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The International Legal Protection of Climate (or Environmental) Migrants at the Crossroads: Fraternity, Responsibility and Sustainability

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I. INTRODUCTION

It is estimated that, over the next four decades, slow onset phenomena (*e.g.*, desertification, rise in sea level, increased vulnerability) and sudden weather events will combine and, according to some estimates, might lead to the displacement of up to 250 million persons.¹ Such displacements may be internal or international, individual or collective,

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¹ Interview of Norman Myers by Christian Aid (March 14, 2007), cited in Christian Aid, *Human Tide: The Real Migration Crisis* (2007), online: <<http://www.christianaid.org.uk/Images/human-tide.pdf>>, at 48. See also previous estimation of 200 million: Norman Myers, “Environmental Refugees: An Emergent Security Issue” (Paper presented to the 13th OSCE Economic Forum, Prague, May 23, 2005), online: <<http://www.osce.org/eea/14851>> [hereinafter “Myers, 2005”]. The recent publication of two reports taking an almost opposite perspective on the importance of climate migrations reflects current uncertainties. See Asian Development Bank, *Policy Options to Support Climate-induced Migration* (2011), online: <<http://www.adb.org/SocialDevelopment/climate-migration/>> [hereinafter “Asian Development Bank”]; Cecilia Tacoli, *Not only climate change: mobility, vulnerability and socio-economic transformations in environmentally fragile areas in Bolivia, Senegal and Tanzania* (IIED, 2011), online: <<http://pubs.iied.org/10590IIED.html>>.

temporary, seasonal or permanent. No international legal document applies to such displacements.²

For the sake of this paper, “climate migrants” may be defined as persons displaced as a consequence of global, anthropogenic climate change, while the broader category of “environmental migrants” also includes people displaced by other changes in environmental conditions, for instance following a tsunami, an earthquake or an epidemic.

During the last decade, a growing number of scholars and non-governmental organizations have underscored the need for international legal protection of climate or environmental migrants. From these needs, the debate went directly on discussing whether protection should take the form of a protocol to the Refugee Convention³ or to the United Nations Framework Convention on Climate Change (“UNFCCC”),⁴ or be inspired by the Convention on Torture,⁵ or be a completely new convention.⁶ Yet, the adoption and implementation of a treaty by a sufficient number of states may face great diplomatic hurdles, to say the least.⁷ Several authors have recently argued that a convention is not actually essential⁸ and that the mere cooperation of states would be sufficient or

² See, e.g., Benoît Mayer, “The International Legal Challenges of Climate-induced Migration: Proposal for an International Legal Framework” (2011) 22:3 *Colo. J. Int’l Envtl. L. & Pol’y* 357 [hereinafter “Mayer”].

³ Republic of the Maldives Ministry of Environment, Energy and Water, *Report on the First Meeting on Protocol on Environmental Refugees: Recognition of Environmental Refugees in the 1951 Convention and 1967 Protocol Relating to the Status of Refugees* (Male, Maldives, August 14-15, 2006), cited in Franck Biermann & Ingrid Boas, “Protecting Climate Refugees: The Case for a Global Protocol” (2008) 50 *Environment* 8 [hereinafter “Biermann & Boas”]; Jeanhee Hong, “Refugees of the 21st Century: Environmental Injustice” (2001) 10 *Cornell J. L. & Pub. Pol’y* 323.

⁴ Biermann & Boas, *id.*

⁵ Dana Zartner Falstrom, “Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment” (2002) 13 *Colo. J. Int’l Envtl. L. & Pol’y* 1, at 18ff [hereinafter “Falstrom”].

⁶ Bonnie Docherty & Tyler Giannini, “Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees” (2009) 33 *Harv. Envtl. L. Rev.* 349, at 363 [hereinafter “Docherty & Giannini”]; Environmental Justice Foundation, *No Place Like Home* (London, 2008), online: <http://www.ejfoundation.org/pdf/climate_refugees_final.pdf>; David Hodgkinson *et al.*, “Towards a Convention for Persons Displaced by Climate Change: Key Issues and Preliminary Responses” (2008) 8 *The New Critic* 1; Emma Brindal, “Asia-Pacific: Justice for Climate Refugees” (2007) 32 *Alt. L.J.* 240, at 240.

⁷ Falstrom, *supra*, note 5, at 27; Philippe Boncour & Bruce Burson, “Climate Change and Migration in the South Pacific Region: Policy Perspectives” (2009) 5:4 *Policy Quarterly* 13, at 18; Angela Williams, “Turning the Tide: Recognizing Climate Change Refugees in International Law” (2008) 30 *L. & Pol’y* 502, at 517 [hereinafter “Williams”]; Bonnie Docherty & Tyler Giannini, “Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees” (2009) 33 *Harv. Envtl. L. Rev.* 349, at 400.

⁸ J. McAdam, “Swimming against the Tide: Why a Climate Change Displacement Treaty Is Not the Answer” (2011) 23:1 *Int’l J. of Refugee L.* 2.

more efficient to protect climate migrants' rights.⁹ Such cooperation could be encouraged and monitored by soft law instruments such as a General Assembly resolution, and implemented by an *ad hoc* organization.¹⁰ The scale of the regime has also been discussed: while most authors have defended a universal framework, others have recently pleaded for purely regional programs that are accordingly more able to deal with the heterogeneity of environmental migrations,¹¹ or have expressed support for a regional or bilateral implementation of universal standards.¹²

Thus, much was written about *what* should be included within an international legal framework on climate migration, and many details were extensively discussed about *how* it could be ensured that such a regime would be efficiently implemented. Yet, the questions *why* such a regime should be adopted and *how* it could be justified were most often avoided.¹³ Many tacit justifications seemed to rest on moral or ethical assumptions that developed states ought to help those in need and as environmental migrants are in need, they should be helped. Significantly, a growing branch of literature has discussed the application of "equity" (or, sometimes, "fairness") to the climate change legal regime in general or, more specifically, to a regime on climate migration.¹⁴

Fairness and equity have clear universal appeal: one can hardly deny that it would be desirable, fair, and potentially equitable to establish an international legal framework on climate migration. In particular, equity has been shown to determine several factors that should be considered within an international regime on climate change adaptation: a polluter's responsibility, the equal entitlement of each state or each person to

⁹ Mayer, *supra*, note 2.

¹⁰ *Id.*

¹¹ Docherty & Giannini, *supra*, note 6, at 400-401; Williams, *supra*, note 7, at 518; Mayer, *id.*

¹² Mayer, *id.*

¹³ However, McAdam and Saul recently asked: "is climate-induced displacement properly conceived of as a refugee issue, a migration issue, a human rights issue, an environmental issue, a security issue, or a humanitarian issue (left to the political discretion of individual governments and regulated outside the 'law')"? See J. McAdam & B. Saul, "An insecure climate for human security? Climate-induced displacement and international law" [hereinafter "McAdam & Saul"] in Alice Edwards & Carla Ferstman, *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge: Cambridge University Press, 2010), at 3.

¹⁴ See e.g., J. Ikeme, "Equity, environmental justice and sustainability: incomplete approaches in climate change politics" (2003) 13 *Global Environmental Change* 195. B. Müller, *Equity in Climate Change: The Great Divide* (Oxford: Oxford Institute for Energy Studies, 2002); Marco Grasso, *Justice in Funding Adaptation under the International Climate Change Regime* (New York: Springer, 2010).

natural resources, the differential capacity to contribute to climate finance and/or to act, the fulfilment of basic needs, the relative quantity of efforts carried out by each state, and perhaps the needs of future generations.¹⁵ Yet, because it lies on *several* competing, incompatible or at least contradictory criteria, equity generally fails to provide, or perhaps does not aim at articulating, one single, uncontroversial response to complex issues about what concretely the international community should do (or if it should act at all) and how. More fundamentally, although equity says what one *should* do, it does not frame a political agenda on its own. In other words, equity will not suffice to commit states to expansive action requiring extensive resources. Equity, on its own, is unlikely to trigger such a systematic framework of protection that could qualify as “legal”. It is all too obvious that today’s world is not “equitable” in that states do not strive to *ensure* an equitable allocation of resources between the nations in spite of the great gap between the world’s poor and its rich.¹⁶

If equity has some influence in international negotiations, at least as an argumentative tool, if not as a sincere but secondary consideration of some state representatives, other considerations that are more closely linked to national interests are likely to come first.

Therefore, beyond idealist thoughts about equity, putting the issue of climate migration on the international agenda and justifying international legal protection for climate migrants call for other arguments. Obviously, climate change migration is neither the only geopolitical issue facing our time, nor the only one that some international cooperation and certain amounts of money would help to solve. Why should the international community intervene to help the 10,000 inhabitants of Tuvalu, a low-lying island state threatened by a rise in sea-level, or even millions of people pushed away by environmental change in Asia, Africa or Amer-

¹⁵ See, e.g., John Ashton & Xueman Wang, “Equity and Climate, in Principle and Practice” in Joseph E. Aldy *et al.*, *Beyond Kyoto: Advancing the International Effort against Climate Change* (Arlington, VA: Pew Center on Global Climate Change, 2003) 61; Rosalind Cook, *Legal Responses for Adaptation to Climate Change: The Role of the Principles of Equity and Common but Differentiated Responsibility* (thesis, Utrecht University, 2010), online: <<http://igitur-archive.library.uu.nl/student-theses/2010-0629-200137/Cookthesis.PDF>>, at 13.

¹⁶ See, e.g., Branko Milanovic, “Global Income Inequality: What It Is And Why It Matters?” (United Nations Department of Economic and Social Affairs, Working Paper No. 26, ST/ESA/2006/DWP/26, August 2006), online: United Nations <http://www.un.org/esa/desa/papers/2006/wp26_2006.pdf>, at 7-8; Branko Milanovic, “Global inequality of opportunity: How much of our income is determined at birth?” (World Bank, Development Research Group, working paper, February 2009), online: World Bank <<http://siteresources.worldbank.org/INTDECINEQ/Resources/Where8.pdf>>.

ica, rather than intervening to help suffering populations in, for instance, Somalia, Darfur or Myanmar? What could push developed states to assist overseas displaced persons, while not helping those who drown almost every day while trying to migrate to Europe to find economic opportunities, or those who die of thirst in the Sonoran Desert on the border between Mexico and the United States? Explicitly justifying the international legal protection of climate migrants and determining its objectives could also help move the discussion on the scope and the content of this regime forward.

This paper identifies fraternity, responsibility and sustainability as three different grounds for the international protection of climate migrants. Each rests on different assumptions as to the nature of international relations and refers to different existing legal rules, which can be found in migration and refugee law, environmental law, development law, general international law, human rights law, tort law, administrative law or international law on peace and security. Overall, each of these grounds leads to fundamentally different conclusions, in particular in terms of the origin, nature, form, scope and scale of the protection provided to climate migrants, and identifies different right-holders (climate or environmental migrants) and different resource-providers. These grounds are not self-excluding and they are all likely to have a certain influence on a future regime. This paper shows what influence each of these grounds may have for the conception of an international protection of climate or environmental migrants. While this paper focuses on an *international* framework, most of the arguments could also be applied in national or regional contexts.

II. FRATERNITY ARGUMENTS: HELPING THOSE IN NEED

Justice Charles D. Gonthier once wrote that fraternity promotes the “*cooperation* of individuals in the community” and he emphasized that “[t]he first value of fraternity recognizes that there are certain people within this community who require special protection and to whom we have a commitment.”¹⁷ Probably the most obvious justification for such a “special protection” should be based on a spontaneous feeling of empathy for another human’s sufferings. The 18th-century philosopher Jean-

¹⁷ Charles D. Gonthier, “Liberty, Equality, Fraternity: The Forgotten Leg of the Trilogy, or Fraternity: The Unspoken Third Pillar of Democracy” (2000) 45 McGill. L.J. 567, at 574 [hereinafter “Gonthier”] (emphasis in the original).

Jacques Rousseau, while depicting a “natural state” pre-dating the “social contract”, argued that compassion is “so much the more universal and useful to mankind, as it comes before any kind of reflection; and at the same time so natural, that the very brutes themselves sometimes give evident proof of it”.¹⁸ Such feeling is translated in the work of numerous non-governmental organizations that help environmental migrants.¹⁹ More than compassion and public generosity, human rights embody this demand for protection of human dignity in a legal system. Fraternity, as a moral principle, calls on the community to provide “special protection” for anyone whose rights are affected. It translates into a form of *modus vivendi* or social contract,²⁰ which reflects the readiness of the members of a community to allocate a certain amount of their resources to help those in need, with a clear *quid pro quo*: the insurance of being helped in case they are themselves in need.

Environmental migrants are forced to migrate because of an environmental change that makes it impossible for them to live in dignity in their place of origin. For example, it cannot seriously be denied that environmental migrants’ rights are threatened when a whole island state is submerged.²¹ Even in less dramatic circumstances, environmental change may deprive a population of their means of subsistence, for instance through drought, the infiltration of salt water in arable lands or other forms of land degradation, or through massive destruction caused by a natural disaster. This may result in the infringement to several human rights, such as the right to life, freedom from inhuman or degrading treatment, the right to property, the right to an adequate standard of

¹⁸ Jean-Jacques Rousseau, “A Dissertation on the Origin and Foundation of the Inequality of Mankind” (1754), online: <<http://www.constitution.org/jjr/ineq.htm>>, Part 1 [translated by G.D.H. Cole] (original: “pitié ... vertu d’autant plus universelle et d’autant plus utile à l’homme qu’elle précède en lui l’usage de toute réflexion, et si naturelle que les bêtes mêmes en donnent quelquefois des signes sensibles”).

¹⁹ Non-governmental organizations working in the field of environmental migrations include Care International, Oxfam, the Pacific Conference of Churches, the World Council of Churches and Bread for the World.

²⁰ See in particular John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press of Harvard University Press, 1971). In Guyana and Colombia, solidarity is expressly recognized in the constitution. See Rudi Muhammad Rizki, *Report of the independent expert on human rights and international solidarity*, U.N. Doc. A/HRC/15/32, July 5, 2010, §55 [hereinafter “Rizki”].

