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# CLIMATE CHANGE, HUMAN RIGHTS, AND FORCED MIGRATION: IMPLICATIONS FOR INTERNATIONAL LAW\*

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## I. INTRODUCTION

Climate change has been identified as the “defining human development issue of our generation”<sup>1</sup> and possibly the “biggest humanitarian and economic challenge that the developing world will have to face in the coming decades.”<sup>2</sup> The Intergovernmental Panel on Climate Change (IPCC) recognized unequivocally in its 4<sup>th</sup> report that global greenhouse gas emissions due to human activities have contributed to the warming of the Earth’s surface,<sup>3</sup> ending years of debate on whether this is a human-made phenomenon or a natural one. Consequences of climate change are already visible in the form of erratic weather events, changes in weather patterns, and changes in the Arctic

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<sup>1</sup> U.N. DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2007/2008, FIGHTING CLIMATE CHANGE: HUMAN SOLIDARITY IN A DIVIDED WORLD 1 (2007), *available at* <http://hdr.undp.org/en/reports/global/hdr2007-2008>.

<sup>2</sup> SUDHIR CHELLA RAJAN, BLUE ALERT - CLIMATE MIGRANTS IN SOUTH ASIA: ESTIMATES AND SOLUTIONS - A REPORT BY GREENPEACE 1 (2008), [http://www.greenpeace.at/uploads/media/blue-alert-report\\_web.pdf](http://www.greenpeace.at/uploads/media/blue-alert-report_web.pdf).

<sup>3</sup> See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 4<sup>TH</sup> REPORT, SUMMARY FOR POLICYMAKERS (2007), *available at* [http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4\\_syr\\_spm.pdf](http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf).

sea ice. If left unchecked climate change will inevitably cause diseases, malnutrition, food and water shortages, migration, conflict, severe weather events, and rises in sea levels.<sup>4</sup>

Never before has the international community been faced with a problem of this magnitude, threatening not only the present generation but future generations as well. Global climate change has the potential to undermine all three pillars of sustainable development as identified by the 2002 Johannesburg Declaration on Sustainable Development – environmental protection, economic development, and social development.<sup>5</sup> While climate change was once considered an environmental problem, it now impinges on every aspect of human life, including the international economy, public health, migration, employment, and, ultimately, international peace and security.

This article focuses on one result of climate change: displacement and forced migration caused by climate change.<sup>6</sup> As the IPCC noted in 1990, the greatest single impact of climate change could be on human migration – with millions of people displaced by shoreline erosion, coastal flooding, and agricultural disruption.<sup>7</sup> This article identifies migration as an extreme form of adaptation, which in certain instances, is the only option available. This article also considers the challenges that forced migration caused by climate change poses for international law. It discusses the present international legal framework governing refugees and internally displaced persons and analyzes some of the proposals which have been advanced in relation to “environmentally displaced persons” and “climate refugees.”

The main objective of the present international legal framework is mitigation of climate change (both the United Nations Framework

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<sup>4</sup> *Id.* at 10, 13.

<sup>5</sup> World Summit on Sustainable Development, Aug. 26-Sept. 4, 2002, *Johannesburg Declaration on Sustainable Development*, ¶ 5, U.N. Doc. A/CONF.199/20 (Sept 4, 2002), <http://www.un-documents.net/jburgdec.htm>.

<sup>6</sup> See Information Note: Climate Change, Environmental Degradation and Migration: Preparing for the Future, UN Inst. for Training and Research (May 8, 2008) available at [http://www.unitar.org/ny/sites/default/files/Information%20note\\_CC.pdf](http://www.unitar.org/ny/sites/default/files/Information%20note_CC.pdf) (mentioning that no consensus exists on whether migration is a way of adaptation or whether it is a failure of adaptation strategies).

<sup>7</sup> See, e.g., OLI BROWN, MIGRATION AND CLIMATE CHANGE 9, INTERNATIONAL ORGANIZATION FOR MIGRATION (2008), available at [http://www.iisd.org/pdf/2008/migration\\_climate.pdf](http://www.iisd.org/pdf/2008/migration_climate.pdf).

Convention on Climate Change, “UNFCCC,”<sup>8</sup> and the Kyoto Protocol<sup>9</sup> are based on this premise). However, the scientific community has increasingly recognized that mitigation alone is insufficient because the greenhouse gases which have already been emitted into the atmosphere will cause adverse consequences.<sup>10</sup> Therefore, for the present generation and the next, adaptation strategies are as crucial as mitigation strategies.<sup>11</sup> As Christian Aid points out in its report on the migration crisis, there is a legal obligation under the UNFCCC for developed countries to help developing countries adapt to the consequences of climate change.<sup>12</sup> These adaptation strategies must be carefully designed so that there will be minimal disruption to peoples’ lives; otherwise, climate change will “fundamentally affect the lives of millions of people who will be forced over the next decades to leave their villages and cities to seek refuge in other areas.”<sup>13</sup>

The World Commission on Environment and Development (WCED) had the foresight to recognize the need for both mitigation and adaptation two decades ago.<sup>14</sup> Yet, the international community has been slow to act on these recommendations. There is no doubt that climate

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<sup>8</sup> United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, 31 I.L.M. 849, 1220, available at <http://unfccc.int/resource/docs/convkp/conveng.pdf> [hereinafter UNFCCC].

<sup>9</sup> Third Session of the Conference of the Parties (COP), Kyoto, Japan, Dec. 1-10, 1997, *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, U.N. Doc. FCCC/CP/1997/L.7/Add.1 (Feb. 16, 2005), available at <http://www.ccsr.utokyo.ac.jp/unfccc2/pdfs/unfccc.int/resource/docs/cop3/107a01.pdf>.

<sup>10</sup> See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 3, at 7.

<sup>11</sup> Adaptation is defined as “. . . finding and implementing sound ways of adjusting to climate change. . . .” UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, TECHNOLOGIES FOR ADAPTATION TO CLIMATE CHANGE 4 (2006), available at [http://unfccc.int/resource/docs/publications/tech\\_for\\_adaptation\\_06.pdf](http://unfccc.int/resource/docs/publications/tech_for_adaptation_06.pdf).

<sup>12</sup> HUMAN TIDE: THE REAL MIGRATION CRISIS, A CHRISTIAN AID REPORT 27 (2007), available at <http://www.christianaid.org.uk/Images/human-tide.pdf>

<sup>13</sup> Frank Biermann & Ingrid Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees* 1 (Global Governance Working Paper No. 33, Nov. 2007), available at [http://www.sarpn.org.za/documents/d0002952/Climate\\_refugees\\_global\\_governance\\_Nov2007.pdf](http://www.sarpn.org.za/documents/d0002952/Climate_refugees_global_governance_Nov2007.pdf) [hereinafter Bierman & Boas].

