

# Sustainable Development Law on Environmental Migration: The Story of an Obelisk, a Bag of Marbles, and a Tapestry

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**Abstract:** No specific, consistent law deals with migration in the context of environmental phenomena (specifically of climate change) as a distinct issue. From this simple assessment, an oft-heard discourse identifies a ‘legal gap’ that should accordingly be filled through new norms specific to environmental migration. A new international treaty, in particular, would build such a normative monolith – an ‘obelisk’. However, I argue that *some* existing international norms may indeed play at least a partial role. The Guiding Principles on Internal Displacement, the United Nations Framework Convention on Climate Change, and the Draft Articles on State Responsibility, among others, are part of a ‘bag of marbles’ – a collection of isolated norms that should be held together if possible. However, these isolated norms have little consistency and need to be woven together into a coherent synthesis. The nascent notion of an international sustainable development law helps us in conceiving such a ‘tapestry’ – a comprehensive analysis of a plethora of existing norms helping us to form a coherent response to the issues raised by environmental migration. Even though this cannot tackle all the issues relating to environmental migration, it should at least allow us to identify the multiple insufficiencies of international law, instead of referring simply to an incurable unique ‘legal gap’.

When I talk about complexity, I am referring to the Latin, elementary meaning of the word ‘complexus’ – ‘what is woven together’. The components are different, but one needs to see the overall picture as in a tapestry. The real problem is that we have learnt to separate; instead, we need to learn to link up. Linking up is not just about establishing a connection, but also about establishing a connection that works like a loop.

– Edgar Morin<sup>1</sup>

## INTRODUCTION

It has become common sense in some milieus to bemoan the ‘legal gap’ resulting from the absence of any international legal instrument specifically conceived to govern environmentally induced migration. Those bodies tasked with formulating international law have been somewhat inattentive to the growing concern relating to the displacement of up to hundreds of millions of individuals as a consequence of environmental change, in

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<sup>1</sup> E. Morin, ‘La stratégie de reliance pour l’intelligence de la complexité’ (1995) 9 *Revue Internationale de Systémique* (translated by the author).

particular in the context of climate change. At the very least, they appear to have been unaware of the forced nature of such movements. How, many scholars have asked during the last decade, could international law leave environmental ‘refugees’ behind and only care for those who, ‘owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion’,<sup>2</sup> are unable to return to their country of origin? If the 1951 Convention Relating to the Status of Refugees (the Refugee Convention) aimed to protect forced migrants, why did it contain such a complicated and limited definition, even after 1967, when its Protocol extended the Convention to non-European, post-1951 refugees?

To a great extent, such questions are misleading. They assume that international law reflects only ethical considerations, while in reality the picture is far more complex. There is no doubt that states’ interests also play an instrumental role in the negotiation of international treaties. It may simply be that the Refugee Convention did not *aim* to protect forced migrants, but rather was incentivised by the security concerns of states already hosting large groups of refugees in the immediate aftermath of World War II.<sup>3</sup> As a matter of fact, the definition of a ‘refugee’ was extensively debated; no omission was accidental. In the context of the Cold War, commentators rapidly concluded that ‘economic refugees’ were not being granted the protection they needed.<sup>4</sup> The way international law frames the notion of refugees is not coincidental, but is the result of a complex interplay between the interests of different states.

In this context, liberal legal researchers have two options. Most of them have engaged in the first: promoting a substantial change of the law. The way of an international *lex ferenda* (future law), paved by universal treaties, regional coordination, or *ad hoc* cooperation, has been extensively scrutinised by a number of scholars.<sup>5</sup> It is a long and tortuous project, however, for international law is made by states anchored in concrete geopolitical circumstances and fully aware of their interests, not by abstract entities behind a veil of ignorance. To this extent, some hope may come from a security-based approach; as with the Refugee Convention, states’ well-understood interests could push them to laudable forms of international cooperation.<sup>6</sup>

2 Convention Relating to the Status of Refugees, Art. 1(A)2.

3 J.C. Hathaway, ‘A Reconsideration of the Underlying Premise of Refugee Law’ (1990) 31 *Harvard Int’l L J* 129.

4 See, e.g., P.A. Woods, ‘Term Refugee in International and Municipal Law: An Inadequate Definition in Light of the Cuban Boatlift’ (1981) 5 *ASILS Int’l L J* 39; A.T. Fragomen, ‘The Refugee: A Problem of Definition’ (1970) 3 *Case Western Reserve J Int’l L* 45; L.V. Kwiatkowski, ‘Economic Refugees: Do They Have a Place Inside the Golden Door?’ (1984) 3 *Can-Am LJ* 189; E.K. Harris, ‘Economic Refugees: Unprotected in the United States by Virtue of an Inaccurate Label’ (1993) 9 *Am U J Int’l L & Pol’y* 269; F. Gabor and J.B. Rosenquest, ‘The Unsettled Status of Economic Refugees from the American and International Legal Perspectives: A Proposal for Recognition under Existing International Law’ (2006) 41 *Tex Int’l L J* 275; A.E. Shacknove, ‘Who Is a Refugee?’ (1985) 95 *Ethics* 274; M. Foster, *International Refugee Law and Socio-Economic Rights* (Cambridge University Press, 2009).

5 In particular, see F. Biermann and I. Boas, ‘Protecting Climate Refugees: The Case for a Global Protocol’ (2008) 50 *Environment: Science and Policy for Sustainable Development* 8; M. Hulme, F. Biermann and I. Boas, ‘Commentary and Response: Climate Refugees: Cause for a New Agreement?’ (2008) 50:6 *Environment* 50; D. Hodgkinson *et al.*, ‘“The Hour When The Ship Comes In”: A Convention for Persons Displaced by Climate Change’ (2010) *Monash University Law Review* (forthcoming); CRIDEAU, ‘Draft Convention on the International Status of Environmentally-Displaced Persons’ (2008) 39 *Revue de Droit de l’Université de Sherbrooke* 451; B. Mayer, ‘The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework’ (2011) 22 *Colorado Journal of International Environmental Law & Policy* 357; J. McAdam, ‘Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer’ (2011) 23 *International Journal of Refugee Law* 2.

6 J. Barnett and W.N. Adger, ‘Climate Change, Human Security and Violent Conflict’ (2007) 26 *Political Geography* 639; General Assembly Resolution 63/281, ‘Climate change and its possible security implications’.

However this is also a dangerous path. Security concerns may also push states to support illiberal regimes that contain irregular out-migration, international trafficking and terrorism, rather than supporting the human rights of environmentally induced migrants. I am not fully convinced that the 'human security' project, if it is to be conceived of as a simple construction of two terms, will be able to lead to a magical reconciliation of the liberal-humanistic project (the human rights or development agenda) with the drive for action stemming from the notion of 'security'. Last but not least, anything approximating reform of the Refugee Convention would open a Pandora's box and, possibly, undermine the existing legal regime.

Yet liberal legal researchers have mostly ignored the second option open to them: exploring today's law as it is, the *lex lata* (current law),<sup>7</sup> and possibly leading the way for its liberal interpretation. This involves going beyond the simplistic view, that because there is no *specific* treaty applying to 'environmental' refugees, these individuals are deprived of *any* form of legal protection. Indeed, it may be useful to develop a more nuanced understanding of the role that existing norms may play to protect people displaced in the context of environmental change. Here, again, one should avoid overly idealistic arguments; existing norms are certainly not sufficient to tackle a completely new problem. Such research may only be a first step towards a more targeted lawmaking process; once the precise, narrower legal gaps in different legal regimes are identified, transforming the law becomes a less ambitious, more realistic, task. Many norms may, indeed, prove to be applicable to environmental migration; others may suggest possible inspirational avenues for future legal efforts.

Following the second option opened to liberal legal researchers – rethinking existing law, instead of, or at least before promoting, new norms – this article submits that environmentally displaced persons suffer from a confusion of multiple existing norms rather than from an absence thereof. As Edgar Morin showed, reconnecting is essential in a complex society. Each norm must be connected with other norms and with empirical realities. From a positivistic conception of law, 'legal gaps' (or 'legal overlaps') result from a lack of interconnectedness: all fields of law accidentally evade one particular social fact (or, in the case of legal overlaps, two or several fields of law converge on the same facts). While this article identifies a nebula of normative frameworks of differing relevance in the face of environmental migration, there surely remain very significant gaps or insufficiencies in the protection of environmentally displaced persons. Yet those gaps or insufficiencies, precisely because they are plural and narrower, are also slightly less fundamental and less difficult to address than the whole single 'legal gap' commonly described in reference to environmental migration.

