The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework

Benoit Mayer*

ABSTRACT

Tens and maybe hundreds of millions of people have been or are about to be displaced because of rising sea levels or land degradation induced by global warming. In some cases, internal displacement of the population is not possible, either because their territory may become entirely uninhabitable (*e.g.*: the Maldives) or because the unaffected part of their territory is not able to absorb the whole displaced population (*e.g.*: Bangladesh). The increasing masses of "climate migrants" cannot benefit from any appropriate protection under today's international law, as they do not fulfill legal conditions to be treated as "refugees." The vulnerability of climate migrants is contrary to the humanitarian conception of Human Rights and goes against the principle of common but differentiated responsibility for climate change. An international legal framework on climate change-induced migrations should be established as soon as possible to provide a sustainable solution, protect affected individuals and communities, and reconcile international funding and local decision-making. It would be unlikely that an

---

* Benoît Mayer, LL.M. (McGill), Master of Political Sciences (Sciences Po), Bachelor of Law (Sorbonne), is a PhD candidate at the National University of Singapore. Remarks and comments can be sent to the author by email at bmayer@nus.edu.sg. This article is a modified version of a LL.M. Research Project supervised by Prof. François Crépeau, whose advice and support were very appreciated. Thanks to Karen Crawley and Mélodie Sahraie for their much appreciated comments, to Sebastien Jodoin for his enlightening conversations, and to Island First, the United Nations Global Migration Database Team, Amanda Greenman, and the staff of the McGill Faculty of Law and its library for their assistance.

HeinOnline -- 22 Colo. J. Int'l Envtl. L. & Pol'y 357 2011

international treaty could receive a sufficient number of ratifications to be efficient and, additionally, it would not be able to sufficiently take into account the specificity of each migration scenario. Therefore, this paper proposes a framework that could be adopted by a United Nations General Assembly resolution. The proposed resolution would recognize climate migrants' fundamental rights, but could also create an agency in charge of facilitating and supervising bilateral or regional ad hoc negotiations on the resettlement of the most affected populations.

TABLE OF CONTENTS

I. INTRODUCTION 360
A. Purpose and Structure 360
B. Climate Change and its Migratory Consequences 361
1. Climate Change and Human Population 361
2. Three Migratory Scenarios 362
3. A Wide-Scale Phenomena, though Difficult to Estimate 365
C. Definition of Climate Migrants 367
II. JUSTIFYING THE CREATION OF AN INTERNATIONAL LEGAL FRAMEWORK ON CLIMATE CHANGE-INDUCED MIGRATION 369
A. The Need for International Legal Consideration of Climate Change-Induced Migration 370
1. The Limits of National Solutions 370
a. In Situ Adaptation 370
b. Resettlement 372
c. The Limits of National Solutions 374
2. Rationale of the International Community's Responsibility 375
B. The Absence of Appropriate International Legal Standards Applicable to Climate Migrants 379
1. Inapplicability of Refugee Law 380
2. Insufficiency of Statelessness 383
3. The Absence of International Protection of Migrants Rights 385
4. Lack of Efficiency of International Human Rights Law 386
III. CONCEIVING AN INTERNATIONAL LEGAL FRAMEWORK ON CLIMATE CHANGE-INDUCED MIGRATION 388
A. Imagining: Guiding Principles for an International Legal

Framework 388
1. When? The Principle of an Early and Sustainable Response 389
2. What to Protect? The Principle of the Protection of Individual and Collective Rights 391
3. What to Decide? The Principle of a Global Approach of Climate Change Migration 393
4. With Whose Resources? The Principle of Common but Differentiated Responsibility 394
5. Who is in Charge? The Principle of Subsidiarity 398
B. Back to the Reality: A Realistic Path for the Adoption of an International Legal Framework 400
1. Limited Discretion of Existing Institutions 400
2. The Incapacity of Litigation to Establish a General Framework 402
3. Necessity of Treaty Law and its Feasibility at the Regional Level 405
4. Soft Law as a Starting Point 408
5. A Combination of Different Modes of Action 409
IV. PROPOSAL FOR AN INTERNATIONAL LEGAL FRAMEWORK ON CLIMATE-INDUCED MIGRATION 410
A. First Act: a UNGA Resolution on the International Community's Responsibility to Protect Climate Migrants 411
1. Guidelines on Climate Migrants and Climate-Induced Migration 411
2. Institutional Provisions 413
a. Global Fund on Climate-Induced Migration 413
b. United Nations Agency on Climate Change Migration 414
c. Expert Panel 414
B. Second Act: Regional Negotiations under the Resolution's Umbrella 415

I. INTRODUCTION

A. Purpose and Structure

The present Article argues that climate migrants should be granted some protection in a third-party country as soon as their state becomes unable to protect their most fundamental human rights. Small island developing states, where internal displacement will be impossible, demonstrate a clear case for this necessity. Larger countries that are not going to become fully uninhabitable make for a more difficult case, but international protection of climate migrants may still be necessary under certain conditions. In particular, countries such as Bangladesh, Egypt, Nigeria, and Vietnam are already facing high demographic pressure and will be unable to cope with the foreseeable loss of inhabitable territory resulting from climate change.[1]

This Article proposes an international legal framework on climate-induced migration. Part I introduces the migratory consequences of climate change and defines climate migrants. Part II argues for the creation of an international legal framework for climate change-induced migration. Populations will not always be able to adapt to climate change in situ and, under certain circumstances, no option will be left but to move. There are several alternative justifications for involvement of the international community, but no existing international legal standard or regime provides sufficient protection to climate migrants. Part III conceives the international legal framework argued for in Part II. First, it lists five guiding principles that should be applied in such a framework. Afterwards, it takes a pragmatic approach and attempts to conceive a realistic path for an international framework to be adopted and implemented. Part IV then presents a concrete proposal of an international legal framework on climate-induced migration. It assumes that an ambitious convention could surely not be ratified at the global

1. *See, e.g.*, Alice Poncelet, *Bangladesh Case Study Report: The Land of Mad Rivers*, (Jan. 30, 2009), http://www.each-for.eu/documents/CSR_Bangladesh_090126.pdf; Tamer Afifi, *Egypt Case Study Report*, (Jan. 30, 2009), http://www.each-for.eu/documents/CSR_Egypt_090130.pdf; Ulrike Grote & Koko Warner, *Environmental Change and Migration in Sub-Saharan Africa*, 2 INT'L J. GLOBAL WARMING 17, 36 (2010); Jamila Abdullahi et al., *Rural – Urban Migration of the Nigerian Work Populace and Climate Change Effects on Food Supply: A Case Study of Kaduna City in Northern Nigeria*, (June 28–30, 2009), http://siteresources.worldbank.org/INTURBANDEVELOPMENT/Resources/336387-1256566800920/6505269-1268260567624/Abdullahi.pdf; Olivia Dun, *Viet Nam Case Study Report: Linkages Between Flooding, Migration and Resettlement*, (Jan. 30, 2009), http://www.each-for.eu/documents/CSR_Vietnam_090212.pdf.

level and probably not at a regional level in the short or medium-term. Yet, concrete results may be reached in regional forums or through bilateral negotiations if they are facilitated by an international structure. Therefore, I suggest that a resolution by the United Nations General Assembly ("UNGA") should create and monitor a global framework that would be implemented through bilateral and regional negotiations and cooperation and funded by the international community through a United Nations ("UN") agency.

B. Climate Change and its Migratory Consequences

1. Climate Change and Human Population

During recent years, scientists have reached a consensus on the existence of climate change, even though the exact scope of this phenomenon remains somewhat uncertain.[2] In 2007, the International Panel on Climate Change ("IPCC") concluded in its *Fourth Assessment Report* that "[w]arming of the climate system is unequivocal."[3] During the twentieth century, the average global temperature increased by 0.76°C, and it is expected to increase by a further 1.8°C to 4°C during the twenty-first century.[4] Consequently, sea levels rose by 17 centimeters during the last century, rising at a rate of 3.1 millimeters per year between 1993 and 2003.[5] The extent to which sea levels are going to rise during the twenty-first century remains uncertain.[6] Though not taking into account ice sheet reaction, the IPCC forecast a further rise, between 18 and 59 centimeters, by the end of the century.[7] More recently, the "Copenhagen Diagnosis" concluded that the "global sea level is likely to rise at least twice as much as projected."[8] Beyond global warming and sea level rise, climate change is highly likely to result in more frequent and more severe weather phenomena, such as droughts, heavy

2. *See, e.g.*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS. CONTRIBUTION OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 12–17 (2007), *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-spm.pdf [hereinafter IPCC WG I].

3. *Id.* at 5.

4. *Id.* at 5, 13.

5. *Id.* at 5–7.

6. *Id.* at 13–14.

7. *Id.* at 5–14.

8. Ian Allison et al., *The Copenhagen Diagnosis: Updating the World on the Latest Climate Science* 7 (Nov. 2009), http://www.ccrc.unsw.edu.au/Copenhagen/Copenhagen_Diagnosis_LOW.pdf.

precipitation, extreme heat, and tropical storms.[9]

There is little doubt that climate change is the result of human activity, in particular the emission of greenhouse gases.[10] Although human beings are responsible for climate change, they also suffer from its diverse consequences. Economic activities, such as agriculture, forestry, and fishery, may be locally impeded.[11] Human life and health are also affected due to extreme heat, natural disasters, and a resurgence of certain diseases such as malaria, which together are estimated to cause over 140,000 excess deaths annually.[12] One of the most dramatic human consequences of global warming could concern human settlement. Climate change is degrading the conditions of life in many inhabited territories, sometimes forcing people to move.

2. Three Migratory Scenarios

Until recently, climate-induced migration was given little consideration by both migration studies and environmental governance.[13] However, over the course of the past decade, a growing number of contributions relating to environmental migrants have focused on climate-induced migration.[14] Yet, unsurprisingly, climate change-induced migration has exclusively been conceived of as the displacement of people *from* a place negatively affected by climate change rather than as a displacement *to* places positively affected by this phenomenon. In fact, climate change might induce migration by attracting people to newly inhabitable territories or to places offering new economic

---

9. IPCC, *supra* note 2, at 8.

10. *Id.* at 10.

11. *See, e.g.*, Dr. Charles Ehrhart, Poverty-Climate Change Coordinator, CARE Int'l, At the Crossroads of Poverty Reduction and Climate Change: New Challenges, New Opportunities for CARE (Aug. 6, 2006) (presentation slides available at http://www.careclimatechange.org/files/CARE_docs/Climate_Change_and_Nepal.pdf) (describing how global warming threatens Nepali agricultural productivity through temporary flooding and degradation of arable land and reduction in yields of cereal crops).

12. World Health Org., *Climate Change and Health*, (Jan. 2010), http://www.who.int/mediacentre/factsheets/fs266/en/index.htmlhttp://www.who.int/mediacentre/factsheets/fs266/en/index.html (last visited July 2, 2011) [hereinafter WHO].

13. Olivia Dun & François Gemenne, *Defining 'Environmental Migration'*, 31 FORCED MIGRATION REV., Oct. 2008, at 10, 10, *available at* http://www.fmreview.org/FMRpdfs/FMR31/FMR31.pdf.

14. Global Governance Project, *Climate Refugees: Hotspots and Numbers*, http://www.glogov.org/?pageid=82 (last visited July 3, 2011) (containing a comprehensive review of works written on climate migration, some of which are cited in this article).

opportunities as a result of climate change.[15] This perception of migration as a burden rather than an opportunity results in an "emigration" approach, rather than an "immigration" approach.

Three scenarios where climate change-induced immigration can occur have been generally identified in low-lying islands, coastal areas, and regions affected by land degradation. The first scenario of climate change-induced migration concerns low-lying islands.[16] In 1998–1999, two islands under the jurisdiction of Kiribati disappeared underwater.[17] In 2005, a thousand inhabitants of the Carteret Islands were evacuated to another island in Papua New Guinea.[18] In 2006, Lohachara Island in the Ganges Delta, where 10,000 inhabitants used to live, was totally submerged.[19] In many cases, however, a very slight rise of the sea level in a particularly vulnerable environment may combine with natural erosion and human activity to render the islands uninhabitable.[20] Many other islands are at high risk.[21] Even without being totally submerged, low-lying islands suffer from more frequent and more violent storms, the infiltration of saltwater threatening domestic agriculture, rapid erosion, and droughts.[22] In particular, the risk is critical for Small Island Developing States ("SIDS"), such as Tuvalu and the Maldives, which are very likely to become fully uninhabitable by the mid-century.[23]

A second scenario of climate change-induced migration concerns coastal areas, in particular deltas where the local rise in sea level could

---

15. For instance, Russia and Canada: *See infra* notes 121, 92.

16. *See* Ilan Kelman, *Island Evacuation*, 31 FORCED MIGRATION REV., Oct. 2008, at 20, 20, *available at* http://www.fmreview.org/FMRpdfs/FMR31/FMR31.pdf.

17. John Vidal, *Pacific Atlantis: First Climate Change Refugees*, THE GUARDIAN (Nov. 25, 2005), http://www.guardian.co.uk/environment/2005/nov/25/science.climatechange.

18. *Id.*; *see also* Displacement Solutions, *The Bougainville Resettlement Initiative Meeting Report*, (Dec. 11, 2008), http://displacementsolutions.org/files/documents/BougainvilleResettlementInitiative-MeetingReport.pdf.

19. *See* Geoffrey Lean, *Disappearing World: Global Warming Claims Tropical Island*, THE INDEPENDENT, Dec. 24, 2006, *available at* http://www.independent.co.uk/environment/climate-change/disappearing-world-global-warming-claims-tropical-island-429764.html.

20. *See* Kelman, *supra* note 16, at 20.

21. *Id.*

22. *See* IPCC, CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE IPCC 687, 691 (2007), *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-chapter16 [hereinafter IPCC WG II]; U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE [UNFCCC], CLIMATE CHANGE: IMPACTS, VULNERABILITIES AND ADAPTATION IN DEVELOPING COUNTRIES 24 (2007); OLI BROWN, INT'L ORG. FOR MIGRATION, MIGRATION AND CLIMATE CHANGE 25 (2008).

23. *See* Kelman, *supra* note 16, at 20.

far exceed the global average.[24] The Mekong Delta in Vietnam is inhabited by 18 million people.[25] Half of Vietnamese rice is produced in the Delta, but higher flooding imperils the population's resilience and forces more people to other regions of the country.[26] In the Ganges-Brahmaputra Delta half a million people are displaced every year as a result of flooding.[27] Ericson found that approximately 9 million people around forty deltas worldwide will soon be displaced.[28] Storms, erosion, and temporary floods will affect even more people.[29] Massive internal displacements create a highly sensitive situation in developing countries, which are in demographic transition and whose environmental resources may be subject to increased competition.[30] For instance, Bangladesh is populated by more than 1,000 inhabitants per square kilometer, but most of its territory lies very near the current sea level.[31]

A third scenario results from desertification and land degradation. There is no clear scientific consensus on the exact scope of this phenomenon, but, according to Reich et al., half of Africa's arable lands are at some risk of desertification or degradation.[32] The slow destruction of agriculture in low-developed countries leaves no choice for populations but to move to survive. In West African Sahel, several countries, in particular Nigeria, are already facing ongoing desertification conjugated with "one of the highest population growth rates in the world."[33] On the North American continent, land degradation is

---

24. *See* IPCC WG II, *supra* note 22, at 747, 812–814 (showing "local sea level change due to change in ocean density and dynamics"); *see also* C.D. Woodroffe et al., *Landscape Variability and the Response of Asian Mega-Deltas to Environmental Change*, *in* GLOBAL CHANGE AND INTEGRATED COASTAL MANAGEMENT: THE ASIA-PACIFIC REGION 277 (2006).

25. Dun, *supra* note 1, at 3.

26. *Id.* at 9–10.

27. *See* KOKO WARNER ET AL., CARE INT'L, IN SEARCH OF SHELTER: MAPPING THE EFFECTS OF CLIMATE CHANGE ON HUMAN MIGRATION AND DISPLACEMENT 2:13 (2009), *available at* http://www.care.org/getinvolved/advocacy/pdfs/Migration_Report.pdf.

28. Jason P. Ericson et al., *Effective Sea-Level Rise and Deltas: Causes of Change and Human Dimension Implications*, 50 GLOBAL PLANET & PLANETARY CHANGE 63, 78 (2006).

29. *See* IPCC WG II, *supra* note 22, at 858.

30. *See* Dun, *supra* note 1.

31. *See* U.N. DEP'T OF ECON. AND SOC. AFFAIRS, POPULATION DIV., WORLD POPULATION PROSPECTS: THE 2008 REVISION (2009), *available at* http://www.un.org/esa/population/publications/wpp2008/wpp2008_text_tables.pdf.

32. *See* P.F. Reich et al., *Land Resource Stresses and Desertification in Africa*, *in* RESPONSES TO LAND DEGRADATION (E.M. Bridges et al. eds., 2001); *see also* IPCC WG II, *supra* note 22 at 439, 442.