<sup>14</sup> See WORLD COMM’N ON ENV’T AND DEV., OUR COMMON FUTURE 291 (1987). A recent document to endorse adaptation is the Bali Action Plan, a product of the United Nations Climate Change Conference in Bali in December 2007. United Nations Climate Change Conference, 3-14 Dec., Nusa Dua, Bali, Indonesia, [http://unfccc.int/meetings/cop\\_13/items/4049.php](http://unfccc.int/meetings/cop_13/items/4049.php). The Conference of Parties called upon parties to take enhanced action on Adaptation. CONFERENCE OF PARTIES, BALI ACTION PLAN 2 (2007), [http://unfccc.int/files/meetings/cop\\_13/application/pdf/cp\\_bali\\_action.pdf](http://unfccc.int/files/meetings/cop_13/application/pdf/cp_bali_action.pdf) (advance unedited version).

change will undermine many (if not all) of the protected rights including the right to life and the right not to be displaced. Despite the clear link between climate change and human rights, the international community has been slow to study this link. Thus, only recently in April 2008, the UN Human Rights Council requested the UN High Commissioner for Human Rights (OHCHR) to study the human rights implications of climate change.<sup>15</sup> In its report the OHCHR identified the right to life, the right to adequate food, the right to water, the right to health, the right to adequate housing, and the right to self-determination as rights which could be affected by climate change.<sup>16</sup> The report further identified women, children, and indigenous people as particularly vulnerable groups.<sup>17</sup>

## II. NUMBERS OF DISPLACED PEOPLE AND FUTURE PROJECTIONS

Given the complexity of the issue, and because people rarely migrate solely for environmental reasons, it is hard to find accurate numbers of those displaced due to environmental factors or specifically due to climate change. According to some estimates, there are about 25-30 million people who fall into the category of environmental refugees worldwide.<sup>18</sup> Furthermore, the United Nations Development Program ("UNDP") predicts that up to 332 million people in coastal and low-lying areas could be displaced as a result of climate change.<sup>19</sup> Another estimate puts this figure at 50 million by the end of 2010.<sup>20</sup> Another

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<sup>15</sup> Human Rights and Climate Change, H.R.C. Res. 7/23 (Mar. 28, 2008), [http://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_7\\_23.pdf](http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_23.pdf).

<sup>16</sup> U.N. HUM. RTS. COUNCIL, *Report of the Office of the U.N. High Comm'r for Human Rights on the Relationship Between Climate Change and Human Rights*, ¶¶ 20-41, U.N. Doc A/HRC/10/61 (January 15, 2009), <http://www.unhcr.org/refworld/pdfid/498811532.pdf>.

<sup>17</sup> *Id.*

<sup>18</sup> See NORMAN MYERS WITH JENNIFER KENT, ENVIRONMENTAL EXODUS: AN EMERGENT CRISIS IN THE GLOBAL ARENA 15 (1995), available at <http://www.climate.org/PDF/Environmental%20Exodus.pdf>. The use of the term "environmental refugee" here should not be taken as an endorsement of its legal status. It is used in a descriptive manner only.

<sup>19</sup> See UN DEV. PROGRAMME, HUMAN DEVELOPMENT. REPORT 2007/08, FIGHTING CLIMATE CHANGE: HUMAN SOLIDARITY IN A DIVIDED WORLD, [http://hdr.undp.org/en/media/HDR\\_20072008\\_EN\\_Complete.pdf](http://hdr.undp.org/en/media/HDR_20072008_EN_Complete.pdf).

<sup>20</sup> David Adam, *50m Environmental Refugees by End of Decade, UN Warns*, THE GUARDIAN, Oct. 12, 2005, at 24, available at <http://www.guardian.co.uk/environment/2005/oct/12/naturaldisasters.climatechange1>.

report estimates that there will be 200 million climate refugees by 2050, and refers to this number as “the most widely repeated prediction.”<sup>21</sup> These estimates show that the number of environmentally displaced people is disputed; however, the overall phenomenon of environmental refugees is not.<sup>22</sup> Whatever the exact numbers are, it is clear that *millions* of people worldwide will continue to be affected by global climate change.<sup>23</sup>

The WCED Report, one of the earliest reports to refer to the phenomenon of environmental refugees, recognized as far back as 1987 that millions of people would be forced to flee their homes for environmental reasons.<sup>24</sup> For example, the WCED Report noted that in 1984-85, approximately 10 million Africans fled their homes due to environment-related reasons.<sup>25</sup> While many of them fled to cities, other environmental refugees moved across national boundaries, which exacerbated inter-state tensions.<sup>26</sup>

However, the number of Africans displaced by environmental problems in 1984-85 pales in comparison to the number of people climate change threatens to displace worldwide. Norman Myers, a proponent of the notion of environmental refugees, noted that in 1995 there were at least 25 million environmental refugees compared with 27 million traditional refugees.<sup>27</sup> This figure is believed to be on the conservative side.<sup>28</sup> He points out that with global warming there could be as many as 200 million environmental refugees.<sup>29</sup> According to Greenpeace, approximately 125 million people in South Asia could be rendered homeless by climate change by the year 2100. Of this, 75

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<sup>21</sup> International Organization for Migration [hereinafter IOM], *Migration and Climate Change*, at 9, IOM Migration Research Series No. 31 (2008).

<sup>22</sup> *Id.* at 11-12.

<sup>23</sup> *Id.* IOM puts the number of 200 million displaced persons in perspective as follows: “by 2050 one in every 45 people in the world will have been displaced by climate change” (emphasis in original). *Id.* See also CHRISTIAN AID REPORT, *supra* note 12, at 22, which laments the lack of credible data on the number of people who will be forced to migrate as a result of climate change.

<sup>24</sup> See *supra* note 14.

<sup>25</sup> *Id.* at 291.

<sup>26</sup> *Id.*

<sup>27</sup> See Norman Myers, Organization for Security and Cooperation in Europe [hereinafter OSCE], *Environmental Refugees: An Emergent Security Issue*, OSCE Doc. EF.NGO/4/05 (May 22, 2005), available at [http://www.osce.org/documents/eea/2005/05/14488\\_en.pdf](http://www.osce.org/documents/eea/2005/05/14488_en.pdf).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

million would be from Bangladesh alone.<sup>30</sup> Additionally, small island states, home to 5% of the world's population,<sup>31</sup> are particularly vulnerable to sea level rise as these islands are only a few feet above sea level. Thus, the number of people, living on these islands alone, who would be affected by rising sea levels due to climate change would be considerable.<sup>32</sup>

Indigenous peoples and poor communities are vulnerable to the impacts of climate change, as their way of life is intrinsically linked to the land and their culture. While developed countries are responsible for the majority of greenhouse gas emissions which leads to climate change, the consequences will be borne by poor and vulnerable communities. These communities have neither the resources nor the technology to adapt to these changes.<sup>33</sup> However, vulnerable communities in developed countries are equally susceptible to the consequences of climate change.<sup>34</sup>

In a recent report, Greenpeace noted: "While the world has woken up to the threat of climate change, the true enormity of what this implies is still sinking in. Governments are yet to face up to the

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<sup>30</sup> See RAJAN, *supra* note 2, at 1, 10. But see IOM, *supra* note 21 (earlier reports that there will be 200 million refugees worldwide by 2050).