To address such gaps, law can operate through hybridisation, a process that Østreng defines as 'a recombination of knowledge and competence in new specialized fields and an activation of the multidimensional network of specialties'.<sup>8</sup> This process is often necessary, 'because specialization leaves gaps between disciplines and specialties and those gaps have to be filled'.<sup>9</sup> In law, hybridisation, as an essentially cognitive process, does not consist in *creating* new norms, but rather in *reinterpreting* and *articulating* existing ones. In international law, it does not require the unlikely general agreement

7 On the opposition between *lex ferenda* and *lex lata* in the context of environmental migration, see: C. Cournil, 'Émergence et faisabilité des protections en discussion sur les "réfugiés environnementaux"' (2010) 204:4 *Revue Tiers Monde* 35 at 43.

8 W. Østreng, 'Crossing Scientific Boundaries by Way of Disciplines' in W. Østreng (ed.), *Complexity: Interdisciplinary Communications* (Oslo: Centre for Advanced Study, 2007) 11 at 12–13.

9 *Ibid.*

process of the international community through which new treaties (or, in a different manner, customary norms) must go. Hybridisation processes may at least contribute to affirming a legal regime that is applicable, in many circumstances, to environmentally displaced persons.

There certainly are other means for synthesising norms relevant in the face of environmental migration. Yet this article argues that international sustainable development law may shape a broad conceptual umbrella under which many isolated legal fields – such as law relating to physical movement; environmental law; law on development; human rights law; and law on disaster management, on humanitarian relief, and on responsibility – may be considered together in a comprehensive and inclusive way. In fact, the ‘human security’ project attempts to create a similar synthesis, though in a less explicit and less ambitious manner. The concept of human security intends to reconnect rights-based approaches with development and security languages, but it leaves behind other legal frameworks that are worth considering in relation to environmental migration, such as the whole responsibility-based discourse on climate change (including the principle of common, but differentiated, responsibilities). Thus more comprehensive than the project of human security, international sustainable development law aims to shape a coherent synthesis of negatively or positively conflicting norms, *inter alia*, when addressing environmental migration.

It must be kept in mind that this article is not the end of a research process, but rather a starting point. It suggests a research project based on the synthesis of different fields of law relevant in the face of environmental migration, operated through the concept of sustainable development law, in order to achieve a more coherent and efficient understanding of existing law. Therefore, this article should be read as a hypothesis rather than a conclusion.

The structure of this article is as follows. First, it discusses the (absence of) ‘environmental migration law’, approached as a legal monolith. Secondly, it lists the different legal fields relevant in the face of environmental migration, which I call a ‘bag of marbles’. Thirdly, it pleads for the role of sustainable development law with regard to environmental migration as a way to weave together these different legal fields within a coherent synthesis that I call a ‘tapestry’.

## THE OBELISK: ENVIRONMENTAL MIGRATION LAW

After identifying environmental change as a factor of displacement, researchers have been inclined to look for specific norms applying to environmental migration. If no such norms existed, researchers argued that they should be invented. Hence the search for an ‘obelisk’: a giant monolith, an unalterable construction that would comprehend the whole issue of environmental migration in a magnificent manner. This section discusses the construction of environmental migration law as such an obelisk.

## ENVIRONMENTAL MIGRATION

### Definitions

‘Environmental migration’ designates the movement of individuals induced by environmental factors.<sup>10</sup> It includes climate migration, that is, environmental migration induced specifically by global anthropogenic climate change. Walter Kälin, the UN special rapporteur on the human rights of internally displaced persons, distinguished between five scenarios of environmental migration:

1. ‘*Sudden-onset disasters*, such as flooding, windstorms ... or mudslides caused by heavy rainfalls’;
2. ‘*Slow-onset environmental degradation* caused, inter alia, by rising sea levels, increased salinisation of groundwater and soil, long-term effects of recurrent flooding, thawing of permafrost, as well as droughts and desertification’;
3. ‘So-called “*sinking*” *small island states*’;
4. Areas designated by governments as ‘*high-risk zones* too dangerous for human habitation on account of environmental dangers’; and
5. Displacement following ‘*unrest seriously disturbing public order, violence or even armed conflict*’ that ‘may be triggered, at least partially, by a decrease in essential resources due to climate change’.<sup>11</sup>

Scenarios 1 to 3 constitute the core of the environmental migration debate, while scenarios 4 and 5 are less often addressed within the notion of environmental migration. Scenario 3 (sinking islands) is, in fact, a sub-category of scenario 2 (slow-onset environmental degradation). Thus, the two main scenarios are migration induced by a natural disaster, or by slow-onset environmental degradation.

Beyond these causative scenarios, environmental migration is characterised by a great diversity of human experiences. Displacement can be planned at an early stage, or it can occur spontaneously before, during, or after a ‘natural’ disaster (which sometimes could have been foreseen, managed, or even prevented) or during slow-onset environmental degradation. Displacement can be temporary, definitive, or recurrent. One should also keep in mind that, in many circumstances, the most vulnerable often cannot afford to move.

Contrary to a common misrepresentation, empirical studies – in particular the Environmental Change and Forced Migration Scenarios (EACH-FOR) project,<sup>12</sup> which included case studies in 23 countries or regions – show that most environmental migration occurs within state borders rather than between states. Cross-border migration is a choice of second order; most often, people go to a directly neighbouring country or at least to a country in the region. Thus, migration from developing to developed countries in the context of environmental change is rare, perhaps even exceptional.

10 The IOM defines environmental migrants as ‘persons or groups of persons who, for compelling reasons of sudden or progressive change in the environment that adversely affects their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad’. F. Laczko and C. Aghazarm, *Migration, Environment and Climate Change: Assessing the Evidence* (Geneva: IOM, 2009) at 19.

11 W. Kälin, ‘Conceptualizing Climate-Induced Displacement’ in J. McAdam (ed.), *Climate Change and Displacement: Multidisciplinary Perspectives* (Oxford: Hart, 2010) 81 at 85–86.

12 EACH-FOR, *Synthesis Report* (2009), available at: [www.each-for.eu](http://www.each-for.eu)

**Environmental 'Migrants' (or 'Refugees') or Environmental 'Migration'?**

In this context, there is a sensible humanistic argument in favour of concentrating on individuals (migrants/refugees) instead of on abstract phenomena (migration).<sup>13</sup> However, notions such as 'environmental refugees' or 'environmental migrants' are extremely problematic. 'Environmental refuge' is a legal misnomer, as the 1951 Refugee Convention and its 1967 Protocol limits the definition of a refugee to a person who, 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country'.<sup>14</sup> Environmentally displaced persons do not, as such, fall within the definition of conventional refugees.

More fundamentally, any conceptualisation of environmental 'migrants' or 'refugees' as individuals that are distinct from other migrants has proved to be problematic. Such categories lack coherence: environmental change may lead to migration through very different avenues. People may be forced to move because of environmental change, but, most often, environmental factors are only 'one in a cluster of causes' that lead to an individual's decision to migrate.<sup>15</sup> To this extent, the presentation of simple figures of 'environmental refugees' or 'environmental migrants' as a group of individuals who can be easily distinguished from others is misleading.<sup>16</sup> Therefore, I prefer to use the terminology of 'environmental migration' whenever possible; I use the notion of 'environmentally displaced person', when necessary, as a more vague notion, a nebulous category of individuals.

**TOWARDS A SPECIFIC LAW ON ENVIRONMENTAL MIGRATION?**

As mentioned previously, the definition of the Refugee Convention is, and intends to be, limited: the *travaux préparatoires* clearly reflect the negotiators' fears that '[t]oo vague a definition ... would amount, so to speak, to a blank check'.<sup>17</sup> According to the *travaux préparatoires*, the drafters attached the utmost importance to the demand that '[t]he categories of refugees coming under the convention should ... be clearly and specifically determined'.<sup>18</sup> Obviously, states are unlikely to approve any binding obligation towards an ill-defined legal category of individuals, especially if large numbers are cited within an alarmist discourse.