²¹ Apisai Ielemia, “A Threat To Our Human Rights: Tuvalu’s Perspective On Climate Change” (2007) 44 U.N. Chronicle 18. On the consequences of climate change generally on human rights, see in particular Sumudu Atapattu, “Global Climate Change: Can Human Rights (and Human Beings) Survive this Onslaught” (2009) 20 Colo. J. Int’l Envtl. L. & Pol’y 35. See also Stephen Tully, “The Contribution of Human Rights as an Additional Perspective on Climate Change Impacts within the Pacific” (2007) 5 N.Z.J. Pub. & Int’l L. 169.

living including adequate food, clothing and housing, the right to the highest attainable standard of physical and mental health, as well as the right to a healthy environment, to natural resources and to social and economic development.²² During and after a relocation, other rights of environmental migrants may be threatened, such as the freedom from discrimination, the right to family life, political rights, cultural rights, rights to social assistance, the right to a nationality and the right to self-determination.²³

Even though environmental migrants are people in great need of special protection, the overarching concept of fraternity does not automatically translate into a legally binding obligation to protect them. As Justice Gonthier highlighted, “the concept or value underlying the duty may be widely shared, but as applied in law, the duty itself may be imposed on a limited class of people”.²⁴ Therefore, the whole success of fraternity as a ground of protection depends on its capacity to translate into a binding legal obligation. At the domestic level, fraternity is certainly a strong component of the nation, which was precisely defined as “large-scale solidarity, constituted by the feeling of the sacrifices that one has made in the past and of those that one is prepared to make in the future”.²⁵ Fraternity is also a core value of post-national states and multicultural societies such as Canada.²⁶

Thus, the moral concept of fraternity might translate in international law into positive obligations of states to protect internal environmental migrants within their territory. In particular, international human rights treaties demand that each state “undertakes to respect and to ensure to all

²² See, e.g., *Declaration of the United Nations Conference on the Human Environment*, June 16, 1972, U.N. Doc. A/Conf.48/14/Rev. 1, 11 I.L.M. 1416 [hereinafter “*Stockholm Declaration*”]; Human Rights Council, Report of the Special Rapporteur on the Right to Food, Jean Ziegler, U.N. Doc. A/HRC/4/30, January 19, 2007, para. 67; Human Rights Council, Resolution 6/27, “Adequate housing as a component of the right to an adequate standard of living”, December 14, 2007, §3, and Resolution 7/14, “The Right to Food”, March 27, 2008, 12th recital.

²³ On climate migrants human rights, see generally Benoit Mayer, *International Law and Climate Migrants: A Human Rights Perspective* (IDLO, Legal Working Paper Series: Sustainable Development Law on Climate Change, 2011), online: <<http://www.idlo.int/english/WhatWeDo/Programs/ClimateChange/Pages/WP.aspx>>. On the right to self-determination, see generally Cara Nine, “Ecological Refugees, States Borders, and the Lockean Proviso” (2010) 27 *Journal of Applied Philosophy* 359.

²⁴ Gonthier, *supra*, note 17, at 575.

²⁵ Ernest Renan, “What is a Nation?” (Conference at Sorbonne University, March 11, 1882), in Homi K. Bhabha, ed., *Nation and Narration* (London, New York: Routledge, 1990) 8, at 19 (original: “Une nation est donc une grande solidarité, constituée par le sentiment des sacrifices qu’on a faits et de ceux qu’on est disposé à faire encore”).

²⁶ Gonthier, *supra*, note 17, at 575.

individuals within its territory and subject to its jurisdiction”.²⁷ More specifically, the Guiding Principles on Internal Displacement²⁸ extend to internal environmental migrants. Yet, if international law does demand that each state protects internal environmental migrants within its jurisdiction, major hurdles may result from the inability or unwillingness of certain states to fully implement their obligations, potentially leading to *international* flows of environmental migrants. Such circumstances may require international financial or organizational support or the recognition of rights to displacement, migration, relocation and specific humanitarian and social support.

In an international context, fraternity is certainly a less pressing social demand. Yet, Justice Gonthier fairly highlighted that “fraternity may be universal in its object” and noticed that “[m]any of the goals advanced by international organizations involve fraternal concepts.”²⁹ The first recital of the Universal Declaration, repeated in several major international human rights conventions, recognizes the “equal and inalienable rights of all members of the human family”.³⁰ Similarly, in a report

²⁷ *International Covenant on Civil and Political Rights*, December 16, 1966, 999 U.N.T.S. 171 [hereinafter “ICCPR”], art. 2.1. See also *Convention for the Protection of Human Rights and Fundamental Freedoms*, November 4, 1950, 213 U.N.T.S. 222 [hereinafter “European Convention”], art. 1; *American Convention on Human Rights*, O.A.S. Treaty Series No. 36, November 22, 1969, 1144 U.N.T.S. 123 [hereinafter “Pact of San Jose”], art. 1; *Convention on the Rights of the Child*, November 20, 1989, 1577 U.N.T.S. 3, art. 2.1; Human Rights Committee, General Comment No. 23, “The rights of minorities (Art. 27)”, August 4, 1994, U.N. Doc. CCPR/C/21/Rev.1/Add.5, §4, and General Comment No. 31, “Nature of the General Legal Obligation Imposed on States Parties to the Covenant”, May 26, 2004, U.N. Doc. CCPR/C/21/Rev.1/Add.13, §10; *Bankovic v. Belgium* (2001), 12 E.C.H.R. 333.

²⁸ *Guiding Principles on Internal Displacement*, February 11, 1998, U.N. Doc. E/CN.4/1998/53/Add.2, “scope and purpose”, §2, which defines IDPs as 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 ... natural or human-made disasters, and who have not crossed an internationally recognized State border”. See also *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa*, October 22, 2009, 49 I.L.M. 86 [hereinafter “Kampala Convention”] (not yet entered into force). The Convention will enter into force after ratification by 15 States. So far (March 12, 2011), it has been ratified by one single state (Uganda). See African Union, List of Countries which Have Signed, Ratified/Acceded to the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), online: <<http://www.africa-union.org/root/au/documents/treaties/list/Convention%20on%20IDPs%20-%20displaced.pdf>>.

²⁹ Gonthier, *supra*, note 17, at 575.

³⁰ *Universal Declaration of Human Rights*, G.A. Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, U.N. Doc. A/810 (1948) 71 [hereinafter “Universal Declaration”], first recital. See also ICCPR, *supra*, note 27, first recital; *International Covenant on Economic, Social and Cultural Rights*, December 16, 1966, 993 U.N.T.S. 3, first recital; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, December 10, 1984, 1465 U.N.T.S. 112, first recital; *Convention on the Rights of Persons with Disabilities*, December 13, 2006, 993

released in 2010, the independent expert on human rights and international solidarity, Rudi Muhammad Rizki, reported the outcomes of consultations of states:

Many viewed international solidarity as the cornerstone of our responsibility to humanity and entry point for building a better society, and as a glue for social cohesion and guarantee against marginalization, exclusion and excessive disparities. Preserving the order and the very survival of international society should be based on the principle of solidarity and mutual assistance, particularly in the face of natural disasters, poverty, terrorism or post-conflict situations. There is a large gap between assertions of international solidarity in theory and their reflection in practice.³¹

Some soft law international instruments, in particular the *Vienna Declaration and Programme of Action*, further underscored the importance of solidarity in the realization of human rights.³² In particular, a resolution of the Human Rights Council adopted in 2009 reaffirmed that “all human rights are universal, indivisible, interdependent and interrelated” and underscored that “climate change is a global problem requiring a global solution”.³³ An oft-repeated argument is that environmental migrants should be specifically protected because their fundamental rights are at risk to be specifically affected. For instance, Bangladeshi finance minister Abul Maal Abdul Muhith called upon other states to “honour the natural right of persons to migrate”, explaining that Bangladesh “can’t accommodate all the people”.³⁴ Taken together, these assessments underscore a *moral* obligation for each state to protect environmental migrants at least as soon as the state that has jurisdiction over them is unable to provide such protection.³⁵

U.N.T.S. 3, recital (a); *Convention on the Rights of the Child*, November 20, 1989, 1577 U.N.T.S. 3, first recital.

³¹ Rizki, *supra*, note 20, §6.

³² See *Vienna Declaration and Programme of Action*, July 12, 1993, World Conference on Human Rights, U.N. Doc. A/CONF.157/23; *Monterrey Consensus*, March 22, 2002, United Nations International Conference on Financing for Development, U.N. Doc. A/CONF.198/11; *Paris Declaration on Aid Effectiveness*, March 2, 2005, OECD High Level Forum on Aid Effectiveness; *Accra Agenda for Action*, September 4, 2008, OECD Third High Level Forum on Aid Effectiveness. For a discussion on the legal authority of these documents, see Rizki, *id.*, §35.

³³ Human Rights Council, Resolution 10/4, “Human rights and climate change”, March 25, 2009, 4th and 9th recitals.

³⁴ Cited in J. Vidal, “Migration Is the Only Escape from Rising Tides of Climate Change in Bangladesh” *The Guardian*, December 4, 2009, online: <<http://www.guardian.co.uk/environment/2009/dec/04/bangladesh-climate-refugees/print>>.

³⁵ See also H.E. Dr. Ahmed Shaheed (Speech at Commonwealth Side-Event, April 6, 2009, online: <<http://www.foreign.gov.mv/v3/?p=speech&view=sep&id=54>>.

Yet, moral principles that are the foundation of law are not binding *per se*: they are applicable only through particular legal instruments, none of which is currently applicable to environmental migrants. In particular, states have manifested their “profound concern” for the situation of refugees and stateless persons and they have established specific protection regimes.³⁶ The 1951 *Geneva Convention* and its additional protocol³⁷ have often been justified through the notions of “solidarity”³⁸ or “fraternity”.³⁹ Yet, except for particular circumstances, environmental migrants do not fall within the scope of the 1951 *Refugee Convention* for lack of political persecution.⁴⁰ Statelessness might apply to some very extreme circumstances of environmental migration, but it will provide only minimal protection.⁴¹ For lack of *lex specialis*, most environmental migrants may invoke only human rights conventions; but still, these conventions limit state obligations to their own jurisdiction, which is generally understood as the territory over which a state has an

³⁶ *Convention relating to the Status of Refugees*, 189 U.N.T.S. 150, July 28, 1951 [hereinafter “*Geneva Convention*”], 2nd Recital; *Convention relating to the Status of Stateless Persons*, 360 U.N.T.S. 117, September 28, 1954, 2nd Recital.

³⁷ *Protocol Relating to the Status of Refugees*, 606 U.N.T.S. 267, October 4, 1967.

³⁸ See, for example, *Assistance to refugees, returnees and displaced persons in Africa*, G.A. Res. 65/193, U.N. G.A.O.R., 6th Sess., Supp. No. 49, A/RES/65/193 (2010) §16 (“Also reaffirms that respect by States for their protection responsibilities towards refugees is strengthened by international solidarity involving all members of the international community and that the refugee protection regime is enhanced through committed international cooperation in a spirit of solidarity and burden- and responsibility-sharing among all States.”).

³⁹ See, for example, Mr. Michelena (Venezuela), statement at the Executive Committee of the Programme of the United Nations High Commissioner for Refugees, in Summary of the Records of the 555th Meeting, held at the Palais des Nations, Geneva, on Tuesday, October 2, 2001: Executive Committee of the Programme of the United Nations High Commissioner for Refugees, 52nd session, U.N. Doc. A/AC.96/SR.555, at 8: “the spirit of solidarity and fraternity with which Venezuela would continue to support the High Commissioner’s task as far as its means permitted”; Mr. Al-Najar (Yemen), statement at the General Assembly Third Committee, in Summary record of the 45th meeting, held at Headquarters, New York, on Tuesday, November 20, 2001, at 10:00 a.m., U.N. Doc. A/C.3/56/SR.45, at 2: Yemen “had opened its doors to refugees from the Horn of Africa for reasons of fraternity, good neighbourliness and humanity”.

⁴⁰ See *Geneva Convention*, *supra*, note 36, art.1A§2, which requires a “well-founded fear of being persecuted”. See David Keane, “Environmental Causes and Consequences of Migration: A Search for the Meaning of Environmental Refugees” (2003) 16 *Geo. Int’l Envtl. L. Rev.* 217, at 217; Kara K. Moberg, “Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection” (2009) 94 *Iowa L. Rev.* 1107, at 1116; Jeanhee Hong, “Refugees of the 21st Century: Environmental Injustice” (2001) 10 *Cornell J. L. & Pub. Pol’y* 323, at 332; IASC, “Climate Change, Migration and Displacement: Who will be affected?” (2008) [unpublished; working paper submitted by the informal group on Migration / Displacement and Climate Change of the IASC], online: UNFCCC <<http://unfccc.int/resource/docs/2008/smsn/igo/022.pdf>>, at 4.

⁴¹ See Jane McAdam, “Disappearing States”, Statelessness and the Boundaries of International Law” in Jane McAdam, ed., *Climate Change and Displacement: Multidisciplinary Perspectives* (Oxford: Hart Pub., 2010) [hereinafter “McAdam”].

effective control.⁴² In other words, third states have no obligation as long as environmental migrants are not under their “jurisdiction”.⁴³ It is true that, *if an environmental migrant enters into the territory of a third state or otherwise falls within its jurisdiction*, the freedom from inhuman or degrading treatment and other fundamental rights would oppose their deportation to their state of origin where the enjoyment of these rights would be threatened.⁴⁴ Anticipating this legal “risk”, states may however react in further strengthening their border control and ensuring to push back environmental migrants before they enter their territory.⁴⁵ In addition, even when environmental migrants reach a safe country’s territory, the enforcement of their rights may be difficult and abuses are likely to be frequent.⁴⁶

The limitation of a state’s human rights obligations to their own jurisdiction does not result from the very concept of human rights, but only from the limited readiness of negotiating states to commit themselves to broad international cooperation. For instance, human rights, as a project, affirm in very broad terms “the inherent dignity and ... the equal and inalienable rights of *all members of the human family*”.⁴⁷ The fraternity argument is therefore well established, at least on a moral point of view, and it clearly pleads in favor of the extension of states’ human rights

⁴² See *supra*, note 27.