33. Anthony Nyong & Charles Fiki, Drought-Related Conflicts, Management and Resolution in the West African Sahel, 25 (paper presented to the Human Security and

considered to be the origin of internal displacement or migration of 700,000 to 900,000 Mexican people every year and may foster emigration to the United States.[34]

The increase of natural hazards is a further reason for concern because it exacerbates other factors of vulnerability. Climate change causes more violent and more frequent extreme phenomena.[35] Scientific surveys show that natural hazards may result in much greater human risk than rise of the sea level.[36] The Bangladesh Delta is particularly vulnerable to sudden storm surges, including instances where up to two-thirds of the land mass has been inundated after extreme weather phenomena.[37] Climate change-driven natural hazards may also result in pandemics and in intrusions of salt water.[38] McLeman and Brown distinguish between "climate process," defined as "slow-onset changes," and "climate events," consisting of "sudden and dramatic hazards."[39] A climate event that occurs on a background of a slow climate process may be the straw that breaks the camel's back and pushes a population into exodus.

3. A Wide-Scale Phenomena, though Difficult to Estimate

The scope of climate change-induced displacements is still very much debated,[40] partly because an individual's decision to move is often

---

Climate Change International Workshop of Asker, Norway, 21 June 2005), *available at* http://www.gechs.org/downloads/holmen/Nyong_Fiki.pdf.

34. *See* U.N. Convention to Combat Desertification, Thematic Fact Sheet Series No. 3: Migration and Desertification, 1, *available at* http://www.unccd.int/documents/Desertificationandmigration.pdf [hereinafter UNCCD Thematic Fact Sheet Series No. 3]; Alexandra Deprez, *Climate Migration in Latin America: A Future 'Flood of Refugees' to the North?*, COUNCIL FOR HEMISPHERIC AFFAIRS (February 22, 2010), *available at* http://www.coha.org/climate-migration-in-latin-america-part-1/.

35. IPCC WG I, *supra* note 2, at 7–9.

36. IPCC WG II, *supra* note 22, at 17, *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-spm.pdf.

37. M. Monirul Qader Mirza, *Global Warming and Changes in the Probability of Occurrence of Floods in Bangladesh and Implications*, 12 GLOBAL ENVTL. CHANGE 127, 128 (2002); *see also* WARNER ET AL., *supra* note 27, at 2:13; IPCC WG II, *supra* note 22, at 333; Lynne Peeples, *The Bigger Kahuna: Are More Frequent and Higher Extreme Ocean Waves a By-Product of Global Warming?*, SCIENTIFIC AMERICAN (Feb. 2, 2010), *available at* http://www.scientificamerican.com/article.cfm?id=big-waves-northwest (showing that "[i]ncreasing maximum wave heights off the Pacific Northwest coast may pose a greater threat than rising sea levels).

38. IPCC WG II, *supra* note 22, at 18.

39. BROWN, *supra* note 22, at 17–18.

40. *See, e.g.*, Roger Harrabin, *Climate Mass Migration Fears 'Unfounded,'* BBC NEWS (February 4, 2011), *available at* http://www.bbc.co.uk/news/science-environment-

induced by a combination of factors rather than by one single factor.[41] This is evident because "environmental migration commonly presents itself where there is a slow onset of environmental change or degradation process (such as desertification) affecting people who are directly dependent on the environment for their livelihood and causing them livelihood stress."[42] Thus, environmental degradation is often a *driver* of displacement, but rarely is it the *unique cause*, as people also take into account factors such as economic opportunities, insecurity, attachment to a territory, the cost of relocation, and their perspectives on a new place to settle and new opportunities to be found there.[43] Therefore, considering migrant workers, political refugees, and climate migrants as alternative categories may not adequately reflect the complexity of individual decisions. Moreover, the link between specific bad environmental conditions and climate change may be difficult to establish: a bad harvest and hunger often lead to migration, whether or not they result from climate change, war, bad governance, or any other reason.

There is a lack of statistics on the ongoing climate change-induced migration on which a forecast could be based. The International Organization for Migration ("IOM") considers, however, that "gradual and sudden environmental changes are already resulting in substantial population movements," and that in 2008, "20 million persons have been

---

12360864; Cecilia Tacoli, *Not Only Climate Change: Mobility, Vulnerability and Socio-economic Transformations in Environmentally Fragile Areas of Bolivia, Senegal and Tanzania*, 28 RURAL-URBAN INTERACTIONS & LIVELIHOOD STRATEGIES 1 (2011), *available at* http://pubs.iied.org/10590IIED.html.

41. *See, e.g.*, William B. Wood, *Ecomigration: Linkages between Environmental Change and Migration*, *in* GLOBAL MIGRANTS, GLOBAL REFUGEES 42 (Aristide R. Zolberg & Peter Benda eds., 2001); Stephen Castles, *Environmental Change and Forced Migration: Making Sense of the Debate* (Oct. 2002); MICHELLE FOSTER, INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS: REFUGE FROM DEPRIVATION 5–21 (2007); *see also* PIERS M. BLAIKIE, ET AL., AT RISK: NATURAL HAZARDS, PEOPLE'S VULNERABILITY AND DISASTERS (1994) (highlighting the socio-political component of natural hazards).

42. Dun & Gemenne, *supra* note 13, at 10.

43. *See, e.g.*, Tamer Afifi & Koko Warner, *The Impact of Environmental Degradation on Migration Flows Across Countries* 3–4 (UNU-EHS Working Paper No. 5, 2008), *available at* http://www.indiaenvironmentportal.org.in/files/Working%20Paper%20No%205%202008.pdf; Richard Black, *Environmental Refugees: Myth or Reality?* (UNHRC, New Issues in Refugee Research, Working Paper No. 34, 2001), *available at* http://www.unhcr.org/3ae6a0d00.html; Mike Hulme, *Commentary: Climate Refugees: Cause for a New Agreement?* 50 ENV'T. MAGAZINE 50 (Nov.–Dec. 2008), *available at* http://www.environmentmagazine.org/Archives/Back%20Issues/November-December%202008/hulme-full.html; Alexandra Deprez, *Climate Refugees, 'Hotspot' Case Study: Mexico*, COUNCIL FOR HEMISPHERIC AFFAIRS (Feb. 27, 2010), *available at* http://www.countercurrents.org/deprez270210.htm (showing that frequent hurricanes accelerate the decision of Mexicans living in Chiapas to migrate).

displaced by extreme weather events, compared to 4.6 million internally displaced by conflict and violence over the same period."[44] Distinguishing people moving because of the degradation of soil in the Sahel or a rise of the sea level in Bangladesh from those making the same journey for another reason is almost impossible. In particular, no record is kept of internal displacements.[45] Therefore, a vast amount of uncertainty remains as to the scope of future climate-induced displacements.[46] Myers recognized that his estimation of 200 million climate-displaced persons by 2050 was based on "heroic extrapolations"[47] and later updated to 250 million.[48] Other estimations range up to 1 billion persons.[49] The UN Secretary-General considers credible estimations to be "between 50 million and 350 million."[50] These figures are particularly large compared with today's 214 million foreign-born individuals worldwide and 16 million political refugees.[51] It is likely that many of these climate-displaced persons will remain in their own country, but some scenarios will necessarily lead to emigration.

C. Definition of Climate Migrants

Black complained in 2001 that "[t]here are abundant typologies of 'environmental refugees' and 'environmental migrants,' but little

---

44. Int'l Org. for Migration, *Migration, Climate Change and Environmental Degradation: A Complex Nexus*, http://www.iom.int/jahia/Jahia/complex-nexus (last visited July 3, 2011).

45. BROWN, *supra* note 22, at 25.

46. *See generally*, Dominic Kniveton et al., *Challenges and Approaches to Measuring the Migration-Environment Nexus, in* MIGRATION, ENV'T AND CLIMATE CHANGE: ASSESSING THE EVIDENCE 41, 43 (Frank Laczko & Christine Aghazarm eds., 2009).

47. *Id.*; *see also* Norman Myers, *Environmental Refugees: An Emergent Security Issue* (2005), *available at* http://www.osce.org/eea/14851 (paper presented to the 13th OSCE Economic Forum, Prague, May 23, 2005).

48. Interview with Norman Myers (London, Mar. 14, 2007), *cited in Human Tide: The Red Migration Crisis: A Christian Aid Report*, at 48 (2007) (revising his estimation to 250 million climate migrants).

49. *See* Harald Winkler, *A Billion Climate Refugees by 2050?*, ENG'G NEWS (Sept. 2008), *available at* http://www.engineeringnews.co.za/article/a-billion-climate-refugees-by-2050-2008-09-19.

50. U.N. Secretary-General, *Climate Change and Its Possible Security Implications: Rep. of the Secretary-General*, ¶ 54, U.N. Doc. A/64/350 (Sept. 11, 2009), *available at* http://www.unhcr.org/refworld/pdfid/4ad5e6380.pdf.

51. *See* Int'l Org. for Migration, *Facts & Figures,* http://www.iom.int/jahia/Jahia/about-migration/facts-and-figures/lang/en (last visited July 3, 2011) [hereinafter IOM, *Facts & Figures*]; United Nations High Commissioner for Refugees, *Refugee Figures*, http://www.unhcr.org/pages/49c3646c1d.html (last visited July 3, 2011).

agreement on, or understanding of what these categories might really mean."[52] Though some literature has tried to clarify the definitions during the last decade, the meaning of the words often remains quite unclear for lack of an official or widely accepted definition.[53] The notion of "climate migrant" coexists with that of "environmental migrants." For the IOM, *environmental* migrants are defined as those who, "for compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad."[54] This definition adopts a pragmatic approach, as it indiscriminately includes people displaced by climatic events as well as by climatic process, people moving temporarily or permanently, people forced to move, and those choosing to do so.

For the sake of this Article, climate migrants will be defined more strictly. First, this Article deals with climate migration, not environmental migration. Climate migrants are people who are only moving because of global *climate change* as opposed to any "changes in the environment." This difference has important consequences when dealing with the role of the international community, as it will be argued that the international community is responsible for causing climate change. On the contrary, dealing with *environmental* migration may be a way to evade any international substantive commitment through the historical rejection of responsibility.

Second, whereas the IOM's definition demands that climate change is the *only* cause for displacement, it has already been mentioned that a decision to migrate generally takes into account a set of factors. Moreover, the way that climate change affects the inhabitability of a territory depends on adaptation capabilities. Thus, the most challenging definitional issue is probably the determination of a threshold of causal relationship between climate change and migration. Renaud et al. suggested a distinction between "environmental motivated migrants," "environmental forced migrants," and "environmental refugees."[55] However, there is minimal utility in creating a kind of *semi-protection*

52. Black, *supra* note 43, at 13.

53. *See* Dun & Gemenne, *supra* note 13, at 10; Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENVTL. L. REV. 349, 363 (2009).

54. Int'l Org. for Migration, *Discussion Note: Migration and the Environment*, ¶¶ 6–7 (Nov. 1, 2007), http://www.iom.int/jahia/webdav/shared/shared/mainsite/about_iom/en/council/94/MC_INF_288.pdf (last visited July 3, 2011).

55. Fabrice Renaud et al., *Control, Adapt or Flee: How to Face Environmental Migration?*, INTERSECTIONS, May 2007, at 3, 29–30.

status for would-be *semi-forced* climate migrants; one is either forced to migrate or not. Therefore, scholars should find a way to decide this question in binary terms. A solution may be found by analogy to the Refugee Convention, which does not require that persecution be the sole, or even the main, reason for the displacement of political refugees; it only requires that there *is* persecution.[56] The same objective criterion that a good reason *exists* rather than *has been a determinant of a personal choice* should be adopted concerning climate migrants.

Third, this Article focuses on the issue of *permanent* climate-induced migration, thus excluding persons fleeing an environmental catastrophe for a short period. Immersion, desertification, droughts, and land degradation necessarily lead to permanent migration. If climate change may also lead to temporary displacements in the case of a heavy climate event disconnected from any ongoing climate process, these displacements would be intrinsically different from permanent resettlement and are likely to be a less thorny legal issue *because* they are only temporary.

Fourth, while the IOM and a large part of the literature include persons displaced *internally* within the category of "climate migrants," this Article focuses on *international* climate migrants. This Article does not argue that internal climate migrants should not be protected by the international community, but it merely assumes that their situation is not of the same nature as international climate migrants. In particular, internal displacement should mainly be monitored by states (with the assistance of the international community), whereas, by definition, international climate migrants are excluded from their state's jurisdiction. Surely, an international program on "climate internally-displaced persons" should complete the international legal framework on international climate-induced migration that is the subject of this Article.

II. JUSTIFYING THE CREATION OF AN INTERNATIONAL LEGAL FRAMEWORK ON CLIMATE CHANGE-INDUCED MIGRATION

This first part argues that a new international legal framework on climate-induced migration should be created. Subpart A demonstrates that national responses to climate change-induced migration are insufficient and require an international normative intervention. Subpart B shows that current international law does not provide for any appropriate standard applicable to climate migrants.

56. Dun & Gemenne, *supra* note 13, at 10.

A. The Need for International Legal Consideration of Climate Change-Induced Migration

This first Subpart argues that national responses to climate change are not sufficient to mitigate the effects of climate change and highlights some possible justifications for the international community's responsibility to protect climate migrants. This Article does not deal with mitigation of climate change but assumes that adaptation is necessary whatever the outcomes of a mitigation program may be because "[t]he benefits of mitigation will be experienced several decades after the implementation of cutbacks in [greenhouse gas], given the long persistence of the latter in the atmosphere."[57]

1. The Limits of National Solutions

It is now common knowledge that "natural disasters" are not fully natural, since they depend heavily on social, economic, and political circumstances. This also applies to climate change, which is now known to have anthropogenic origins. However, this also applies to the consequences of climate change, as we often have the capacity to foresee natural phenomena and to prevent or mitigate any harm through appropriate policies. As Brown underscores, "[a] community's vulnerability . . . is a function of its *exposure* to climatic conditions (such as a coastal location) and the community's *adaptive capacity* (the capacity of a particular community to weather the worst of the storm and recover after it)."[58] The adaptive capacity is primarily a national matter. Under international human rights law, states must secure their own population's fundamental rights. As will be shown, international organizations have, however, helped states to implement this obligation. The two possible ways of coping with climate change will be examined in turn: adapting in situ or leaving.

a. In Situ Adaptation

In situ adaptation is a first-rank choice for adaptation to environmental change. For instance, a decision not to establish human settlements in flood plains will have little cost in comparison with the damages undergone otherwise. More specific ways of adapting to the local consequences of climate change have been implemented. Adaptation to land degradation may classically consist of culture diversification, water storage and management, irrigation systems, and

57. MARCO GRASSO, JUSTICE IN FUNDING ADAPTATION UNDER THE INTERNATIONAL CLIMATE CHANGE REGIME 13 (2010).

58. BROWN, *supra* note 22, at 18.

famine early warning systems. In contrast, desertification clearly calls for more radical policies. On June 17, 2010, a summit on the Great Green Wall gathered the representatives of the eleven most affected African states in N'Djamena, defining an ambitious project to plant a 7,000-kilometer-long, 15-kilometer-wide "strip of forest," in order to "reforest the continent from west to east to battle desertification."[59] However, national policies often take note that it is not possible to fight against climate change, and instead they prefer to focus on the aggravating factors, such as human overexploitation of land.[60] Such policies may slow down land degradation and desertification, but they will probably not reverse ongoing phenomena.

Adaptation to flooding allows more original ideas to be followed. For instance, the Bangladesh government built flow regulators along rivers. Similarly, the Maldives built a 3.5-meter-high wall around Male, its most inhabited island, reducing its vulnerability to natural hazards. In a more ambitious adaptation strategy, the Netherlands adopted a Flooding Defense Act and a Coastal Defense Policy, which included the project of building higher storm surge barriers, controlling the expansion of the rivers into side channels and wetlands, and leading regular safety reviews.[61] Similarly, Singapore is contemplating the possibility of having dikes built by Dutch companies.[62] Another form of adaptation consists of mitigating flooding damage as opposed to preventing floods, for instance through the creation of "'floating gardens' that rest on a bed of water hyacinths"[63] or raising ducks rather than chickens.[64]

National adaptation programs have been encouraged by international organizations. The United Nations Development Programme ("UNDP"),[65] the World Bank,[66] the Organisation for

59. Global Envtl. Facility, *Summit on the Great Green Wall*, http://www.thegef.org/gef/node/3286 (last visited July 3, 2011).

60. REPUBLIC OF YEMEN ENV'T PROT. AUTH., NAT'L ADAPTATION PROGRAMME OF ACTION 48 (2009), *available at* http://unfccc.int/resource/docs/napa/yem01.pdf.