<sup>31</sup> See Robert McLeman, *Climate Change Migration, Refugee Protection, and Adaptive Capacity-Building*, 4 MCGILL INT'L JOURNAL OF SUSTAINABLE DEV. LAW & POL'Y 1, 11 (2008).

<sup>32</sup> For a discussion of the situation of small island states, see *infra* p. 8 and note 46.

<sup>33</sup> See Jonathan Patz et al., *Climate Change and Global Health: Quantifying a Growing Ethical Crisis*, 4 ECOHEALTH 397, 397, 402-03 (2007); see also Francoise Hampson, *Prevention of Discrimination and Protection of Indigenous Peoples* 4-5 (United Nations Economic and Social Council, Working Paper No. E/CN.4/Sub.2/2005/28, 2005), available at <http://www.hic-mena.org/documents/Hampson%20wp%20ECN4Sub2200528.doc> (noting that financial responsibility will have to be assumed by others). Also interesting in this regard is the case filed against the United States by the Inuit Circumpolar Conference before the Inter-American Commission of Human Rights in 2005. SHEILA WATT-CLOUTIER, INUIT CIRCUMPOLAR CONFERENCE, PETITION TO THE INTER AM. COMM'N ON HUMAN RIGHTS SEEKING RELIEF FROM VIOLATIONS RESULTING FROM GLOBAL WARMING CAUSED BY ACTS AND OMISSIONS OF THE U.S. (Dec. 7, 2005) [hereinafter *Inuit Case*], available at <http://www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf>.

<sup>34</sup> The *Inuit Case*, *supra* note 33, is a good example of this. The case was filed by the Inuit of U.S. and Canada and the Inuit Circumpolar Conference against the U.S. before the Inter-American Commission of Human Rights in December 2005. Petitioners alleged that the United States, as the biggest emitter of greenhouse gases, has contributed to the phenomenon of climate change which is having a disproportionate impact on the Arctic. They argued that this was giving rise to a violation of the rights of the Inuit people, including the right to life, right to health, right to food and water, right to culture, and the right to a subsistence. They requested the Commission hold a hearing and produce a report recommending that the U.S. take mandatory measures to reduce greenhouse gas emissions.

extraordinary social and economic problems in the future, not to mention environmental impacts that unchecked global warming would generate.”<sup>35</sup>

### III. MIGRATION AS A STRATEGY OF ADAPTATION

Given that it is inevitable that the international community will have to take measures to both mitigate the consequences of climate change and to adapt to its consequences, states will have to develop adaptation strategies.<sup>36</sup> Under the UNFCCC, developed states have an obligation to assist developing states “that are particularly vulnerable to adverse effects of climate change in meeting costs of adaptation to those adverse effects.”<sup>37</sup>

Migration<sup>38</sup> is an extreme form of adaptation, although in some instances this may be the only viable option.<sup>39</sup> However, some scholars have contended that migration is a failure of adaptation strategies.<sup>40</sup> Yet, this view is not strictly correct. For example, in the case of those living in small island states, migration will be the only adaptation strategy available. This is because a small rise in sea level could completely submerge their states. With proper planning, migration can be handled with minimal disruption to those who are vulnerable to climate change. However, the involvement of international organizations<sup>41</sup> is necessary when migration occurs across national borders. These international

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<sup>35</sup> See RAJAN, *supra* note 2, at 1.

<sup>36</sup> Some countries have already prepared adaptation strategies. See United Nations, National Adaptation Programmes of Action (NAPAs), [http://unfccc.int/cooperation\\_support/least\\_developed\\_countries\\_portal/submitted\\_napas/items/4585.php](http://unfccc.int/cooperation_support/least_developed_countries_portal/submitted_napas/items/4585.php) (last visited Sept. 15, 2009).

<sup>37</sup> UNFCCC, *supra* note 8, art. 4(4).

<sup>38</sup> Migration here is used to cover all situations of displacement from one's home, whether voluntary or forced. However, pure economic migrants are excluded from this discussion.

<sup>39</sup> See CECILIA TACOLI, INT'L INST. FOR ENV'T & DEV., MIGRATION AND ADAPTATION TO CLIMATE CHANGE (2007), [www.iied.org/pubs/pdfs/17020IIED.pdf](http://www.iied.org/pubs/pdfs/17020IIED.pdf) (noting that “Migration is an adaptive response to changes in people's circumstances.”).

<sup>40</sup> See *supra* note 6.

<sup>41</sup> The United Nations High Commissioner for Refugees (UNHCR) currently has the mandate to look after refugees. It has, in recent years, provided relief to victims of natural disasters. See generally What We Do: Help the Uprooted and Stateless, <http://www.unhcr.org/pages/49c3646cbf.html> (last visited Sept. 29, 2009). The International Committee of the Red Cross (ICRC) also has a mandate to provide humanitarian relief to victims of war and internal violence; however, they too have provided humanitarian assistance to victims of natural disasters such as the earthquake in Pakistan. See Pakistan: Earthquakes Devastate Bulchistan, (Oct. 10, 2008) <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/Pakistan-feature-291008?opendocument>.



organizations could also provide assistance to developing countries to work on adaptation strategies.

Desertification, which will be exacerbated by climate change, is identified as one of the major causes of environmental displacement and is likely to threaten the livelihoods of over one billion people: "It is estimated that 135 million people are at risk of being displaced due to desertification."<sup>42</sup> Moreover, 10% of the world population currently lives in coastal cities and "[t]he combination of new risks and the exacerbation of existing ones has led a number of authors and agencies to suggest that global warming will lead to population displacements and migration in the future, at numbers never before witnessed."<sup>43</sup>

With regard to displacement and migration caused by climate change, two scenarios must be taken into account: displacement caused by the *sudden* onset of climatic disruptions such as hurricanes<sup>44</sup> and displacement caused by the *gradual* consequences associated with climate change such as rising sea levels. While in the former case the international community may not have sufficient time to take precautionary measures to protect the affected population, in the latter situation, with proper planning, displacement can be integrated into adaptation strategies. On the other hand, displacement related to sudden climatic disruptions will be temporary, while displacement related to gradual consequences of climate change would likely be permanent. Protection of human rights is imperative in both situations; however, the legal situation that arises in relation to gradual consequences associated with climate change is much more complex.