⁴³ The argument according to which a country has an effective control over another territory that is affected by its pollution is unlikely to succeed. Even when the pollution of one state was established as the direct cause of an environmental change in another state, this would not meet the nexus required within the “effective control” criterion. For an example of the intensity of this nexus, see *Bankovic v. Belgium*, *supra*, note 27, where the European Court of Human Rights excluded that a state has jurisdiction over a territory that it is bombarding, as this state does not have a sufficiently direct control on the attacked territory.

⁴⁴ See Human Rights Committee, General Comment No. 20, “Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)”, March 10, 1992, U.N. Doc. HRI/GEN/1/Rev.1, at 30, §9; *Soering v. United Kingdom* (1989) 11 E.C.H.R. (Ser.A) 439; C.W. Wouters, *International Legal Standards for the Protection from Refoulement: A Legal Analysis on 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* (Antwerp: Intersentia, 2009), at 187ff and 359ff; Nicole de Moor & Dr. An Cliquet, “Environmental Displacement: a New Challenge for European Migration Policy” (Paper presented to the Conference on “Protecting People in Conflict and Crisis: Responding to the Challenges of a Changing World”, Oxford, September 22, 2009) [unpublished], online: <<http://www.rsc.ox.ac.uk/PDFs/sessionIIgroup5nicolede Moor.pdf>>, at 7.

⁴⁵ On such asylum policies carried out in recent years, see, e.g., Jennifer Hyndman & Alison Mountz, “Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe” (2008) 42 *Government and Opposition* 249; Emily C. Peyser, “Pacific Solution”? The Sinking Right to Seek Asylum in Australia” (2002) 11 *Pac. Rim L. & Pol’y J.* 431.

⁴⁶ Kara K. Moberg, “Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection” (2009) 94 *Iowa L. Rev.* 1107, at 1117.

⁴⁷ *Universal Declaration*, *supra*, note 30, first recital (emphasis added).

obligations beyond their jurisdiction, for instance through the notion of a “responsibility to protect”⁴⁸ in the context of major crimes.

Rather than in international binding obligations, international fraternity *vis-à-vis* environmental migrants is reflected in voluntary policies followed by individual states, by international organizations and by civil society organizations, supported for instance through voluntary financial or organizational support. The international adaptation funding carried through the UNFCCC long focused on the increasing resilience of populations, but it has recently extended to “[m]easures to enhance understanding, coordination and cooperation with regard to climate displacement, migration and planned relocation, where appropriate, at the national, regional and international levels”.⁴⁹ The United Nations High Commission for Refugees (“UNHCR”) has so far excluded most internal environmental migrants from its mandate.⁵⁰ Other international organizations, such as the Asian Development Bank, are considering international support programs.⁵¹ Several states have also engaged in unilateral or concerted policies. For instance, Sweden and Finland adopted legislation granting subsidiary refugee protection for anyone who, “by reason of an environmental catastrophe, cannot return to his home country”.⁵² In other circumstances, national solidarity has led to immigration concessions. After the 2004 tsunami, Switzerland, Canada, the United States and the United Kingdom, following a recommendation of the UNHCR, suspended all deportations to the affected countries.⁵³

⁴⁸ See *Report of the Secretary-General on the Responsibility to Protect*, January 12, 2009, U.N. Doc. A/63/677, §11(a).

⁴⁹ *The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention*, UNFCCC decision 1/CP.16, Doc. FCCC/CP/2010/7/Add.1 (2010) 2 [hereinafter “*Cancun Agreements*”], §14(f).

⁵⁰ The UNHCR has constantly considered that it “does not have a general competence for internally displaced persons” and its intervention is far from automatic. *UNHCR’s Role with Internally Displaced Persons*, IOM/33/93-FOM/33/93, April 28, 1993, §8. See also Catherine Phuong, *The International Protection of Internally Displaced Persons* (Cambridge: Cambridge University Press, 2004), at 84. The UNHCR tends to consider only internally displaced persons who would qualify as refugees if they cross a border.

⁵¹ See Asian Development Bank, *supra*, note 1.

⁵² *Swedish 2005 Aliens Act*, SFS2005:716, Chapter 4, sect.2§3, online (official translation): <<http://www.sweden.gov.se/content/1/c6/06/61/22/bfb61014.pdf>>. See also Finnish *Aliens Act*, 301/2004, Sect. 88a(1), online (unofficial translation): <http://www.google.com/url?q=http%3A%2F%2Fwww.finlex.fi%2Fen%2Flaki%2Fkaannokset%2F2004%2Fen20040301.pdf&sa=D&snz=1&usq=AFQjCNH981IWt2R-DifAld9HB-ejIWwl_A>, see also <<http://www.finlex.fi/en/laki/kaannokset/2004/en20040301.pdf>>.

⁵³ Frank Laczko & Elizabeth Collett, “Assessing the Tsunami’s Effects on Migration”, April 2005, online: <<http://www.migrationinformation.org/USfocus/display.cfm?id=299>>.

Many states have domestic legislation providing temporary protection for people whose country of origin has undergone an environmental disaster. In the European Union, a directive organizes a procedure to give “temporary protection” in the event of “a mass influx of displaced persons from third countries that are unable to return to their country of origin”.⁵⁴ This protection might be applied to environmental migrants.⁵⁵ However, this procedure may be difficult to implement as it requires a decision of the Council at the qualified majority.⁵⁶ In the United States, similarly, the *Immigration Act of 1990* created a “temporary protected status”.⁵⁷ Accordingly, it falls to the Attorney General to consider that a state that has undergone an environmental disaster is “unable, temporarily, to handle adequately the return” of people originating from this country.⁵⁸ In application of this provision, the United States suspended all deportations to Haiti after the January 2010 earthquake.⁵⁹ Yet, in the EU as in the U.S., such a protection is only *temporary*, even if the disaster may have long-lasting repercussions.⁶⁰ The EU directive provides for a protection that normally lasts one year, but can be prolonged — or interrupted — by a decision of the Council.⁶¹ Similarly, the duration of the U.S. temporary protection also greatly depends on decisions of the Attorney General.⁶² The United States resumed deportations to Haiti in December 2010, despite the fact that the country had just been hit by a hurricane and was facing a cholera epidemic.⁶³

⁵⁴ EU, *Council Directive 2001/55/EC of 20 July 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*, [2001] O.J. L 212/12, celex number 32001L0055 [hereinafter “*Directive 2001/55/EC*”], art. 1.

⁵⁵ *Id.*, art. 2(c). See Vikram Kolmannskog & Finn Myrstad, “Environmental Displacement in European Asylum Law” (2009) 316 *Eur. J. Migr. & L.* 11, 313, at 316.

⁵⁶ *Directive 2001/55/EC, supra*, note 54, art. 5.1.

⁵⁷ *An Act to amend the Immigration and Nationality Act to change the level, and preference system for admission, of immigrants to the United States, and to provide for administrative naturalization, and for other purposes*, PL 101-649, 1990 S 358, Sect. 302, 8 USCA § 1254a [hereinafter “*Immigration Act of 1990*”].

⁵⁸ *Id.*, (b)(1).

⁵⁹ Julia Preston, “In Quake Aftermath, U.S. Suspends Deportations to Haiti” *New York Times* (January 13, 2010).

⁶⁰ Roberta Cohen & Megan Bradley, “Disasters and Displacement: Gaps in Protection” (2010) 1 *J. Int’l Human. Legal Stud.* 95, at 111-12.

⁶¹ *Directive 2001/55/EC, supra*, note 54, arts. 4 and 6.1.

⁶² *Immigration Act of 1990, supra*, note 57, (b)(3)B.

⁶³ Letter from the American Civil Liberties Association to President Barack Obama (December 29, 2010), online: <<http://www.aclufl.org/pdfs/HaitianLetter-2010-12-29.pdf>>.

As a conclusion, fraternity is mainly a *moral* ground for the international legal protection of environmental migrants.⁶⁴ Through the project of universal human rights, it may build the theoretical foundation to a form of cosmopolitan fraternity *vis-à-vis* environmental migrants. It calls for a broad protection of environmental migrants, before, during and after their relocation. The transformation into a legal protection of environmental migrants is more likely in a national context, where community and fraternity are stronger notions, than in an international context. Clearly, there are many circumstances in which states have not shown far-reaching solidarity for foreign populations in need, for example, to fight against extreme poverty, curable diseases or major crimes.⁶⁵ The independent expert on human rights and international solidarity, Rudi Muhammad Rizki, rightly underscored that “[t]he fact that more than 1 billion people suffer from poverty and hunger is an indicator that, as the human race, we are failing to live as one family.”⁶⁶ Thus, the question should not be “why are environmental migrants not protected while political refugees are protected?”, but rather “why are political refugees protected while most people in need of special protection are not protected?”. As has been described, the international protection of political refugees is grounded in other sorts of considerations. So, too, should be the protection of environmental migrants. Fraternity is surely a moral justification proudly put forward by states, but it is certainly not a strong incentive to commit to demanding international cooperation.

III. RESPONSIBILITY ARGUMENTS: SEEKING A DEBTOR

While fraternity starts from the needs of environmental migrants and seeks potential resources, responsibility goes in the opposite direction: first of all it identifies duty-holders, and then goes on to define the

⁶⁴ See for instance Maumoon Abdul Gayoom (president of the Republic of Maldives) “With Millions under Threat, Inaction is Unethical” *New York Times* (September 12, 2008), online: <<http://www.nytimes.com/2008/09/09/opinion/09iht-edgayoom.1.16011481.html>>.

⁶⁵ Among many other examples, the limits of the international solidarity appeared through the failure of the International Peacekeeping forces to prevent the massacre in Srebrenica. See Stephen Kinzer, “Dutch Conscience Stung By Troops’ Bosnia Failure” *New York Times* (October 8, 1995), online: <<http://www.nytimes.com/1995/10/08/world/dutch-conscience-stung-by-troops-bosnia-failure.html>>.

⁶⁶ Rizki, *supra*, note 20, §7.

content of their obligations towards climate migrants.⁶⁷ While fraternity is mainly a moral principle, responsibility is one of the most firmly established foundations of law. The core legal argument in favour of international protection of climate migrants boils down to a very simple syllogism. The major premise is that “[e]very internationally wrongful act of a State entails the international responsibility of that State.”⁶⁸ An internationally wrongful act of a state is defined as a “conduct consisting of an action or omission [which] (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State”.⁶⁹ The minor premise is that historical emissions by polluting states result in a harm undergone by the states that have jurisdiction over people forced to migrate because of climate change as well as, in the case of international migration, the states of refuge. Although the act of polluting may not be attributable to the state itself,⁷⁰ the wrongful act is the omission of the state to prevent persons under its jurisdiction from polluting. The international obligation that was breached is the no harm principle, a corollary of the well-established principle of the sovereign equality of states.⁷¹ Finally, the conclusion of the syllogism is that the failure of polluting states to prevent persons under their jurisdiction from polluting entails their international responsibility towards states that are affected by climate migration.

As a matter of fact, responsibility may be invoked either as a genuinely legal argument, or as a more political one. As a legal argument, a responsibility of polluters in cases of climate migration has already been claimed before domestic courts, yet never successfully.⁷² A representative

⁶⁷ See generally Peter Penz, “International Ethical Responsibilities to ‘Climate Change Refugees’” in McAdam, *supra*, note 41, 151, at 162-67.

⁶⁸ *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, in *Report of the ILC on the Work of its Fifty-third Session*, U.N. G.A.O.R., 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) 43 [hereinafter “*Draft Articles on State Responsibility*”], art. 1. See also *Corfu Channel (U.K. v. Albania)*, Merits, judgment, [1949] I.C.J. Rep. 4 [hereinafter “*Corfu Channel (U.K. v. Albania)*, Merits”], at 23; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, Merits, Judgment, [1986] I.C.J. Rep. 14, at 142, para. 283, and at 149, para. 292; *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, judgment, [1997] I.C.J. Rep. 7 [hereinafter “*Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*”], at 38, para. 47.

⁶⁹ *Draft Articles on State Responsibility, id.*, art. 2. See also *United States Diplomatic and Consular Staff in Tehran (USA v. Iran)*, Judgment, [1980] I.C.J. Rep. 3, at 29, para. 56. See also *Military and Paramilitary Activities in and against Nicaragua, id.*, at 117-18, para. 226; and *Gabčíkovo-Nagymaros Project, id.*, at 54, para. 78.

⁷⁰ See *Draft Articles on State Responsibility, id.*, arts. 4-11.

⁷¹ *Charter of the United Nations*, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153 [hereinafter “U.N. Charter”], art. 2(1).

⁷² See Joyeeta Gupta, *Who’s Afraid of Climate Change?* (Amsterdam: Vrije Universiteit, 2005), at 43; Donna Green & Kirsty Ruddock, “Could Litigation Help Torres Strait Islanders Deal

claim was brought by Kivalina, a 400-inhabitant Alaskan native village that had to be relocated further from the coast, as global warming allegedly resulted in the reduction of sea ice, erosion and a greater vulnerability to storm waves and surges.⁷³ The village brought a suit “to damages from global warming”⁷⁴ against 24 major industrial companies in reason of their “contributions to global warming”.⁷⁵ In *Native Village of Kivalina v. ExxonMobil Corp.*, the Northern District Court of California dismissed the suit of Kivalina as a non-justiciable political question.⁷⁶ This decision is currently under appeal before the Ninth Circuit Court of Appeal.⁷⁷

Other claims might oppose one state to another before international jurisdictions. For instance, Kiribati, Nauru, Papua New Guinea and Tuvalu adopted a common declaration highlighting that the adoption of the UNFCCC should “in no way constitute a renunciation of any rights under international law concerning a state’s responsibility for the adverse effects of climate change”.⁷⁸ Over the last decade, Tuvalu repeatedly threatened to lodge a complaint against Australia and the United States before the International Court of Justice (“ICJ”).⁷⁹ Obviously, the admissibility of such an action would first require that Australia and the

with Climate Impacts?” (2009) 9 S.D.L. & Pol’y 23. See also, generally, Roda Verheyen, *Climate Change Damage and International Law: Prevention, Duties and State Responsibility* (Boston: Nijhoff, 2005); Laura Westra, *Environmental Justice and the Rights of Ecological Refugees* (London: Earthscan, 2009); William C.G. Burns & Hari M. Osofsky, *Adjudicating Climate Change: State, National, and International Approaches* (Cambridge: Cambridge University Press, 2009).