Yet, environmentally displaced persons cannot be defined in the same way as conventional refugees. They do not belong to specific groups of individuals who, as in the case

13 Per analogy, see: J.C. Hathaway, 'Forced Migration Studies: Could We Agree Just to "Date"?' (2007) 20 *J. Refugee Stud.* 349.

14 Convention Relating to the Status of Refugees, Art. 1(A)(2); Protocol Relating to the Status of Refugees, Art. 1(2).

15 A. Suhrke, *Pressure Points: Environmental Degradation, Migration and Conflict* (Cambridge, American Academy of Art and Science, 1993) at 5; G. Hugo, 'Environmental Concerns and International Migration' (1996) 30 *Int'l Migration Rev.* 105 at 107–108.

16 On the debate between 'maximalists' (or 'alarmists') and 'minimalists' (or 'sceptics'), see J. Morrissey, *Environmental Change and Forced Migration: A State of the Art Review* (Refugee Studies Centre, Oxford Department of International Development, 2009). Available at: [www.rsc.ox.ac.uk/events/environmental-change-and-migration/EnvChangeandFmReviewWS.pdf](http://www.rsc.ox.ac.uk/events/environmental-change-and-migration/EnvChangeandFmReviewWS.pdf)

17 UN Ad Hoc Committee on Refugees and Stateless Persons, Ad Hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Third Meeting Held at Lake Success, New York, on Tuesday, 17 January 1950, at 3 p.m. 1950, at 37. Available at: [www.unhcr.org/refworld/docid/40aa193f4.html](http://www.unhcr.org/refworld/docid/40aa193f4.html)

18 Executive Committee of the High Commissioner's Programme, Report of the Forty-Fifth Session, 1994, at 40.

of the Refugee Convention, can be identified as being persecuted in a specific state. Overall, environmental change can impact on individuals indirectly, for example through economic pathways (e.g. the reduction of essential resources). Environmentally displaced persons themselves are not necessarily conscious of the indirect environmental causality of their migration and seldom conceive of themselves as ‘environmental refugees’.

A rights-based normative framework addressing environmentally displaced persons would also have the undesirable consequence of excluding those who most urgently need assistance, for the poorest often cannot move. Certainly, social vulnerability may be a consequence of displacement, as displaced persons lose their social and economic, cultural and sometimes linguistic, networks. Yet the danger is that attention goes to people who have been displaced, but not to the more discrete victims of environmental change who are not able to move.

Thus, in the context of conventional refugees, Lubkemann engaged in an original conceptual discussion on ‘involuntary immobility’,<sup>19</sup> highlighting the fact that a fundamental change in the ‘human lifescape’ could induce what he calls a ‘displacement in place’.<sup>20</sup> In other words, even if people are not moving, their environment is nonetheless changing. Indeed, Lubkemann’s argument is more likely to flourish in the context of environmental migration than political asylum. When a government persecutes part of its population, the distinction between people fleeing their country and those left behind is legally relevant, as it can be assumed that such a government is unwilling to authorise the international community to come and protect those persecuted people: absent a military intervention, conventional refugees can only be protected once in the territory of a ‘safe’ state. Yet the circumstances of environmental migration are substantially different. Local and national authorities are presumably willing to reach an agreement with other states or institutions for international assistance to individuals remaining within their territory.

Therefore, environmentally displaced persons can be conceived of in two different ways. In both cases they are only part of a larger category. On the one hand, they are part of the larger category of displaced persons who, because they are often socially isolated in their place of destination, are more vulnerable. On the other hand, they are part of the larger category of people affected by environmental changes, be they physically displaced or ‘displaced in place’. As a result, a specific rights-based protection regime for environmentally displaced persons is necessarily shaky, first because it is based on two inconsistent rationales, protecting individuals either on the grounds of their physical displacement or because they are affected by environmental change; and secondly because environmental migration would be too narrow a scope to be coherent with any of these rationales. This analysis, then, results in two different problems: the protection of displaced persons and the protection of people affected by environmental change.

## THE BAG OF MARBLES: NORMS RELEVANT IN THE FACE OF ENVIRONMENTAL MIGRATION

McAdam highlighted the need to reconcile a ‘plethora of existing as well as potential governance mechanisms, processes, and institutions ... across the fields of migration, environment, development, human rights, disaster management, and humanitarian

19 S.C. Lubkemann, ‘Involuntary Immobility: On a Theoretical Invisibility in Forced Migration Studies’ (2008) 21 *J. Refugee Stud.* 454.

20 S.C. Lubkemann, *Culture in Chaos: An Anthropology of the Social Condition in War* (University of Chicago Press, 2008), Ch. 6.

relief'.<sup>21</sup> This section lists some of the fields of law relevant in the face of environmental migration and starts a collection of 'marbles'.

## THE LAW RELATING TO PHYSICAL DISPLACEMENT

### Internal Displacement

The Guiding Principles on Internal Displacement were developed by Francis Deng, the UN Secretary General's representative on internally displaced persons (IDPs), on the demand of the UN Commission on Human Rights.<sup>22</sup> They were presented to the Commission on Human Rights in 1998 but were never opened to ratification; thus, they are a 'soft law' instrument. In addition to some general provisions, the Guiding Principles address protection from displacement; during displacement; the framework for humanitarian assistance; and the norms applicable to return, resettlement, and reintegration.

The Guiding Principles adopt a broad definition of IDPs as 'persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of, or in order to, avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border'.<sup>23</sup> Therefore, environmentally displaced persons fall within the definition of IDPs under two restrictive conditions. First, they must not have crossed any international border. Secondly, a threshold of forcedness must be reached.

One obvious limitation of the legal authority of the Guiding Principles is their soft legal nature. The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, adopted in 2009 but not yet entered into force, is an attempt to increase the legal authority of these norms in a regional context.<sup>24</sup>

### International displacement

#### Migration

International law on migration deals exclusively with *international* migration; therefore, it may address some of the environmentally displaced persons excluded from the scope of international law on internal displacement. When Jorge Bustamante, the previous Special Rapporteur on the human rights of migrants, left office, he indicated 'migration in the context of climate change' as one of the 'possible themes for further studies'. His newly appointed successor, Professor François Crépeau, is likely to make environmental migration one of the priorities of his mandate. However, international law on migration remains a work in progress. The 1990 UN Convention on the Protection of the Rights of all Migrant Workers and Members of their Families has been ratified by no than more

21 J. McAdam, 'Environmental Migration' in *Global Migration Governance* (Oxford: Oxford University Press, 2011) 153 at 153.

22 Guiding Principles on Internal Displacement, UN Doc. E/CN.4/1998/53/Add.2 (1998).

23 Ibid., Introduction, para. 2.

24 See, e.g., A.M. Abebe, 'The African Union Convention on Internally Displaced Persons: Its Codification Background, Scope, and Enforcement Challenges' (2010) 29 *Refugee Survey Quarterly* 28; S. Ojeda, 'The Kampala Convention on Internally Displaced Persons: Some International Humanitarian Law Aspects' (2010) 29 *Refugee Survey Quarterly* 58.



45 countries, all from the global South.<sup>25</sup> The International Labour Organization (ILO) conventions on migrant workers<sup>26</sup> do not go as far, clearly because they do not extend to irregular migrants.

It may be that the strongest protection of the rights of migrants comes from the general prohibition against discrimination contained in international human rights instruments and in the constitutional law of many states. In its 1986 General Comment on 'the position of aliens' under the 1966 International Covenant on Civil and Political Rights, the Human Rights Committee insisted that 'the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens'.<sup>27</sup> Thus, in the words of Professor Crépeau, 'migrants share with citizens all human rights, except two: the right to vote and be elected, and the right to enter and stay in the country. All other human rights are for "everyone", irrespective of immigration status'.<sup>28</sup> Yet states are reluctant to recognise the 'universal' rights of migrants, who remain part of the "human rights" outsiders'.<sup>29</sup>

#### *Statelessness*

The 1954 Convention relating to the Status of Stateless Persons may apply to some environmentally displaced persons in the eventuality that the whole territory of some small island developing states would disappear or at least become uninhabitable.<sup>30</sup> Much ink has recently been spilled on the possibility and consequences of the territory of a state disappearing, notably regarding the existence of the state and the status of its nationals. Yet this debate goes against commonsense considerations. Until the territory of a state disappears, or at least becomes uninhabitable, any argument based on the law on statelessness is bound to fail, as the protection afforded by the 1954 Convention applies only to individuals who, at a given time, are not considered as nationals by any (existing) state under the operation of its law. Only when the territory *has* become uninhabitable or *has* disappeared, or when its entire population *has* left, may one argue for an application of the law on statelessness. In any case, the disappearance of the state would follow, not precede, the displacement of its population. The period between the desirable relocation of a population increasingly exposed to extreme weather events and the disappearance of the state may span several years, perhaps even decades.