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<sup>42</sup> Tracey King, *Environmental Displacement: Coordinating Efforts to Find Solutions*, 18 GEO. INT'L ENVTL. L. REV. 543, 548 (2006). See also United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, art. 1(a), Sept. 10, 1994, U.N. Doc. A/AC.241/27, available at <http://www.unccd.int/convention/text/pdf/conv-eng.pdf> (defining desertification as "land degradation in arid, semi-arid and dry sub-humid areas resulting from various factors, including climatic variations and human activities").

<sup>43</sup> See McLeman, *supra* note 31, at 4 (quoting Norman Myers, *Environmental Refugees: A Growing Phenomenon of the 21st Century* (2002) 357 PHILOSOPHICAL TRANSACTIONS: BIOLOGICAL SCIENCES 609; Press Release, United Nations University, Institute for Environment and Human Security, As Ranks of Environmental Refugees' Swell Worldwide, Calls Grow for Better Definition, Recognition, Support (Oct. 12, 2005), available at [http://www.ehs.unu.edu/index.php?cat=7&menu=44&page=12\\_October\\_-\\_UN\\_Disaster\\_Day](http://www.ehs.unu.edu/index.php?cat=7&menu=44&page=12_October_-_UN_Disaster_Day).

<sup>44</sup> See IOM, *supra* note 21, at 12 (arguing that Hurricane Katrina, which temporarily displaced over a million people in August 2005, was more than a mere meteorological event; a combination of poor planning, underinvestment in protective levees, and the destruction of wetlands led to the devastation).

It has been estimated that 634 million people who live in low-lying coastal areas will be vulnerable to the rise of sea level associated with climate change. Tokyo and New York are examples of large populous cities that may be affected by the rising sea levels.<sup>45</sup> In this situation, people will be forced to migrate from these low-lying cities. It is generally accepted by scientists that in the future sea level rise will displace many millions of people currently living in coastal areas: "For the small island nations of the world, especially the many cultural groups living on coral atolls, entire nations face complete submersion."<sup>46</sup>

While forced migration itself is a violation of the right not to be displaced, it could lead to further violations of human rights such as: the rights to health, food and water, livelihood, shelter, culture, and a healthy environment (to the extent the latter two rights are recognized under international law).<sup>47</sup>

#### IV. IMPLICATIONS FOR INTERNATIONAL LAW

##### A. PRESENT LEGAL FRAMEWORK GOVERNING REFUGEES AND INTERNALLY DISPLACED PERSONS

When people migrate across international borders, irrespective of the reason, international law must govern the legal situation created by that movement because the main link between people and their state is nationality.<sup>48</sup> It is the link of nationality that accords people certain rights, such as the right to hold a passport, the right of return, and the right of diplomatic protection. When people are no longer bound by this link, either because that state is unable to provide the necessary protection to its people (as is possibly the case of developing countries which are helpless in the face of severe environmental consequences of global climate change) or because the state itself is the cause of such migration (as in the case of human rights violations), international law

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<sup>45</sup> See Thomas Wagner, *Major Cities Warned Against Sea-Level Rise*, INDEPENDENT ONLINE, Mar. 2007, at 1, [http://www.iol.co.za/index.php?set\\_id=1&click\\_id=31&art\\_id=nw20070328024424684C606123](http://www.iol.co.za/index.php?set_id=1&click_id=31&art_id=nw20070328024424684C606123).

<sup>46</sup> See BEN WISNER ET AL., CLIMATE CHANGE AND HUMAN SECURITY 8 (2007), <http://www.disasterdiplomacy.org/cchswisneretal.pdf>.

<sup>47</sup> See Sumudu Atapattu, *Global Climate Change: Can Human Rights (and Human Beings) Survive this Onslaught?*, 20 COLO. J. INT'L ENVTL. L. & POL'Y 35, 45-53 (2008).

<sup>48</sup> See DAVID BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 73 (2nd ed. 2006).

must step in to fill this void, and provide some legal protection to such people. Under international law principles, the reason why people leave their homes is crucial to accord them certain rights. Thus, when a natural disaster occurs, international law considers that the state is still primarily responsible for its people. However, when people who are fleeing repression by their own states move across international borders, international law seeks to provide protection, with the responsibility falling on the international community to provide protection.

For legal purposes, those who cross national boundaries are referred to as “refugees” while those who flee their homes but remain within the boundaries of their own country are referred to as “internally displaced people” (IDPs). While international law has sought to regulate the plight of refugees, the international community has yet to adopt a binding instrument on IDPs.<sup>49</sup> Traditionally international law did not govern activities *within* states and because IDPs remain within their national boundaries, technically, international law cannot govern them. This situation has, however, changed in recent years with the advent of the protection of human rights. Additionally, with the “internationalization” of issues such as environmental protection, sustainable development, and good governance, international law has begun to govern activities *within* nations’ borders.<sup>50</sup>

The Geneva Convention Relating to the Status of Refugees of 1951 defines a refugee as a person who:

[o]wing to a 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

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<sup>49</sup> The UN adopted a set of non-binding principles governing IDPs in 1998. See The Secretary-General, *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, on the Guiding Principles on Internal Displacement, delivered to the Economic and Social Council*, 2-3, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998) [hereinafter *Principles on Internal Displacement*]. See also U.N. HIGH COMM’R FOR REFUGEES [UNHCR], *THE STATE OF THE WORLD’S REFUGEES 2006: HUMAN DISPLACEMENT IN THE NEW MILLENNIUM* 167 (2006) (dealing with IDPs).

<sup>50</sup> See SUMUDU ATAPATTU, *EMERGING PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 1-8 (2006), for a discussion of internationalization.

such events, is unable or, owing to such fear, is unwilling to return to it.<sup>51</sup>

It is clear that a person fleeing his home or his country due to environmental reasons will not satisfy the conditions necessary to be considered a “refugee” under the above definition because it would be impossible for him to establish a well-founded fear of persecution based on any of the grounds enumerated in the Geneva Convention.

It must be pointed out that regional instruments have sought to expand the definition of refugees to include those fleeing “events seriously disturbing public order.”<sup>52</sup> It is likely that those who flee natural disasters such as a tsunami or an earthquake would fall within this definition. A similar expansion is envisaged under the Cartagena Declaration on Refugees adopted in 1984.<sup>53</sup> The Declaration notes that because of previous massive refugee flows in Central America, it is necessary to consider enlarging the concept of refugees to include “persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order (emphasis added).”<sup>54</sup> Of course, while the African Convention is a binding instrument, the Cartagena Declaration is not.