61. IPCC WG II, *supra* note 22, at 717, 722.

62. *See Planning for Climate Change: Singapore Wants Dutch Dikes*, SPIEGEL ONLINE INT'L (Apr. 24, 2007), http://www.spiegel.de/international/world/0,1518,479061,00.html; *see also* Chang Chian Wui, *Meeting the Challenges of Climate Change: Singapore*, *in* CLIMATE CHANGE AND WATER: INT'L PERSPECTIVES ON MITIGATION AND ADAPTATION 241, 247 (Carol Howe, Joel B. Smith & Jim Henderson eds., 2010).

63. *See* WARNER ET AL., *supra* note 27, at 20.

64. CARE, CARE USA ANNUAL REPORT 2007: THE CHANGING TIMES (2007), *available at* http://www.care.org/newsroom/publications/annualreports/2007/FY07_AnnualReport.pdf. Chickens are often drowned by flooding in Bangladesh. *Id.*

65. United Nations Dev. Programme, *Adapting to Climate Change*, http://www.undp.org/climatechange/pillar_adaptation.shtml (last visited July 3, 2011).

66. The World Bank, *Climate Change Adaptation*,

Economic Cooperation and Development ("OECD"), and the Asian Development Bank[67] have each set up their own program on adaptation to climate change, while the UN Convention to Combat Desertification calls for international cooperation and partnership. However, only very limited financial aid has been provided. The United Nations Framework Convention on Climate Change ("UNFCCC") supervised the creation of National Adaptation Programs of Actions[68] for least-developed countries, which was funded by an ad hoc voluntary trust fund administered by the Global Environment Facility ("GEF"). The GEF administers two other trust funds focused on climate change adaptation programs, and the GEF is the "largest funder of projects to improve the global environment."[69] Yet, none of these four funds has an annual budget reaching $3 billion, which is the sole cost of the Dutch "Room for the River Program" that consists of improving security around rivers in the Netherlands.[70]

b. Resettlement

Leaving one's home is, at least, the only option when adaptation is not possible, not affordable, or too dangerous. It seems quite consensual in scientific literature, as well as in publications by non-governmental organizations ("NGOs"), that in situ adaptation is not always possible. For instance, Brown underscores that "migration may be the only possible adaptive response in the case of some of the small island and low-lying states where rising seas will eventually flood large parts of the country."[71] In 2009, NGOs unsuccessfully suggested inserting a framework for international resettlement programs in the Copenhagen Treaty.[72]

---

http://climatechange.worldbank.org/overview/climate-change-adaptation (last visited July 3, 2011).

67. ASIAN DEV. BANK, CLIMATE PROOFING: A RISK-BASED APPROACH TO ADAPTATION xv (2005), *available at* http://www.adb.org/Documents/Reports/Climate-Proofing/climate-proofing.pdf.

68. *See* United Nations Framework Convention on Climate Change, *Least Developed Countries Portal* (June 5, 2011), http://unfccc.int/cooperation_support/least_developed_countries_portal/items/4751.php (last visited July 3, 2011).

69. Global Env't Facility, *GEF-Administered Trust Funds,* http://www.thegef.org/gef/trust_funds (last visited July 3, 2011); Global Env't Facility, *What is the GEF*, http://www.thegef.org/gef/whatisgef (last visited July 3, 2011).

70. *See* Room for the River Programme, *Room for the River: A Safer and More Attractive Rivers Region*, http://www.ruimtevoorderivier.nl/media/19174/factsheet_uk.pdf (last visited July 3, 2011).

71. BROWN, *supra* note 22, at 38.

72. *See* David Suzuki Found. et al., *A Copenhagen Climate Treaty Version 1.0: A proposal for an Amended Kyoto Protocol and a New Copenhagen Protocol by Members of the NGO Community*, art. 5, ¶ 25 (2009), *available at* http://assets.panda.org/downloads/treaty_vol2_web_compl.pdf.

However, the international community remains, to say the least, reluctant to acknowledge that resettlement may sometimes be necessary. For instance, an official report by the UNFCCC on "Climate Change: Impacts, Vulnerabilities and Adaptation in Developing Countries" stated that "international relocation is not an option"[73] for SIDS and then failed to suggest any possible adaptation track for low-lying SIDS, and only recommended research, meetings, and national or international partnerships. The Copenhagen Agreement only mentioned "adaptation actions aimed at reducing vulnerability and building resilience in developing countries,"[74] without considering resettlement as an option. Thus, the international community assumes that adaptation should be national,[75] and even domestic resettlement is rarely considered. This may be explained by the fear that recognizing resettlement as a legitimate solution at the national level would give an argument in favor of *international* resettlements in situations where national resettlement is not possible.

Within affected states, particularly SIDS, there are ongoing debates on the relevance of resettlement solutions, which are sometimes opposed or mistrusted by these states' representatives. In favor of resettlement, the UN ambassador from Nauru denounced efforts to mitigate climate change consequences, saying they were focused on development, whereas "no amount of development could save the small islands from disappearing if global warming continues."[76] Many fear that adaptation to climate change, either through in situ adaptation or resettlement programs could take the place of preventing climate change,[77] and resettlement is often associated with the loss of identity. For instance, Tuvalu's Prime Minister reminded that "Tuvalu is a nation with a unique language and culture" and argued that "[r]esettlement would destroy the very fabric of [its] nationhood and culture."[78]

---

73. UNFCCC, *supra* note 22, at 44–45.

74. United Nations Framework Convention on Climate Change, Conference of the Parties, *Decisions Adopted by the Conference of the Parties*, ¶ 3, U.N. Doc. FCCC/CP/2009/11/Add.1 (Mar. 30, 2010) *available at* http://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf.

75. W. Neil Adger et al., *Adaptation to Climate Change in the Developing World*, 3 PROGRESS IN DEV. STUD. 179, 189–90 (2003).

76. Press Release, General Assembly, Our Challenges are Shared; So, Too, is Our Commitment to Enhance Freedom from Fear, Freedom from Want, Freedom to Live in Dignity, Says Secretary-General, U.N. Press Release GA/10942 (May 20, 2010), *available at* http://www.un.org/News/Press/docs/2010/ga10942.doc.htm.

77. *See* Karen Elizabeth McNamara & Chris Gibson, *'We Do Not Want to Leave our Land': Pacific Ambassadors at the United Nations Resist the Category of 'Climate Refugees,'* 40 GEOFORUM 475, 480–82 (2009).

78. Apisai Ielemia, *A Threat To Our Human Rights: Tuvalu's Perspective on*

Yet, climate-induced migrations are not something new. Adger highlights that "[m]igration . . . is a coping mechanism used throughout history by societies as part of their resource utilization strategies and as a means of coping with climate variability."[79] In 1984 and 1985, 600,000 people were internally displaced in Ethiopia during the famine.[80] In the last decade, several resettlement programs have been set up by states to combat local consequences of climate change. For instance, the Vietnamese "living with floods" program organizes the resettlement of 20,000 landless and poor households in regularly flooded areas to very close but less endangered areas. Yet, it has been put forward that this program considerably weakened the social links of displaced people.[81] In the United States, a "voluntary home buyout" program was created in Harris County, Texas, to displace households living in flood plains.[82] However, resettlement programs so far have been limited to within national borders; as a result, the foe of climate migrants is not climate as much as borders and migration control.

c. The Limits of National Solutions

Zarsky shows that "[u]nsurprisingly, but worrisome nonetheless, the most vulnerable regions are the poorest."[83] The Tropics are predicted to experience the most severe consequences of climate change, such as desertification and increased natural hazards. If rising sea levels theoretically cause equal concern in every coastal country, the vulnerability of the Tropics is increased by three factors: high demographic pressure, difficult settlement conditions, and little financial capacity. While all coastal states face challenges, "[p]oorer countries are under-equipped to support widespread adaptation."[84] Therefore, one solution to the consequences of climate change on least-developed and developing countries might consist of huge international development aid. This would be extremely costly, and such generosity from Western governments may be deemed quite unlikely; overall, this would not be sufficient in all cases, as adaptation may be technologically impossible.

Climate Change, 44 UN CHRON. 18, 18 (2007).

79. Adger et al., *supra* note 75, at 189.

80. Helmut Kloos & Adugna Aynalem, *Settler Migration During the 1984/85 Resettlement Programme in Ethiopia*, 19 GEOJOURNAL 113, 113 (1989).

81. WARNER ET AL., *supra* note 27, at 15.

82. Harris Cnty. Flood Control Dist., *Voluntary Home Buyout*, http://www.hcfcd.org/buyout.asp?flash=yes (last visited July 3, 2011).

83. Lyuba Zarsky, *Climate-Resilient Industrial Development Paths: Design Principles and Alternative Models*, *in* TOWARDS NEW DEVELOPMENTALISM: MARKET AS MEANS RATHER THAN MASTER 229 (Shahrukh Rafi Khan & Jens Christiansen eds., 2010).

84. WARNER ET AL., *supra* note 27, at iv.

In any case, this Article assumes that such massive aid will not be able to be given in time, and that in the short- or middle-term, a certain number of states will no longer be able to protect their populations from the life-endangering consequences of climate change.

2. Rationale of the International Community's Responsibility

This Article argues that the international community bears certain obligations toward populations affected by climate change, including setting up international resettlement programs for climate migrants. There could be different ways of justifying such a commitment from the international community, and these different justifications lead to very different forms of intervention. This paper briefly presents four types of arguments: a positivist argument based on treaty obligations, a humanitarian argument on solidarity and responsibility to protect, a fairness argument on the polluter-pays principle, and a realist argument based on the protection of world security.[85] These arguments are often complementary rather than alternative.

The international community's responsibility is first justified by obedience to the law. The UNFCCC provides that "[t]he developed country Parties . . . shall . . . assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects."[86] Up to now, this provision led only to very limited financial aid to in situ adaptation, exclusive of any program on resettlement. Arguably, the 1992 convention drafters were not aware of the existence of a hypothesis whereby no choice would be left to populations but to leave their countries; therefore, the notion of "adaptation" in the UNFCCC should be understood as including national or international resettlement as need be.

A second possible justification relates to humanitarian assumptions. Nescient international solidarity may be invoked to justify a moral, if not legal, obligation of developed states to somehow intervene. The paradigm of human rights, recognizing dignity and fundamental rights to any human person, may also push for some political decisions to help populations facing disasters. If the protection of one population's human

85. For a more extensive discussion of "fraternity," "responsibility" and "sustainability" as alternative or complementary grounds for an international protection of climate migrants, *see* Benoit Mayer, *Fraternity, Responsibility and Sustainability: The International Legal Protection of Climate (or Environmental) Migrants at the Crossroads* (Mar. 2011), *available at* http://ssrn.com/abstract=1806760.

86. United Nations Framework Convention on Climate Change [UNFCCC], art. 4, § 4, May 9, 1992, 1771 U.N.T.S. 107.

rights is normally the responsibility of the nationally and territorially competent state, one may consider that other states bear a second-rank obligation. An obligation to protect has been recognized in the case of "genocide, war crimes, ethnic cleansing and crimes against humanity"[87] in a three-pillar structure. It is easy to draw a parallel between mass crimes and climate change, as both threaten entire populations' most fundamental rights. The first pillar is the classical "protection responsibilities of the state" towards its own inhabitants. Yet, the second and third pillars include respectively the international community through "[i]nternational assistance and capacity-building" and "[t]imely and decisive response."[88] A second-pillar obligation has been recognized in the climate change context through cooperation, the creation of partnerships, and funding of adaptation programs. The next step would be for the international community to recognize third-pillar obligation, consisting of intervening "in a timely and decisive manner when a state is manifestly failing to provide" protection.[89]

A third possible justification of the international community's obligation relates to the general principle of responsibility.[90] There is no need to review sophisticated theories of fairness to notice the injustice of the human consequences of climate change. Most affected populations live in least-developed or developing countries, which have benefited little from the emission of greenhouse gases. On the opposite side, those who have emitted greenhouse gases are developed countries that will likely suffer much less from climate change.[91] Some polluting states, like Canada and Russia, could even benefit from global warming, since some northern regions will become more inhabitable or exploitable.[92]

---

87. U.N. Secretary-General, *Implementing the Responsibility to Protect: Rep't of the Secretary-General,* ¶ 11(a), U.N. Doc. A/63/677 (Jan. 12, 2009), *available at* http://globalr2p.org/pdf/SGR2PEng.pdf.

88. *Id.* ¶ 11(b)–(c).

89. *Id.* ¶ 11(c).

90. *See generally,* Romain Felli, *Justice globale pour les réfugié-e-s climatiques?*, 6 ASYLON(S) (2008), *available at* http://www.reseau-terra.eu/article850.html; Angela Williams, *Promoting Justice Within the International Legal System: Prospects for Climate Refugees*, *in* CLIMATE LAW AND DEVELOPING COUNTRIES, LEGAL AND POLICY CHALLENGES FOR THE WORLD ECONOMY 84, 90 (Yves Le Bouthillier, Benjamin J. Richardson & Heather Mcleod-Kilmurray eds., 2010).

91. *See, e.g.,* Zarsky, *supra* note 83, at 229.

92. *See, e.g,* Jamie Hewitt et al., *Assessment of Climate Change Impacts on Agricultural Land-Use Suitability: Spring Seeded Small Grains on the Prairies* (2008) http://www4.agr.gc.ca/AAFC-AAC/display-afficher.do?id=1210289174331&lang=eng (arguing that "by 2040–2069, climate change would lead to a change in limitations over much of the Prairies' agricultural regions and some new opportunities may develop in northern areas"). However, on the short and medium-term, Canada and Russia may have to undergo adaptation to climate change, in particular to the melting of permafrost and

Therefore, the principle of tort responsibility may be invoked by affected developing states claiming a share of developed states' benefits. Alternatively, the doctrine of unjust enrichment may apply, allowing affected states to claim some part of the new opportunities appearing in northern states.[93] Besides being "moral," applying the polluter-pays principle could lead to economic efficiency, as it would favor domestic measures mitigating climate change through re-internalizing negative externalities in the cost of production. The Stern Review showed that a rational behavior of developed states taking externalities fully into account would consist of drastic measures to mitigate global warming.[94]

A fourth justification of international intervention relates to peace and security.[95] Considering that some states will not be able to cope with the consequences of climate change, plenty of migrants will flee their countries, and many others will be displaced internally. International migration should be legal and monitored rather than be illegal and out of control. One can hardly imagine the human, but also the potential political and geopolitical, consequences of tens or hundreds of millions of additional undocumented migrants over the upcoming decades, compared with today's number of unauthorized migrants, estimated by the OECD to be more than 30 million.[96] Obviously, concerted migration schemes are preferred to emergency evacuation. In the absence of such a scheme, natural events, such as massive floods or severe cyclones in Asian deltas, might break the resilience of entire populations to climate change and lead to a domino effect whereby millions of people suddenly decide to leave. History has shown that such displacements can hardly happen without conflicts. This is especially true for our time, which is characterized by high population density in many regions of the world, states' sovereignty, and control of borders. According to Akhavan, post-9/11 international relations are characterized by "an emerging albeit grudging consciousness of humankind's inextricable interdependence" in

---

changes in the animal population.

93. Tort responsibility requires a wrongful act. In this case, the wrongful act may consist of pursuing greenhouse gas emissions in spite of scientific evidence indicating ongoing climate change, and in violation of the precautionary principle. In contrast, the doctrine of unjust enrichment does not require any wrongful act; therefore, a state's responsibility may be assessed even for historical pollution pre-dating any discovery of climate change.

94. NICHOLAS STERN, THE ECONOMICS OF CLIMATE CHANGE: THE STERN REVIEW vii (2006).

95. On climate change-induced migration and security, *see generally* Michael Renner, *Climate of Risk, Climate Change Poses new Challenges to Security Policy*, 23:1 WORLD WATCH MAGAZINE 18 (2010).

96. *See* OECD, THE FUTURE OF INTERNATIONAL MIGRATION TO OECD COUNTRIES TO 2030 (2009).

"a world in which events in the most remote reaches of the planet would have inevitable repercussions on all."[97] The areas of the world negatively affected by global warming or sea level rise, but abandoned by those responsible for climate change, could become the new Afghanistan, in which instability and violence would be the fertile ground of a new wave of terrorism. Therefore, Western governments cannot ignore the conflicts that are going to arise from climate change-induced migration.

Though the least convincing from an ethical perspective, the security approach may be a good driver to push developed countries to commit. For instance, security expert Söderblom published an alarmist article in a leading Australian security magazine warning of the risk that "potentially millions of poor and unskilled regional neighbours come begging for a new life." Climate change could "raise the risk of people-smuggling syndicates targeting Australia," whereas "[t]errorist 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." Therefore, Söderblom concludes that "Australia needs to invest more time and money in scoping the impact of global warming and earn some credibility along the way by *being seen* to proactively drive improvements to the problem of global warming."[98]

Furthermore, security may constitute a legal argument to implicate the United Nations, whose first purpose is "[t]o maintain international peace and security," which includes "tak[ing] effective collective measures for the prevention and removal of threats to the peace."[99] On April 17, 2007, the United Kingdom organized a debate at the UN Security Council on climate change as a security issue.[100] Two years later, on June 3, 2009, the UNGA adopted a resolution on Climate and its Possible Security Implications, which "invite[d] the relevant organs of the United Nations, as appropriate and within their respective mandates, to intensify their efforts in considering and addressing climate change, including its possible security implications"[101] and requested a report by the Secretary-General on the security implications of climate change.