⁷³ Luke W. Cole & Brent Newell, Attorneys for Plaintiffs Natie Village of Kivalina and City of Kivalina, Complaint for damages, February 26, 2008, online: <<http://www.climatelaw.org/cases/country/us/kivalina/Kivalina%20Complaint.pdf>>, §16.

⁷⁴ *Id.*, §1.

⁷⁵ *Id.*, §2.

⁷⁶ *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F.Supp.2d 863, 2009 WL 3326113 (N.D. Cal. 2009). See also Ashley 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 W.-Nw. J. Env. L. & Pol’y 39.

⁷⁷ 9th Circuit Court of Appeal, Doc. No. 09-17490.

⁷⁸ Declarations of Kiribati, Nauru, Papua New Guinea and Tuvalu on the United Nations Framework Convention on Climate Change, online: United Nations Treaty Collection, <http://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII~7&chapter=27&Temp=mtdsg3&lang=en>.

⁷⁹ Kalinga Seneviratne, “Tiny Tuvalu Steps up Threat to Sue Australia, U.S.” *Inter Press Service* (September 5, 2002), online: Common Dreams <<http://www.commondreams.org/headlines02/0905-02.htm>> [hereinafter “Seneviratne”]; Apisai Ielemia, “A Threat To Our Human Rights: Tuvalu’s Perspective On Climate Change” (2007) 44 U.N. Chronicle 18.

United States accept the jurisdiction of the International Court of Justice.⁸⁰

Claims of responsibility for internationally wrongful acts could, for example, be brought before the International Court of Justice or, in many cases, before the International Tribunal for the Law of the Sea.⁸¹ Such claims of responsibility for an internationally wrongful act are well established in international environmental law. In the *Trail Smelter* case, an international arbitral tribunal condemned Canada for failing to prevent an enterprise on its territory from releasing fumes that damaged property in U.S. territory. The tribunal stated in general terms 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”.⁸² The “no harm principle”, understood as a “due diligence requirement to prevent trans-boundary pollution”,⁸³ was later reassessed in several soft-law instruments⁸⁴ and is now part of international customary law.⁸⁵

⁸⁰ Kiribati, Papua New Guinea and Tuvalu have not accepted the compulsory jurisdiction of the ICJ, while the acceptance by Nauru was made for a limited period of time that has now expired (see United Nations Treaty Collection, c. 1, part 4: “Declarations recognizing as compulsory the jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute of the Court”). Therefore, even though Australia has accepted the compulsory jurisdiction of the ICJ (*id.*), this is only in relation to any other state accepting the same obligation. See generally *Statute of the International Court of Justice*, in U.N. Charter, *supra*, note 71, art. 36.2.

⁸¹ The Convention on the law of the sea contains a very broad definition of pollution and may cover circumstances of damages due to the rise of the sea level. *United Nations Convention on the Law of the Sea*, December 10, 1982, 1833 U.N.T.S. 3, 21 I.L.M. 1261, art. 1 para. 1(4). See also *id.*, arts. 207-212. See generally William C.G. Burns, “Potential Causes of Action for Climate Change Damages in International Fora: The Law of the Sea Convention” (2006) 2 McGill J.S.D.L.P. 27.

⁸² *United States of America v. Canada* (1941) 3 R.I.A.A. 1911 (Mixed Arbitral Tribunal) [hereinafter “*Trail Smelter*”], at 1965. See also *Corfu Channel (U.K. v. Albania)*, Merits, *supra*, note 68, at 22; *Legality of the Threat or Use of Nuclear Weapons Case*, Advisory Opinion, (1996) P.C.I.J. (Ser. A/B) No. 226, at 241; *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, *supra*, note 68, at 41.

⁸³ See Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford: Oxford University Press, 2002), at 63.

⁸⁴ *United Nations Framework Convention on Climate Change*, May 9, 1992, 1771 U.N.T.S. 107, entered into force on March 21, 1994 [hereinafter “UNFCCC”], recitals 8 and 9; *Declaration of the United Nations Conference on the Human Environment*, June 16, 1972, U.N. Doc. A/Conf.48/14/Rev. 1, 11 I.L.M. 1416, principle 21; *Rio Declaration on Environment and Development*, June 14, 1992, U.N. Doc. A/CONF.151/26 (Vol. I) [hereinafter “*Rio Declaration on Environment and Development*”], principle 2.

⁸⁵ See Rudiger Wolfrum, “International Environmental Law: Purposes, Principles and Means of Ensuring Compliance” in Fred Morrison & Rudiger Wolfrum, eds., *International*,

The obligations of a state responsible for a wrongful act are, first, “to cease the act” and “offer appropriate assurances and guarantees of non-repetition”,⁸⁶ and, second, “to make full reparation for the injury caused by the internationally wrongful act”.⁸⁷ Thus, responsibility seeks not only the reparation of a past harm, but also, more fundamentally, the prevention of future harms.⁸⁸ Therefore, claiming polluting states’ responsibility for climate migration does not necessarily aim at obtaining reparation, but it may also intend to have an international jurisdiction affirm that the “no harm principle” applies to excessive emission of greenhouse gas.

Yet, such action would face several thorny questions.⁸⁹ According to the *Tail Smelter* award, the “no harm principle” can be invoked only if (1) the “case is of serious consequence” for the affected state and if (2) “the injury is established by clear and convincing evidence”.⁹⁰ Both of these conditions may be difficult to meet in the case of a claim of responsibility of polluting states for climate change induced migration. A first hurdle would be the threshold of gravity. This threshold results from the necessity to balance the sovereign interests of one state with those of other states.⁹¹ In other words, the importance of the sovereign rights of one state over its territory justify that the other state should tolerate some acceptable inconveniences. Thus, each state being responsible only for the activities carried out on its own territory and not for all global warming, it could easily show that its level of pollution falls within a reasonable threshold of gravity.

Moreover, the second condition of “clear and convincing evidence” of a causal link from the pollution emitted from one state to the migration of persons may be another major hurdle. A first step consists of proving that local environmental change is at least partly caused by the pollution emitted within the jurisdiction of another state, and not, for

Regional and National Environmental Law (Boston: Kluwer, 2000), at 7 [hereinafter “Morrison & Wolfrum”]; Joseph Smith & David J.C. Shearman, *Climate Change Litigation: Analyzing the Law, Scientific Evidence & Impacts on the Environment, Health & Property* (Sydney: Presidian, 2006), at 49; P. Sands, “International Law in the Field of Sustainable Development: Emerging Legal Principles” in W. Lang, ed., *Sustainable Development and International Law* (London: Graham & Trotman, 1995) 53, at 62.

⁸⁶ *Draft Articles on State Responsibility*, *supra*, note 68, art. 30 §1-2.

⁸⁷ *Id.*, art. 31 §1.

⁸⁸ Michael Faure & Andre Nollkaemper, “International Liability as an Instrument to Prevent and Compensate for Climate Change” (2007) 26 *Stan. J. Int’l L.* 123, at 139 [hereinafter “Faure & Nollkaemper”].

⁸⁹ See generally *id.*, at 128-29.

⁹⁰ *Trail Smelter*, *supra*, note 82.

⁹¹ Peter-Tobias Stoll, “Transboundary Pollution” in Morrison & Wolfrum, *supra*, note 85, at 176.

instance, in the case of “sinking islands”, by tectonic movements or natural erosion.⁹² Arguably, climate change does not result in specific environmental change reaching specific places, but rather in an increase of the *probability* of environmental changes worldwide. Therefore, the “no harm principle” should probably, somehow, be transformed to integrate the “probability of harm” generated by climate change. A second step, no less difficult, is to show that particular migration flow is caused by this environmental change, not by other socio-economic or political factors. In reality, migration is often determined by a conjunction of different factors so that obtaining “clear and convincing evidence” of a univocal causal link between an environmental change and a migration flow may be difficult.⁹³

These hurdles may push affected states to seek grounds of responsibility other than the international responsibility of a state for a breach of the “no harm principle”. To that extent, they may be tempted to resort to the doctrine of unjust enrichment. Most domestic legal systems,⁹⁴ as well as international law,⁹⁵ accept the principle stemming from Roman law that “[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other”.⁹⁶ Global warming may reflect such a circumstance, as developed states benefit from industrial activities resulting in global warming at the expense of vulnerable states. Polluting states like Canada or the United States may even benefit from environmental change, as shorter and warmer winters may increase

⁹² Steve Marshall, “Carteret Islands: That sinking feeling” *CNN* (April 18, 2008), online: <<http://www.cnn.com/CNN/Programs/untoldstories/blog/2007/05/carteret-islands-that-sinking-feeling.html>>.

⁹³ On the multi-causal origin of migration, see, e.g., Stephen Castles, *Environmental change and forced migration: making sense of the debate* (2002) (UNHCR Issues in Refugee Research, Working Paper No. 70), online: <<http://www.unhcr.org/research/RESEARCH/3de344fd9.pdf>>, at 1.

⁹⁴ See Brice Dickson, “Unjust Enrichment Claims: A Comparative Overview” (1995) 54 *Cambridge L.J.* 100; Hanoch Dagan, *Unjust Enrichment: A Study of Private Law and Public Values* (Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 1997)) [hereinafter “Dagan”]; Christoph H. Schreuer, “Unjustified Enrichment in International Law” (1974) 22 *Am. J. Comp. L.* 281, at 301.

⁹⁵ See *Lena Goldfields Arbitration*, reproduced in Arthur Nussbaum, “The Arbitration between the Lena Goldfields, Ltd. and the Soviet Government” (1950) 36 *Cornell L.Q.* 31, at 52-53, §29; *Spanish Zone of Morocco Claims (Great Britain v. Spain)*, (1924) 2 *R.I.A.A.* 615. See generally Wolfgang Friedmann, “The Uses of ‘General Principles’ in the Development of International Law” (1963) 57 *Am. J. Int’l L.* 279, at 295.

⁹⁶ Warren Seavey & Austin Scott, *Restatement of Restitution* (1937), §1, cited in Emily Sherwin, “Restitution and Equity: An Analysis of the Principle of Unjust Enrichment” (2001) 79 *Texas L. Rev.* 2083, at 2083.

agricultural productivity.⁹⁷ In terms of migration, therefore, an argument is that environmental “pushes”, or incentives to leave regions negatively affected by climate change, should be connected to environmental “pulls”, or incentives to migrate to regions positively affected by climate change. The main advantage of the doctrine of unjust enrichment to claim a responsibility of polluting states is that, unlike state responsibility for an internationally wrongful act, this doctrine does not assume any guilt of the responsible state. The success of the claim would solely require the recognition of a causal relation between the “enrichment” of one or several states and the “impoverishment” of one or several other states, and the absence of justification for the enrichment and impoverishment. Yet, the judicial application of this doctrine is very unlikely⁹⁸ and one can only agree with Schreuer that “restitution for unjustified enrichment can be considered hardly more than a decision-technique to be applied once the basic policy decisions have been made, and not a normative principle or general rule from which specific ‘correct’ decisions can be logically derived”.⁹⁹

Eventually, however, an international claim of responsibility against polluting states is unlikely to lead to fair, yet realistic, reparation. Reparation of internationally wrongful acts calls, in order of preference, for restitution, compensation or satisfaction, or to a combination of those.¹⁰⁰ In the case of climate migration caused by the loss of territory or degradation of exploitable soils (*e.g.*, through drought, desertification or infiltration of salt water), the affected state may wish to obtain (1) sovereign rights over a new territory to organize a collective relocation; (2) the right of all or part of its inhabitants to migrate to the territory

⁹⁷ Regarding Canada, see Wade N. Nyirfa & Bill Harron, *Assessment of Climate Change Impacts on Agricultural Land-Use Suitability: Spring Seeded Small Grains on the Prairies* (Agriculture and Agri-food Canada, 2008), online: <<http://www4.agr.gc.ca/AAFC-AAC/display-afficher.do?id=1210289174331&lang=eng>>. Regarding the United States, see Dr. Thomas Fingar (Deputy Director of National Intelligence for Analysis), Statement for the record at the House Permanent Select Committee on Intelligence, on the National Intelligence Assessment on the National Security Implications of Global Climate Change to 2030, June 25, 2008, online: <http://www.dni.gov/testimonies/20080625_testimony.pdf> [hereinafter “House Statement on the National Security Implications of Global Climate Change”], at 4.

⁹⁸ Dagan, *supra*, note 94, at 130.

⁹⁹ Christoph H. Schreuer, “Unjustified Enrichment in International Law” (1974) 22 Am. J. Comp. L. 281, at 301.

¹⁰⁰ *Draft Articles on State Responsibility*, *supra*, note 68, arts. 34-37. See also *Factory at Chorzów (Germany v. Poland)*, Merits (1928) P.C.I.J. (ser. A) No. 17; *Texaco/Calasiatic v. Libya*, 53 I.L.R. 389, 17 I.L.M. 1 (1978).

of another state;¹⁰¹ or (3) financial compensation. The transfer of sovereign rights over a new territory does not qualify as “restitution”, which would relate to the restitution of the *same* territory.¹⁰² Even if it did qualify as restitution, such a transfer would surely be excluded as requiring the respondent to carry “a burden out of all proportion to the benefit deriving from restitution instead of compensation”.¹⁰³ Similarly, the right to migrate would surely not be considered as restitution or as somewhat proportionate. Compensation would therefore be the most likely form of reparation. Yet, compensation “generally consists of a monetary payment”, even though states may agree otherwise.¹⁰⁴ Thus, except for an unlikely agreement between the polluting state and the applicant, the claim would at most lead to financial compensation. Such financial compensation may include the replacement cost of the lost (value of a) territory,¹⁰⁵ but also the costs of resettlement or adaptation to a new environment, and a compensation of the moral harm.¹⁰⁶ Yet, the compensation would be limited twofold. On the one hand, each polluting state would be held responsible only for its own contribution to global warming.¹⁰⁷ On the other hand, the compensation would be limited to the damage caused to the sole applicant.¹⁰⁸ Consequently, except for a

¹⁰¹ It was reported that Tuvalu made “a formal request ... to Australia and New Zealand to open their doors for its citizens to immigrate if they face imminent danger from sea level rise”. Kalinga Seneviratne, “Tiny Tuvalu Steps up Threat to Sue Australia, U.S.” *Inter Press Service* (September 5, 2002), online: <<http://www.commondreams.org/headlines02/0905-02.htm>>.