The UN Guiding Principles on Internal Displacement<sup>55</sup> define internally displaced persons as: “persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.”<sup>56</sup>

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<sup>51</sup> U.N. High Comm’r for Refugees [UNHCR], *Convention and Protocol Relating to the Status of Refugees*, art. 1, available at <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>.

<sup>52</sup> Africa Union [AU], *Convention Governing the Specific Aspects of Refugee Problems in Africa*, art. 1(2) (Sept. 10, 1969), available at [http://www.africa-union.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Refugee\\_Convention.pdf](http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Refugee_Convention.pdf).

<sup>53</sup> *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, (Nov. 22, 1984), available at <http://www.unhcr.org/refworld/docid/3ae6b36ec.html>.

<sup>54</sup> *Id.*

<sup>55</sup> See Principles on Internal Displacement, *supra* note 49.

<sup>56</sup> *Id.* at 1.

While the definition of IDPs encompasses those who flee their homes as a result of disasters, whether natural or man-made, this definition will not include those who are fleeing their homes as a result of environmental degradation caused by climate change unless such a situation amounts to a disaster. It is questionable whether gradual degradation leading to desertification would meet this condition. This begs the question whether a group of people leaving their homes because their land can no longer sustain them will be without any legal protection. While a natural disaster triggered by climate change leading to displacement will be included in the definition of IDPs and, therefore, trigger the safeguards in the Guiding Principles, it would seem that incidents caused by creeping degradation or pollution will not be covered.

The Guiding Principles on Internal Displacement prohibit arbitrary displacement and provide that “every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence.” Arbitrary displacement includes “displacement in cases of large-scale development projects, which are not justified by compelling and overriding public interests.” Principle 2 of the Guiding Principles squarely places the primary responsibility of providing protection and humanitarian assistance to IDPs on the shoulders of national authorities.

In its report on the link between human rights and climate change, the Office of the High Commissioner for Human Rights noted that, referring to the First Assessment Report of the IPCC, the greatest single impact of climate change will be on human migration.<sup>57</sup> The report recognizes that while people moving across an international border due to environmental factors are entitled to general human rights guarantees in the receiving state, they would not have a legitimate right of entry.<sup>58</sup> This, however, is a contradictory statement; if people have no right of entry to a state, what is the point of being entitled to general human rights guarantees in that state? The report seems to indicate that those who cannot reasonably be expected to return to their home country should be considered forcibly displaced, and be granted at least a temporary stay.<sup>59</sup> The report refers to the submergence of small island

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<sup>57</sup> UNITED NATIONS HUMAN RIGHTS COUNCIL, *supra* note 16, ¶ 55

<sup>58</sup> *Id.* ¶ 58.

<sup>59</sup> *Id.* ¶ 59.

states as a possible scenario of forcible displacement, and recognizes that human rights law does not provide clear answers to the status of populations in such situations.<sup>60</sup> The report further indicates that an adequate long term political solution is needed, rather than any new legal instruments<sup>61</sup>

## B. TERMINOLOGY<sup>62</sup>

Essam El-Hinnawi, an Egyptian scholar who was then working for the United Nations Environment Program (“UNEP”), is considered to have first coined the term “environmental refugees”<sup>63</sup> to refer to those people “who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental

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<sup>60</sup> *Id.* ¶ 60.

<sup>61</sup> *Id.*

<sup>62</sup> The literature on environmental refugees and environmental migration has expanded considerably in recent years. See generally Suzette Brooks Masters, *Environmentally Induced Migration: Beyond a Culture of Reaction*, 14 GEO. IMMIGR. L.J. 855 (2000); 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 (2001); Tracey King, *Environmental Displacement: Coordinating Efforts to Find Solutions*, 18 GEO. INT’L ENVTL. L. REV. 543 (2006); Brooke Havard, *Seeking Protection: Recognition of Environmentally Displaced Persons under International Human Rights Law*, 18 VILL. ENVTL. L.J. 65 (2007); MOLLY CONISBEE & ANDREW SIMMS, ENVIRONMENTAL REFUGEES: THE CASE FOR RECOGNITION (New Economics Foundation 2003), available at <http://www.neweconomics.org/gen/uploads/lpce0g55xjx5eq55mfjx5523102003180040.pdf>; U.N. High Comm’r for Refugees [UNHCR], Evaluation & Policy Analysis Unit, *Environmental Change and Forced Migration: Making Sense of the Debate*, Working Paper No. 70 (Oct. 2002) (prepared by Stephen Castles); SUSANA B. ADAMO, ADDRESSING ENVIRONMENTALLY INDUCED POPULATION DISPLACEMENTS: A DELICATE TASK (2008), available at [http://www.populationenvironmentresearch.org/papers/sadamo\\_pem2008.pdf](http://www.populationenvironmentresearch.org/papers/sadamo_pem2008.pdf) (background paper for the Population-Environment Research Network Cyberseminar on “Environmentally Induced Population Displacements”); SEREN BOYD & RACHEL ROACH, FEELING THE HEAT (2006), available at <http://www.tearfund.org/webdocs/Website/News/Feeling%20the%20Heat%20Tearfund%20report.pdf>; U.N. Univ. Inst. For Env’t & Human Sec. [UNU-EHS], *Control, Adapt or Flee: How to Face Environmental Migration?*, No. 5/2007 (prepared by Fabrice Renaud et al.). See also, Maria Stavropoulou, *The Right not to be Displaced*, 9 AM. U. J. INT’L L. & POL’Y 689 (1994); Karen E. McNamara, *Conceptualizing Discourses on Environmental Refugees at the United Nations*, 29 POPULATION & ENV’T 12 (2007).

<sup>63</sup> See, e.g., 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, 210 (2004). Others identify Lester Brown of the Worldwatch Institute as the first person to have introduced the concept of environmental refugees. FABRICE RENAUD ET AL., ENVIRONMENTAL DEGRADATION AND MIGRATION, available at <http://www.berlin-institut.org/online-handbuchdemografie/bevoelkerungsdynamik/faktoren/migration/environmental-migration.html>.

disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life.”<sup>64</sup>

The Climate Institute, on the other hand, defines environmental refugees as “people fleeing from environmental crises, whether natural or anthropogenic events, and whether short or long term.”<sup>65</sup> According to the Climate Institute, an environmental refugee “encompasses any person uprooted from his or her home by long-term environmental degradation, short-term incidents or development projects.”<sup>66</sup> There seems to be a discrepancy here. The definition refers to people who are fleeing from an environmental crisis – are people uprooted from their home for a development project “fleeing from an environmental crisis” for the purposes of this definition? In other words, do development projects fall into the category of an environmental crisis? It is obvious that these two categories are not synonymous.