#### *Political asylum*

As a general rule, the Refugee Convention does not apply to environmentally displaced persons. As McAdam argues, '[t]he effects of rising sea levels, salination, and increasingly

25 See, e.g., E. MacDonald and R. Cholewinski, *The Migrant Workers Convention in Europe: Obstacles to the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (EU/EEA Perspectives, UNESCO, 2007); J. Lonroth, 'The International Convention on the Rights of All Migrant Workers and Members of Their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotiation' (1991) 25 *Int'l Migration Rev.* 710.

26 See, in particular, Migration for Employment Convention (Revised), ILO C97, 1949; Migrant Workers (Supplementary Provisions) Convention, ILO C143, 1975.

27 See, in particular, Human Rights Committee, General Comment No. 15: The position of aliens under the Covenant (1986), para. 2.

28 F. Crépeau, Special Rapporteur on the Human Rights of Migrants, statement on the Human Rights of Migrants, 66th session of the General Assembly, Third Committee, Item 69 (b),(c), New York, 2011.

29 See, e.g., B. Mayer, 'Universalism v. Magic Circles: Human Rights' Outsiders' in P. Singh and V. Kanwar, eds, *Critical International Law* (New Delhi: Oxford University Press, 2012).

30 See, e.g., J. McAdam, "'Disappearing States", Statelessness and the Boundaries of International Law' in J. McAdam (ed.), *Climate Change and Displacement: Multidisciplinary Perspectives* (Oxford: Hart, 2010) 105; S. Park, *Climate Change and the Risk of Statelessness: The Situation of Low-lying Island States* (UNHCR, 2011); B.K. Blitz, 'Statelessness and Environmental-Induced Displacement: Future Scenarios of Deterritorialisation, Rescue and Recovery Examined' (2011) 6 *Mobilities* 433.

frequent storms, earthquakes, and floods on people's homes, livelihoods, and health may be harmful, but they do not constitute "persecution" as it is understood in international and domestic law<sup>31</sup> as part of the definition of a 'refugee'. However, in principle at least, the convention may apply either in the case of a coincidental overlap of the environmental inducement with persecution; or in case of a causal relationship between environmental change and persecution (e.g. if people are persecuted as a result of a conflict triggered by environmental change).<sup>32</sup>

#### *Subsidiary protection*

If environmentally displaced persons do not generally qualify as refugees as defined by international law, states may take the initiative to extend the protection granted to refugees to a subsidiary category of individuals. Sweden and Finland protect people who 'by reason of an environmental catastrophe, cannot return to his [*sic*] home country'.<sup>33</sup> By contrast, neither the Cartagena Declaration on Refugees nor the Convention Governing the Specific Aspects of Refugee Problems in Africa have extended the definition of a refugee to an environmentally displaced person.<sup>34</sup> Indeed, as was recalled regarding environmental migration law, there are strong conceptual impediments against an extension of refugee-like protection to environmentally displaced persons.

#### *Temporary protection*

Some fields of domestic and regional law provide for the temporary protection of groups of people displaced by environmental change.<sup>35</sup> EU Directive 2001/55 provides 'minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof'.<sup>36</sup> Yet this system was never enforced, and the qualified majority of the Council of the EU that is required to implement this directive is unlikely to be met other than for very exceptional circumstances.

In the United States, the 1990 Immigration Act set up a 'temporary protected status' (TPS).<sup>37</sup> The TPS has already been implemented, most recently to suspend deportations to Haiti soon after the January 2010 earthquake.<sup>38</sup> The TPS, as a favour voluntarily granted by a state to a population, relies entirely on the engagement of civil society movements;

31 McAdam, above n. 22, at 162–163.

32 See generally: S. Edwards, 'Social Breakdown in Darfur' (2008) 31 *Forced Migration* 23; N.P. Gleditsch, 'Environmental Conflict: Neomalthusians vs. Cornucopians' in H.G. Brauch (ed.), *Security and Environment in the Mediterranean: Conceptualising Security and Environmental Conflicts* (Springer, 2003) 477; T.F. Homer-Dixon, *Environment, Scarcity, and Violence* (Princeton University Press, 1999); Barnett and Adger, above n. 7; V. Kolmannskob, *Climate Change, Disaster, Displacement and Migration: Initial Evidence from Africa* (UNHCR, working paper series on New Issues in Refugee Research, Working paper No. 180, 2009); W.A.V. Clark, 'Social and Political Contexts of Conflict' (2008) 31 *Forced Migration* 22.

33 *Swedish 2005 Aliens Act*, SFS 2005:716, Chapter 4, sect. 2, para. 3. Official translation available at: [www.sweden.gov.se/content/1/c6/06/61/22/bfb61014.pdf](http://www.sweden.gov.se/content/1/c6/06/61/22/bfb61014.pdf); *Finish Aliens Act*, 301/2004, Sect.88a(1), unofficial translation available at [www.finlex.fi/en/laki/kaannokset/2004/en20040301.pdf](http://www.finlex.fi/en/laki/kaannokset/2004/en20040301.pdf)

34 See D. Keane, 'Environmental Causes and Consequences of Migration: A Search for the Meaning of Environmental Refugees' 16 *Georgetown Int'l Env'l L Rev* 217, 217 (2003); K.K. Moberg, 'Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection' 94 *Iowa L Rev* 1107, 1116 (2009).

35 See generally: B. Mayer, 'Fraternity, Responsibility and Sustainability: The International Legal Protection of Climate (or Environmental) Migrants at the Crossroads' (2012) Special Issue of the Canadian Supreme Court Law Review (forthcoming).

36 Council Directive 2001/55/EC (OJ L.212-223 7.8.2001) on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof.

37 US Immigration Act of 1990, PL 101-649, 1990 S 358, Sect. 302, 8 USCA § 1254a.

38 J. Preston, 'In Quake Aftermath, US Suspends Deportations to Haiti' *New York Times*, 13 January 2010.

once a population feels less concerned by the lot of another country, it can be interrupted at any time. In December 2010, when Haiti was facing an epidemic of cholera, the United States suspended the application of the TPS; deportations immediately restarted.<sup>39</sup>

### **Conclusion: The General Limitation of Law Relating to Physical Displacement**

Existing norms on physical displacement can bring some rights-discourse background to the debate on the protection of environmentally displaced persons. However, internal displacement, even more than international migration, is still an underdeveloped field of international law, arguably because of the long-lasting idea that international law should not meddle in the domestic affairs of states.

When applied to environmentally induced migration, displacement-based law generally fails to take into account the specific responsibility of third states. Therefore, such a focus on the primary responsibility of the territorially competent state evades considerations of climate justice and deviates from the idea of a ‘common but differentiated responsibility’ for climate change.

## **LAW RELATING TO THE ENVIRONMENT**

### **Law on Climate Change**

Principle 7 of the Rio Declaration on Environment and Development provides the following:

States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.<sup>40</sup>

The notion of a common but differentiated responsibility is further affirmed in the United Nations Framework Convention on Climate Change (UNFCCC)<sup>41</sup> and in many instruments adopted by the Conference of the Parties to the UNFCCC (COPs). The Bali Action Plan, adopted by COP 13 in 2007, defined ‘enhanced action on adaptation’ as one of the pillars of international cooperation on climate change, equal with ‘enhanced national/international action on mitigation of climate change’.<sup>42</sup> Yet the notion of ‘migration’ was not addressed by the UNFCCC regime before 2010, when COP 16 adopted the Cancun Agreements. Section 14 of the Cancun Agreements provides that all Parties are invited to:

... enhance action on adaptation under the Cancun Adaptation Framework, taking into account their common but differentiated responsibilities and respective capabilities, and specific national and regional development priorities, objectives and circumstances, by undertaking, inter alia, the following: ... (f) Measures to enhance understanding, coordination and cooperation with

39 Letter from the American Civil Liberties Association to President Barack Obama, 29 December 2010. Available at: [www.aclufl.org/pdfs/HaitianLetter-2010-12-29.pdf](http://www.aclufl.org/pdfs/HaitianLetter-2010-12-29.pdf)

40 Principle 7.

41 Sixth recital, Art. 3(1) and Art. 4.

42 Decision 1/CP.13, 2007.

regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels.<sup>43</sup>

The language of COP 16 on migration, however, remains weak. It lays the foundations for an international sharing of the costs of environmental migration, but it lacks any concrete mechanism to enforce these principles. It is uncertain whether the Cancun Agreements even pave the way for an international funding of 'displacement, migration and planned relocation' policies through the funds dedicated to support adaptation.

