNFCCC, which acknowledges the inequality in the financial and technological capabilities of different state parties and distributes obligations in a way that seeks to equip developing state parties.[24] Developing state parties are to be provided with necessary financial and technological support and they do not have any obligations to undertake emission reduction targets.[25]

The application of distributive justice is further seen in the division of state parties into different groups, which reflect their developmental status and the distribution of responsibilities in accordance with these groupings.[26] While all state parties, irrespective of developmental status, have a duty to publish their national inventory of emissions, only Annex I and II parties have a duty to undertake emission cuts and communicate their emission reduction policies.[27] Annex II parties have the additional responsibility to provide new and additional financial resources to developing state parties and provide vulnerable state parties with climate change mitigation support.[28] In doing this, the UNFCCC creates a structure that allows for distributive justice.

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[22] See section 5 of chapter three, section 2.3 of chapter four, section 3 of chapter five.
[23] See section 5.5 of chapter three.
[24] See section 5.5 of chapter three.
[25] See section 5 of chapter three
[26] See section 5.2 of chapter three.
[27] Article 4 of the Adopted and Opened for Signature, Ratification and Accession by the General Assembly, A/RES/48/189, 20 January 1994 (hereinafter UNFCCC); see section 5.2 of chapter three.
[28] Article 4 of the UNFCCC; see section 5.2 of chapter three.

The position of the UNFCCC on restorative justice is less clear.[29] The treaty recognises the status of developed states as the primary emitters of greenhouse gases and these states are saddled with responsibilities, such as emission reduction obligations and the transfer financial and technological resources to their developing counterparts. However, and as explained in chapter three, the UNFCCC does not state clearly if developed states undertake these responsibilities based on their superior financial and technological capacity (distributive justice) or as a form of compensation for their role as major emitters (restorative justice), or a combination of both.[30]

With respect to the Kyoto Protocol, this thesis has shown that there is a clear case of both distributive and restorative justice principles.[31] The Protocol reflects distributive justice in article 11 by recognising the differing capabilities of developed and developing states and creating an obligation for developed state parties to provide financial and technological resources to developing state parties.[32] Distributive justice is also reflected in article 12, which establishes the Clean Development Mechanism, a programme which ensures resource flow from developed to developing states.[33]

The Kyoto Protocol also contains a clearer codification of restorative justice when compared with the UNFCCC.[34] It contains provisions that reflect the difference in emission levels between parties and the need for higher emitters to bear higher responsibilities. This is most obvious in Annex B of the Protocol, which goes as far as assigning specific quantified emission quotas to different state parties. Not only does this list exclude developing states, but it also ensures that each developed state parties' obligation is paralleled with its historical emissions.[35]

Following the UNFCCC and the Kyoto Protocol before it, the Paris Agreement contains a distributive justice conception of equity.[36] It distributes rights and responsibilities in line with a party's developmental status by differentiating between developed, developing and least

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[29] See section 5.5 of chapter three.
[30] See section 5.5 of chapter three.
[31] See section 2.3.2 of chapter four.
[32] See section 2.3 of chapter four.
[33] See section 2.3 of chapter four; article 12(2) of the Kyoto Protocol to the United Nations Framework Convention on Climate Change 11 December 1997, 2303 United Nations Treaty Series, 162 (entered into force 16 February 2005) (hereinafter Kyoto Protocol).
[34] See section 2.3.2 of chapter four.
[35] See section 2 of chapter four.
[36] See section 3.5 of chapter five.

developed state parties. Distributive justice is reflected in the Paris Agreement through provisions such as climate finance and emission reduction targets. Article 9 obliges developed state parties to provide their developing counterparts with financial support necessary for the latter to fulfil their obligations under the treaty.[37] Article 4 gives developing parties a longer period before they begin to reduce their emissions, unlike their developed counterparts who have a duty to take on economy-wide emission reduction targets.[38]

Although the Paris Agreement adopts a distributive justice conception of equity, it is silent on issues of restorative justice.[39] The Paris Agreement contains no reference to the responsibility of developed states for the majority of emissions and does not distribute obligations in line with this historical responsibility. Instead, the Agreement focuses on the present capability of each state in determining the extent of rights and responsibilities accruing to such a state party.