---

97. Payam Akhavan, *Justice, Power, and the Realities of Interdependence: Lessons from the Milos Evi and Hussein Trials*, 38 CORNELL INT'L L.J. 973, 974 (2005).

98. Jason D. Söderblom, *Climate Change: National & Regional Security Threat Multiplier for Australia* 52 SECURITY SOLUTIONS 58, 60–61, 68 (2008) (emphasis added).

99. UN Charter art. 1, para. 1.

100. *See* U.N. Security Council [UN S.C.], Rep. of the Security Council, Apr. 17, 2007, U.N. Doc. S/PV.5663.

101. G.A. Res. 63/281, ¶ 1, U.N. Doc. A/RES/63/281 (June 3, 2009), *available at* http://www.un.org/en/ga/63/resolutions.shtmlhttp://www.un.org/en/ga/63/resolutions.shtml.

B. The Absence of Appropriate International Legal Standards Applicable to Climate Migrants

The previous Subpart has shown that there are good arguments for international legal "consideration" to be given to climate change migration. However, no existing specific international legal regime applies to climate migrants. In particular, climate change law focuses on climate change mitigation and adaptation, but it does not recognize a status for those who cannot adapt in their country and have to flee elsewhere. Recognizing climate migration for the first time ever, the Cancun Adaptation Framework contented itself with encouraging states to carry out "measures to enhance understanding, coordination and cooperation with regard to climate change-induced displacement, migration and planned relocation, where appropriate, at national, regional, and international levels."[102] Thus, this Subpart examines what Docherty and Giannini have called a wide "legal gap"[103] and looks at international law instruments concerning (1) refugee protection, (2) statelessness, (3) migrants, and (4) human rights generally.

A paradox is that international law does provide some protection in case of *internal* climate-induced displacements. As long as the victims of climate change do not cross a border, they benefit from the Guiding Principles on Internal Displacement, which applies to any person or group of persons "who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of . . . natural or human-made disasters, and who have not crossed an internationally recognized State border."[104] Under this regime, internally displaced persons ("IDPs"), including

---

102. United Nations Framework Convention on Climate Change, Conference of the Parties, Dec. 7–19, 2009, *Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention*, advanced unedited version, ¶ 14(f), U.N. Doc. A/CP.16 (Dec. 10, 2010), *available at* http://unfccc.int/files/meetings/cop_16/application/pdf/cop16_lca.pdf [hereinafter UNFCCC COP 16]; *see also,* Benoît Mayer, *Cancun Conference on Climate Change: Enhanced Attention on Adaptation* (Center for International Sustainable Development Law, Working Paper, Jan. 2011), *available at* http://www.cisdl.org; Inter-Agency Standing Committee [IASC], *Climate Change, Migration and Displacement: Who Will be Affected?* 1 (working paper submitted by the informal group on Displacement and Climate Change, 2008), *available at* http://unfccc.int/resource/docs/ 2008/smsn/igo/022.pdf.

103. Docherty & Giannini, *supra* note 53, at 357.

104. Representative of the U.N. Secretary-General, *Guiding Principles on Internal Displacement*, ¶ 2, U.N. Doc. E/CN.4/1998/53/Add.2 (1998), *available at* http://www.unhcr.org/43ce1cff2.html. Yet, the UN High Commissioner for Refugees adopted a more restrictive definition of internally displaced persons. *See* David Keane, *The Environmental Causes and Consequences of Migration: A Search for the Meaning of "Environmental Refugees"*, 16 GEO. INT'L ENVTL. L. REV. 209, 217 (2003).

climate-induced displacements, have the right "to receive protection and humanitarian assistance" from their state's authorities, and a state shall not arbitrarily refuse international humanitarian assistance.[105] However, the United Nations High Commissioner for Refugees ("UNHCR") has so far interpreted its mandate on IDP protection as limited to those IDPs "who, if they had breached an international border, would be refugees."[106] Furthermore, due to its limited resources, the UNHCR has constantly maintained that it "does not have a general competence for internally displaced persons,"[107] and its intervention is far from automatic.[108] As it will be seen in the next section, this result excludes most of the climate change-induced IDPs from the UNHCR's jurisdiction.

1. Inapplicability of Refugee Law

Climate or environmental migrants are often qualified as climate or environmental "refugees" in journalistic language,[109] and in some scientific literature.[110] More than a mere question of vocabulary, this reflects an easily perceivable analogy and, in some cases, an argumentative posture based on this analogy. For instance, Stavropoulou underscores that "[t]here is nothing inherent in the ordinary meaning of the word 'refugee' that would suggest that people fleeing flooded homes . . . should not be considered as refugees."[111] The analogy stems from the fact that both political refugees and climate migrants are fleeing a place where their safety is no longer ensured. The forced character of

105. Representative of the U.N. Secretary-General, *Guiding Principles on Internal Displacement*, Principle 3, ¶ 2, Principle 25, ¶ 2, U.N. Doc. E/CN.4/1998/53/Add.2 (1998), *available at* http://www.unhcr.org/43ce1cff2.html.

106. *See, e.g.*, Keane, *supra* note 104, at 217; United Nations High Commissioner for Refugees [UNHCR], *Internally Displaced People*, http://www.unhcr.org/pages/49c3646c146.html (last visited July 3, 2011) ("Even if they have fled for similar reasons as refugees . . . , IDPs legally remain under the protection of their own government."); Int'l Org. for Migration, *UNHCR's Role with Internally Displaced Persons*, IOM/33/93-FOM/33/93, Apr. 28, 1993, § 8.

107. *See, e.g.*, Int'l Org. for Migration, *UNHCR's Role with Internally Displaced Persons*, IOM/33/93-FOM/33/93, Apr. 28, 1993, § 8.

108. *See* CATHERINE PHUONG, THE INTERNATIONAL PROTECTION OF INTERNALLY DISPLACED PERSONS 84 (James Crawford ed., 2004).

109. *See, e.g.*, Lester R. Brown, *Climate Refugees' Growing Tab*, U.S.A. TODAY, July 21, 2007.

110. *See, e.g.*, Emma Brindal, *Asia-Pacific: Justice for Climate Refugees*, 32 ALT. L.J. 240 (2007); Hulme, *supra* note 43; Docherty & Giannini, *supra* note 53.

111. Maria Stavropoulou, *Drowned in Definitions?*, 31 FORCED MIGRATION REV., Oct. 2008, at 11, 12, *available at* http://www.fmreview.org/FMRpdfs/FMR31/FMR31.pdf.

displacement is often considered as the main difference between political refugees and "ordinary" migrants.[112] In this somewhat simplistic dichotomy, climate migrants should surely be considered closer to political refugees than to "ordinary" migrants. In addition, climate migrants flee depravation of their core fundamental rights, in particular their right to life, more than they pursue a better standard of life in a more prosperous country. As a result, "climate refugees" and political refugees have some similar needs in terms of legal protection. In particular, the non-refoulement principle, which is at the core of the international protection of political refugees, is equally a moral requirement for climate refugees.[113]

The 1951 Refugee Convention, as modified by the 1967 Protocol,[114] defines a refugee as any person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."[115] Consequences of climate change cannot fall per se within the definition of a "well founded fear of being persecuted." Though most climate migrants would have no difficulty proving that they could suffer a sufficient level of harm, a generally insuperable difficulty stems from the "source-of-persecution" requirement that "the cause of the harm [be] either the government or a person or group of persons that the government is unwilling or unable to prevent from continuing the persecution."[116]

---

112. *See, e.g.,* United Nations High Commissioner for Refugees, *Flowing Across Borders*, http://www.unhcr.org/pages/49c3646c125.html (last visited July 3, 2011).

113. *See, e.g.*, Nicole de Moor & An Cliquet, Environmental Displacement: A New Challenge for European Migration Policy, 7 (Paper presented to the Conference on "Protecting People in Conflict and Crisis: Responding to the Challenges of a Changing World", Oxford, Sept. 22, 2009), *available at* http://www.rsc.ox.ac.uk/PDFs/sessionIIIgroup5nicoledemoor.pdf.

114. U.N. General Assembly, Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Convention Relating to the Status of Refugees]; U.N. General Assembly, Convention and Protocol Relating to the Status of Refugees, Jan. 30, 1967, 606 U.N.T.S. 267.

115. U.N. General Assembly, Convention and Protocol Relating to the Status of Refugees, Jan. 30, 1967, 606 U.N.T.S. 267, art. 1.2.

116. Kara K. Moberg, *Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection*, 94 IOWA L. REV. 1107, 1121 (2009); *see also* Pierre-François Mercure, *À la recherche d'un statut juridique pour les migrants environnementaux transfrontaliers: la problématique de la notion de réfugié*, 37 R.D.U.S. 1, 13 (2006).

Since the origin of the Refugee Convention, the cause of displacement has been understood as "deriv[ing] from the relations between the State and its nationals."[117] The UNHCR later confirmed that "[p]ersecution is normally related to action by the authorities of a country,"[118] either because national authorities persecute someone or because they let someone be persecuted. The requirement that a person be deprived of their fundamental rights because of national authorities was actually intended to exclude climate migrants from the protective status of refugees. According to Hong, "[t]he development of refugee law, as evidenced by legislative history and interpretative guides, indicates that the drafters recognized natural calamities as major causes of human migration and purposefully declined to extend refugee status to the victims of such events."[119] Thus, "[e]nvironmental factors that cause movements across international borders are not grounds, *in and of themselves*, for the grant of refugee status"[120] under international law. According to the UNHCR Handbook, by indicating persecution as a specific motive, the convention "automatically makes all other reasons for escape irrelevant to the definition" and "rules out such persons as victims of famine or natural disaster, unless they also have well-founded fear of persecution."[121]

However, refugee law may provide some protection to climate migrants in two cases. First, refugees may accidentally fall within the Convention's definition of "refugee." It seems difficult to imagine that consequences of climate change might be considered a form of persecution committed by polluting states, as the causal and purposeful relation between one country's pollution and some local disaster would be very difficult to establish. Responsibility for climate change is collective, and "no individual government is primarily at fault."[122] But the "source-of-persecution" requirement could be fulfilled if a government has not been willing to reduce the known vulnerability of a particular group to climatic phenomena. For instance, a national policy

117. Jeanhee Hong, *Refugees of the 21st Century: Environmental Injustice*, 10 CORNELL J.L. & PUB. POL'Y 323, 331 (2001) (citing JACQUES VERNANT, THE REFUGEE IN THE POST-WAR WORLD 5–7 (1953)).

118. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶ 65 (1979), *available at* http://www.unhcr.org/refworld/pdfid/3ae6b3314.pdf [hereinafter UNHCR Handbook].

119. Hong, *supra* note 117, at 332.

120. IASC, *supra* note 102, at 4.

121. UNHCR Handbook, *supra* note 118, ¶ 39.

122. Jessica B. Cooper, *Environmental Refugees: Meeting the Requirements of the Refugee Definition*, 6 N.Y.U. ENVTL. L.J. 480, 513 (1998).

that prevents any internal displacement of endangered populations or mistreats those who move from an endangered location could be qualified as "persecution," entitling some climate migrants to refugee protection. This would also be the case if a government excluded a minority from any protection in face of a natural catastrophe, as the minority members who would be discriminated against might be considered to be suffering from persecution by the government. Alternatively, preventing the provision of international humanitarian assistance to the victims of a climate process may be considered a form of persecution. Thus, when a state is unwilling to protect any part of its population against the consequences of climate change, people "seeking refuge from the resulting environmental degradation are effectively seeking refuge from their government as well."[123]

A second hypothesis under which climate migrants can be entitled to refugee protection relates to subsidiary protection. Two pioneer states, Finland and Sweden, have adopted legislation granting such subsidiary protection for anyone who left their country and who "is unable to return to the country of origin because of an environmental disaster."[124] Nonetheless, the Scandinavian subsidiary protection of "environmental refugees," including some climate migrants, is the exception to the rule; climate migrants are generally not entitled to refugee protection.

2. Insufficiency of Statelessness

The international legal regime for the protection of stateless persons and the reduction of the cases of statelessness[125] might be applicable to some climate migrants, even though there are many uncertainties as to how this concept might apply. The first issue relates to the very nature of statehood. To be recognized, a state must have a territory, a population, and a government. However, it is uncertain whether these conditions must be respected continuously *after* a state has been recognized.[126] Most likely, a state cannot be maintained if an element disappears on a permanent basis.

Another issue is whether the territory requirement for statehood

---

123. *Id.* at 502.

124. SWEDISH ALIENS ACT, ch. 2, § 4 (SFS 2005:716) (Swed.), *available at* http://www.sweden.gov.se/content/1/c6/06/61/22/bfb61014.pdf (official translation); *see also* Finnish Aliens Act, § 88a(1), 301/2004, *available at* http://www.finlex.fi/en/laki/kaannokset/2004/en20040301.pdf.

125. For a general presentation of statelessness under international law, *see* LAURA VAN WAAS, NATIONALITY MATTERS: STATELESSNESS UNDER INTERNATIONAL LAW (2008).

126. Jane McAdam, *'Disappearing States', Statelessness and the Boundaries of International Law*, 6–7 (University of New South Wales Faculty of Law Research Series No. 2, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1539766.

would be met when land territories emerge. This does not seem to be the case in the United Nations Convention on the Law of the Sea, which considers territorial waters as the accessory of land territory and recognizes territorial waters only to inhabited, natural islands.[127] However, these provisions "rest on the assumption that there will not be a significant rise in sea-level,"[128] and may therefore be inapplicable. Yamamoto and Esteban suggest that the concept of a "deterritorialized state" may "become a special type of international entity that would allow these Island States to survive in some form the disappearance of their territory."[129] Yet, even in a worst-case scenario, the land territory of Pacific islands, such as the Maldives, is not likely to be entirely submerged before the end of the century; however, it will become uninhabitable long before being submerged.[130] Then, the "population element" of statehood would be challenged long before its "territorial" element. Eventually, the existence of a state is not defined by international conventions or institutions, but assessed by other states. Then, the continuing existence of the Maldives or other "sinking" islands depends primarily on political decisions.[131]

Statelessness is obviously a more secure status than the nationality of an uninhabitable country. However, international law does not provide stateless persons with a plethora of rights, and, in particular, does not provide the right to enter a territory. The Convention relating to the Status of Stateless Persons, ratified by sixty-six States,[132] prohibits expulsion of stateless persons except on grounds of national security or public order, but under the condition of lawful stay on the territory,[133] whereas political refugees protected by the Convention Relating to the Status of Refugees cannot be sanctioned for their illegal entrance into a

127. United Nations Convention on the Law of the Sea, art. 121, paras. 1–3, art. 60 para. 8, Dec. 10, 1982, 1833 U.N.T.S. 3973.

128. David D. Caron, *When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea Level*, 17 ECOLOGY L.Q. 621, 622 (1990).

129. Lilian Yamamoto & Miguel Esteban, *Vanishing Island States and Sovereignty*, 53 OCEAN & COASTAL MANAGEMENT 1, 8 (2010).

130. In this sense, *see* McAdam, *supra* note 126, at 2; *see also* The United Nations High Commissioner for Refugees [UNHCR], *Climate Change and Statelessness: an Overview*, 2, *Submission to the 6th Session of the Ad Hoc Working Group on Long-Term Cooperative Action (AWG-LCA 6) under the UNFCCC*, June 1–12, 2009, http://unfccc.int/resource/ docs/2009/smsn/igo/048.pdf.

131. McAdam, *supra* note 126, at 12.

132. Convention relating to the Status of Stateless Persons, Sept. 28, 1954, 360 U.N.T.S. 117, *available at* http://treaties.un.org/doc/Publication/UNTS/Volume%20360/volume-360-I-5158-English.pdf.

133. *Id.*, art. 31.

state's territory.[134] However, the notion of a *reduction* of statelessness may give stateless climate migrants an argument for naturalization. The Preamble of the Convention on the Reduction of Statelessness provided in a weak language that it is "desirable to reduce statelessness by international agreement."[135] A similar claim could be based on Article 15 of the Universal Declaration of Human Rights, providing that "[e]veryone has the right to a nationality," but this right has also remained of a doubtful legal nature.[136] Then, the requirement to reduce statelessness or the universal right to a nationality may constitute good political arguments, but probably not legal ones.