Efforts to mitigate climate change may also be relevant, although indirectly, as they may reduce future environmental change. However, it is risky to use the spectre of environmentally displaced persons to trigger supplementary international cooperation regarding climate change mitigation instead of tackling unavoidable human suffering.

### General environmental law

Besides law dealing specifically with climate change, a background of environmental law can have some relevance in the face of environmental migration. Climate change is not the only circumstance in which environmental migration occurs: states have tried to control the settlement of their territory as long as they have existed. From 1905 to 1989, policy of 'transmigration' in Indonesia relocated close to five million individuals from overpopulated central islands to peripheral ones, with a controversial social and environmental outcome.<sup>44</sup> In 1936, the village of Naikelayaga in Kabara, eastern Fiji, was resettled two kilometres away from the sea, after a cyclone partly destroyed it.<sup>45</sup> In other cases, large public projects such as dams have displaced entire, often indigenous, communities. In 1961, David Howarth reported the relocation of several traditional villages of the Tonga tribe in Northern Rhodesia (today's Zambia) as part of the construction of the Kariba dam.<sup>46</sup> Policies taken following industrial disasters – from Bhopal to Fukushima – may also be a source of inspiration for legal approaches to environmental migration.

Generally speaking, these questions have been little studied. They should be explored, however, for much experience on environmental migration, resettlement and evacuation has been developed over many decades. Regional development banks, for instance, have often developed guidelines on the management of population displacement within large development projects. Here and elsewhere, norms exist; these need to be collected, compared, put in perspective and circulated, so that new projects can build on accumulated experience.

43 Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, 2010, section 14. See generally K. Warner, 'Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations'. Background paper presented for UNHCR's Expert Roundtable on Climate Change and Displacement convened from 22 to 25 February 2011 in Bellagio, Italy, 2011.

44 See, e.g., P.M. Fearnside, 'Transmigration in Indonesia: Lessons from Its Environmental and Social Impacts' (1997) 21 *Environmental Management* 553; C. MacAndrews, 'Transmigration in Indonesia: Prospects and Problems' (1978) 18 *Asian Survey* 458; A.J. Whitten, 'Indonesia's Transmigration Program and Its Role in the Loss of Tropical Rain Forests' (1987) 1 *Conservation Biology* 239.

45 J. Campbell, 'Climate Change and Population Movement in Pacific Island Countries' in Bruce Burson (ed.), *Climate Change and Migration: South Pacific Perspectives* (Wellington: Institute of Policy Studies, 2010) 29 at 36

46 D. Howarth, *The Shadow of the Dam* (London: Macmillan, 1961).

## OTHER FIELDS OF LAW

### Human rights

Environmental change does not violate human rights, as ‘environmental change’ is not a legal person capable of holding duties. But it is a major hurdle to the obligation of states to respect, protect and fulfil the human rights of individuals within their control.<sup>47</sup> Therefore, there is a growing demand that human rights guide law and policies addressing environmental change.<sup>48</sup>

However, this rights-based approach of environmental change may clash with a responsibility-based one, as human rights attribute duties to states that are territorially competent (i.e. often developing states) instead of the states responsible for climate change (i.e. mainly developed ones, at least if historical contributions are considered). Therefore, because of its reliance on state jurisdiction, the human rights framework may result in an arguably unfair result. More importantly, from the viewpoint of the populations affected, the jurisdictional basis of the human rights framework may undermine the efficiency of the protection. International law recognises that all states may not bear the same responsibilities, at least regarding positive obligations to realise social, economic and cultural rights; depending on the amount of available resources, developing states do not have the same level of obligation as developed ones.<sup>49</sup> In reality, many developing countries severely affected by environmental change are unable to ensure the safety of their population.

Certainly, human rights law has some capacity to foster international cooperation. The International Covenant on Economic, Social and Cultural Rights calls for ‘international assistance and co-operation, especially economic and technical’.<sup>50</sup> Moreover, Wouters has argued that some international human rights treaties contain an obligation not to expel aliens who could not return in dignity in their home country,<sup>51</sup> a norm similar to the central provision of the Refugee Convention on the ‘prohibition of expulsion or return (“refoulement”)’.<sup>52</sup> Yet neither these remarks nor the discourse on a responsibility to protect have remedied the absence of any compulsory cooperation of the international community with a state unable to protect the individuals under its jurisdiction. A stronger incentive for international cooperation is essential: too often, human rights are conceived as a relationship between a nation and a state, and this concept does not lead to a discourse sufficiently supportive of cross-border cooperation.

### Development

There is a strong but ill-defined link between environmental migration and development. Certainly, development has a decisive impact on the adaptation capacity, illustrated for instance by a comparison between the Netherlands (where one-quarter of the territory lies below sea level) and Bangladesh. But the conceptual relationship between migration and development is more complex than that. Migration may help development through remittances, but soon the ‘brain drain’ will be an impediment. Under-development may

47 See in particular: S. McInerney-Lankford, ‘Climate Change and Human Rights: An Introduction to Legal Issues’ (2009) 33 *Harv Envtl L Rev* 431.

48 See Human Rights Council Resolutions 7/23, 10/4, 16/11 and 18/22. See also Cancun Agreements, above n. 44, seventh recital.

49 International Covenant on Economic, Social and Cultural Rights, Art. 2.1.

50 *Ibid.*

51 See generally: C. Wouters, *International Legal Standards for the Protection from Refoulement: A Legal Analysis of the Prohibitions on Refoulement Contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture* (Portland: Intersentia, 2009).

52 Convention Relating to the Status of Refugees, Art. 33.

be a cause of out-migration, but development and additional resources may allow more individuals to fund a migratory strategy and accelerate migration.<sup>53</sup>

The relationship between development and adaptation is also ambivalent. From a policy perspective, a report by the World Resources Institute showed that '[f]ailure to clarify the relationship between adaptation and development runs the risk that funding mechanisms will create redundancies or leave gaps in the landscape of activities that receive support', while 'efforts to draw a distinct line between adaptation and development can prove counterproductive'.<sup>54</sup>

International development law is mainly constituted by a set of soft legal instruments (e.g. General Assembly resolutions, conference statements) calling for official development assistance. In particular, in 1970 the International Development Strategy for the Second United Nations Development Decade, adopted by the General Assembly, conceded that '[d]eveloping countries must, and do, bear the main responsibility for financing their development', but also provided that:

In recognition of the special importance of the role which can be fulfilled only by official development assistance, a major part of financial resource transfers to the developing countries should be provided in the form of official development assistance. Each economically advanced country will progressively increase its official development assistance to the developing countries and will exert its best efforts to reach a minimum net amount of 0.7 per cent of its gross national product at market prices by the middle of the Decade.<sup>55</sup>

Most developed countries have never reached this target, reaffirmed several times since 1970.<sup>56</sup> According to the Organisation for Economic Co-operation and Development (OECD), in 2010, official development assistance from developed countries represented only 0.32 per cent of their gross national income (GNI).<sup>57</sup> Over the last decade, attention has been diverted from quantitative targets through an emphasis on qualitative development.<sup>58</sup>

Further research is needed on literature and discourses on development and their legal significance when the international community faces environmentally induced migration. Can the right to development, declared by the General Assembly in 1986,<sup>59</sup> be an approach by which to address environmental migration? What role could official development assistance play? A meaningful contribution by international development law to the issue of environmental migration could be the holistic approach adopted by the former: the development discourse generally goes hand-in-hand with calls for international cooperation, as it is well understood that national development greatly depends upon global circumstances.

53 G. Hugo, *Migration, Development and Environment* (IOM, 2008) at 20 *et passim*.

54 H. McGray, A. Hammill and R. Bradley, *Weathering the Storm: Options for Framing Adaptation and Development* (World Resources Institute, 2007) at 4. See also H. de Haas, *Turning the Tide? Why "Development Instead of Migration" Policies are Bound to Fail* (International Migration Institute, University of Oxford, Working Paper, 2006).