¹⁰² This is at least implied by International Law Commission commentaries on the draft articles on state responsibility: see *Draft Articles on State Responsibility*, *supra*, note 68, commentary of art. 35, §4-5. See also Dinh Nguyen Quoc, Patrick Daillier & Alain Pellet, *Droit International Public*, 7th ed (Paris: L.G.D.J., 2002), at 799 [hereinafter “Quoc, Daillier & Pellet”] (“lorsqu’un acte matériel a causé un dommage définitif, la remise des choses en l’état n’est plus concevable et il faut chercher une autre modalité de réparation”).

¹⁰³ *Draft Articles on State Responsibility*, *id.*, art. 35(b).

¹⁰⁴ *Id.*, commentary of art. 36, §4. See also *Lusitania (United States v. Germany)*, (1923) Opinion, R.I.A.A. VII 32, at 34 [hereinafter “*Lusitania*”].

¹⁰⁵ *Draft Articles on State Responsibility*, *supra*, note 68, commentary of art. 36, §9; *Corfu Channel, (United Kingdom v. Albania)*, Assessment of Compensation, [1949] I.C.J. Rep. 244, at 249.

¹⁰⁶ *Draft Articles on State Responsibility*, *id.*, art. 31.2 (provides that “Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.”). See also *id.*, commentary of art. 31, §§5-6, 8, and commentary of art. 36, §1. See also *Lusitania*, *supra*, note 104, at 35-37.

¹⁰⁷ Each state is responsible only for the conduct attributable to it. *Draft Articles on State Responsibility*, *id.*, art. 47 §1 (provides that “[w]here several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act”). See also *id.*, commentary of art. 47; art. 39; *LaGrand (Germany v. United States of America)*, Judgment, [2001] I.C.J. Rep. 466 at 487, para. 57, and at 508, para. 116.

¹⁰⁸ *Contra: Draft Articles on State Responsibility*, *id.*, art. 48, takes a very ambiguous stand on this question, as it allows *non injured states only* to claim damages to third states in certain

multiplication of claims before international jurisdictions or the development of (a) very wide claim(s) potentially including all polluting states and all affected states, financial compensations for climate migration would remain a drop in the ocean of international climate funding.¹⁰⁹

While responsibility, as a legal argument, is unlikely to succeed in establishing an ambitious protection regime in favour of climate migrants, it may however transform into a more political argument, whose forum is not international courts but international negotiations. Actually, the very threat of lodging an international complaint against a polluting state may already be a political argument used either to encourage mitigation through pushing polluters to cease polluting, or even to trigger “spontaneous” good faith negotiations on an international protection of climate migrants.¹¹⁰ Thus, responsibility as a ground for an international protection of climate migrants deeply differs from fraternity, as the former affirms the wrongfulness of the pollution, whereas the latter clearly avoids this question.

Similarly, responsibility has sometimes been successfully invoked in the context of the protection of political refugees. In a milestone article, Lee argued that “a refugee-generating country is obligated to reimburse the country of asylum for the costs of caring for refugees it generated not only directly, but also indirectly; for example, through actual or threatened military intervention in the internal affairs of a state resulting in the flight of the latter’s citizens for fear of persecution”.¹¹¹ More generally, responsibility was a core argument in the political debate over the existence of specific obligations that Western states at war with Iraq may

circumstances, in case of an obligation “owed to the international community as a whole”. It may be invoked that the obligation not to cause global climate change is of such a nature. On the ambiguity of draft art. 48, see Quoc, Daillier & Pellet, *supra*, note 102, at 805-807, arguing that this provision does not reflect the current state of international law, *id.* See also Faure & Nollkaemper, *supra*, note 88, at 165.

¹⁰⁹ Financial compensations obtained by small island states are likely to be very small compared with the pledges of US \$100 billion per year by 2020 inserted in the Cancun agreements. See *Cancun Agreements*, *supra*, note 49, §98.

¹¹⁰ This was probably the strategy that Tuvalu followed when it threatened Australia and the United States to bring a claim before the ICJ. See for instance Seneviratne, *supra*, note 79, according to which Tuvalu turns its judicial threats against Australia and the United States because “Australia is the biggest per capita producer of greenhouse gases, and the United States is the world’s single biggest polluter of such gases”.

¹¹¹ Luke T. Lee, “The Right to Compensation: Refugees and Countries of Asylum”(1986) 80 *Am. J. Int’l L.* 532, at 558 [hereinafter “Lee”]. See also *id.*, at 552-64; Committee on international assistance to refugees, council of the league of nations, June 20, 1936, L.N. Doc. C.2 M.2 1936 XII (stating that “[i]n view of the heavy burden placed on the countries of refuge, the Committee considers it an international duty for the countries of origin of the refugees at least to alleviate to some extent, the burdens imposed by the presence of refugees in the territory of other states”).

have to pay *vis-à-vis* Iraqi asylum seekers. According to this argument, the unauthorized use of force against Iraq is an internationally wrongful act¹¹² attributable to the members of the multinational force, therefore entailing their international responsibility.¹¹³ Yet, no belligerent recognized any specific *legal* obligation going beyond their obligations under the 1951 *Refugee Convention*.¹¹⁴ Indeed, such a legal claim would generally face the same hurdles presented above, in particular relating to the causation of the displacement.¹¹⁵ Here again, reparation is unlikely to consist of an obligation to host asylum-seekers,¹¹⁶ but it might consist of financial compensation of host countries or international organizations such as the UNHCR.¹¹⁷ Yet, recognizing a certain political responsibility while rejecting any legal duty, the United States and the United Kingdom

¹¹² See U.N. Charter, *supra*, note 71, art. 2(4). The use of force is allowed only as a self-defence or as collective action authorized by the Security Council. *Id.*, arts. 51 and 42. Obviously, none of these circumstances are applicable in the case of the attack on Iraq by the multinational force.

¹¹³ See Rita Bettis, "The Iraqi Refugee Crisis: Whose Problem Is It?" (2010) 19 *Transnat'l L. & Contemp. Probs.* 261. See also Roberta Cohen, "Iraq's Displaced: Where to Turn?" (2008) 24 *Am. U. Int'l L. Rev.* 301; Bill Felick, Refugee Policy Director for Human Rights Watch, "The Human Cost of War: The Iraqi Refugee Crisis" (Testimony Before the U.S. Congressional Human Rights Caucus, November 15, 2007), online: <<http://hrw.org/english/docs/2007/11/15/iraq17340.htm>>; "Iraq: Rhetoric and Reality: the Iraqi Refugee Crisis" *Amnesty International* (June 15, 2008), online: <<http://www.amnesty.org/en/library/info/MDE14/011/2008/en>>, at 43; Brittany Fox, "Terrorists or Terrorized? Granting Refugee Status to Iraqi Civilians Pre and Post Operation New Dawn" (2010) 1 *U. Fla. Int'l L. Rev.* 29, online: <http://www.polisci.ufl.edu/UF_Review/documents/ufir-fall2010.pdf#page=29> [hereinafter "Fox"].

¹¹⁴ Fox, *id.*, at 31.

¹¹⁵ Responding to Lee, *supra*, note 111, Garry highlighted the main difficulties in establishing a cause of action for compensation. See Honnah R. Garry, "The Right to Compensation and Refugee Flows: A 'Preventive Mechanism' in International Law?" (1998) 10 *Int'l J. Refugee L.* 97, at 101-113 [hereinafter "Garry"]. See also Jennifer Peavey Joanis, "A Pyrrhic Victory: Applying the Trail Smelter Principle to State Creation of Refugees" in R.M. Bratspies & R.A. Miller, eds., *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (Cambridge: Cambridge University Press, 2006) 254, at 265 (highlighting the opposition between the humanitarian grounds of the Law of Refugees and responsibility for wrongful act: "Tragic would be the day when the charitable hand was held out after the conflict in order to receive 'just payment' for their services.").

¹¹⁶ This possibility was actually considered neither by Lee, nor by Garry, who both focused on monetary compensation as the only available form of reparation. See Lee, *id.*, at 562-64 and Garry, *id.*, at 113-16. The right of return to the country of origin may be considered either as restitution, or as cessation of a continuous violation of an international obligation. Concerning the Palestinian refugees, however, such a right was endorsed with very cautious language. See Yoav Tadmor, "Palestinian Refugees of 1948: The Right to Compensation and Return" (1994) 8 *Temp. Int'l & Comp. L.J.* 403.

¹¹⁷ Lee, *id.*, at 562-64.

financed international assistance to Iraqi asylum-seekers and accepted an increasing number of asylum-seekers from Iraq.¹¹⁸

A similar argument is that polluting states are politically responsible for climate change and should compensate states affected by climate migration. For instance, Maldives president Gayoom suggested moving the world “from an attitude of self-indulgent negligence to one of shared responsibility”.¹¹⁹ Similarly, Bolivia, in a recent submission to the UNFCCC *ad hoc* working group on long-term cooperative action, highlighted that developed states, because they bear the greatest part of the responsibility for climate change, must:

... recognize and commit to honor their climate debt in all its dimensions, as the basis for a just, effective and scientific climate change solution, including through ... being accountable for the hundreds of millions of people that will have to migrate as a result of climate change and to remove their restrictive policies on migration, including by providing migrants with opportunities to achieve a decent life and with all human rights.¹²⁰

According to Bolivia, the responsibility of developed countries demands that they “assume responsibility for climate migrants, welcoming them into their territories and recognizing their fundamental rights through the signing of international conventions that provide for the definition of climate migrant and require all States to abide by determinations”.¹²¹

The ambiguity of the principle of “common but differentiated responsibility”¹²² reflects a lively debate over the nature and relevance of

¹¹⁸ James B. Foley (Senior Coordinator for Iraqi Refugee Issues Ambassador) & Lori Scialabba (Senior Adviser to the Secretary of Homeland Security for Iraqi Refugees), Briefing on Developments in the Iraqi Refugee Admissions and Assistance Programs (September 12, 2008), online: <<http://merln.ndu.edu/archivepdf/iraq/State/109568.pdf>>; Fox, *supra*, note 113, at 31.

¹¹⁹ Maumoon Abdul Gayoom, “Climate Justice in a Shared Global Ecosphere” (statement at the 2008 Annual Meeting of the Global Humanitarian Forum on The Human Face of Climate Change, June 24, 2008), online: <http://www.maldivesmission.ch/fileadmin/Pdf/Environment/HEP_Speech_to_GHF_final.pdf>. Brown underscored the “irony” that “the developing countries — the least responsible for emissions of greenhouse gases — will be the most affected by climate change”. Oli Brown, *Migration and climate change* (Geneva: IOM, 2008), at 31 [hereinafter “Brown”].

¹²⁰ Bolivia (Submission received on April 26, 2010), in *Additional views on which the Chair may draw in preparing text to facilitate negotiations among Parties: Submission from Parties*, April 30, 2010, UNFCCC Doc. FCCC/AWGLCA/2010/MISC.2, 14, at 17 [hereinafter “Bolivia”]. See also Venezuela (Submission received on April 26, 2010), in *id.*, 86, at 88.

¹²¹ Bolivia, *id.*, at 34.

¹²² *Stockholm Declaration*, *supra*, note 22, principle 23; *Rio Declaration on Environment and Development*, *supra*, note 84, principle 7; UNFCCC, *supra*, note 84, 6th recital, arts. 3(1) and 4.

polluting states' historical responsibility for climate change. Compared with the more commonly known "polluter pays principle", the "common but differentiated responsibility" principle has made a consensus in avoiding taking a position as to the basis of differentiation, which could either be the financial capacities or the historical contributions to climate change of the respective states. The UNFCCC ambiguously refers to states' "common but differentiated responsibilities" and to their "respective capabilities and their social and economic conditions"¹²³ without making it clear whether the latter elements are included in the former principle or, on the contrary, should be distinguished from them. On the one hand, it establishes a system wherein states have different obligations depending mainly on their level of development, not their historical responsibility.¹²⁴ On the other hand, however, it "note[s] 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 developmental needs".¹²⁵ Similarly, it refers to "equity" in relation to the common but differentiated responsibility principle.¹²⁶ The 2010 Cancun conference on Climate Change maintained this constructive ambiguity when it provided that, "owing to [their] historical responsibility, developed country Parties must take the lead in combating climate change and the adverse effects thereof".¹²⁷

The opposition between two alternative bases of differentiation — the level of development and the historical contribution to global warming — appeared during the debates of the Ad Hoc Group on the Berlin Mandate.¹²⁸ Generally, developed states have favoured the

See generally Agnès Michelot, "A la recherche de la justice climatique: perspectives à partir du principe de responsabilités communes mais différenciées", in Christel Courmil & Catherine Colard-Fabregoule, *Changements climatiques et défis du droit* (Bruxelles: Bruylant, 2010) 183.

¹²³ UNFCCC, *id.*, 6th recital. See also *The Berlin Mandate: Review of the adequacy of Article 4, paragraph 2(a) and (b), of the Convention, including proposals related to a protocol and decisions on follow-up*, UNFCCC Decision 1/CP.1, Doc. FCCC/CP/1995/7/Add.1 [hereinafter "*The Berlin Mandate*"], 1(e).

¹²⁴ See UNFCCC, *id.*, art. 3(1) and annexes I and II.

¹²⁵ UNFCCC, *id.*, 3rd recital. See also *The Berlin Mandate*, *supra*, note 123, §1(d).

¹²⁶ UNFCCC, *id.*, art. 3(1) (providing that "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").

¹²⁷ *Cancun Agreements*, *supra*, note 49, recitals before §36.

¹²⁸ The Ad Hoc Group on the Berlin Mandate, established by the "Berlin Mandate", aimed at "begin[ning] a process to enable [the Conference of the Parties] to take appropriate action ... through the adoption of a protocol or another legal instrument" (*The Berlin Mandate*, *supra*, note

adoption of development as the basis of differentiation. For example, Poland and Russia argued that “[t]he differentiated responsibility means individual responsibilities of the Parties to the Convention related to their commitments determined to taking into account their economic capabilities”.¹²⁹ Estonia suggested taking the Gross Domestic Product per capita into account.¹³⁰ From a fund-raising perspective, supporting development as the basis of differentiation is a pragmatic position. Yet, it also results in disconnecting the common but differentiated responsibility from any notion of wrongfulness, thus reducing “responsibility” to a form of fraternity or voluntary charity.