3. The Absence of International Protection of Migrants Rights

Climate migrants can hardly invoke their status as "migrants," as international law does not provide much protection to migrants. The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families does not provide any right to cross borders.[137] Neither the International Labour Organization conventions,[138] nor the UNGA's Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live give migrants any rights to move to or to stay.[139] These international instruments mainly recall internationally recognized human rights in the specific case of migrant workers or aliens, and their low rate of

---

134. Convention Relating to the Status of Refugees, *supra* note 114, art. 31.

135. Convention on the Reduction of Statelessness, second recital, Aug. 30, 1961, 989 U.N.T.S. 175, *available at* http://treaties.un.org/doc/Publication/UNTS/Volume%20989/volume-989-I-14458-English.pdf.

136. Universal Declaration of Human Rights, GA Res. 217(III), art. 15, para. 1, U.N. Doc. A/810 (Dec. 10, 1948), *available at* http://www.un.org/en/documents/udhr/. The right to a nationality has not been recognized as such by the International Covenant on Civil and Political Rights. Human Rights were originally conceived in order to protect citizens from their (own) state and therefore do not easily apply to stateless persons.

137. *See* International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Dec. 18, 1990, (entered into force July 1, 2003), *available at* http://www2.ohchr.org/english/law/cmw.htm.

138. *See* C97 Migration for Employment Convention (Revised), July 1, 1949, 120 U.N.T.S. 70; C143 Migrant Workers (Supplementary Provisions) Convention, June 24, 1975, 1120 U.N.T.S 77.

139. *See* GA Res. 40/144, Document A/RES/40/144 (Dec. 13, 1985), *available at* http://www.un.org/documents/ga/res/40/a40r144.htm. Article 2, paragraph 1 clearly provides that "[n]othing in this Declaration shall be interpreted as legitimizing the illegal entry into and presence in a State of any alien, nor shall any provision be interpreted as restricting the right of any State to promulgate laws and regulations concerning the entry of aliens and the terms and conditions of their stay or to establish differences between nationals and aliens."

ratification shows that few states are actually keen to recognize and protect even basic human rights in the case of economic migrants.

Free from any international obligation, many states will select migrants so as to accept only qualified, working-age migrant workers. For instance, "[f]ollowing the Tuvaluan government's appeal for assistance with relocation in 2000, the New Zealand government created the Pacific Access Category (PAC) to enable seventy-five residents... from Tuvalu . . . to migrate each year," but "applicants must be eighteen to forty-five, have an 'acceptable' offer of employment and meet a minimum English language requirement."[140] Yet, the migration opportunities obviously do not bring an appropriate answer to the necessity that *all* climate migrants be given a new place to live in dignity and may even "disrupt production systems and undermine . . . domestic markets" in the country of origin.[141] It is fundamental that no one be left behind on an isolated island against their will, and economic migration does not generally give any satisfactory answer to this requirement.

4. Lack of Efficiency of International Human Rights Law

A last potential source of international legal protection for climate migrants might be found in international human rights law.[142] Obviously, submersion of one's entire country, flooding, desertification, or a significant increase of natural hazards have consequences on fundamental, widely recognized rights such as the right to life, but also economic and social rights and possibly third generation human rights, such as the right to security.[143] However, if climate migrants' rights are well established, there are obstacles to the identification of the corollary duty holders. Under international human rights law, a state has the responsibility to protect the fundamental rights of its citizens and any other person within its jurisdiction.[144] States do not have any human rights obligations to other countries' citizens who are not under their

140. Brindal, *supra* note 110, at 241.

141. BROWN, *supra* note 22, at 32.

142. *See generally* C.W. WOUTERS, INTERNATIONAL LEGAL STANDARDS FOR THE PROTECTION FROM REFOULEMENT (2009).

143. For a human rights analysis of climate migration, see, e.g., Benoit Mayer, *International Law and Climate Migrants: A Human Rights Perspective* (CISDL-IDLO joint working paper series on sustainable development law on climate change, March 2011), *available at* http://www.idlo.int/Publications/8_MayerBenoit_International LawandClimateMigrants.pdf.

144. In this context, "jurisdiction" is to be understood as a synonym of "control." *See* Marko Milanovic, *From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties*, 8 H.R. L. REV. 411, 435–36 (2008).

jurisdiction, understood as "effective control."[145] In the *Bankovic* case, the European Court of Human Rights concluded that state-parties of NATO did not have effective control over the victims whom they were bombing in Sarajevo, and therefore the Convention did not apply.[146] Even if a state has, or should have, effective control over its level of greenhouse gas emissions, it surely does not have control over the remote consequences of climate change on the other side of the world, several decades later.[147]

If human rights can obviously serve as a *justification* for the international community's moral and political responsibility to intervene, it does not by itself create any pre-departure right that climate migrants could invoke vis-à-vis third-party states, such as a right to migrate. Legally unprotected climate migrants would be turned back by "host" countries with even less hesitation than asylum-seekers are turned away. However, if climate migrants eventually manage to move to a new country, either legally or illegally, they should be allowed to invoke fundamental rights against the state that has effective control over them. For instance, this could lead to a prohibition against the expulsion of a climate migrant based on, for example, the Convention Against Torture.[148] The Human Rights Committee stated that "state parties [to the ICCPR] must not expose individuals to the danger of torture, cruel, inhuman, or degrading treatment or punishment upon return to another

145. *See, e.g.*, U.N. Human Rights Comm., *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, § 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (March 29, 2004), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument; Saldano v. Argentina, Petition, Inter-Am. Comm'n H.R., Report No. 38/99, OEA/Ser.L./V/II.102, doc. 6 rev. ¶¶ 17–19 (1999).

146. Bankovic et al. v. Belgium, 2001-XII Eur.Ct. H.R.333 ¶¶ 50–58.

147. A condition of "jurisdiction" or "effective control" is more restrictive than a condition of causal link, which would be implemented in litigations on polluters' tort responsibility.

148. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3.1, December 10, 1984, 1465 U.N.T.S. 85 ("No State Party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."). This convention adopts a very broad definition of torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him, or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." *Id.*, art. 1.

HeinOnline -- 22 Colo. J. Int'l Envtl. L. & Pol'y 387 2011

country by way of their extradition, expulsion or *refoulement.*"[149] The European Court of Human Rights adopted a similar position in *Soering v. The United Kingdom.*[150] Yet it is likely that many states will not accept the full dimension of their obligation to protect fundamental rights under international human rights law, especially if climate migrants have crossed the border illegally. Abuses may be frequent, while litigation under international human rights law would be extremely long and difficult.[151] Therefore, international human rights law is too vague and leaves too much room for national "interpretation" to provide quick and efficient protection of climate migrants. On the other hand, international human rights are likely to develop, thanks to the issue of climate-induced migration, through new jurisprudence and instruments.

III. CONCEIVING AN INTERNATIONAL LEGAL FRAMEWORK ON CLIMATE CHANGE-INDUCED MIGRATION

As argued in Part II, a new international legal framework on climate-induced migration should be created. Part III will describe the picture of such a framework, first through identifying guiding principles that an international legal framework on climate change-induced migration should respect (Subpart A) and then by imagining a realistic path to implement this legal framework (Subpart B).

A. Imagining: Guiding Principles for an International Legal Framework

This Subpart identifies five guiding principles that such an international legal regime should respect: (1) an early and sustainable response; (2) respect for individual and collective rights; (3) a global approach to climate change migration; (4) burden-sharing; and (5) subsidiarity.

149. U.N. Human Rights Comm., *General Comment No. 20: Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment*, art. 7, § 9, Mar. 10, 1992, *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument; *see generally* WOUTERS, *supra* note 142, at 359.

150. *Soering v. United Kingdom,* XI Eur. Ct. H.R. (Ser.A) at 439 (1989); *see generally* WOUTERS, *supra* note 142, at 187; Moor & Cliquet, *supra* note 113, at 7.

151. In this sense: Moberg, *supra* note 116, at 1117.

1. When? The Principle of an Early and Sustainable Response

Members of the international community are likely to bury their "heads in the sands,"[152] waiting for a tragic catastrophe to happen before even recognizing the reality of climate change-induced migration. A cynic may wonder how many people need to die for the world to open its eyes. In the Ganges Delta, the most recent major storm surge in 2007 killed 4,000 people, in addition to 140,000 who died in 1991.[153] In 2008, Cyclone Nargis caused more than 145,000 deaths in the Irrawaddy Delta in Burma.[154] In every such instance, hundreds of thousands, or millions, of people are displaced, and many of them remain homeless.[155] In comparison, widespread images of a storm surge touching a small, would-be paradisiacal island, with a possible second disaster in the near future, may then have a greater influence on public opinion. This may lead to emergency evacuation and an international resettlement program announced by governments in prime time.

Yet, unlike political asylum claims, climate change migration can be foreseen well in advance. Even though nobody can guess when a climate event will suddenly force people to migrate from their homes, the growing probabilities of such an event are established.[156] The international community should take advantage of the foreseeable character of climate migrations and adopt a response to climate change migration as early as possible in order to mitigate the harm produced by climate change, reduce the potential cost, and adopt sustainable solutions.[157] Thus, a "planned and voluntary resettlement and reintegration of affected populations over periods of many years and decades" should be preferred to "mere emergency response and disaster relief."[158] Short-term in situ adaptation should be pursued only with due

---

152. BROWN, *supra* note 22, at 36.

153. Andrew C. Revkin, *The Dangers of the Deltas*, N.Y. TIMES, May 11, 2008, *available at* http://www.nytimes.com/2008/05/11/weekinreview/11revkin.html?scp=7&sq=Cyclone+Sidr+&st=nyt.

154. *Id.*

155. Joanna Kakissis, *Environmental Refugees Unable to Return Home*, N.Y. TIMES, Jan. 3, 2010, *available at* http://www.nytimes.com/2010/01/04/world/asia/04migrants.html.

156. *See*, Myers, *supra* note 47.

157. *See generally,* Frank Biermann & Ingrid Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, 10 GLOBAL ENVTL. POL. 60, 75 (2010) (arguing in favor of a "Principle of Planned Re-location and Resettlement" and a further "Principle of Resettlement Instead of Temporary Asylum").

158. Frank Biermann & Ingrid Boas, *Protecting Climate Refugees: The Case for a Global Protocol*, 50 ENVT. 8, 12 (2008) [hereinafter Biermann & Boas, *Protecting Climate Refugees*].

consideration to a longer-term solution, which may imply resettlement.[159] The risk is that false promises of in situ adaptation give the international community an excuse to avoid considering the necessity of resettlement and allows the world to simply wait for a catastrophe.

A good response to climate change migration should not only be found early, it should also be a sustainable solution that prevents any further catastrophe. When someone leaves an immerged land or is pushed away by desertification, there is little to no hope that this land will become inhabitable again in that person's lifetime. Like economic migrants, there is a risk that climate migrants would be admitted to asylum countries only when the country of destination can take advantage from them "to free the citizens from hard and unpleasant work."[160] To avoid such a situation, climate migrants should be "seen and treated as permanent immigrants"[161] from the outset and be entitled to the same rights as citizens. Substantive equality of climate migrants in the enjoyment of their rights may require particular forms of action given the difference of their situation. For example, climate migrants may require language education or assistance in finding a job. More particularly, Locke underlines that "[d]uring and after relocation, psychological trauma will no doubt be severe" and that "[r]elocation methods must take this into account."[162] Eventually, the permanent character of climate change-induced migration reflects the fact that the environmental causes of climate migration are themselves permanent, whereas a political change may stop the persecution of political refugees at their place of origin.

All in all, resettlement sustainability means that climate migrants should be given a stable and permanent status, entitling them to certain forms of protection. Indeed, if climate migrants are likely to live the rest of their life in a host country, there is no reason why they should not be naturalized. Naturalization would be the best way to ensure that climate migrants are not exploited after their migration and to guarantee "political justice."[163] However, the automatic naturalization of all climate migrants is utopian, as states may be reluctant to accept any international legal breakthrough in the sovereign and sacrosanct prerogative of granting nationality.[164] In addition, assimilation may also impede climate

159. *See, e.g.*, Kelman, *supra* note 16.

160. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 3, 52 (1983).

161. Biermann & Boas, *supra* note 158, at 12.

162. Justin T. Locke, *Climate Change-Induced Migration in the Pacific Region: Sudden Crisis and Long-Term Developments*, 175 GEOGRAPHICAL J. 171, 177 (2009).

163. WALZER, *supra* note 160, at 59.

164. *See, e.g.*, YAFFA ZILBERSHATS, THE HUMAN RIGHT TO CITIZENSHIP 7 (2002) ("It

migrants' collective identity, and resettlement in itself may be perceived as a major cultural loss.[165]

2. What to Protect? The Principle of the Protection of Individual and Collective Rights

A second guiding principle is that an international legal framework on climate-induced migration should recognize both *individual* rights and *collective* rights. The framework should leave no doubt that "[r]espect for human rights must be an integral part of any policy response to the migration and displacement consequences of climate change, no matter how the motivations for movement are defined."[166] Yet, individuals do not live alone; belonging to communities is a human need on economic, social, and political levels. Thus, one may consider that "if certain individual moral rights exist, then certain collective moral rights also exist," for "[c]ertain individual rights . . . cannot be separated from collective rights."[167] The Human Rights Committee recognized that "the right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights."[168] In addition, cultural rights include the right to take part in "cultural life,"[169] which certainly requires a form of collective identity.

An international legal framework dealing with climate-induced migration must reconcile the protection of a displaced groups' collective identity with the fundamental rights of each individual, which might be a

---

is commonly accepted that issues of citizenship are outside the reach of international law and are dealt with by states in accordance with their respective domestic legal system. . . . State sovereignty is primarily understood to entail the power to determine who will be the permanent and preferred members of the State, or, put differently, who will be its citizens.").

165. *See, e.g.*, Ielemia, *supra* note 78.

166. Philippe Boncour & Bruce Burson, *Climate Change and Migration in the South Pacific Region: Policy Perspectives, in* CLIMATE CHANGE AND MIGRATION: SOUTH PACIFIC PERSPECTIVES 5, 19 (Bruce Burson ed., 2010).

167. Dwight G. Newman, *Collective Interests and Collective Rights*, 49 AM. J. JURIS. 127, 158,162 (2004).

168. U.N. Human Rights Comm., *General Comment No. 12: The Right to Self-Determination of Peoples*, art. 1, § 1, (Mar. 13, 1984) *available at* http://www.unhchr.ch/tbs/doc.nsf/0/f3c99406d528f37fc12563ed004960b4?Opendocument.

169. *See* The International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, art. 15, § 1, *available at* http://www2.ohchr.org/english/law/cescr.htm ("The States Parties to the present Covenant recognize the right of everyone [. . .] [t]o take part in cultural life.").

very difficult task.[170] Individual economic migration under today's national regimes would tend to leave unproductive people behind and destroy the community's social structure. It has, for instance, been argued that "[r]elaxing immigration rules as part of a concerted policy to 'release the population pressure' in areas affected by climate change could accelerate the brain drain of talented individuals from the developing world to the developed—and worsen the 'hollowing out' of affected economies, which is itself a driver of migration."[171] Large-scale resettlement programs could also have dramatic consequences, as "moving people out of established social networks threatens their livelihoods and contributes to a sense of isolation."[172] A collective resettlement, rather than individual migration, may reduce this destruction of the social network. Eventually, the cultural rights of climate migrants would be nullified if they had to "abandon their identity and their community and integrate elsewhere."[173]

Biermann and Boas argue for a climate migrant regime to be "tailored not to the needs of individually persecuted people (as in the current UN refugee regime) but of entire groups of people, such as populations of villages, cities, provinces, or even entire nations, as in the case of small island states."[174] An international collective resettlement program may be a solution not only in the extreme case of an island state immersion, but also when population density reaches a tolerance threshold resulting from climate-induced internal displacements.[175] An interesting option would be to grant "migrants" sovereignty in their new settlement,[176] either through cession or lease of territory, as it would fully allow migrants to maintain their national identity. Such an option has been considered by Tuvalu and the Maldives without much success, because New Zealand and Australia are opposed to any cession of territory or any specific migration program.[177]

On the other hand, a purely collective treatment of climate migrants would undermine individual rights. Each climate migrant may have

---

170. *See generally,* Jean Rivero, *Les droits de l'homme : droits individuels ou droits collectifs?*, *in* LES DROITS DE L'HOMME : DROITS COLLECTIFS OU DROITS INDIVIDUELS? 23, 23 (Alain Fenet ed., 1982).

171. BROWN, *supra* note 22, at 40.

172. WARNER ET AL., *supra* note 27, at 2:15.

173. Kelman, *supra* note 16, at 20 (noting that "[t]he 12,000 Tuvaluans still on Tuvalu, for example, could easily disperse among the millions of Sydney, Tokyo, Los Angeles or other large cities").

174. Biermann & Boas, *supra* note 158, at 12.

175. *See generally, supra* note 1.