55 General Assembly Resolution 2626 (XXV) 'International Development Strategy for the Second United Nations Development Decade' at 41, 43.

56 Most recently, see General Assembly Resolution 65/159, 'Protection of Global Climate for Present and Future Generations of Humankind', para. 78(f).

57 See OECD website: <http://webnet.oecd.org/oda2010/>.

58 See in particular: Paris Declaration on Aid Effectiveness, 2005; Accra Agenda for Action, 2008.

59 General Assembly Resolution 41/128, 'Declaration on the Right to Development'.

### Humanitarian relief

International humanitarian law has developed a set of protective norms applicable in time of armed conflicts. Their core is constituted by the four 1949 Geneva Conventions and their three additional protocols. In particular, this field of law may be relevant in its interaction with refugee law, in the case of environmentally induced migration caused by conflicts in turn fuelled by environmental change.<sup>60</sup> The Fourth Geneva Convention prohibits the ‘individual or mass forcible transfer, as well as deportation’ of civilians, save for the ‘total or partial evacuation of a given area if the security of the population or imperative military reasons so demand’.<sup>61</sup> In the latter case, it provides for some minimum standards of treatment. The Second Additional Protocol contains similar (though less detailed) provisions in case of internal conflict.<sup>62</sup> The Geneva Conventions and their protocols also protect refugees and stateless persons.<sup>63</sup>

However, international humanitarian relief spans much further than situations of armed conflicts, extending in particular to humanitarian emergency in the context of natural disasters. Except for the particular circumstance of the law on armed conflicts, international humanitarian relief has generally not been supported by strong, binding legal norms. Like official development assistance, international efforts around humanitarian relief were mostly conceived of as the discretionary actions of states. Unable to blunt the state-centredness of the Westphalian international system, international and non-governmental organisations have, at most, tried to direct the resources that states made available within a multilateral regime.

In 1991, the General Assembly adopted a ‘text ... for the strengthening of the coordination of emergency humanitarian assistance of the United Nations system’.<sup>64</sup> This includes some ‘guiding principles’ inspired by the Geneva Conventions: noting that ‘humanitarian assistance is of cardinal importance for the victims of natural disasters and other emergencies’, they highlight that ‘humanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality’.<sup>65</sup> The United Nations Office for the Coordination of Humanitarian Affairs (OCHA) was established to ‘bring ... together humanitarian actors to ensure a coherent response to emergencies’.<sup>66</sup> In Resolution 58/177 in 2003, the General Assembly highlighted the ‘central role’ of the head of OCHA ‘for the inter-agency coordination or protection of and assistance to internally displaced persons’.<sup>67</sup>

If humanitarian relief generally aims to react after a disaster, another path of action aspires to reduce the risk of such disasters, for no disaster is *entirely* natural. Thus, disaster risk reduction (DRR) flourished out of a growing awareness that responding to natural disasters is not enough. The United Nations International Strategy for Disaster Reduction

60 On the interplay of international humanitarian law and refugee law, see for instance: S. Jaquemet, ‘The Cross-Fertilization of International Humanitarian Law and International Refugee Law’ (2001) 843 *International Review Red Cross* 651.

61 Convention (IV) relative to the Protection of Civilian Persons in Time of War, Art. 49.

62 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Art. 17.

63 Convention (IV) relative to the Protection of Civilian Persons in Time of War, Arts 44, 70; Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Art. 73.

64 General Assembly Resolution 46/182 ‘Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations’, Art. 1.

65 *Ibid.*, annex, paras 1, 2.

66 ‘Who we are.’ OCHA website. Available at: [www.unocha.org/about-us/who-we-are](http://www.unocha.org/about-us/who-we-are).

67 General Assembly Resolution 58/177 ‘Protection of and assistance to internally displaced persons’, op. para. 12.

defined DRR as '[t]he concept and practice of reducing disaster risks through systematic efforts to analyse and manage the causal factors of disasters, including through reduced exposure to hazards, lessened vulnerability of people and property, wise management of land and the environment, and improved preparedness for adverse events'.<sup>68</sup> In 2005, the World Conference on Disaster Reduction adopted the Hyogo Framework for Action 2005–2015. This framework is based on the assumption that DDR should be addressed as a cross-cutting issue:

... efforts to reduce disaster risks must be systematically integrated into policies, plans and programmes for sustainable development and poverty reduction, and supported through bilateral, regional and international cooperation, including partnerships. Sustainable development, poverty reduction, good governance and disaster risk reduction are mutually supportive objectives, and in order to meet the challenges ahead, accelerated efforts must be made to build the necessary capacities at the community and national levels to manage and reduce risk.<sup>69</sup>

Therefore, the Hyogo framework adopts the goal of a 'more effective integration of disaster risk considerations into sustainable development policies, planning and programming at all levels, with a special emphasis on disaster prevention, mitigation, preparedness and vulnerability reduction'.<sup>70</sup>

There is no doubt that DDR has direct significance on environmentally induced migration, both as a way to avoid or to manage migration. In a 2010 report, the IOM highlighted that:

[Disaster Risk Management], DRR and [Climate Change Adaptation] are complementary tools and have a cumulative effect, reinforcing each other in building resilience and the capacity to cope with adverse and changing conditions. ... Beyond the so-called institutional divide between the humanitarian, development and environmental communities, IOM, looking at the cross-cutting issue of migration, believes that we share a common goal of promoting the resilience of communities and countries based on understanding the nature of risks and vulnerability and the need to adjust accordingly.<sup>71</sup>

### Responsibility

A last field of law that may be relevant in the face of environmental migration is responsibility. In international law, the *Trail Smelter* case of 1941 established that:

... under the principles of international law, ... no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.<sup>72</sup>

68 2009 UNISDR Terminology on Disaster Risk Reduction. Available at: [www.unisdr.org/files/7817\\_UNISDRTerminologyEnglish.pdf](http://www.unisdr.org/files/7817_UNISDRTerminologyEnglish.pdf).

69 Hyogo Framework for Action 2005–2015, para. 4.

70 *Ibid.*, para. 12.

71 IOM, *Disaster Risk Reduction, Climate Change Adaptation and Environmental Migration: A Policy Perspective* (2010) at 12.

72 *United States of America v Canada* (1941) 3 RIAA 1911 (Mixed Arbitral Tribunal) at 1965.



The ‘no harm’ principle, understood as a due diligence obligation to prevent trans-boundary pollution, was later reassessed in several legal instruments and is now part of international customary law.<sup>73</sup>

Secondary rules on state responsibility were synthesised by the International Law Commission. The Draft Articles on Responsibility of States for Internationally Wrongful Acts reflected that ‘[e]very internationally wrongful act of a State entails the international responsibility of that State’.<sup>74</sup> Accordingly, the ‘[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter’.<sup>75</sup>

Nonetheless, Tuvalu’s repeated threats to lodge a claim before the International Court of Justice (ICJ) against Australia and the United States, on the grounds that these countries are responsible for the consequences of climate change in this tiny island state, are unlikely to succeed, not least because the United States would first need to accept the jurisdiction of the ICJ in this matter.<sup>76</sup> Significant causation issues would certainly impede any legal proceedings. Tuvalu would not only have to prove that greenhouse gas (GHG) emissions in Australia and the United States have (partly) caused a global environmental change, but also that global environmental change (and no other natural or manmade phenomena) is the cause of environmental degradation in Tuvalu. While there is little doubt that the environmental degradation of small island developing state has ‘serious consequences’, the contribution of one given state to global environmental change is only a very partial cause of these events. Certainly, the standard, bilateral conception of the responsibility of one state *vis-à-vis* one other state is ill-adapted to addressing environmental migration.

The responsibility of states may alternatively be sought before human rights bodies, thus apparently eluding the causation issues: a state is responsible to protect the human rights of its population without regard to its contribution to climate change. At least two such petitions are currently pending before the Inter-American Commission for Human Rights, one on behalf of Inuit peoples against the United States, another on behalf of aboriginal communities of the Amazon against Brazil’s plan to displace them as part of the Belo Monte hydroelectric project. However, such claims are different in nature; states are not responsible *qua* polluter (or because they failed to prevent GHG emissions within their jurisdiction), but *qua* human rights guarantors. Consequently, too strong an emphasis on human rights law tends to deny the culpability of developed states.