While the conception of equity within the Paris Agreement follows distributive justice, its application of this principle differs from the UNFCCC and the Kyoto Protocol.[40] The Paris Agreement eliminates the static classification of states into annexes as used in the UNFCCC and the Kyoto Protocol. While these earlier treaties adopted a static position of states that are developed and those that are developing, and divides obligations in line with this classification, the Paris Agreement maintains a more fluid categorisation. It makes use of the phrase, 'in the light of different national circumstances', to emphasise that the national circumstance of a state rather than a broad grouping as developed or developing will determine the extent of rights and responsibilities to be borne by such a state. As its national circumstance changes, so will a state's rights and responsibilities. This ensures that climate change responsibilities do not lie permanently with state parties that are traditionally referred to as developed states.

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[37] See section 3.1 of chapter five.
[38] See section 3.3 of chapter five; article 4(4) of the Paris Agreement.
[39] See section 3.5 of chapter five.
[40] See section 4 of chapter five.

2.4 To what extent does the distribution of rights and responsibilities under the Paris Agreement address the contention between climate change action and the need for development in Africa?

The Paris Agreement is the most recent protocol to the UNFCCC and, as shown in chapter five, represents a shift from earlier agreements in the way it addresses the needs of developing state parties.[41]

This thesis has shown that the distribution of rights and responsibilities under the Paris Agreement is inadequate to address climate change action and the need for development in Africa.[42] Although the Agreement contains provisions for the transfer of climate finance and technology from developed states to their developing counterparts, it is couched in ambiguous language.[43] This makes it difficult to ascertain the extent of protection offered to African states. This lack of clarity implies that African states may need to undertake climate change action without support from developed states. As explained in chapter five, this would have the effect of hindering the capacity of African states to pursue climate change action without adversely affecting their developmental objectives.[44]

In an attempt to give developing states some leeway to pursue national developmental objectives, the Paris Agreement provides that developed state parties have a responsibility to take the lead with respect to emission reduction.[45] They are urged to undertake economy-wide emissions reduction targets. Developing states, on the other hand, are allowed a longer period to peak their emissions.[46] As seen in chapter five, this means that African states as developing states have no immediate obligation to reduce their emissions.[47] The provisions on climate finance and emission reduction are targeted at ensuring that developing states get the needed financial support for

[41] See section 4 of chapter five.
[42] See section 4 of chapter five.
[43] See section 3.1 and 3.2 of chapter five.
[44] See section 4 of chapter five.
[45] See section 3.3 of chapter five.
[46] See section 3.3 of chapter five.
[47] See 3.3.2 of chapter five.

climate change action and to ensure that emission reduction obligation does not constitute a constraint on the pursuit of development by developing states.[48]

However, these provisions are insufficient to provide African states with the necessary support to ensure that they pursue climate change action and their developmental objectives.[49] Although the Paris Agreement encourages global technology cooperation, chapter five showed it fails to establish a distinct obligation for developed parties to transfer the necessary technology to their developing counterparts.[50] This implies that developing states would have to rely on commercial transfer of such technologies necessary for a transition to a climate-friendly economy.[51] This becomes an extra financial burden and has the potential of adding to the existing developmental burden of these states.[52]

Similarly, the provision on climate finance is couched with very little clarity on how this provision is to be actualised or enforced and the bottom-up approach of the agreement gives room for state parties to get away with doing very little to support developing state parties.[53] There are no quantitative or qualitative standards against which to measure the performance of the developed states.[54] Although the Paris Decision creates a $100 billion (USD) target, this figure is not legally binding and, unsurprisingly, is far from being met.[55]

The provision on climate finance is further weakened by the broadening of the class of donors to include other parties.[56] This serves as a statement from developed parties that they are unwilling to be the sole providers of climate finance and blurs the line between which states qualify as donors and which ones qualify as beneficiaries of climate finance. The provision on climate finance as it is, is insufficient to actualize the transfer of finance to African states and other developing state

[48] See section 3.1, 3.2 and 3.3 of chapter five.
[49] See section 3.5 of chapter five.
[50] See section 3.2 of chapter five.
[51] See section 3.2 of chapter five.
[52] See section 3.5 of chapter five.
[53] See section 3.1 of chapter five.
[54] See section 3.1 of chapter five.
[55] See section 3.1 of chapter five.
[56] See section 3.1 of chapter five.

parties.[57] While there is a normative recognition of the role of developed states, the provisions for its practical implementation are weak.[58]

Flowing from this, chapter five established that the Paris Agreement fails to actualize the distributive claims of African state parties.[59] While the Paris Agreement does not place strict duties on African states that have the potential to restrict their developmental imperatives, it fails to provide them with adequate support for pursuing climate change action.[60] This means that if African states are to undergo climate change mitigation and adaptation, they must do so with little or no support from developed state parties. This further increases the likelihood of diverting existing developmental funds for purposes of climate change action.[61]