Some contend that the term “environmental refugee” is too vague or is a myth.<sup>67</sup> Others argue that it is necessary to develop a term that is specific to those who migrate for climate related reasons.<sup>68</sup> Yet others contend that it is increasingly difficult to categorize types of refugees or migrants as the line between political refugees, economic migrants, and environmentally displaced persons is getting blurred.<sup>69</sup>

Even the proponents of the term environmental refugees accept that it is hard to identify the specific reasons why a person migrates. People migrate for a number of different reasons, coupled with environmental factors and poverty:

Poverty serves as an additional “push” factor associated with the environmental problems displacing people. Other factors include

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<sup>64</sup> Keane, *supra* note 63, at 210. He identifies three categories of environmental refugees: those temporarily displaced because of an environmental stress such as an earthquake or cyclone; those permanently displaced because of permanent changes to their habitat, such as dams or lakes; and those who are permanently displaced because their original habitat can no longer provide for their basic needs.

<sup>65</sup> The Climate Institute, Environment and Security, <http://www.climate.org/topics/environmental-security/index.html> (last visited Nov. 21, 2009).

<sup>66</sup> *Id.*

<sup>67</sup> See U.N. High Comm’r for Refugees [UNHCR], Evaluation & Policy Analysis Unit, *Environmental Refugees: Myth or Reality?*, 11, Working Paper No. 34 (Mar. 2001) (prepared by Richard Black) (arguing that “(t)he use of the term “environmental” can imply a false separate between overlapping and interrelated categories”) (quoting JoAnn McGregor, *Refugees and the Environment*, in GEOGRAPHY AND REFUGEES: PATTERNS AND PROCESSES OF CHANGE 157-70 (Richard Black & Vaughan Robinson eds.1993)).

<sup>68</sup> See *infra* pp. 21-26.

<sup>69</sup> See Havard, *supra* note 62, at 75; See also Castles, *supra* note 62.

population pressures, malnutrition, landlessness, unemployment, over-rapid urbanization, pandemic diseases and faulty government policies, together with ethnic strife and conventional conflicts. In particular, it is sometimes difficult to differentiate between refugees driven by environmental factors and those impelled by economic problems.<sup>70</sup>

The U.N. has recognized that environmental factors may trigger displacement, and proposed the term “environmentally displaced persons” (EDPs) to describe those persons “who are displaced from or who feel obligated to leave their usual place of residence, because their lives, livelihoods and welfare have been placed at serious risk as a result of adverse environmental, ecological or climatic processes and events.”<sup>71</sup> The United Nations High Commissioner for Refugees (“UNHCR”) categorically distinguishes between “refugees” and EDPs:

Within international law, refugees are defined as individuals who flee their country because of fear of ethnic, religious or political persecution, or to escape conflict, and cannot rely on the protection of their own government. The loss of national protection is a key element of the refugee definition, and of direct consequence for the work of the United Nations High Commissioner for Refugees. It is the mandate of my Office to provide international protection and assistance to refugees and to find solutions to their problems.

Using the term “environmental refugee” to refer to all people forced to leave their homes because of environmental change loses the distinctive need of refugees for protection. It blurs the respective responsibilities of national governments towards their citizens and of the international community towards those who are without protection. It also impedes a meaningful consideration of solutions and action on behalf of the different groups. Therefore, UNHCR believes the term “environmental refugee” is a misnomer.<sup>72</sup>

While, in general, EDPs are not targeted as a specific group by adverse government action, in certain instances this may be the case. For example, the Ogoni people of Nigeria were specifically targeted as a

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<sup>70</sup> See Myers, *supra* note 27.

<sup>71</sup> BRIAN GORLICK, ENVIRONMENTALLY DISPLACED PERSONS: A UNHCR PERSPECTIVE, [http://www.equatorinitiative.org/images/stories/events/2009events/brian\\_gorlick\\_environmentally\\_displaced\\_persons\\_unhcr\\_perspective.pdf](http://www.equatorinitiative.org/images/stories/events/2009events/brian_gorlick_environmentally_displaced_persons_unhcr_perspective.pdf)

<sup>72</sup> Sadako Ogata, United Nations High Commissioner for Refugees, at the Swiss Peace Foundation, Statement in Geneva (Oct. 30, 1992), <http://www.unhcr.org/admin/ADMIN/3ae68fad20.html>.



group by the Nigerian government. Thus, they may have been able to fulfill the criteria for a refugee in the Refugee Convention because they were subject to repression as well as being subjected to environmental hazards caused by the Nigerian government and the Shell oil company.<sup>73</sup> However, this will not be the case in many other instances.

## V. SOME PROPOSALS THAT HAVE BEEN ADVANCED

Several proposals have been advanced to address the issue of environmental displacement. It is very likely that any attempt to expand the scope of the 1951 Refugee Convention to cover environmentally displaced persons would be met with severe opposition from states for several reasons: an expansion would devalue the current protection for refugees; environmentally displaced persons are not fleeing state persecution; and EDPs do not meet the requirements laid down in Article 1 of the Refugee Convention.<sup>74</sup> Some contend that the definition of IDPs in the Guiding Principles includes environmentally displaced persons (EDPs).<sup>75</sup> However, the Guiding Principles make it clear that the displacement must result from, *inter alia*, a disaster, either natural or man-made.<sup>76</sup> Thus, the definition of IDPs in the Guiding Principles will not include all EDPs, and the source of the displacement will be relevant. However, even if the definition of IDPs is wide enough to cover EDPs, the guiding principles have no binding force, as they fall into the realm of soft law.

The reality remains that a significant number of people will be displaced as a result of environmental problems, particularly desertification and climate change. At the 1994 Symposium on Desertification and Migration, the UN noted that the number of migrants is increasing by about 3 million each year, and it is estimated that over 135 million people may be at risk of being displaced as a consequence of severe desertification.<sup>77</sup>

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<sup>73</sup> See The Soc. and Econ. Rights Action Ctr. and the Ctr. for Econ. and Social Rights v. Nigeria, Case 155/96, African Comm'n on Human and Peoples' Rights, (Oct. 27, 2001), <http://www1.umn.edu/humanrts/africa/comcases/155-96.html>.

<sup>74</sup> See Keane, *supra* note 63, at 215-16.

<sup>75</sup> *Id.*

<sup>76</sup> See Principles on Internal Displacement, *supra* note 49.

<sup>77</sup> See The Climate Institute, *supra* note 65.