176. UNHCR, *supra* note 130, at 2.

177. *See* Locke, *supra* note 162, at 177–78.

different expectations abroad. According to Locke, for instance, "[y]oung unemployed islanders with few educational or economic opportunities at home may benefit from access to educational facilities, the job market and perhaps the greater freedom available in developed countries," whereas "older Pacific islanders, and those who unwillingly relocate, may be the losers if forced to migrate."[178] This may lead to different attitudes toward resettlement, which all ideally should be taken into account. Mortreux and Barnett show that "[p]eople in Funafuti [the main atoll of Tuvalu] wish to remain living in Funafuti for reasons of lifestyle, culture and identity."[179] Any collective resettlement would require a collective decision. A democratic decision-making process that would allow an effective, early, and collective resettlement decision to be taken will need to be invented.[180] In general, collective resettlement leads to very difficult issues relating to the respect of minorities in the exercise of collective rights. For instance, how would elders who want to finish their lives on "their" island be dealt with if everyone else wants to leave?

3. What to Decide? The Principle of a Global Approach of Climate Change Migration

A third guiding principle is that the adopted approach should be global in its geographical and material scope. Climate change is a global phenomenon that should lead to a global solution, as the largest greenhouse gas emitters are often far from affected countries, and instability in one region of the world can bring insecurity to remote countries.[181] Adopting a global approach to climate change migration is an equity requirement as it ensures that those states responsible for climate change pay for its consequences; but it is also an efficiency requirement as it includes both developed countries of the global North together with affected countries, mostly of the global South. This also implies that an international framework on climate-induced migration cannot completely evade the issue of climate-induced *internal*

178. *Id.* at 178.

179. Colette Mortreux & Jon Barnett, *Climate Change, Migration and Adaptation in Funafuti, Tuvalu*, 19 GLOBAL ENVT'L CHANGE 105, 105 (2009).

180. The Alaskan indigenous community of Kivalina gives a first example of such a democratic decision making. Referendums on a resettlement of the village, threatened by erosion, were rejected in 1953 and again in 1963. Yet another referendum was held in 1992, where 72 voted for a resettlement and only 7 against. *See* Kivalinacity.com, *Relocation*, http://www.kivalinacity.com/kivalinarelocation.html (last visited June 21, 2011). Yet, such a procedure results in imposing the decision of a majority upon a minority: those seven persons who voted against resettlement will surely have no choice but to move with the others. On the other hand, unanimous decisions are unlikely.

181. *See supra* note 97.

displacements. Granting asylum only to those who cannot be protected in their home country might, in extreme circumstances, create an incentive for suboptimal domestic decisions not to take adaptive measures for the purpose of "getting rid" of vulnerable populations. A genuinely global approach toward climate-related migration would push the actors to balance the costs and benefits of international displacement and in situ adaptation. Furthermore, a global approach toward climate change migration should also be coordinated with climate change mitigation policies. This may open the path to national contributions to an international fund that is indexed on the level of emissions of greenhouse gases and/or on the reduction of these emissions.

4. With Whose Resources? The Principle of Common but Differentiated Responsibility

A fourth guiding principle is that costs should be split between states on a fair basis. But what is a fair basis? Reflecting a widespread claim in the developing world, the Ethiopian Prime Minister Meles Zenawi stated "those who did the damage will have to pay."[182] A solution could be found in the Principle of Common but Differentiated Responsibility ("PCDR"), recognized in the 1992 *Rio Declaration on Environment and Development*[183] and in the UNFCCC.[184] The PCDR demands that states address the consequences of climate change together, while still differentiating between states in different situations.[185] Thus, it "fosters partnership and cooperation among states" and "promotes effective implementation of agreements"[186] through more acceptable, capacities-tailored agreements. An application of the PCDR is the requirement that "[t]he special situation and needs of developing countries, particularly the least-developed and those most environmentally vulnerable, shall be given special priority," so that "[i]nternational actions in the field of environment and development . . . address the interests and needs of all countries."[187] The authority of the

182. *Migration and Climate Change: A New (Under) Class of Travellers*, THE ECONOMIST, June 25, 2009.

183. United Nations Conference on Environment and Development, Rio De Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, vol. I, princ. 7, U.N. Doc. A/CONF.151/26, (June 14, 1992) *available at* http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm (hereinafter "Rio Declaration on Environment and Development").

184. U.N. Framework Convention on Climate Change, *supra* note 86, art. 3, § 1.

185. LAVANYA RAJAMANI, DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW 137 (2006).

186. FRIEDRICH SOLTAU, FAIRNESS IN INTERNATIONAL CLIMATE CHANGE LAW AND POLICY 186 (2009).

187. Rio Declaration on Environment and Development, *supra* note 183, princ. 6.

PCDR is strengthened since "[g]rowing evidence of state practice supports the view that [it] is a principle of international environmental law."[188]

There are two alternative interpretations of the PCDR: whether differentiation of responsibility may be based either on historical emissions, or on financial capabilities.[189] An emissions-based PCDR is similar to the "Polluter-Pays Principle," recognized as a principle of domestic governance,[190] and it may act as an incentive to reduce pollution.[191] In contrast, a financial capacity-based PCDR would lead to a justification such as solidarity or generosity, thus weakening the moral sense implied by the notion of "responsibility."[192] During the negotiations of the UNFCCC, developed countries accepted a higher responsibility justified by financial capacities, but rejected any idea of

188. SOLTAU, *supra* note 186, at 189.

189. See, for instance, the contradiction between the reference to "historical responsibility" and the designation of "developed countries" in, UNFCCC, *Decision 1/CP.16: The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention*, 2, recitals before § 36, U.N. Doc. FCCC/CP/2010/7/Add.1 (2010) ("owing to [their] historical responsibility, developed country Parties must take the lead in combating climate change and the adverse effects thereof.").

190. Rio Declaration on Environment and Development, *supra* note 183, princ. 16 ("National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.").

191. The "Polluter Pays Principle" intends to internalize the negative environmental consequences of an activity in the cost of this activity. *See, e.g.*, Guiding Principles Concerning the International Economic Aspects of Environmental Policies of the Organization for Economic Co-Operation and Development (OECD), adopted in *Recommendation of the Council on Guiding Principles Concerning International Economic Aspects of Environmental Policies*, ¶ 4, Doc. C(72)128, (May 26, 1972), *available at* http://webnet.oecd.org/oecdacts/Instruments/ShowInstrumentView.aspx?InstrumentID=4&Lang=en&Book=False ("The principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment is the so-called 'Polluter-Pays Principle.' This principle means that the polluter should bear the expenses of carrying out the above-mentioned measures decided by public authorities to ensure that the environment is in an acceptable state. In other words, the cost of these measures should be reflected in the cost of goods and services that cause pollution in production and/or consumption. Such measures should not be accompanied by subsidies that would create significant distortions in international trade and investment."); *see also* Sanford E. Gaines, *Polluter-Pays Principle: From Economic Equity to Environmental Ethos*, 26 TEXAS INT'L L.J. 463, 469 (1991).

192. For an extensive discussion of the distinction between capacity-based and responsibility-based PCDR, *see* Mayer, *supra* note 85, at 24–27.

"culpability."[193] For instance, the United States has consistently underscored that it "does not accept any interpretation of [the PCDR] that would imply a recognition or acceptance by the United States of any international obligations or liabilities, or any diminution in the responsibilities of developing countries."[194] This disagreement may seem of little practical consequence since "rich" countries are usually those who historically have contributed the most to greenhouse gas emissions.

The financial capacity-based interpretation, being voluntary by nature (rich states accepting to offer assistance), deeply differs from the integral reparation due under a "polluter-pays principle"-like rule. This latter option could open the way to litigation, because, referring to the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*: the injured states would be allowed to demand the "cessation of the wrongful act" and would be "entitled to obtain from the state which has committed an internationally wrongful act full reparation in the form of restitution, in-kind compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination."[195] Based on the other interpretation of the PCDR, states may argue that their responsibility is of a purely moral nature and that it has been mentioned in international instruments only as a mere explanation for specific financial mechanisms.[196] Therefore, the prevalence of either interpretation of the PCDR may have important consequences concerning the nature and the scope of the international community's commitment.

Questions also arise concerning the concrete meaning of the PCDR. Even if opening Western borders to climate migrants is an option, it is unlikely that most climate migrants will want to go to a completely different environment. For instance, most Bangladeshis will naturally want to go to India, and the Tuvalu will try to resettle on other Pacific islands or in Australia rather than in the suburbs of American or

193. Daniel Bodansky, *United Nations Framework Convention on Climate Change: A Commentary*, 8 YALE J. INT'L L. 451, 503 (1993).

194. U.N. Conference on Environment and Development, *Report of the UN Conference on Environment and Development*, ch. IV, § 16 U.N. Doc. A/CONF.151/26(vol. IV), *available at* http://www.un.org/documents/ga/conf151/aconf15126-4.htm.

195. International Law Commission, *Report on its 53rd Working Session*, arts. 41 & 42, § 1, U.N. Doc. A/56/10, *available at* http://untreaty.un.org/ilc/reports/2001/2001report.htm.

196. For a presentation of the adaptation financial mechanisms established by the UNFCCC, see, e.g., Karoline Hægstad Flåm & Jon Birger Skjærseth, *Does adequate Financing Exist for Adaptation in Developing Countries?*, 9 CLIMATE POL'Y 109, 110–11 (2009).

European cities.[197] As such, other actions should be taken by Western governments such as "financing, supporting, and facilitating the protection and resettlement of climate refugees."[198] Developing countries that are neighboring affected areas are likely to be the main destinations for climate migrants, and their capacity to resettle climate migrants should be taken into consideration. The UN Secretary-General emphasized that "[s]ocieties differ greatly in their capacity to manage population movements and assimilate migrants, and a capacity adequate to manage moderate and/or gradual flows may be overwhelmed by massive and/or sudden flows," concluding that "[a]dequately planning for and managing environmentally induced migration will be critical."[199] Eventually, compensation from developed countries to developing countries neighboring affected countries must be established to ensure fairness and successful resettlement.

197. *See, e.g.*, Jane McAdam & Ben Saul, *Displacement with Dignity: International Law and Policy Responses to Climate Change Migration and Security in Bangladesh*, 53 GERMAN YEARBOOK OF INT'L L. 1 (2010) (arguing that climate migration in Bangladesh is and will mostly be internal); Afifi, *supra* note 1, at 21 (reporting that "rather than traveling to Europe, [Nigerian climate migrants] travel to other African countries (if they leave their own country in first place) where there are similar agricultural activities to theirs. These countries are mainly the Benin Republic, Cameron, Chad, Ghana, Ivory Coast, Mali, Nigeria and Togo"); Francois Gemenne & Shawn Shen, *Tuvalu and New Zealand Case Study Report, in* ENVIRONMENTAL CHANGE AND FORCED MIGRATION SCENARIOS 2, 10–11 (2009), *available at* http://www.each-for.eu/documents/CSR_Tuvalu_090215.pdf, (reporting that Tuvaluan climate migrants mainly go to Fiji and New Zealand, but only exceptionally to Australia or the United States, mainly for cultural reasons); Mohamed Ait Hamzad, Brahim El Faskaoui & Alfons Fermin, *Migration and Environmental Change in Morocco: The Case of Rural Oases Villages in the Middle Drâa Valley, in* ENVIRONMENTAL CHANGE AND FORCED MIGRATION SCENARIOS 2, 12 (2009), *available at* http://www.each-for.eu/documents/CSR_Morocco_090328.pdf (showing that, even though international migration to Europe is frequent, "internal migration has always remained more important in numerical terms," in particular concerning emigration from remote oases); Thomas Faist et al., *Environmental Factors in Mexican Migration: The Cases of Chiapas and Tlaxcala, in* ENVIRONMENTAL CHANGE AND FORCED MIGRATION SCENARIOS 2, 12 (2009), *available at* http://www.each-for.eu/documents/CSR_Mexico_090126.pdf (noting that Emigration from Mexico is overwhelmingly directed towards the United States (other international migration flows are close to insignificant) and strongly interlinked to the respective economic, social, and political conditions in both countries, Mexico and the United States, yet also recognizing (without quantifying) the development of internal migration. Even in cases of developing countries close to developed ones, where socio-economic "pulls" add to environmental "pushes," social and cultural links with potential places of destination have a great importance).

198. Biermann & Boas, *supra* note 158, at 12.

199. U.N. Secretary-General, *supra* note 50, § 63.

5. Who is in Charge? The Principle of Subsidiarity

A fifth requirement is that decisions should be taken through a procedure that conforms to a principle of "subsidiarity." The principle of subsidiarity stems from the *Treaty on European Union,* where it is used as a principle of competence sharing between the Union and its member states.[200] It provides that "the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States . . . but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."[201] In a very convincing article, Carozza argues that "[a]s in the European Union, in international law subsidiarity can be understood to be a conceptual alternative to the comparatively empty and unhelpful idea of state sovereignty,"[202] in particular to justify international human rights law. Similarly, this Article argues that an international legal framework on climate migrants would greatly benefit from an approach based on the principle of subsidiarity.

Carozza considers that, when applied to human rights, subsidiarity may be summarized in three elements. The first element is "that local communities be left to protect and respect the human dignity and freedom represented by the idea of human rights whenever they are able to achieve those ends on their own." Regarding climate-induced displacements, this would mean that victims of climate change should normally fall within the competence of the state on the territory of which they live. The second element is "the integration of local and supranational interpretation and implementation into a single community of discourse with respect to the common good that the idea of human rights represents." Similarly, a set of commonly accepted minimal standards should be recognized by the international community, including the principles of an early and sustainable response; consideration for individual and collective rights; a global approach; and common but differentiated responsibility. A third element of subsidiarity is that, "to the extent that local bodies cannot accomplish the ends of human rights without assistance, the larger communities of international society have a responsibility to intervene."[203] Thus, the principle of subsidiarity may be interpreted to define the international community's duty to intervene upon the incapacity of the affected state to adapt in situ

200. *See, e.g.*, J.L. CLERGERIE ET AL., L'UNION EUROPÉENNE 239 (6th ed. 2006).

201. Consolidated Version of the Treaty on European Union, art. 5, §§ 1, 3, Mar. 30, 2010, O.J. (C83) 15.

202. Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 40 (2003).

203. *Id.* at 57–58.

HeinOnline -- 22 Colo. J. Int'l Envtl. L. & Pol'y 398 2011

or to resettle internally. It commands that the international intervention be as limited as possible: founding of an *in situ* adaptation scheme or an internal resettlement program should be preferred to international displacements of people.

However, adopting the principle of subsidiarity leads to two questions. A first procedural question is to determine who will implement the principle: assessing that one level of governance is unable to achieve a given goal (e.g. the protection of its population facing adverse environmental change) and that the upper level of governance should be in charge. In the EU context, the European Court of Justice, constituted by judges nominated by the member states, has competency to arbitrate between the authorities of the member states and those of the European Union.[204] Such an international institution may be essential to the proper functioning of a subsidiarity-based framework.

Another substantive issue relates to the appropriate number of levels of governance. The subsidiarity principle was invented to share competences between only two levels of governance: the states and the European Union. Concerning climate change-induced migration, however, it could be argued that a regional level of governance should be encouraged between the international community and the states. Regional agreements may be easier to make than global ones, as few Western states are likely to welcome a significant number of new migrants. In contrast, in regional diplomatic forums, countries that already face increased illegal migration would be willing to help further a negotiated collective solution rather than unilaterally fence their borders.[205] Regional negotiations have already been shown to be more able to foster ratification of conventions on the protection of refugees and human rights.[206] Consequently, concerning climate migrants, it is likely that regional negotiations will result in more ambitious decisions than in universal ones.[207]

---

204. Consolidated Version of the Treaty on European Union, *supra* note 201, arts. 35, 220.

205. *See, e.g.,* Lisa Friedman, *A Global 'National Security' Issue Lurks at Bangladesh's Border*, SCRIBD.COM (March 23, 2009), http://www.scribd.com/doc/13651961/India-Fence-Along-Bangladesh (reporting on India's ongoing project to fence more than 2,000 miles of its borders with Bangladesh in an attempt to prevent illegal migration).

206. *See in particular* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222; Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45; American Convention on Human Rights, Nov. 22, 1969. O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123; African Charter on Human and People's Rights, June 27, 1981, 21 I.L.M. 58.

207. *See* Aurélie Sgro, *Towards Recognition of Environmental Refugees by the*

Nonetheless, regional governance may lead to fears that the treatment of climate migrants may differ from one region to another, and that burden-sharing would not be possible on the regional scale, since rich Western States would be separated from needy tropical ones. To prevent this from happening, a global normative and financial umbrella should be created to establish common minimal human rights standards and to ensure efficient burden-sharing at a global level. An independent international institution should also be in charge of providing independent scientific assessments on issues, such as the inhabitability of a region, in order to ensure the respect of common standards at the regional level through public reporting, and to diffuse the best practices observed in a country or a region. Eventually, the failure of regional protection should be considered. Under these circumstances, one could imagine a direct intervention of the international community.