Therefore, developing or least-developed states have pleaded for differentiation based on the individual contribution of a state to global warming. For instance, Malaysia recently argued that “[d]eveloped countries, having first occupied the environmental space in the process of developing their economies, have a historical responsibility to address climate change”.¹³¹ Similarly, Venezuela, Iran, Saudi Arabia and the United Arab Emirates suggested that a state’s “historical share” in global warming should be one of the relevant criteria for differentiation.¹³²

123, 3rd recital). It led to the adoption of the Kyoto Protocol (Kyoto Protocol to the United Nations Framework Convention on Climate Change, December 11, 1997, 2303 U.N.T.S. 148). See generally Laurence Boisson de Chazournes, “Kyoto Protocol to the United Nations Framework on Climate Change” *Audiovisual Library of International Law*, online: <<http://untreaty.un.org/cod/avl/ha/kpccc/kpccc.html>>. For a synthesis of the negotiations regarding the differentiation of responsibility, see generally Ad Hoc Group on the Berlin Mandate, *Review of possible indicators to define criteria for differentiation among Annex I Parties*, Note by Secretariat, June 21, 1996, Doc. FCCC/AGBM/1996/7, online: <<http://unfccc.int/cop4/resource/docs/1996/agbm/07.htm>> [hereinafter “*Note by UNFCCC Secretariat on possible indicators to define criteria for differentiation*”], §23.

¹²⁹ Proposals of Poland and the Russian Federation, cited in *Note by UNFCCC Secretariat on possible indicators to define criteria for differentiation, id.*, Annex 1: “List of Proposals on Differentiation to the Ad Hoc Group on the Berlin Mandate”, (f).

¹³⁰ Ad Hoc Group on the Berlin Mandate, *Comments from Parties, Note by the Secretariat*, February 16, 1996, Doc. FCCC/AGBM/1996/MISC.1, online: <<http://unfccc.int/resource/docs/1996/agbm/misc01.pdf>>, Paper No. 3, “Estonia — Submission date 15 January 1996” 40 [hereinafter “*Estonia Submission to the Berlin Group*”], at 41.

¹³¹ Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention, *Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan: Submissions from the Parties*, March 13, 2009, Doc. FCCC/AWGLCA/2009/MISC.1, online: <<http://unfccc.int/resource/docs/2009/awglca5/eng/misc01.pdf>>, Paper 14: “Malaysia — Shared Vision for Long-Term Cooperative Action (Submission received January 9, 2009)” 56, at 56. See also Marco Grosso, *Justice in Funding Adaptation under the International Climate Change Regime* (New York: Dordrecht, 2010), at 7 (arguing that “the raising of adaptation funds should be carried out according to the responsibility for climate impacts”).

¹³² *Note by the Chairman of the Berlin Group, infra*, note 135, Doc. FCCC/AGBM/1997/2 <<http://unfccc.int/resource/docs/1997/agbm/02a01.pdf>> §19. See also *Estonia Submission to the Berlin Group, supra*, note 130, at 41.

Brazil went on to assess that “[t]he principle of the common but differentiated responsibilities ... arises from the acknowledgment by the Convention that the largest share of historical and current global emissions of greenhouse gas has originated in the developed countries,” and it suggested defining the “relative responsibilities in terms of the relative resulting change in global mean temperature”.¹³³ Beyond historical emissions of greenhouse gases, one may also suggest that the efforts carried out by one state to mitigate climate change should be taken into account to assess its degree of “guilt” in an effort to link adaptation finance with mitigation efforts.

Such an understanding of the common but differentiated responsibility principle results in transposing the polluter pays principle into international environmental law. This perspective is all the more promising given that, unlike the case of political refugees, the states responsible for global warming happen to be developed ones with high financial capacities.¹³⁴ In addition, responsibility is a strong moral notion, which could push developed states to single out climate migrants among other populations in need of international aid, and to protect them as “victims” of the environmental change generated by their own development. However, this would assume a distinction between the environmental migrants induced by global warming (“climate migrants”) or by other (*i.e.*, regional) anthropogenic environmental change on the one hand, and environmental migrants merely induced by natural environmental change on the other hand, the latter being excluded from any responsibility claim. Drawing such a clear line between circumstances resulting in the same sorts of human experiences would be humanely difficult to accept. Overall, it would be technically difficult to operate as, in many cases, it may be impossible to assess the role played by climate change along with

¹³³ Ad Hoc Group on the Berlin Mandate, *Additional Proposals from Parties, Addendum*, May 30, 1997, FCCC/AGBM/1997/MISC.1/Add.3, online: <<http://unfccc.int/cop4/resource/docs/1997/agbm/misc01a3.htm>>, Paper 1: “Brazil (Submission dated 28 May 1997)”, Part I (2) and Part III (2). This criterion, more complex than the sole quantity of emissions of each state, aims at “tak[ing] into consideration the different historical emission path resulting from very different industrialization process and consumption patterns in time” (*id.*, Part III (2)).

¹³⁴ Tally Kritzman-Amir, “Not In My Backyard: On the Morality of Responsibility Sharing in Refugee Law” (2009) 4 *Brook. J. Int’l L.* 355, at 386-87 (arguing that calling to the responsibility of countries of origin for the flight of asylum seekers “could, in fact, serve as a means of preserving the unjust distribution of wealth, as the countries of origin would have to pay money to the host countries, which are frequently wealthier”). Of course, this counter-argument would not apply to proposals of invoking belligerents’ responsibilities for the flight of asylum-seekers from the attacked country (for example, the responsibility of the U.K. and the U.S. for the flight of Iraqi asylum-seekers).

other environmental factors — thus, coming back to issues essentially similar to those that a litigation would face while trying to establish a causal relation between climate change and certain instances of migration.

Lastly, a small risk is that responsibility may actually backfire against environmental claims. For instance, oil producers called for a form of strict liability of the international community when they proposed that the UNFCCC could establish a “compensation fund” for the “loss of income from export of fossil fuels”.¹³⁵ Even though this proposal was clearly rejected, the UNFCCC recognizes the vulnerability of oil producers “to the adverse effects of the implementation of measures to respond to climate change”.¹³⁶ At the domestic level, such political claims may lead to legal actions invoking strict liability mechanisms in case of breach of equality.¹³⁷

IV. SUSTAINABILITY ARGUMENTS: ACTING IN ONE’S SELF-INTEREST

Besides fraternity and responsibility, sustainability is a third potential ground that may justify the international protection of environmental migrants. Following its traditional understanding, sustainability calls upon a development that “meets the needs of the present without compromising the ability of future generations to meet their own needs”.¹³⁸

¹³⁵ Ad Hoc Group on the Berlin Mandate, *Framework compilation of proposals from parties for the elements of a protocol or another legal instrument*, January 31, 1997, Doc. FCCC/AGBM/1997/2, online: <<http://unfccc.int/cop4/resource/docs/1997/agbm/02.htm>>, §119(d). See also *id.*, §120; Ad Hoc Group on the Berlin Mandate, *Framework compilation of proposals from parties for the elements of a protocol or another legal instrument*, Addendum: Note by the Chairman, February 26, 1997, Doc. FCCC/AGBM/1997/2/Add.1, online: <<http://unfccc.int/cop4/resource/docs/1997/agbm/02a01.htm>> [hereinafter “*Note by the Chairman of the Berlin Group*”], §32.1-2.

¹³⁶ UNFCCC, *supra*, note 84, art. 4 §10. See also *id.*, §8; Ad Hoc Group on the Berlin Mandate, *Implementation of the Berlin mandate*, Comments from the Parties, Addendum: Note by the Secretariat, June 27, 1997, Paper No. 1: “Netherlands (on behalf of the European Community and its member states)”, II.C, where the European Union “recognize[d] the situation of Parties whose economies are highly dependant on income generated from the production, processing and consumption of fossil fuels and associated energy-intensive products”.

¹³⁷ See for example, in French law, Cons. d’Etat (Assembly), January 14, 1938, La Fleurette, Rec. 1938.25; George A. Bermann & Étienne Picard, *Introduction to French Law* (Boston: Kluwer, 2008).

¹³⁸ For a traditional definition of sustainability or sustainable development, see World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987), at 43 (“sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs”).

Sustainability may lead to several different arguments for the protection of environmental migrants.

An obvious link between sustainability and environmental change relates to development. Environmental change may impede development.¹³⁹ Therefore, an argument calls to increase development aid so as to take into account additional development needs due to adaptation to environmental change. Thus, the 2007 Male's Declaration on the Human Dimension of Global Climate Change stated "that immediate and effective action to mitigate and adapt to climate change presents the greatest opportunity to preserve the prospects for future prosperity, and that further delay risks irreparable harm and jeopardizes sustainable development".¹⁴⁰ Yet, this argument amounts to nothing more than a call to international support for the development of affected populations; thus, it does not fundamentally differ from other fraternity arguments.¹⁴¹

Another argument that could be drawn from "sustainable development" is that development may be part of adaptation policies as a way to increase communities' resilience to environmental change.¹⁴² Thus, rather than supporting adaptation in the most affected countries, international funds may intend to foster development in these countries, so that they can cope with adaptation on their own. Taking a more controversial position on the link between migration and development, this approach may encourage partial worker migration programs as a policy of promoting development to increase resilience. Some studies have indeed shown

¹³⁹ See generally Saleemul Huq, Hannah Reid & Laurel A. Murray, *Climate Change and Development Links* (London: International Institute for Environment and Development, 2006); Emily Boyd *et al.*, "Resilience and 'Climatizing' Development: Examples and Policy Implications" (2008) 51 *Development* 390.

¹⁴⁰ *Male's Declaration on the Human Dimension of Global Climate Change*, November 14, 2007, online: <http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf>.

¹⁴¹ See, *e.g.*, Jessica M. Ayers & Saleemul Huq, "Supporting Adaptation to Climate Change: What Role for Official Development Assistance?" (Presented at DSA Annual Conference 2008 "Development's Invisible Hands: Development Futures in a Changing Climate". November 8, 2008, Church House, Westminster, London); Mark E. Keim, "Building Human Resilience: The Role of Public Health Preparedness and Response As an Adaptation to Climate Change" (2008) 35 *Am. J. Preventive Medicine* 508; Ole Mertz *et al.*, "Adaptation to Climate Change in Developing Countries" (2009) 43 *Environmental Management* 743. In addition to lower financial capacity to afford expensive adaptation programs, the least developed or developing countries are certainly more dependent on natural resources for agriculture or fishing than developed countries whose economies depend on services and international trade.

¹⁴² United Nations Development Program, *Human Development Report: Overcoming Barriers: Human Mobility and Development* (2009), at 7. See also Bimal Ghosh, *Migrant's Remittances and Development: Myths, Rhetoric and Realities* (Geneva: International Organization for Migration, 2006); Philippe L. Martin, "The Trade, Migration, and Development Nexus" in James F. Hollifield, *et al.*, *Migration, Trade and Development* (Dallas: Federal Reserve Bank of Dallas, 2007), online: <<http://www.dallasfed.com/research/pubs/migration/migration.pdf>>, at 11.

that “migrants boost economic output [in their place of origin] at little or no cost to locals”¹⁴³ in the place of destination. In particular, remittances reach the least accessible and poorest people who are seldom reached by international aid,¹⁴⁴ but who may be the most affected by environmental changes. Thus, the IOM recently called “for further integrating migration-related programmes into comprehensive action for the benefit of vulnerable countries and communities affected by the impact of climate change, environmental degradation and other factors of vulnerability, such as poverty”.¹⁴⁵ However, development as an adaptation tool also leads to permanent migration of qualified workers (“brain drain”), which is a quite frequent phenomenon in regions facing environmental degradation or disaster and may diminish resilience.¹⁴⁶

Yet another sustainability argument that may plead in favour of an international protection of climate migrants is the notion of a “sustainable adaptation”.¹⁴⁷ For example, the 2007 South Asian Association for Regional Cooperation Declaration on Climate Change expressed a “belie[f] that the best and most appropriate way to address the threats of climate change is to adopt an integrated approach to sustainable development”.¹⁴⁸ Sustainable adaptation to climate change demands that present measures help future adaptation,¹⁴⁹ thus excluding short term *in*

¹⁴³ See United Nations Development Program, *id.*; “Migration and Development: The Aid Workers Who Really Help” *The Economist* (October 8, 2009).

¹⁴⁴ International Organization for Migration, *Disaster Risk Reduction, Climate Change Adaptation and Environmental Migration, A Policy Perspective* (Geneva: International Organization for Migration, 2010), at 14. See also Oli Brown, “Eating the Dry Season” *Opinions and Insights from the International Institute for Sustainable Development* (June 2007), online: <http://www.iisd.org/pdf/2007/com_dry_season.pdf>.

¹⁴⁵ *Disaster Risk Reduction, id.* See also International Organization for Migration, *Climate Change, Environmental Degradation and Migration* (Background paper, International Dialogue on Migration, March 30, 2011), online: <http://www.iom.int/jahia/webdav/shared/shared/mainsite/microsites/IDM/workshops/climate-change-2011/background_paper.pdf>.

¹⁴⁶ Asmita Naik, Elca Stigter & Frank Laczko, *Migration, Development and Natural Disasters: Insights from the Indian Ocean Tsunami* (Geneva: International Organization for Migration, 2007), online: <http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published_docs/serial_publications/MRS30.pdf>, at 17. See also Brown, *supra*, note 119, at 31.

¹⁴⁷ Siri H. Eriksen & Katrina Brown, *Sustainable Adaptation to Climate Change: Prioritising Social Equity and Environmental Integrity* (London: Earthcan, 2011).

¹⁴⁸ *Declaration on Climate Change*, South Asian Association For Regional Cooperation, December 7, 2007, adopted at the 29th Session of the Council of Ministers, online: <http://www.maldivesmission.ch/fileadmin/Pdf/Environment/SAARC_Declaration_on_CC_-_FINAL_7.12.07.pdf>. See also Karen O’Brien & Robin Leichenko, *Human Security, Vulnerability and Sustainable Adaptation* (UNDP, Human Development Report Office Occasional Paper, 2007), online: <http://hdr.undp.org/en/reports/global/hdr2007-8/papers/O'Brien_Karen%20and%20Leichenko_Robin.pdf>, at 31.