These numbers are quite staggering and emphasize the need to address the root causes of migration. Migration due to environmental reasons, unfortunately, leads to environmental deterioration of the new surroundings because displaced persons must rely on natural resources in the new surroundings in order to sustain themselves. Moreover, since the host population must use the same resources to sustain themselves, this can lead to conflict, particularly where the resources are scarce.<sup>78</sup> The sudden arrival of migrants can also disrupt environmentally fragile areas in the host country,<sup>79</sup> leading to a vicious cycle of environmental problems in the receiving state.<sup>80</sup>

Large numbers of people from all over the world have been displaced due to environmental reasons. A few examples are, Yanomani people of Brazil, Ogoni people in Nigeria, and victims of a gas leak in a chemical factory in Bhopal, India. While environmental displacement is not new,<sup>81</sup> the present scale of displacement is a new phenomenon. Since the beginning of the 20<sup>th</sup> century, people have begun to migrate due to pollution and other environmental degradation.

While there are environmentally displaced persons in all regions of the world, Africa probably is the most affected:<sup>82</sup> “Years of drought and non sustainable agricultural practices, coupled with a large, poor population and occasional natural environmental disasters have left Africa with a disproportionate number of the world’s environmentally displaced persons.”<sup>83</sup>

Nomenclature as well as appropriate legal protection for this category of people have become hotly debated issues. Thus, for example, Stephen Castle of the Refugee Studies Center contends that the term ‘*environmental refugee*’ is simplistic, one-sided, and misleading:

A reasonable conclusion from this research literature is therefore that the notion of the ‘environmental refugee’ is misleading and does little to help us understand the complex processes at work in specific situations of impoverishment, conflict and displacement. This does

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<sup>78</sup> See WILLIAM A.V. CLARK, ENVIRONMENTALLY INDUCED MIGRATION AND CONFLICT 16 (2007), [http://www.wbgu.de/wbgu\\_jg2007\\_ex04.pdf](http://www.wbgu.de/wbgu_jg2007_ex04.pdf); Thomas F. Homer-Dixon, *Environmental Scarcities and Violent Conflict: Evidence from Cases*, 19 INT’L SECURITY, No. 1, 5-40 (1994), available at <http://www.library.utoronto.ca/pcs/evidence/evid1.htm>

<sup>79</sup> See Falstrom, *supra* note 62, at 16.

<sup>80</sup> *Id.* at 17.

<sup>81</sup> *Id.* at 3

<sup>82</sup> *Id.* at 6.

<sup>83</sup> *Id.*

not mean, however, that environmental factors are unimportant in such situations. Rather they are part of complex patterns of multiple causality, in which natural and environmental factors are closely linked to economic, social and political ones. This is where we need much more research and better understanding, if we are to address the root causes of forced migration.<sup>84</sup>

Whatever the term the international community finally adopts to refer to those people who are displaced *primarily* due to an environmental factor, it would seem that the numbers of possible displaced persons will compel it to address the issues of definition and legal protection sooner rather than later. While there is no doubt that underlying causes of environmentally induced migration must be addressed,<sup>85</sup> the international community must take steps to ensure that this category of people is accorded some legal protection. As Norman Myers stresses, "We cannot continue to ignore environmental refugees simply because there is no institutionalized mode of dealing with them."<sup>86</sup> As acknowledged by several scholars, the problem is compounded by the lack of official recognition that such a problem exists at all.<sup>87</sup>

On the other hand, it has been contended that the definition of refugees in the Geneva Convention is outdated and does not take present day realities into consideration.<sup>88</sup> For example, it is contended that a definition of "refugee" based on human rights law rather than immigration law should be adopted because human rights law affords better protection to people and an expanded version would offer protection to those who are forced to migrate as a result of environmental causes, such as natural disasters, development projects, or environmental degradation.<sup>89</sup> While it is unlikely that the 1951 Geneva Convention will be expanded to include "environmental refugees" (and the wisdom of expanding its scope to cover environmental refugees has been rightly

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<sup>84</sup> See Castles, *supra* note 62, at 5.

<sup>85</sup> See Myers, *supra* note 27 (stressing the need to widen our understanding of the root causes of environmental migration).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* See also Brooke Harvard, *supra* note 62 citing JoAnn McGregor, "Refugees and the Environment" in GEOGRAPHY AND REFUGEES 161 (Richard Black & Vaughan Robinson, eds., 1993).

<sup>89</sup> *Id.*

questioned<sup>90</sup>), no one is in doubt that this category of people must be accorded some legal protection. Stephen Castles proposes that a much wider international protection regime embracing all categories of displaced persons should be adopted.<sup>91</sup>

The UNHCR, to its credit, has extended its mandate *de facto* by providing assistance beyond those covered under the Geneva Convention, including those displaced by natural disasters. Thus, for example, the UNHCR provided aid to those affected by the unusually severe winter in Afghanistan in December 2008.<sup>92</sup> It is debatable whether this can be termed a natural disaster, but it is clear that the UNHCR has gone beyond its original mandate of providing relief to “refugees” as defined under the Geneva Convention.

In her June 1992 statement to the U.N. Conference on Environment and Development (UNCED), the then U.N. High Commissioner for Refugees, Sadako Ogata, noted that despite the fundamental link between displacement, development, and the environment, the “relationship between refugees and the environment has long been overlooked.”<sup>93</sup> She identified three reasons for this link. First, people are being forced to flee their homes for a combination of reasons such as poverty, famine, environmental degradation, human rights violations, and armed conflict.<sup>94</sup> Second, refugee movements themselves lead to environmental destruction in the areas they settle.<sup>95</sup> Finally, environmental degradation contributes to armed conflict and is an inevitable consequence of it.<sup>96</sup>

Despite this *de facto* expansion of its mandate, the UNHCR is not in favor of the term “environmental refugee,” which it considers is a misnomer. Defending the mandate of the UNHCR, the High

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<sup>90</sup> See Dana Falstrom, *supra* note 62, at 11-14. The Refugee Convention was adopted for a specific situation after the Second World War which was later expanded to cover all situations of state repression. Given this background, and given the fact that refugees are those who flee repression by their own state, it is hard to expand this definition to cover “environmentally displaced persons.”

<sup>91</sup> Castles, *supra* note 62.

<sup>92</sup> Mohammad N. Farhad, *UNHCR distributes winter aid for 200,000 Afghans*, UNHCR News, Feb. 19, 2008, <http://www.unhcr.org/news/NEWS/47bae9e84.html>.