It is not just states that can be held accountable for environmental change; large multinational corporations are another possible culprit. This legal avenue was taken by Kivalina, a 400-inhabitant Alaskan village that had to be relocated further from the coast because global warming had allegedly resulted in the reduction of sea ice, erosion and a greater vulnerability to storm waves and surges. The village sought the responsibility of 24 major industrial companies for their alleged ‘contributions to global warming’. In *Native Village*

73 In particular: United Nations Framework Convention on Climate Change, Recitals 8 and 9; Declaration of the United Nations Conference on the Human Environment, Principle 21; Rio Declaration on Environment and Development, Principle 2. See, also, P. Sands, ‘International Law in the Field of Sustainable Development: Emerging Legal Principles’ in W. Lang (ed.), *Sustainable Development and International Law* (Leiden: Martinus Nijhoff, 1995) 53 at 62.

74 Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 1.

75 *Ibid.*, Art. 34.

76 See K. Seneviratne, ‘Tiny Tuvalu Steps up Threat to Sue Australia, US’ *Inter Press Service* (5 September 2002); A. Ielemia, ‘A Threat to our Human Rights: Tuvalu’s Perspective on Climate Change’ 44 *UN Chronicle* 18 (2007).

of *Kivalina v ExxonMobil Corp.*, the Northern District Court of California dismissed the suit as a non-justiciable political question.<sup>77</sup> At the time of writing, the appeal decision of the Ninth Circuit Court of Appeal is still unknown.

## CONCLUSION: THE CHALLENGE OF FRAGMENTATION

Many fields of law are, or may be, relevant in the face of environmental migration. A thorough analysis of these norms is necessary to identify possible complementarities, overlaps, and gaps. The difficulty of this analysis is that each legal field has developed its own culture – a set of notions, standards and ways of analysing the reality – and pursues its own objectives. These may be inconsistent, or in conflict with one another. For instance, Professor Ellis highlights that ‘reforestation and afforestation to create carbon sinks may be carried out in a manner that is harmful to biological diversity’.<sup>78</sup> So far, international law has not been able to arbitrate in conflicts between different normative fields. Our bag of marbles threatens to break if it becomes too full and too heavy. A more coherent structure is necessary. The next section pleads for sustainable development law as a project to reconcile these different approaches.

## THE TAPESTRY: SUSTAINABLE DEVELOPMENT LAW ON ENVIRONMENTAL MIGRATION

Edgar Morin suggests a tapestry as the representation of a coherent synthesis to our world’s complexity. This section argues that sustainable development law may be the frame on which relevant legal approaches may be woven.

### SUSTAINABLE DEVELOPMENT LAW AS AN ‘OVERARCHING CONCEPT’<sup>79</sup>

In 1987, as a result of a General Assembly resolution,<sup>80</sup> the World Commission on the Environment and Development, chaired by Gro Harlem Brundtland, issued a report entitled ‘Our Common Future’ (also known as ‘the Brundtland report’). This document famously defined sustainable development as ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’.<sup>81</sup> The Brundtland Commission surely did not invent the notion of sustainable development. Even beyond the notion of ‘sustainable development’, as Segger and Khalfan argue, the idea that ‘the humanity must live with the carrying capacity of the earth, and manage natural resources so as to meet both current demand and the needs of future generation ... has long been recognized’.<sup>82</sup> Yet the Brundtland report did ‘popularize ... the concept of sustainable development in international discourse’.<sup>83</sup>

77 *Native Village of Kivalina v ExxonMobil Corp. et al.*, 663 F.Supp.2d 863, 2009 WL 3326113 (ND Cal. 2009). See A. E. Breakfield, *Political Cases or Political Questions: The Justiciability of Public Nuisance Climate Change Litigation and the Impact on Native Village of Kivalina v ExxonMobil* (2011) 17 *Hastings West-North-west Journal of Environmental Law and Policy* 39.

78 J. Ellis, ‘Sustainable Development and Fragmentation in International Society’ in D. French (ed.), *Global Justice and Sustainable Development* (Leiden: Martinus Nijhoff, 2010) 57 at 59.

79 *Ibid.*

80 General Assembly Resolution 38/161, ‘Process of Preparation of the Environmental Perspective to the Year 2000 and Beyond’.

81 G.H. Brundtland, *Our Common Future* (1987) at 87.

82 M.C. Cordonier Segger and A. Khalfan, *Sustainable Development Law: Principles, Practices, and Prospects* (New York: Oxford University Press, 2004) 16.

83 *Ibid.*

In the last quarter-century, Ellis has shown that sustainable development has become a double negation: ‘a concept that it is virtually impossible to oppose outright, but it is far from possessing a taken-for-granted quality’.<sup>84</sup> The legal principle was enthroned at the 1992 Earth Summit, with references in the UNFCCC, the Convention on Biological Diversity, and (12 times!) in the Rio Declaration on Environment and Development.<sup>85</sup> Moreover, Agenda 21 detailed, over 800 pages, a plan to organise ‘global partnership for sustainable development’.<sup>86</sup> Five years later, the General Assembly convened a special session on sustainable development and, in 2002, the World Summit on Sustainable Development in Johannesburg ‘reinvigorat[e] global commitment to sustainable development’.<sup>87</sup>

In the meantime, ICJ Judge Weeramantry argued, in a separate opinion in the *Gab ikovo-Nagymaros* case, that sustainable development is a ‘principle of international law’, highlighting the ‘wide and general recognition of the concept’ in international legal instruments.<sup>88</sup> Accordingly, [s]ustainable development is one of the most vibrant current topics in the development of domestic and international law. It is also one of the least developed topics in international law, legal jurisprudence, and scholarship’.<sup>89</sup> For Judge Weeramantry, sustainable development is not just “soft” law, nor is it just “aspirational”: ‘sustainable development is a substantive area of the law in a very real sense. Courts and countries must endeavour to administer and implement sustainable development law, just as is done with other “hard” and established rules’.<sup>90</sup>

Today, however, Ellis considers that sustainable development ‘holds an uncertain place in international law’, being alternately described ‘as a principle of international law, an umbrella concept which draws together a number of international legal principles, a body of international law in its own right, and as an influential concept which, though it does not itself have the status of a legal norm, has immense actual and potential significance to legal norms and institutions’.<sup>91</sup> In sum, sustainable development may be a language rather than a set of norms. In Ellis’s words, it is an ‘overarching concept or set of policy goals on which broad consensus can be won, and which can then serve to orient and coordinate developments in various bodies of international law’.<sup>92</sup> The global enthusiasm for the concept of sustainable development in the legal literature results from its capacity to structure knowledge from isolated fields in a coherent, fair, and relatively consensual manner.

Therefore, it is no surprise that this language is widely used. In 2008, Schrijver noted that 24 national constitutions referred to sustainable development,<sup>93</sup> and the number has probably increased since then. But beyond states, sustainable development aims at becoming the universal language of the peoples; it has been acclaimed by civil society

84 See Ellis, above n. 79 at 66.

85 United Nations Framework Convention on Climate Change, Art. 3(4); United Nations Convention on Biological Diversity, Art. 8(e); Rio Declaration on Environment and Development, Principles 1, 4, 5, 7, 8, 9, 12, 20, 21, 22, 24 and 27.

86 Agenda 21 (1992) at op. para. 1.1.

87 See Segger and Khalfan, above n. 83 at 25.

88 Separate Opinion of Vice-President Weeramantry in *Gab ikovo-Nagymaros* project (1998).

89 C.G. Weeramantry, ‘Foreword’ in Segger and Khalfan, above n. 83 at ix.

90 Ibid.

91 See Ellis, above n. 79 at 64–65.

92 Ibid.

93 N. Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status* (Leiden: Martinus Nijhoff, 2008) at 153.

organisations worldwide. Thus, it may be a first step toward the realisation of Rajagopal's proposal for an 'international law from below'.<sup>94</sup>

Today, many questions raised by sustainable development remain open. Is this project workable? How far can different fields of law be articulated in a common language? How consensual can it be for peoples worldwide? In a provocative argument, Fischer-Lescano and Teubner submitted that '[l]egal fragmentation cannot itself be combated', and that nothing more than a 'weak normative compatibility of the fragments might be achieved'.<sup>95</sup> At least, however, legal and interdisciplinary coherence should be considered an ideal goal, and sustainable development is likely to help in moving towards this ideal.