¹⁴⁹ *Cf.* definition of sustainable development, *supra*, note 138.

situ adaptation when long-term strategies necessarily require relocation, for example, when a territory is condemned to becoming uninhabitable in the foreseeable future, or when vulnerability to natural disasters increases to a dangerous point. Thus, the notion of sustainable adaptation may be the conceptual tool needed to convert slow-onset climate or environmental modifications into preventive collective relocation.¹⁵⁰ Yet, sustainable adaptation is a method, not a justification for the international legal protection of environmental migrants.

In order to become a fully operative argument, or even an *incentive* for states, sustainability needs to come along a much stronger political basis that can be found in the notion of security. Obvious links exist between sustainability and security: on one hand sustainable development requires a certain form of security, and, on the other hand, there is no better way to prevent conflicts than the harmonious development promised by sustainable development.¹⁵¹ In other words, “if climate change is not effectively addressed and the negative environmental impacts arising from current climate change trends increase, sustainable development will be in peril”.¹⁵² The Security Council highlighted these links and “reaffirm[ed] the need to adopt a broad strategy of conflict prevention, which addresses the root causes of armed conflict and political and social crises in a comprehensive manner, including by promoting sustainable development, poverty eradication, national

¹⁵⁰ The relocation of the 1,000 inhabitants of the Carteret islands, a sinking island in Papua New Guinea, is an example of such a sustainable adaptation program. See *e.g.*, Dr. Sanjay Gupta, “Pacific swallowing remote island chain” *CNN* (July 31, 2007), online: <<http://www.cnn.com/CNN/Programs/anderson.cooper.360/blog/2007/07/pacific-swallowing-remote-island-chain.html>>; Tulelepeisa website, online: <<http://www.tulelepeisa.org>>.

¹⁵¹ *Statement by the President of the Security Council*, February 11, 2011, U.N. Doc. S/PRST/2011/4, online: <<http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/SL%20SPRST%202011%204.pdf>> (emphasizing that “The Security Council underlines that security and development are closely interlinked and mutually reinforcing and key to attaining sustainable peace.”).

¹⁵² Francesco Sindico, “Climate Change: A Security (Council) Issue?” (2007) 1 *Carbon and Climate L. Rev.* 26, at 31 [hereinafter “Sindico”]. See also United Nations Development Program, *Human Development Report, New Dimensions of Human Security* (1994), at 1 [hereinafter “United Nations Development Plan”] (“More generally, it will not be possible for the community of nations to achieve any of its major goals — not peace, not environmental protection, not human rights or democratization, not fertility reduction, not social integration — except in the context of sustainable development that leads to human security.”); Thomas N. Gladwin, James F. Kennelly & Tara-Shelomith Krause, “Shifting Paradigms for Sustainable Development: Implications for Management Theory and Research” (1995) 20 *Academy of Management Rev.* 874, at 889; Jon Barnett & Stephen Dovers, “Environmental Security, Sustainability and Policy” (2001) 13 *Pacifica Review: Peace, Security & Global Change* 157.

reconciliation, good governance, democracy, gender equality, the rule of law and respect for and protection of human rights”.¹⁵³

Security experts increasingly fear that climate change may increase competition for natural resources, generating a “myriad of problems of political, social and economic sorts” which “could readily become a cause of turmoil and confrontation, leading to conflict and violence”.¹⁵⁴ A 2008 U.S. National Intelligence Estimate on the National Security Implication of Global Climate Change to 2030¹⁵⁵ judged that “global climate change will have wide-ranging implications for US national security interests over the next 20 years”.¹⁵⁶ Environmental migration holds a central place in these fears, both as a potential cause of conflicts, but also as the consequence of potential conflicts.¹⁵⁷ Two major American security think-tanks published a report in 2007 assessing that “[p]erhaps the most worrisome problems associated with rising temperatures and sea levels are from large-scale migrations of people — both

¹⁵³ *Threats to International Peace and Security*, Security Council Resolution 1625/2005, Resolutions and decisions of the Security Council, August 1, 2005 – July 31, 2006 — S/INF/61 — (SCOR, 60th year), U.N. Doc. S/RES/1625 (2005) [hereinafter “*Threats to International Peace and Security*”], annex, 6th recital.

¹⁵⁴ Myers, 2005, *supra*, note 1, at 3. See also Hans Joachim Schellnhuber *et al.*, *Climate Change as a Security Risk* (London: Earthscan, 2008) [hereinafter “Schellnhuber”]; Simon Dalby, *Security and Environmental Change* (Cambridge: Polity, 2009), at 129-58 [hereinafter “Dalby”]; Christiana Figueres (Executive Secretary of the United Nations Framework Convention on Climate Change), “Security Address” (Address to the Congress of Deputies of Spain at the Centro Superior de Estudios de la Defensa Nacional, in Madrid, February 15, 2011), online: <http://unfccc.int/files/press/statements/application/pdf/speech_seguridad_20110215.pdf> (“All these factors taken together mean that climate change, especially if left unabated, threatens to increase poverty and overwhelm the capacity of governments to meet the basic needs of their people, which could well contribute to the emergence, spread and longevity of conflict.”); Islands First, Press Release, “Drowning Islands Demand Security Council Action on Climate Change” (May 20, 2010), online: <http://www.islandsfirst.org/updates/20100520_pressrelease.html>.

¹⁵⁵ National Security Council, Security Implications of Global Climate Change to 2030 (2008), (classified). See National Intelligence Council’s webpage on The Impact of Climate Change to 2030, online: <http://www.dni.gov/nic/special_climate2030.html>.

¹⁵⁶ “House Statement on the National Security Implications of Global Climate Change”, *supra*, note 97. The National Security Implication has led to the creation of the Central Intelligence Agency’s Center on Climate Change and National Security in September 2009. It has also carried out further research on six countries or regions of concern: China, India, Russia, Southeast Asia and Pacific Islands, North Africa and Mexico, with the view of “determin[ing] if anticipated changes from the effects of climate change will force inter- and intra-state migrations, cause economic hardship, or result in increased social tensions or state instability within the country/region”. National Intelligence Council’s webpage, *id.*

¹⁵⁷ See, e.g., Vikram Odedra Kolmannskog, *Future Floods of Refugees: A Comment on Climate Change, Conflict and Forced Migration* (Norwegian Refugee Council, 2008), online: <http://www.nrcfadder.no/arch/img.aspx?file_id=9904602>, at 18 [hereinafter “Kolmannskog”].

inside nations and across existing national borders.”¹⁵⁸ An Australian security expert warned that “potentially millions of poor and unskilled regional neighbors come begging for a new life, ... rais[ing] the risk of people-smuggling syndicates targeting Australia”, while “terrorist groups could target Australians travelling overseas, orchestrate a terrorist attack upon Australia as retribution for the perceived damage to their environment, or attack Australian shipping in the Malacca Straits region”.¹⁵⁹ Some have even argued that environmental migration may be one of the elements triggering current conflicts in the African Sahel, in particular in Darfur.¹⁶⁰

Security was often invoked as an argument in favour of international cooperation on climate migration issues.¹⁶¹ For instance, the Prime Minister of Bangladesh, calling for the international protection of climate migrants a few weeks before the Cancun Climate Change Conference, highlighted that climate migration may “cause social disorders, political instability, cross-border conflicts and upheavals”.¹⁶² Castels criticized this strategic emphasis on security, as it would accordingly “tend to reinforce existing negative images of refugees as a threat to the security, prosperity and public health of rich countries in the global North”.¹⁶³ However, this strategy may also lead to greater attention from the world’s leaders. Thus, the international concern for both refugee and stateless

¹⁵⁸ Kurt M. Campbell *et al.*, *The Age of Consequences: The Foreign Policy and National Security Implications of Global Climate Change* (Center for Strategic and International Studies & Center for a New American Security, 2007), online: <http://csis.org/files/media/isis/pubs/071105_ageofconsequences.pdf>, at 8. However, the report is based on the idea that “perhaps billions of people over the medium or longer term” (*id.*) may be forced to relocate, which goes much further than any scientific estimation so far. See also Myers, 2005, *supra*, note 1.

¹⁵⁹ Jason D. Söderblom, “Climate Change: National & Regional Security Threat Multiplier for Australia” (2008) 52 *Security Solutions* 58, online: <<http://ssrn.com/abstract=1101961>>, at 60-61.

¹⁶⁰ See *e.g.*, Kolmannskog, *supra*, note 157, at 21; Ole Danbolt Mjøs (Chairman of the Norwegian Nobel Committee), “Presentation speech” (presentation of the Nobel Peace Prize to the Intergovernmental Panel on Climate Change and Al Gore, Oslo, December 10, 2007), online: <http://nobelpeaceprize.org/en_GB/laureates/laureates-2007/presentation-2007/>; Ban Ki-moon, “A Climate Culprit in Darfur” *The Washington Post* (June 16, 2007). *Contra*, on Bangladesh, see Jane McAdam & Ben Saul, “Displacement with Dignity: International Law and Policy Responses to Climate Change Migration and Security in Bangladesh” (2010) 53 *German Y.B. Int’l Law* 233, online: <<http://ssrn.com/abstract=1701486>> [hereinafter “McAdam & Saul, ‘Displacement’”] (showing that there is “scant evidence to justify claims that mass outflows of Bangladeshi ‘climate refugees’ will threaten international or regional security”).

¹⁶¹ See in particular Lorraine Elliott, “Climate Migration and Climate Migrants: What Threat, Whose Security?” in McAdam, *supra*, note 41, 175.

¹⁶² “PM warns of climate refugee crisis” *The Daily Star* (September 22, 2010), online: <http://www.thedailystar.net/newDesign/latest_news.php?nid=26005>.

¹⁶³ Stephen Castels, “Afterword: What Now? Climate-Induced Displacement after Copenhagen” [hereinafter “Castels”] in McAdam, *supra*, note 41, 239, at 242.

persons originated at least in part from the goal of mitigating international tensions.¹⁶⁴ Hathaway showed that “neither a humanitarian nor a human rights vision can account for refugee law as codified in the United Nations Convention Relating to the Status of Refugees and the Protocol adopted under its authority”,¹⁶⁵ as revealed in particular by the narrowness of the definition of the political refugee. Accordingly, “the pursuit by states of their own well-being has been the greatest factor shaping the international legal response to refugees since World War II”: the existing regime mainly aims at “govern[ing] disruptions of regulated international migration in accordance with the interests of states”.¹⁶⁶

Security is a powerful argument for putting climate migration on the international agenda. The Security Council recognized in 1992 that “[t]he absence of war and military conflicts amongst States does not in itself ensure international peace and security” as “[t]he non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security”.¹⁶⁷ Subsequent resolutions of the Security Council emphasized the link between sustainable development and security.¹⁶⁸ This approach opened a debate on climate change and its possible security impacts at the Security Council¹⁶⁹ and led to a General Assembly resolution¹⁷⁰ and a report by the Secretary General.¹⁷¹

¹⁶⁴ On refugees, see *Geneva Convention*, *supra*, note 36, 5th recital (“Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States.”). On stateless persons, see *Draft Convention on the Reduction of Future Statelessness*, Yearbook of the International Law Commission, 1954, vol. II, doc. A/CN.4/88, at 143, 3rd recital (“Whereas statelessness is frequently productive of friction between States.”). This recital was however deleted from the final version during the negotiations held at the United Nations Conference on the Elimination or the Reduction of Future Statelessness, which deemed that this draft preamble was “too lengthy and pompous”. Mr. Hubert (France), Summary Records, summary record of the 19th meeting of the Committee on the Whole, April 14, 1959, U.N. Doc. A/CONP.9/C1/SR.19, at 5. See 1961 *Convention on the Reduction of Statelessness*, August 30, 1961, 989 U.N.T.S. 175.

¹⁶⁵ James C. Hathaway, “Reconsideration of the Underlying Premise of Refugee Law” (1990) 31 *Harv. Int’l L.J.* 129, at 130.

¹⁶⁶ *Id.*, at 133.

¹⁶⁷ *Note by the President of the Security Council*, U.N. Doc. S/23500, U.N. S.C.O.R., 3046th Meeting, 1992, p. 3 (cited in Sindico, *supra*, note 152, at 30, note 10).

¹⁶⁸ See *Threats to International Peace and Security*, *supra*, note 153, annex, 6th recital.

¹⁶⁹ *Council Holds First-ever Debate on Impact of Climate Change on Peace, Security, Hearing over 50 Speakers*, U.N. Doc. SC/9000, 17 April 2007, available at <<http://www.un.org/News/Press/docs/2007/sc9000.doc.htm>> [hereinafter “*Security Council Debate*”]. For a review of the debate, see Sindico, *supra*, note 152.

¹⁷⁰ *Climate change and its possible security implications*, G.A. Res. 63/281, U.N. G.A.O.R., 63rd Sess., U.N. Doc. A/RES/63/281 (2009).

¹⁷¹ *Climate change and its possible security implications*, Report of the Secretary-General, September 11, 2009, U.N. Doc. A/64/350.

Security often calls for more ambitious measures, emphasizing the importance of early and preventive action. In the case of uncertainties — which are plentiful with regards to environmental migration — security experts call upon states to adopt such policies that they “would not regret having pursued even if the consequences of climate change prove less severe than feared”.¹⁷² In addition, the argument applies to any major environmental change, even if it is most often formulated in relation with global warming.

Yet, it has been argued that security would be a restrictive approach to environmental migration.¹⁷³ Accordingly, security would push states to focus exclusively on certain states such as trade partners, allies¹⁷⁴ and states which might host international terrorism,¹⁷⁵ with the result of leaving behind environmental migrants who do not fall within one of these “strategic” situations. More fundamentally perhaps, security, dealing with the “management” of environmental migration,¹⁷⁶ would favour political stability over human well-being. Concretely, this may push some states to support authoritarian regimes that, although oppressive towards their population, ensure a certain form of regional stability. Other critics have argued that the security discourse would backfire, feeding fears and hostility *against* environmental migrants. According to Castels, for instance, the security argument would “tend ... to reinforce existing negative images of refugees as a threat to security, prosperity and public health of rich countries”, thus constructing migration “as intrinsically bad and as something to be stopped”.¹⁷⁷ The risk is that linking security and environmental migration could lead to militarizing the political response to environmental migration.¹⁷⁸

¹⁷² Josh Busby, *Climate Change and National Security: An Agenda for Action* (New York: Council on Foreign Relations, 2007), at 11.