B. Back to the Reality: A Realistic Path for the Adoption of an International Legal Framework

Turning from theory to practice, this Subpart deals with the issue of determining the best media to set up a new international legal framework, which could be done through: (1) the action of existing institutions; (2) litigation; (3) international conventions; (4) international soft-law instruments; or (5) a combination of different modes of action.

1. Limited Discretion of Existing Institutions

First, stretching the competence of an existing institution would clearly be the easiest way to protect climate migrants. The UNHCR's extension of its jurisdiction to internally displaced persons provides a historical example. [208] The UNHCR's original statute clearly delimited its jurisdiction to persons who are "outside the country of [their] nationality, or if [they] ha[ve] no nationality, the country of [their] former habitual residence."[209] However, the UNGA adopted the statute of the UNHCR and retains the authority to modify it. Successive resolutions of the UNGA extended the UNHCR's authority to internally displaced persons "on the basis of specific requests from the Secretary-General or the competent principal organs of the United Nations and with the consent of

---

European Union, 6 ASYLON(S) (2008), *available at* http://www.reseau-terra.eu/article844.html.

208. *See* GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 23 (2007).

209. G.A. Res. 428(V), art. 6(A)(ii), U.N. Doc. A/Res/428(V) (Dec. 14, 1950), *available at* http://www.unhcr.org/refworld/docid/3ae6b3628.html.

the concerned State."[210] As a result, "[a]t the end of 2008, the UN refugee agency was caring for around 14.4 million of these IDPs, more than the total number of refugees of concern to UNHCR."[211]

It may be tempting to imagine a similar initiative in the context of climate-induced migration, as a UNGA resolution may suffice to extend the jurisdiction of an existing agency of the United Nations to the protection of climate migrants or to create a new agency. A UNGA resolution may be quite difficult to obtain because it requires support by the "majority of the members present and voting,"[212] but it is much easier than ratification of an international treaty. Alternatively, one may even argue that the UNHCR could do without a UNGA resolution, contenting itself with a reinterpretation of the definition of refugees so as to include climate migrants. Yet, the UNHCR cannot extend its mandate from the protection of nearly 25 million refugees and IDPs[213] to hundreds of millions of internal or international climate migrants without a profound reorganization. Of course, other existing institutions may also have a role to play in protecting climate migrants, such as the UNDP, the World Bank, the United Nations Environment Program ("UNEP"), and the UNFCCC. Cooperation among all of these institutions would be required in order for any efficient international framework to respect the requirement of a global approach.[214]

Overall, an international organization's initiative would face an insurmountable obstacle: the absence of commitment by third-party states. First, a unilateral initiative may lack financial resources. However, if the initiative were decided by a UNGA resolution, states that voted for the resolution may be ready to donate some voluntary contributions. The example of the UNHCR shows that "[a]s its work and size have grown, [its] expenditure has soared:"[215] voluntary donations by states, which represent almost the whole budget of this agency,[216] have followed the expansion of its scope of competencies. Yet, states likely would not fund

---

210. GA Res. 47/105, ¶ 14, U.N. Doc. A/RES/47/105 (Dec. 16, 1992), *available at* http://www.un.org/documents/ga/res/47/a47r105.htm.

211. UNHCR, *Internally Displaced People Figures*, http://www.unhcr.org/pages/49c3646c23.html (last visited June 22, 2011) [hereinafter *Displaced*].

212. U.N. Charter, *supra* note 99, art. 18, § 3.

213. Approximately 10.4 million refugees (excluding Palestinian refugees of the UNRWA's competence) and 14.4 million IDP are cared for by the UNHCR. *See* UNHCR, *Refugee Figures*, http://www.unhcr.org/pages/49c3646c1d.html (last visited June 22, 2011); *see also, Displaced*, *supra* note 211.

214. *See, e.g.*, Biermann & Boas, *supra* note 157, at 79.

215. UNHCR, *Financial Figures*, http://www.unhcr.org/pages/49c3646c1a.html (last visited June 22, 2011).

216. *See id.* (93% of the UNHCR budget comes from voluntary donations by states and 3% from private donors).

a program that they did not support. The main issue concerning an international organization or an NGO's own initiative is that there would be no adequate limitation to states' sovereignty. As a consequence, such a program would be limited to adaptation and possibly assistance to intergovernmental negotiations on resettlement, whereas states would remain totally free as to whether to cooperate.

2. The Incapacity of Litigation to Establish a General Framework

Litigation provides a second possible medium for international law to deal with climate-induced migration. In 2002, Tuvalu considered filing a complaint before the International Court of Justice against Australia and the USA.[217] Again in 2007, the new Prime Minister Ielemia threatened the international community, "[i]f urgent action is not taken in addressing the adaptation needs of vulnerable countries, [Tuvalu] will be forced to go down the path of litigation" and "seek the necessary restitution for all damages created by climate change."[218] If no complaint has been lodged yet, litigation is surely not an option that should be excluded straightaway. It could be initiated either directly by a state that is the victim of climate change, or by a state that is the destination of climate change-induced migration; both claiming to be an indirect victim of climate change resulting from several states' high emissions of greenhouse gases.

State responsibility for air pollution was recognized as early as 1941, when the *Trail Smelter* arbitration panel ordered Canada to indemnify the USA for transboundary air pollution. The panel stated that:

> [U]nder 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.[219]

Similarly, the ICJ in *Corfu Channel* referred to "every State's obligation not to allow knowingly its territory to be used contrary to the

---

217. *See, e.g.*, Kalinga Seneviratne, *Tiny Tuvalu Steps up Threat to Sue Australia, U.S.*, COMMONDREAMS.ORG (Sept. 5, 2002), http://www.commondreams.org/headlines02/0905-02.htm.

218. Ielemia, *supra* note 78, at 19.

219. Trail Smelter (U.S. v. Can.), 3 R.I.A.A. 1911, 1965 (Perm. Ct. Arb. 1940), *available at* http://untreaty.un.org/cod/riaa/cases/vol_III/1905-1982.pdf.

rights of other States."[220] Later, the *Stockholm Declaration* provided that "States have, in accordance with the Charter of the United Nations and the principles of international law, . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."[221] According to Smith and Shaerman, the no-harm principle "is so widely accepted amongst members of the international community that it would be difficult to argue against the proposition that it forms part of customary international law."[222]

Obviously, the main advantage of litigation is to "force" states to commit to international cooperation. However, litigation is in no case a perfect solution, in particular because some states, like the United States, have not accepted the compulsory jurisdiction of the ICJ.[223] However, the main difficulty with litigation would be to establish causation. Sufficient scientific evidence of an anthropogenic climate change phenomenon probably exists for the no-harm principle to be applied rather than the precautionary principle. Yet, a plaintiff would have to prove the individual responsibility of states for global warming, the causal link between global warming and environmental effects, and the relation between this environmental effect and a given harm to the plaintiff.[224] The last step may be particularly problematic, as community resilience to environmental phenomena widely depends on other conditions.[225] Immigration in particular depends on many causes, and may be triggered by climate *in conjunction* with other drivers.[226] Moreover, the most harmful consequence of climate change is not climate process, but climatic events. Plaintiffs will have difficulty demonstrating that a storm surge would not have occurred, or would not have been so devastating,

220. *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 22 (Apr. 9).

221. United Nations Conference on the Human Environment, June 16, 1972, *Declaration of the United Nations Conference on the Human Environment*, art. 21, U.N. Doc. A/Conf.48/14/Rev.1 (1972), *available at* http://www1.umn.edu/humanrts/instree/humanenvironment.html; *see also* Rio Declaration on the Environment and Development, *supra* note 183, art. 2.

222. JOSEPH SMITH & DAVID SHEARMAN, CLIMATE CHANGE LITIGATION: ANALYZING THE LAW, SCIENTIFIC EVIDENCE & IMPACTS ON THE ENVIRONMENT, HEALTH & PROPERTY 49 (2006). Litigation could also be brought to the UNCLOS tribunal. William C.G. Burns, *Potential Causes of Action for Climate Change Damages in International Fora: The Law of the Sea Convention*, 2 MCGILL J. SUSTAINABLE DEV. L. & POL'Y 27 (2006).

223. *See* SMITH & SHEARMAN, *supra* note 222, at 53.

224. RODA VERHEYEN, CLIMATE CHANGE DAMAGE AND INTERNATIONAL LAW: PREVENTION, DUTIES AND STATE RESPONSIBILITY 238 (2005).

225. *See* IPCC WG II, *supra* note 22, at 357–90, *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-chapter7.pdf.

226. WARNER ET AL., *supra* note 27, at 2.

"but for" emissions of greenhouse gases by one particular state. Therefore, probability methods of assessment would be more adequate to establish a causal link than a classic binary "but for" test.[227] Moreover, rather than scapegoating one or a few states for the wrongdoing of the whole developed world, the ICJ may be tempted to recognize a form of collective international responsibility, or even the responsibility of the international community of states. In recognizing either of these forms of liability, the ICJ would recognize that, as Delbruck argued, "[t]he traditional paradigm of repressive and early preventive environmental law, based on individual state obligations and liability," could be "inadequate in view of the formidable global task of preserving the environment and thereby securing a livable planet for the future."[228]

The consequence of state responsibility for wrongful acts should normally include restitution; if restitution is impossible, then compensation should be ordered.[229] While restitution is impossible when a territory has been submerged or rendered uninhabitable, cession of territory may be fair compensation after a plaintiff's territory has become uninhabitable. Then successful litigation might force developed states to accept a certain number of climate migrants, thus dividing the affected population between numerous host countries. Though highly preferable, collective resettlement may be difficult to achieve through litigation. A court order for cession of territory would affect only one state—that which had jurisdiction over the ceded territory—and in all likelihood, the court would order that state to cede an amount of territory exceeding the share of responsibility owned by that state. One way to evade this issue would be to have affected countries file a collective complaint against all developed states, so that each state would be "responsible enough" to cede one piece of territory, which would then be allocated to one particular plaintiff. Another more realistic possibility would be if the ICJ asks the condemned states to negotiate and find one resettlement place in one of their territories, with a threat of more severe penalties if they cannot succeed in doing so. A higher condemnation may consist of additional compensation relating to the impossibility of a collective resettlement.

Even if it is unlikely to give a full response to the issue of climate-induced migration, litigation can bring some hope that international law will avoid the injustice in which states that are responsible for climate change are not very affected by its consequences. Eventually, litigation

227. SMITH & SHEARMAN, *supra* note 222, at 111.

228. *See, e.g.*, Jost Delbruck, *A More Effective International Law or a New "World Law"?: Some Aspects of the Development of International Law in a Changing International System*, 68 IND. L.J. 705, 717 (1992).

229. International Law Commission, *supra* note 195, art. 44(1).

on climate change consequences may deeply transform the nature of international justice, which has never had to deal with cases of such proportion. Basing their survey on less severe climate change scenarios than are commonly accepted today, Told and Verheyen evaluated the damages at four percent of the OECD's Gross Domestic Product.[230]

However, it is quite unlikely that a 10,000-inhabitant state such as Tuvalu will dare to—and be able to—lodge a complaint against all developed states, given that a great amount of scientific and legal resources would be required for such a case. Litigation may nonetheless be a useful threat for "victim" states to push developed states into negotiations.

3. Necessity of Treaty Law and its Feasibility at the Regional Level

A third medium consists of the adoption of a new treaty. For instance, the UN Secretary-General's Report on climate change and its possible security implications highlighted that "[m]ultilateral comprehensive agreements would be the ideal preventive mechanism, providing where, and on what legal basis, affected populations would be permitted to move elsewhere, as well as their status."[231] More scholars now reject a mere reform of the 1951 Refugee Convention, such as a second protocol extending the definition of refugees to include climate migrants.[232]

A practical reason for this belief is that political refugees may be the collateral victims of a very significant extension of the *Refugee Convention* scope by losing the specificity of their protection.[233] Moreover, the *Refugee Convention* focuses on the protection of individual rights and would fail to take into account the climate migrants' collective rights. This document and its application by states and the UNHCR have prioritized return over assimilation, whereas climate migrants need to be considered permanent migrants and should not be destined to live in tents indefinitely. In addition, the extension of

---

230. Richard S.J. Tol & Roda Verheyen, *State Responsibility and Compensation for Climate Change Damages—A Legal and Economic Assessment*, 32 ENERGY POL'Y 1109, 1125 (2004).

231. U.N. Secretary-General, *supra* note 50, ¶ 72.

232. *See, e.g.*, Biermann & Boas, *Protecting Climate Refugees*, *supra* note 158, at 11; Dana Zartner Falstrom, *Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment*, 13 COLO. J. INT'L ENVTL. L. & POL'Y 1 (2002); Hulme, *supra* note 43; *Contra* Jessica B. Cooper, *Environmental Refugees: Meeting the Requirements of the Refugee Definition*, 6 N.Y.U. ENVTL. L.J. 480 (1998).

233. *See* Moberg, *supra* note 116, at 22.

the refugee regime would disconnect the climate migrant issue from the climate adaptation issue, which could result in incoherent decision making. Furthermore, the *Refugee Convention* does not provide for burden-sharing because in principle the first host country must accept refugees,[234] and because the UNHCR, which may provide some assistance, is funded by voluntary donations. This would make an extension of the *Refugee Convention* to climate migrants unfair and unacceptable for countries like India, which are likely to receive an amount of climate migrants disproportionate to their financial capacity or historical responsibility for climate change.

Finally, one of the strongest arguments against an extension of the *Refugee Convention* regime to climate migrants is that the *Refugee Convention* does not protect populations *before* they have moved. Therefore, the only way for climate migrants to fall within the protection of such a regime would be to illegally cross borders, often through dangerous means such as overcrowded boats. States would promptly assimilate asylum seekers with illegal migrants and reinforce their borders' protection so as to prevent asylum seekers from entering their territory. Therefore, an extension of the refugee protection to climate migrants would result in further increases in human trafficking and avoidable fatalities. Surely such a system would not meet the requirement that climate migrant protection be an early and sustainable response.

During the Sixteenth Conference of the Parties to the UNFCCC in Cancun, Equity BD, leading a group of NGOs, presented a petition for a "Protocol under the UNFCCC to ensure social, cultural and economic rights of the climate change induced forced migrants." Such a protocol would be based on UNFCCC Article 3, which provides that "developed country Parties should take the lead in combating climate change and the adverse effects thereof."[235] Alternatively, Falstrom pleaded for a protocol to the Convention Against Torture.[236] Westra recommended a "Framework Convention for Global Health," which would "go to the heart of the environmental justice issue—that is, to the blatant inequalities in life expectancy, the incidence of infectious diseases, and chronic diseases disproportionately present among the poor and developing countries, on the one hand, and rich nations on the other."[237] Yet, these two approaches would fail to take collective rights fully into consideration.

---

234. *See* Convention Relating to the Status of Refugees, *supra* note 114, art. 31.

235. UNFCCC, *supra* note 86, art. 3, § 1.

236. Falstrom, *supra* note 232.

237. LAURA WESTRA, ENVIRONMENTAL JUSTICE AND THE RIGHTS OF ECOLOGICAL REFUGEES 188 (2009).

Climate-induced migration may be an issue "sufficiently new and substantial to justify its own legal regime instead of being forced within legal frameworks that were not designed to handle it."[238] Thus, other authors have suggested a "broad, interdisciplinary legal and policy framework."[239] Such a framework would contain guarantees of assistance, burden-sharing mechanisms, and institutional provisions. A definition of climate migrants should be adopted and the duty of any state to protect its rights should be provided for, particularly non-refoulement and non-discrimination. Unlike the *Refugee Convention*, a new treaty would encourage "long-term resettlement."[240] It should also contain provisions on humanitarian assistance for arriving climate migrants. A global fund with compulsory participation may organize financial contributions from developing states that are responsible for climate change.[241] In addition, a new treaty should create an expert body, which would be in charge of identifying affected areas from which migrants could claim protection and other affected areas that could claim international aid for adaptation. The international community would provide funding.[242] Though Biermann and Boas suggest that implementation would be organized by several existing international institutions working together, it seems more appropriate to establish a new agency, which would be wholly in charge of climate migrants' welfare, even though the agency's creation may be inspired by the UNHCR.[243]

Such a project is obviously very ambitious, and one may wonder whether an international convention would successfully be ratified. Falstrom recognizes that such an international convention "is not something that will happen overnight."[244] Similarly, Boncourt and Burson argue that "'[h]ard-law' policy instruments may be [sic] not be attractive to states, particularly when the potential scale of the obligations assumed is unknown."[245] Similarly, Docherty and Giannini

238. Docherty & Giannini, *supra* note 53, at 350.

239. *Id.* at 359, 373.

240. David Hodgkinson et al., *Towards a Convention for Persons Displaced by Climate Change: Key Issues and Preliminary Responses*, 8 THE NEW CRITIC 1, 2 (2008).