## SUSTAINABLE DEVELOPMENT LAW AS AN UMBRELLA FOR NORMS RELEVANT TO ENVIRONMENTAL MIGRATION

In a 2010 report on 'disaster risk reduction, climate change adaptation and environmental migration' presented at the Cancun Conference on climate change, IOM highlighted that,

... beyond the so-called institutional divide between the humanitarian, development and environmental communities, IOM, looking at the cross-cutting issue of migration, believes that we share a common goal of promoting the resilience of communities and countries based on understanding the risks and vulnerability and the need to adjust accordingly.<sup>96</sup>

This adjustment is precisely what sustainable development proposes.

The different norms relevant in the face of environmental migration can be structured along the three pillars of sustainable development. The social pillar includes law on internal displacement, statelessness, political asylum and subsidiary protection, temporary protection, human rights, humanitarian relief, responsibility, etc. The economic pillar reassembles law on a rights-based approach to development, international cooperation for development and development projects, etc. Lastly, the environmental pillar puts together general environmental law with law on climate change, land use, etc. However, some other fields of law relevant in the face of environmental migration span over two or three pillars; such is the case of law on migration (between the social and economic pillars) and on disaster management (between the three pillars).

There is an immense potential for sustainable development to coordinate and, possibly, reconcile the different fields of law relevant in the face of environmental migration. From a technical point of view, sustainable development may act as an interpretative principle, particularly when different norms relevant to environmental migration are contradictory. But more broadly, sustainable development may help in framing new normative frameworks to be applied to environmental migration, and it may be used as the touchstone to evaluate existing policies. As the 2010 IOM report suggested, a common goal of different normative approaches may be the promotion of the sustainability of human societies, both during and after displacement from natural disasters.

94 B. Rajagopal, *International Law from Below* (Cambridge University Press, 2003); 'International Law and Social Movements: Challenges of Theorizing Resistance' (2002) 41 *Columbia Journal of Transnational Law* 397.

95 G. Teubner and A. Fischer-Lescano, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2003) 25 *Michigan Journal of International Law* 999 at 1004.

96 IOM, *Disaster Risk Reduction, Climate Change Adaptation and Environmental Migration*, above n. 72.

Therefore, sustainable development allows one to go beyond a mere collection of existing norms. It offers a constructive synthesis of different approaches within a unique, comprehensive, and coherent language. This language assumes, as Judge Weeramantry explained, that ‘we have passed out of the era of co-existence, into the era of cooperation’<sup>97</sup> not only between peoples but also, more broadly, between disciplines and generations.

### CHALLENGES TO SUSTAINABLE DEVELOPMENT LAW AS AN UMBRELLA

Ellis submitted that ‘[i]f fragmentation within law, and among social systems more generally, is to be understood as the inevitable consequence of increased complexity in society, then a concept like sustainable development, with its explicitly integrative thrust, is concurrently extremely useful and very difficult to implement’.<sup>98</sup> While sustainable development may establish a comprehensive normative framework on environmental migration, several hurdles will have to be overcome.

The first obstacle is related to the difficulties of carrying out cross-cutting studies on environmental migration. Much research will be needed to understand how each field of law relevant to environmental migration may be connected with other fields of law. Research teams will need to bring together lawyers with different areas of expertise and, often, different cultures, who may even ignore the existence of one another.

A second challenge derives from the striking lack of available empirical information on law and policies implemented to face environmental migration (particularly at the community, local, or domestic level of governance) and from the disconnect between legal and empirical research. It is essential that legal research on environmental migration be built on empirical elements from the social, environmental, and political sciences, including, in particular, observations of ongoing migratory phenomena, foresight regarding future environmental phenomena and their likely consequences, and discussion of existing policies. More specifically, past and existing norms and experiences must be compiled, put in parallel, and evaluated so that evidence-based analyses of the interplay of different fields of law with different phenomena can be developed, leading to integrative, policy-relevant studies, and improvement of the law.

## CONCLUSION

First, I described the radical projects of changing refugee law and recognising, perhaps through an international convention, a new category of individuals – what I call the monolithic approach of environmental migration law, aiming at a kind of obelisk. Secondly, I argued that a plethora of existing norms do, indeed, apply in the circumstances of environmental migration, and I listed some of these norms. In no case was my argument that these norms are *sufficient*, but at least I denied the opposite radical argument, that there would be absolutely no law applicable in the face of environmental migration. Thirdly, I argued that the collection of miscellaneous existing norms should be woven together in a more coherent structure, and that sustainable development law, as a nascent language, could allow such a synthesis (which I call a ‘tapestry’). Thus, my final argument is that sustainable development law may be a language through which heterogeneous legal fields and miscellaneous norms may be put on the same plane, compared and articulated, thus allowing the identification of plural legal gaps to which it could realistically be remedied.

97 See Weeramantry, above n. 90 at xi.

98 See Ellis, above n. 79 at 58.

Ming Chen, the Dean of the Louis D. Brandeis School of Law, University of Louisville, recently proposed a 'hierarchy of legal scholarship'. At the lower end of this hierarchy, Chen situates blog posts and the 'publication of what are essentially blog posts with footnotes'. Higher stages include different kinds of doctrinal works ('doctrinal reviews of the state of the law' and 'of interesting questions of law', and 'doctrinal synthesis of developments in law'). Next come policy-relevant scholarship, 'normative policy analysis of law', with or without 'substantial reform proposals'. 'Legal theory' follows. Finally, Chen situates "law and" interdisciplinary studies', 'empirical studies of legal institutions', and 'empirical studies of law's impact on society' at the top of his hierarchy.

Although one may question the utility of such a hierarchy – there is certainly a middle ground between the post-modern relativism according to which all forms of scholarship are equal and such a rigid hierarchical view – it is tempting to apply it to the current normative debate on environmental migration. 'Blog posts with footnotes' were developed by liberal researchers and were efficient in flagging environmentally induced migration as an issue and putting new ideas forward; but, I argued, they lacked a solid analysis of existing law. However, isolated doctrinal works followed, looking at the application of existing law on refugees, stateless persons, human rights, migration, subsidiary protection, etc. From mid-2010, plenty of normative policy analyses were published, and some substantial reforms based on legal analyses rapidly followed. However, no existing legal scholarship on environmental migration has yet reached the last four stages identified by Chen: 'legal theories', 'law and' interdisciplinary studies, 'empirical studies of legal institutions', and 'empirical studies of law's impact on society'. I argue that such analyses are urgently needed and that they could be triggered by an approach based on the notion of sustainable development.

Identifying people in need and pleading for their protection is an essential but insufficient task. The approach of environmental migration law as an obelisk (i.e. the erection of a heavy, monolithic legal structure) is at best a long-term undertaking and, at worst, an impossible mission. Hands have to get dirty to shape a collection of 'marbles', these little normative elements that, taken together, may help international law to protect people displaced in the context of environmental change. Yet a bag of marbles is fragile: some may be lost if the bag breaks, or the right marble is not played at the right time. Therefore, this article argued that further research should be based on developing sustainable development law, as a tapestry that weaves together all relevant legal fields and seeks coherence.

The vagueness of the language on sustainable development law does not prevent it from at least providing a forum for discussion. But its corollary flexibility enables it to explore many promising issues, putting isolated legal fields and different disciplines into perspective. Thus, sustainable development law is not likely to look only at legal norms, but also at their implementation and adaptation to the issues that are to be tackled. In other words, a sustainable development legal framework calls for nothing less than the last four categories of Ming Chen's hierarchy of law: legal theories, 'law and' studies, empirical studies on legal institutions, and law's impact on society.

As a framework, a mindset, or an umbrella as you will, sustainable development does not bring many answers, but it does raise issues in a provocative way and pushes for cross-cutting answers; this is precisely the way by which new issues may develop coherence and affirm their importance. To this extent, we can only agree with Ellis's affirmation that sustainable development 'still has the potential to play a role in challenging or disrupting settled assumptions about what is reasonable or acceptable, and it is still sufficiently controversial, even among those who accept its broad objectives, to

generate real debate and discussions'.<sup>99</sup> Flexibility, vagueness or indecision are assets, not drawbacks, when foundations remain to be laid; in such circumstances, existential doubts proper to the notion of sustainable development are not only useful, but probably necessary.

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<sup>99</sup> *Ibid.* at 66.