¹⁷³ A corollary argument is that climate migration should mainly be an issue of the competence of the General Assembly. See statement of Khaled Aly Elbakly (Egypt), *Security Council Debate*, *supra*, note 169. See also Sindico, *supra*, note 152, at 34.

¹⁷⁴ “House Statement on the National Security Implications of Global Climate Change”, *supra*, note 97.

¹⁷⁵ See McAdam & Saul, “Displacement”, *supra*, note 160; CNA, *National Security and the Threat of Climate Change* (2007), online: <<http://www.npr.org/documents/2007/apr/security-climate.pdf>>, at 47.

¹⁷⁶ *Discussion Note: Migration and the Environment*, IOM, 94th session, November 1, 2007, Doc. MC/INF/288, online: <http://www.iom.int/jahia/webdav/shared/shared/mainsite/about_iom/en/council/94/MC_INF_288.pdf> [hereinafter “*Discussion Note: Migration and the Environment*”], §27.

¹⁷⁷ Castels, *supra*, note 163, at 242.

¹⁷⁸ Paul J. Smith, “Climate Change, Mass Migration and the Military Response” (2007) 51 *Orbis* 617, at 622. See generally, *id.*

The strength of the latter argument depends on one's definition of "security", which is an "essentially contested concept".¹⁷⁹ While security is generally defined as "the pursuit of freedom from threat",¹⁸⁰ a debate focuses on the determination of the nature and target of these "threats".¹⁸¹ The consequences of invoking security in the context of environmental migration fundamentally depend on the understanding of the concept of "security". On the one hand, climate change, as such, may be considered as a security issue, opening the path to a realist conception of security: the security of a state that has to be achieved at the expense of the security of other states, in a zero sum game.¹⁸² This would result in portraying environmental migrants as a threat to the global West and in calling for the "militarization of international politics".¹⁸³ On the other hand, however, climate change may be considered a security issue *because and in as much as* it affects sustainability. This approach of security, extending beyond state level and beyond physical violence, assumes that "true (stable) security can only be achieved by people and groups if they do not deprive others of it", somewhat reflecting "the Kantian idea that we should treat people as ends and not means".¹⁸⁴ Rather than realism, this clearly calls to a liberal theory of international relations as characterized by the notion of complex interdependence.¹⁸⁵ According to this broader understanding of security as interdependence, "the possibilities for less violent and more constructive responses open up".¹⁸⁶

The latter, liberal conception of security is reflected among others in the concept of "human security".¹⁸⁷ King and Murray showed that "[t]he argument of human security in the security literature captured the view that the focus on security studies should shift from the state to the

¹⁷⁹ Barry Buzan, *People, States and Fear* (Colchester, U.K.: ECPR Press, 2007), at 7.

¹⁸⁰ *Id.*, at 18. See also Arnold Wolfers, "'National Security' as an Ambiguous Symbol" (1952) 67 *Political Science Quarterly* 481, at 485; C.-P. David, *La guerre et la paix. Approches contemporaines de la sécurité et de la stratégie* (Paris: Presses de Sciences Po, 2000), at 31.

¹⁸¹ For a synthetic presentation of the debate on the definition of security, see Dario Battistella, *Théories des relations internationales*, 3d ed. (Paris: Presses de Sciences Po, 2009), at 508-41.

¹⁸² See John J. Mearsheimer, *The Tragedy of Great Power Politics* (New York: Norton, 2001), at 17-18.

¹⁸³ Schellnhuber, *supra*, note 154, at 20.

¹⁸⁴ Ken Booth "Security and Emancipation" (1991) 17 *Rev. Int'l Studies* 313, at 319.

¹⁸⁵ See generally, Robert O. Keohane & Joseph S. Nye, *Power and Interdependence: World Politics in Transition* (Boston: Little, Brown, 1977).

¹⁸⁶ Dalby, *supra*, note 154, at 129.

¹⁸⁷ United Nations Development Plan, *supra*, note 152, at 24ff. If the notion of human security is clearly "embedded in a notion of solidarity among people", such "solidarity" should be understood as "de facto solidarity" or "complex interdependence", not as a moral duty of fraternity.

individual and should encompass military as well as nonmilitary threats.”¹⁸⁸ Although the content of this concept remains contested,¹⁸⁹ its great promise from a development perspective is to “capture some of the more substantial political interests and superior financial resources associated with military security and foreign policy by linking human security to human development”.¹⁹⁰ Thus, human development not only extends security from the state to individuals, but also puts global developmental issues at the top of the international agenda by revealing the interdependence of developmental and security issues in the long term.¹⁹¹ Through a realpolitik approach based on the well-understood interest of states rather than on the interests of individuals, human security can represent a great incentive for international cooperation in the protection of environmental migrants.¹⁹²

Thus, a human security or “sustainable security” argument calls for international cooperation with solving issues that potentially lead to tensions. For instance, states may cooperate in relocation programs to avoid illegal migration flows, which could otherwise support human trafficking.¹⁹³ This approach may also encourage “support to the most vulnerable countries and population groups through building the capacity of governments and stakeholders to the challenges presented by the climate change, environmental degradation and migration nexus”.¹⁹⁴ More fundamentally, human security arguments call upon early and preventive action,¹⁹⁵ extending to post-relocation integration support.¹⁹⁶

¹⁸⁸ Gary King & Christopher J.L. Murray, *Rethinking Human Security* (Paris: UNESCO, 2008), at 588-89 [hereinafter “King & Murray”].

¹⁸⁹ See generally Roland Paris, “Human Security: Paradigm Shift or Hot Air?” (2001) 26:2 *International Security* 87; Alexandra Amouyel, “What is Human Security?” (2006) 1 *Human Security Journal* 10; Yuen Foong Khong, “Human Security: A Shotgun Approach to Alleviating Human Misery” (2001) 7 *Global Governance* 231; Karen O’Brien, Asuncion Lera St. Clair & Berit Kristoffersen, *Climate Change, Ethics and Human Security* (New York: Cambridge University Press, 2010) 23, at 42 [hereinafter “O’Brien, St. Clair & Kristoffersen”].

¹⁹⁰ King & Murray, *supra*, note 188, at 589.

¹⁹¹ See O’Brien, St. Clair & Kristoffersen, *supra*, note 189, at 44.

¹⁹² *Discussion Note: Migration and the Environment*, *supra*, note 176.

¹⁹³ *Id.*, § 24.

¹⁹⁴ Andrew Morton, Philippe Boncour & Frank Laczko, “Human Security Policy Challenges” (2008) 31 *Forced Migration Rev.* 5, online: <<http://www.fmreview.org/FMRpdfs/FMR31/5-7.pdf>>.

¹⁹⁵ See Howard Adelman, “From Refugees to Forced Migration: The UNHCR and Human Security” (2001) 35 *Int’l Migration Rev.* 7 (showing that, under the influence of the concept of human security, the UNHCR has increasingly considered a preventive rather than merely reactive approach to asylum).

¹⁹⁶ Michael Renner, “Climate of Risk, Climate Change Poses new Challenges to Security Policy” (2010) 93 *World Watch* 18, at 20 (arguing that “In migrants’ likely destinations, there will

However, McAdam and Saul fairly underscored the “danger that the development of the political project — which often takes on a life of its own — will come to overshadow, dilute, or erode the norms which it is supposed to be uplifting”.¹⁹⁷ More concretely, human security approaches which reveal an interest rather than an obligation of states, may “submit ... human rights standards and approaches for the discretionary, political ‘human security’ agenda”.¹⁹⁸ Nothing guarantees that broadening the concept of security to “human security” and highlighting the complex interdependence of states will prevent some prioritization of “strategic” environmental migrants or encourage undesirable cooperation with authoritarian governments. Another risk is that the security discourse may favour particular political goals. Institutionally, dealing with environmental migration from a security perspective displaces the debate from the General Assembly to the Council of Security, thus considerably limiting the influence of affected countries.¹⁹⁹ Financially, it may also replace the principle of “common but differentiated responsibilities” by a principle of “shared responsibilities”,²⁰⁰ thus disconnecting environmental adaptation from climate change mitigation and diminishing the “responsibility” of the main polluters.

V. CONCLUSION

This paper has shown that fraternity, responsibility and sustainability are three potential grounds for the international legal protection of climate or environmental migrants. These three grounds are constantly evolving discourses reflecting a disciplinary background, a type of approach and a way of reasoning rather than a determined answer to what the international legal protection of climate or environmental migrants should be. Each ground may lead to very different arguments, which are sometimes incompatible. For instance, responsibility may call

be a need for policy measures that make their arrival less disruptive. ... The key is for the immigrants to be and be seen as an asset for local society instead of an unwanted burden.”).

¹⁹⁷ McAdam & Saul, *supra*, note 13, at 25.

¹⁹⁸ *Id.*, at 2-3.

¹⁹⁹ See *Security Council Debate*, *supra*, note 169, in particular statements of Khaled Aly Elbakly (Egypt), Ileana Nunez Mordoche (Cuba) and Liu Zhenmin (China). See also Sindico, *supra*, note 152, at 33. See generally U.N. Charter, *supra*, note 71, arts. 12.1 and 24.1.

²⁰⁰ See statement of Khaled Aly Elbakly (Egypt), *id.* See also U.N. Charter, *id.*, art. 2(5) (calling “[a]ll Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action”).

upon arguments based on torts, but also on unjust enrichment or strict liability; it can call upon purely legal or more political arguments, pleading for duties toward countries affected by climate change or toward countries whose economy relies on the petrochemical industry. The discourse on sustainability may include state-centrist approaches to security, potentially supporting authoritative regimes, or it may call upon “human security”, development and liberal regimes when integrating the notion of a global interdependence.

However, each of these three grounds starts from different assumptions and leads to different conclusions. These major differences may be synthesized only at the risk of oversimplifying the complex ramifications of each system of thought.

First, each ground indicates a specific material scope of a protection regime. Fraternity and sustainability call for the protection of all environmental migrants — or, indeed, of all persons in need of protection — while responsibility arguments call for a compensation of all *climate* migrants (whether in need or not). Fraternity calls for a form of redistribution from developed countries to developing countries, while responsibility calls for polluting states to compensate affected states, and sustainability calls upon any country to help unstable societies.

Second, each ground relies on different actors. Non-governmental initiatives, if they manage to raise sufficient funds, may implement a protection of environmental migrants based on the notion of fraternity. Responsibility, as either a legal or a political argument, would likely start from claims formulated by affected countries. Arguments relating to security would represent a great incentive for developed states to take the lead. Sustainability generally could be easily implemented at a regional level, which would surely be excluded by responsibility. Each ground would concern different institutions within the United Nations: fraternity would give full competence to the General Assembly and the Economic and Social Council; sustainability could also call for an action of the Security Council; and responsibility, at least as a legal argument, should be dealt with by the International Court of Justice.

Third, each ground creates very unequal incentives for states to cooperate. Fraternity arguments may push states to support emergency humanitarian actions, but the extensive allocation of resources in the long term or for preventive programs is unlikely. Responsibility, as a legal argument, would only lead to punctual compensation; as a political argument, today it appears as a major argument in a power struggle between developed and developing states, whose outcomes remain

uncertain. Sustainability is probably the greatest incentive for spontaneous involvement of massive resources, similar to the Marshall Plan, in support of environmental migrants. In the context of scientific uncertainties regarding the scope of future environmental migration, doomsday forecasts may strengthen sustainability arguments, but it may also frighten polluting states and exclude any recognition of their historical responsibility.

Overall, each ground leads to fundamentally different forms of protection. Fraternity arguments push the international community to intervene and protect a broad set of rights of all climate migrants in need, including general human rights (*e.g.*, the right to health), but also specific ones (*e.g.*, a form of right to migrate and find asylum in a safe region or country). Responsibility, in contrast, mainly focuses on financial transactions, even though states may agree to provide compensation otherwise. Finally, sustainability arguments may support different forms of intervention such as capacity-building and empowerment, with a view of avoiding dependency on international aid. Responsibility pleads for a recognition of the rights of states that are affected by climate change, while fraternity pleads for universal human rights, and sustainability rejects any right-based argument, favouring voluntary international or regional cooperation.

Surely, a future international legal protection of climate or environmental migrants will be influenced by a combination of several different arguments, as no single argument would be able to gather sufficient political resources. By analogy, the international conventions on statelessness were negotiated upon the understanding that “[s]tatelessness is considered as undesirable, both from the aspect of the interests of States and from the aspect of the interests of the individual.”²⁰¹ Concerning climate or environmental migrants too, the real advocacy challenge consists of articulating several arguments to convince populations and leaders in donor and affected countries and international institutions to act hand in hand. Thus, arguments based on sustainability and security in particular are likely to play a major role in the determination of the

²⁰¹ *Statelessness: A Working Paper*, in Report by Mr. Manley O. Hudson, Special Rapporteur, on “Nationality, including Statelessness”, annex 3 of Document A/CN.4/50, in Yearbook of the International Law Commission, Vol. II, 1952, Documents of the fourth session, doc. A/CN.4/SER.A/1952/Add.1, at 19. (“From the point of view of States it is desirable in the interest of orderly international relations that every individual should be attributed to some State which, as a result, has certain rights and obligations as regards this individual under international law, in its relations to other States. ... From the point of view of the individual, statelessness is undesirable as the status of stateless persons is, as a rule, precarious.”)

political will of donor countries. However, the “humanization” of security and the links with development call for the integration of some of the human rights language within a sustainable or security framework of action. Thus, chances are that fraternity arguments will be proudly put forward in any legal instrument. Even though responsibility, taken alone, will certainly not be a determining argument, it will be put forward by developing states as an argument in favour of extensive financial obligations. Developed states are, however, likely to reject any argument based on responsibility, for fear of signing a blank cheque extending their international legal duties to the unknown extent of a binding obligation to compensate all adverse consequences of climate change.