The inadequacy of the Paris Agreement is further revealed in its position on loss and damage.[62] As seen in chapter five, while the Agreement acknowledges the necessity to prevent, minimise and tackle loss and damage from the effects of climate change, it does not oblige any of the parties to support those who are most at risk of climate change loss and damage.[63] At best, it brings the Warsaw International Mechanism for Loss and Damage within the Convention's framework.[64]

In conclusion, the Paris Agreement's provisions on climate finance are weak; the Agreement contains no clear obligations on climate technology and loss and damage. The Paris Agreement is thus an insufficient expression of equity and fails to provide a framework that allows African states to continue their developmental objectives while receiving adequate support for climate change mitigation and adaptation.[65]

3. RECOMMENDATIONS

Flowing from the discussion in this thesis, it is evident that climate change treaties, including the Paris Agreement, contain some major gaps in the actualization of the distributive and restorative

[57] See section 3.1.3 of chapter five.
[58] See section 3.5 of chapter five.
[59] See section 3.5 of chapter five.
[60] See section 3.5 of chapter five.
[61] See section 3.5 of chapter five.
[62] See section 3.4 of chapter five.
[63] See section 3.4.1 of chapter five.
[64] See section 3.4 of chapter five.
[65] See section 3.5 of chapter five.

claims made by African state parties. The Paris Agreement fails to provide for a clear set of obligations which would ensure that African states are able to undertake climate change action while receiving adequate financial and technological support. On the other hand, and has shown in chapter five, the Paris Agreement fails to create a system to ensure that African states and other developing parties progressively take on substantial responsibility.[66]

As outlined in chapter three, the need for African states to receive technological and financial support is justified by the relatively low contribution of the region to the global emissions and their low financial and technological capacity.[67] Receiving such support will not only help African states to undertake climate change mitigation and adaptation efforts, but it will also enhance global climate change resilience.

To fill the deficiencies in the Paris Agreement, the following are recommended:

- Article 10 of the Paris Agreement should be amended to include a clear obligation on the part of developed state parties to share climate technology and information with their developing counterparts. This will ensure that African state parties are provided with the necessary information and technical support to undertake climate change action. This transfer should be carried out within the context of local capacity building.

- As seen in chapter five, the provision of the Paris Agreement for loss and damage is inadequate to provide protection for vulnerable state parties.[68] The Agreement should be amended to give the Warsaw International Mechanism for Loss and Damage more substantive powers to make decisions and offer compensation to vulnerable states. Such compensation could be funded under the existing Global Climate Fund.

- The Paris Agreement should be amended to include a system that ensures that African states progressively take on substantive climate change obligations. Examples of such obligations may include the enactment of national climate change laws and the creation of national monitoring regulators. African states must, however, be provided with adequate

[66] See section 5 of chapter three.
[67] See section 3.3 of chapter three.
[68] See section 3.4 of chapter five.

support to carry out such obligations. In other words, climate change responsibilities should be placed on African states, but the financial costs of such obligations should be taken care of through the global climate fund. This approach would ensure that both developmental objectives and climate change action are properly integrated.

- The Paris Agreement should also be amended to include strict carbon sink and carbon emission reporting obligations on African states and their developing counterparts. Such reports will help to monitor the rate of emissions in each African state and the region as a whole. This record and the rate of increase in emissions will then inform the peaking period to be allocated to African states. This arrangement ensures that while African states are given room to industrialize, their emissions are closely monitored and this emission peaks before it gets to levels of global significance.

- The Paris Agreement should be amended to include the African Group as a distinct group with its own set of rights and obligations. As seen in chapter five, the opposition by developed states against the distributive justice claims of African states is primarily based on the increased emissions and capacity of stronger developing states, such as China, India and Brazil.[69] Developed states argue that these states now have emission levels almost at par with that of most developed states and it is inequitable to exempt them from emission reduction obligations.[70] Unfortunately, since all developing states, other than small island states, are grouped together under climate change agreements, it means that what applies to these emerging economies also applies to weaker developing states, most of which are African.

  In order to ensure that they are protected, it would be necessary that the Paris Agreement and subsequent climate change treaties provide for African states as a distinct group with their own sets of rights and responsibilities. A similar approach has already been taken with respect to the least developed states and small island states where the Paris Agreement expressly makes provision for their protection on climate finance and reporting obligations. Similar protection should be extended to African states. This approach ensures that African

[69] See section 3 of chapter five.
[70] See section 3 of chapter five.

states do not have to contend with the objections raised by developed states against stronger developing states like China, Brazil and India.

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