241. *See* Docherty & Giannini, *supra* note 53, at 378; Biermann & Boas, *supra* note 157, at 79.

242. *See* Biermann & Boas, *supra* note 157, at 79; Docherty & Giannini, *supra* note 53, at 389.

243. Biermann & Boas, *supra* note 157, at 79; Docherty & Giannini, *supra* note 53, at 388–89.

244. Falstrom, *supra* note 232, at 13.

245. Boncour & Burson, *supra* note 166, at 21; *see also* Angela Williams, *Turning the Tide: Recognizing Climate Change Refugees in International Law*, 30 L. & POL'Y 502, 517 (2008).

acknowledge that "there may be reluctance to develop a new treaty."[246] However, they emphasize that affected states and their neighbors will push the international community toward a treaty, whereas other states may be sensitive to humanitarian or economic considerations, as well as to the management of international migration. As argued above, states may be less reluctant to negotiate and ratify conventions at the regional level, but an international framework should still monitor these efforts.[247]

In any case, conventions cannot be expected to solve every problem. A treaty is an instrument through which a state decides to commit itself to some obligations. Treaty obligations cannot extend beyond States' consent. The price to pay to obtain States' ratifications may be to remove ambitious norms from any potential Climate Migrant Convention. It is therefore significant that proposals for such conventions have taken little consideration of collective rights and the common but differentiated principle. Most of the burden could be supported by neighboring countries. This is deeply unfair and would create the risk of a "domino effect," as neighboring countries may themselves be affected by similar environmental degradation and unable to sustainably resettle climate migrants.[248] Altogether, a treaty is likely to adopt a narrow humanitarian approach to climate migrant protection rather than a wide, rights-based approach focusing on sustainable resettlement. Climate migrants would be resettled on an individual basis in the suburbs of existing cities, thus losing any social, cultural, or national identity. Overall, the application of a convention should not be left to the goodwill of states without any independent control.

4. Soft Law as a Starting Point

A fourth mode of action consists of a resolution adopted either by the Security Council or the UNGA. The Security Council already addressed climate change in a debate on April 17, 2007.[249] However, it did not adopt a resolution but instead concluded that the Security Council is not the correct institution to deal with climate change migration. In any case, the Security Council's responsibility for "maintenance of international peace and security"[250] would exclude any general approach. This seems to undermine the triggering effect that a resolution by the

246. Docherty & Giannini, *supra* note 53, at 400.

247. *See* U.N. Secretary-General, *supra* note 50; *see also* Williams, *supra* note 245, at 518.

248. For example, Nigeria may receive many migrants from Niger, though Nigeria is itself concerned by land degradation (as well as by floods).

249. *See* UN S.C., *supra* note 100.

250. UN Charter, *supra* note 99, art. 24, § 1.

Security Council may have if the resolution decides that a well-known international issue calls for an immediate international answer. For this reason, a group of Pacific Small Island Developing States is currently pushing the Security Council to address this issue again and to adopt a resolution as the start to a lobbying effort.[251]

The UNGA, which has already adopted Resolution 63/281 on climate migration,[252] may be a more appropriate forum for a decision because its procedures to adopt a resolution are less demanding and its general competence allows it to adopt a global approach to climate-induced migration. A resolution by the UNGA may press states to negotiate a global, concerted, early, and sustainable response to this phenomenon, which would implement the guiding principles of burden-sharing, subsidiarity, and respect for collective, as well as individual, rights. More concretely, a resolution may also recommend that existing fundamental rights of climate migrants be respected, including the right to life and the right not to be submitted to inhuman or degrading treatment. A right to resettlement may also be deduced from existing fundamental rights. Eventually, the UNGA may encourage states or international organizations to take some measures to protect climate migrants. Eventually, it may recommend that states ratify a convention.

Soft law would have a highly *symbolic* importance and may define universal norms that should be applied by states. Obviously, its main pitfall stems from the absence of an obligation of states to cooperate in a compulsory funding instrument, although a fund such as the UNHCR's can be opened to voluntary contributions. Furthermore, contrary to a treaty, *because* a resolution does not have to be ratified, it would not raise national debate and public awareness. Overall, one can hardly imagine that a UNGA resolution would be sufficient to push states to recognize the rights of climate migrants. Therefore, a resolution is probably a starting point, but it will in no case be sufficient to deal with climate-induced migration.

5. A Combination of Different Modes of Action

None of the above-mentioned modes of action alone would be able to deal with the issue of climate change-induced migration. This article agrees that an "alternative system for addressing the plight of those

---

251. Teall Crossen & Rona Meleisea, *Drowning Islands Demand Security Council Action on Climate Change*, ISLANDS FIRST (May 20, 2010), http://www.islandsfirst.org/updates/20100520_pressrelease.html; *see also* Francesco Sindico, *Climate Change: A Security (Council) Issue?*, 1 CARBON & CLIMATE L. REV. 26, 34 (2007) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1013186.

252. *See* GA Res 63/281, *supra* note 101.

displaced by climate change may be better coordinated by way of regional agreement, operating under an international umbrella framework."[253] Such cooperation between the United Nations and regional organizations would not be a complete novelty. In 1974, the UNEP launched its Regional Seas Program, which supervises 140 countries in thirteen regional agreements. This program is not based on any international "hard-law" instrument, but on cooperation between the UNEP, states, and regional organizations through which binding standardized regional conventions are negotiated, adopted, and implemented.[254]

Similarly, a satisfying international legal framework on climate-induced migration should exist on three different levels. States should be individually concerned and cooperative so that they respect their obligations and collaborate to find collective resettlement solutions. At a universal level, common standards should be adopted as to which fundamental rights should be applied to climate migrants, and the burden should be shared between developed polluting states, and least-developed or developing affected states. However, only at an intermediary, regional level is it possible to imagine that ambitious conventions could be negotiated and widely ratified, and that collective resettlement solutions could eventually be negotiated.

IV. PROPOSAL FOR AN INTERNATIONAL LEGAL FRAMEWORK ON CLIMATE-INDUCED MIGRATION

Part II has shown that a new international legal framework on climate-induced migration should be created, and Part III has conceived this framework. Part IV now suggests an international legal framework to protect climate migrants. At the core of this proposal lies the principle of subsidiarity, which is not only justified by considerations of the efficiency of public policies, but also by the consideration that an international convention would not be able to be ratified and/or would not be able to produce any *collective* resettlement. The First Act consists of the adoption of a UNGA resolution on the international responsibility

253. Williams, *supra* note 245, at 518; *see also* Boncour & Burson, *supra* note 166, at 23 (suggesting "an interconnected and mutually-reinforcing series of global, regional, and bilateral responses under the umbrella of the UNFCCC").

254. *See generally* UNEP, REGIONAL SEAS, PARTNERSHIPS FOR SUSTAINABLE DEVELOPMENT (2005), *available at* http://www.unep.org/regionalseas/publications/brochures/pdfs/regionalseas_brochure.pdf; Akiwumi & T. Melvasalo, *UNEP's Regional Seas Programme: Approach, Experience and Future Plans*, 22 MARINE POL'Y 229 (1998).

for the protection of climate migrants. This resolution refers to, encourages, and supervises negotiations at the regional level of international governance, which constitute the Second Act of the proposal.

A. First Act: a UNGA Resolution on the International Community's Responsibility to Protect Climate Migrants

No international legal framework on climate-induced migration can be adopted without a preliminary campaign to raise public awareness and press states to become concerned. This should be achieved through a Security Council resolution recognizing the security challenge posed by climate-induced migration and the necessity for international action.[255] Only afterwards may the UNGA take on a substantive resolution project. This resolution, conceived as the start of a longer process consisting of substantial regional negotiations, should set the tone for an international legal framework on climate-induced migration. This "Resolution on the International Community's Responsibility to Protect Climate Migrants" ("the Resolution") should contain guidelines as well as institutional provisions.

1. Guidelines on Climate Migrants and Climate-Induced Migration

The first part of the Resolution should recognize guidelines for the treatment of climate migrants and for the monitoring of climate change-induced migration. Rather than directly establishing protection for climate migrants, these guidelines should constitute general considerations that may later be implemented through regional negotiations or referred to by national institutions. These guidelines would play an important role in framing the debate and adopting a common approach with key priorities. A climate migrant should be defined as "a person who, for a reason linked to anthropogenic climate change, is unable to live in dignity in the territory of his or her country of nationality." Climate change IDPs would therefore be excluded from this regime, but they are already formally protected as IDPs. Climate change IDPs' vulnerability should, however, be recalled in the Resolution, and some of the principles applied to climate migrants may be extended to them.

The Resolution should recall the obligation of states to protect

255. *See* Akiwumi & Melvasalo, *supra* note 254, at 153.

individual and collective human rights at any stage. It should clearly state that migrants are, and remain, human beings, and that as a principle their status as migrants should not lead to any differential legal treatment. It should confirm that states have a primary obligation to protect their own population's human rights. However, it should also assert that the international community as a whole, and each state individually, with regard to national circumstances (e.g. financial capacities), has a secondary obligation to protect the human rights of any person whose own state is unable or unwilling to protect those rights. Some individual and collective human rights should be explicitly underscored, such as the right to life, the right to freedom from inhuman and degrading treatment, the right to health, and the right to a family life, but also cultural rights—the right to a collective identity, the right to self-determination, and minority rights. Particular applications of universal human rights should be identified, such as a right to non-refoulement and the right to a place to live in safety and dignity.

Overall, the right of climate migrants to a safe and sustainable relocation should be affirmed. Certain applications of this right should be explicitly underscored: the right to assistance during one's insertion in the host country, the right to freedom from discrimination, and the right to conserve one's cultural identity when settling into the host country's society. The notion of a right to a nationality may be put forward to suggest that the host state should establish specific naturalization procedures for climate migrants.[256]

As for the responsibility of states, the Resolution should assert the relevance of the PCDR with respect to protection of climate migrants. It should confirm that each state shall contribute to solving the problems relating to climate-induced migration in proportion to its historical responsibility for climate change as well as its economic capacity. The Resolution should recall the duty of developed states to take the lead on the policies necessary for the protection of climate migrants.

The Resolution should establish the principle of an early and sustainable response as a way to minimize human suffering, costs, and security threats; as well as the principle of a global approach to all the consequences of climate change on vulnerable populations and the necessity to coordinate local adaptation and population displacement strategies. The Resolution should also apply the principle of subsidiarity of action and emphasize that the regional level of governance is the best

256. This provision may be inspired by article 34 of the Convention Relating to the Status of Refugees, *supra* note 114 ("The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.").

forum for resettlement negotiations. Accordingly, it should press states to engage in bilateral and regional negotiations in order to identify future needs of climate migration and in order to reach a negotiated solution in the light of these guiding principles. Regional negotiations should produce both a general legal framework and concrete ad hoc solutions to actual needs of climate migration.

2. Institutional Provisions

To complement the Guiding Principles, the Resolution should establish a UN Program on Climate Change Migration to promote negotiations at the bilateral and regional level, and to supervise the implementation of the international framework (i). Moreover, an international, independent expert panel should be in charge of scientific assessments used as the basis of regional negotiations (ii). Eventually, a Global Fund on Climate-Induced Migration should be monitored by the Program on Climate Change Migration (iii).

a. Global Fund on Climate-Induced Migration

A fund should be created, entitled the "Global Fund on Climate-Induced Migration" ("Fund"). Its income should come from voluntary contributions by states and private actors. The Fund should be used to help find regional- or bilateral-negotiated solutions to actual or future needs of migration induced by climate change. It should not cover costs of in situ adaptation, as in situ adaptation is already funded by UNFCCC tools.[257] However, the requirement of a global approach would demand that the Fund be closely coordinated with financial tools within the UNFCCC system. The main purpose of the Fund should be to convince third-party states to actively collaborate in resettlement solutions, in particular through compensation to states that agree to welcome climate migrants. Specific funding mechanisms may be created in order to ensure the successful integration of climate migrants. For instance, part of the compensation may be correlated to an evaluation of political outcomes with regard to social insertion, based on indicators such as climate migrants' differential rate of unemployment two years after their arrival.

257. In order to complete the Kyoto Adaptation Fund, the 16th Conference of the Parties to the UNFCCC decided to set up a "Green Climate Fund" in charge of ensuring a balanced funding of adaptation and mitigation activities. *See* UNFCCC COP 16, *supra* note 102, ¶ 102.

b. United Nations Agency on Climate Change Migration

Because the issue of climate-induced migration is too widespread and too instance-specific to be addressed by an existing institution, the United Nations should create an ad hoc monitoring institution. This institution should report to the UNGA and it may be entitled the "United Nations Agency on Climate Change Migration" ("Agency"). In the absence of field operations, the functioning budget of the Agency should be relatively limited, and it might be funded by the general budget of the United Nations.

The Agency should have three main missions. Firstly, it should encourage and supervise regional negotiations. This may include suggesting terms of negotiations and offering good offices, mediation, or conciliation. For this purpose, it should be authorized to adopt soft-law instruments, such as a manual on the implementation of the guiding principles, standard or specific terms of negotiations, and reports of good practices and recommendations. Secondly, the Agency should administer the Fund, particularly through encouraging voluntary donations by states, and the Agency should spend this fund so as to help successful regional negotiations. Thirdly, the Agency should raise global public awareness on climate-induced migration by funding scientific activities and reporting regularly on ongoing climate-induced migration.

Throughout these missions, the Agency should act to facilitate effective and successful implementation of the framework. As a forum for coordination of all actors concerned with climate migrants, it should work together with other international institutions such as the UNHCR, the UNFCCC, the UNEP, the UNDP, and the GEF. The Agency, in turn, will benefit from the specific expertise of each of these institutions. The Agency should also cooperate closely with regional institutions, states, and NGOs.

c. Expert Panel

The Resolution may either create an ad hoc expert body or call for an extension of the mandate of the IPCC ("Panel"). Functioning essentially as a referee between diverging interests, this expert panel should foster regional negotiations and the functioning of the Resolution's framework by providing scientific assessments. Because of the importance of these assessments, the experts should be completely independent.

The first task of the Panel would be to encourage states to contribute to the Fund, for instance through the regular assessment of each state's expected contributions to the fund. Such an assessment may be based on states' respective historical responsibility for climate change and on the

efforts states are making to reduce their greenhouse gas emissions, as well as on their financial capacity. This assessment may also take into consideration the costs of adaptation supported by each state and its past participation in the research and implementation of collective resettlement solutions.

Either the Agency or any interested state could initiate other assessments by the Panel. First, the Panel could be asked to assess whether there is ongoing migration and whether there is a need for international migration. This assessment could prevent states from claiming that would-be climate migrants are not "forced" to move and could further prevent states from rejecting support for any migration program under the pretext that the program funds *in situ* adaptation projects.[258] Secondly, concerned states could not only ask the Panel to assess the capacity of one or several states to welcome climate migrants using objective criteria, such as their domestic population and demographic growth, natural resources, socio-economic, and political capacity to integrate climate migrants, but also to assess new economic opportunities allowed by climate change. Thus, it would review the "we don't have a place for them" argument with an independent perspective and determine objectively which state is most able to welcome climate migrants, in order to push states towards an agreement on an international resettlement program.

B. Second Act: Regional Negotiations under the Resolution's Umbrella

The Resolution would only be a large umbrella under which regional negotiations should be organized. These regional negotiations should take two different forms. First, negotiations should be organized as general regional agreements, establishing more detailed, ambitious, and concrete legal frameworks on climate-induced migration. The Agency should participate in such negotiations and ensure that these agreements are compatible with the Resolution's guidelines. Negotiations at the regional level should also deal with concrete climate-induced migratory needs on a case-by-case basis, within the international legal framework of the Resolution and with help of the Agency, the Fund, and the Panel. Such negotiations would benefit from a framework

258. For such an argument, see Public communiqué, New Zealand Ministry of Foreign Affairs and Trade, *New Zealand's Immigration Relationship with Tuvalu* (Aug. 4, 2009), *available at* http://www.mfat.govt.nz/Foreign-Relations/Pacific/NZ-Tuvalu-immigration.php (in which New Zealand rejects any resettlement program from Tuvalu through underlining its commitment for "climate change projects in developing countries").

that establishes key priorities, assesses each state's duties, introduces an institution that supervises and fosters cooperation, and compensates states that cooperate actively. States themselves would surely prefer a low-cost negotiated solution to the higher price of building fences, enduring higher regional insecurity, severing their diplomatic relations with their neighbors and the international community, and facing growing discontent in civil society against their policy.

At the end of the day, all would depend on states' involvement in these ad hoc negotiations; it is the fate of any international legal project that the beginning and the end of the story lie in the hands of states. If international institutions cannot do anything without the consent of states, they should do everything possible to encourage states to cooperate and lessen the human suffering arising from climate change. This proposal aims at establishing a legal background that will help international cooperation to succeed in protecting climate migrants.

HeinOnline -- 22 Colo. J. Int'l Envtl. L. & Pol'y 416 2011