<sup>93</sup> Statement by the United Nations High Commissioner for Refugees at the UN Conference on Environment and Development, June 10, 1992, available at <http://www.unhcr.org/cgi-bin/texis/vtx/admin/opedoc.htm?tbl=ADMIN&page=home&id=3ae68fcd4c>

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

Commissioner noted, a few months after her statement to the UNCED, that the loss of national protection is the key element of the definition of “refugees” and international protection is based on this fact:<sup>97</sup>

Using the term “environmental refugee” to refer to all people forced to leave their homes because of environmental change loses the distinctive need of refugees for protection. It blurs the respective responsibilities of national governments towards their citizens and of the international community towards those who are without protection. It also impedes a meaningful consideration of solutions and action on behalf of the different groups. Therefore, UNHCR believes the term “environmental refugee” is a misnomer.<sup>98</sup>

Adaptation to climate change consequences requires accommodating climate refugees which, in turn, necessitates adopting a proper legal and institutional framework to govern them. Since amending the Geneva Convention on Refugees is unlikely (and is indeed ill-advised) and adopting a separate convention on environmental refugees could take years, the most feasible solution is to ensure that environmental refugees are at least considered IDPs if they remain within their own state which would accord them the minimum protection required by the Guiding Principles. Omitting the word “disaster” from the definition of “internally displaced persons” and imposing a requirement that environmental degradation meet a specified level of severity may afford refugees proper legal protection as long as it is understood that they will be migrating en masse.

The definition of “environmentally displaced persons” proposed by the UNHCR seems workable; however, the question is whether it would be sufficient as a legal definition for purposes of according them legal protection. In this regard, the definition proposed by Brian Gorlick merits mention: “Environmentally displaced persons are people who are displaced from or who feel obliged<sup>99</sup> to leave their usual place of residence, because their lives, livelihoods and welfare have been placed at serious risk as a result of *adverse environmental, ecological or climatic processes and events* (emphasis in original).”<sup>100</sup>

His proposed definition contains an element of compulsion, does not refer to cross-border movement, describes different levels of threats,

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<sup>97</sup> See Sadako, *supra* note 72.

<sup>98</sup> *Id.*

<sup>99</sup> “Compelled” is probably a better word to use here.

<sup>100</sup> See Brian Gorlick, *supra* note 71, at 17.

and is not related to persecution, armed conflict, or human rights violations.<sup>101</sup> This definition is not limited to those who are displaced by climate change and applies across the board to all environmentally displaced persons. Neither does it distinguish between those who have crossed an international border and those who haven't.

One can argue that the basic human rights accorded by international human rights law should be applicable regardless of displaced persons' categorization and regardless of whether they have crossed an international border. As long as the displacement is temporary, this argument can be made. However, problems do arise when displacement is not temporary. An international framework would be necessary to recognize this category of people as a group that requires special protection.

As mentioned earlier, "environmentally displaced persons" do not enjoy any rights under international law, apart from the basic human rights that are accorded to all human beings. They cannot seek asylum under international law because they do not fall within the definition of "refugee." Given the large number of people that are already displaced and the number of people projected to be displaced as a result of climate change induced consequences, it is only a matter of time before the international community will be compelled to deal with the lacuna in the law relating to this category of displaced persons, particularly where they cross international borders. As long as these displaced people stay within their own state, the primary responsibility for such people will remain with their own state, helped to the extent feasible by international relief agencies. Legal problems that arise as a result of these displaced people crossing international borders will have to be resolved soon. In addition, the underlying causes of such displacement and forced migration will have to be addressed before we are faced with a disaster of catastrophic levels such as that caused by Hurricane Katrina in New Orleans in 2006.

#### A. CLIMATE REFUGEES

While the notion of "environmental refugees" or whatever term is eventually adopted by the international community includes "climate refugee," critics have argued that this term is too broad to specify or

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<sup>101</sup> *Id.* at 18.

quantify climate-related migration.<sup>102</sup> In addition, they argue that climate refugees<sup>103</sup> must be treated as a separate category from other environmental refugees due to their special character.<sup>104</sup> However, as stated earlier, since there are multiple causes of forced migration, it is hard to establish that climate change-related factors are the main reason for migration which leads to difficulties in establishing causation.

Bierman and Boas, proponents of the term “climate refugees,” specifically exclude four factors from a possible definition of climate refugees: (i) climate impacts that have only a marginal link with forced migration; (ii) forced migration caused by measures that are adopted to mitigate or adapt to climate change; (iii) migration due to other factors, such as industrial accidents or natural disasters unrelated to human activities; and (iv) migration as a result of indirect impacts of climate change such as conflicts over diminishing natural resources that might cause additional migration.<sup>105</sup> It is, however, difficult to categorize (iv) above as an “indirect” result of climate change as resource scarcity is recognized as a direct result of climate change; in fact, resource scarcity leading to conflict is considered to pose a serious threat to peace and security in the future.<sup>106</sup> It has been argued that climate refugees differ from traditional political refugees in several respects; unlike political refugees, climate refugees are unable to return to their homes,<sup>107</sup> are likely to migrate in large numbers, and are predictable to a certain extent.<sup>108</sup>

Thus, the proponents of “climate refugees” seek to restrict its application to three direct impacts of climate change: sea-level rise, extreme weather events, and drought and water scarcity.<sup>109</sup> While

<sup>102</sup> See Biermann & Boas, *supra* note 13, at 5.

<sup>103</sup> The term “climate refugee” is being increasingly used in literature. See, e.g., FRIENDS OF THE EARTH AUSTRALIA, A CITIZEN’S GUIDE TO CLIMATE REFUGEES (2007), available at <http://www.foe.org.au/resources/publications/climate-justice/CitizensGuide.pdf>; BOYD & ROACH, *supra* note 62.

<sup>104</sup> See Biermann & Boas, *supra* note 13, at 6.

<sup>105</sup> *Id.* at 6-7.

<sup>106</sup> See Norman Myers, *Environmental Security: What’s New and Different?* (2002), available at <http://www.envirosecurity.org/conference/working/newanddifferent.pdf>; see also Norman Myers, *Environmental Refugees: A Growing Phenomenon of the 21<sup>st</sup> Century* (2001), available at <http://www.pubmedcentral.nih.gov/picrender.fcgi?artid=1692964&blobtype=pdf>. But see Castles, *supra* note 62, for debate on this issue.

<sup>107</sup> This, of course, is not strictly correct as political refugees face the possibility of persecution if they return to their home country.

<sup>108</sup> See Biermann & Boas, *supra* note 13, at 10.

<sup>109</sup> *Id.* at 7.

extreme weather events and drought are partially related to climate change, they are included because their severity is predicted to sharply increase with climate change.<sup>110</sup> The question then arises whether the fourth category excluded from the definition – indirect results of climate change, such as conflict – is really different from the consequences included in the definition.

Proposing a possible definition of climate refugees, Bierman and Boas argue that the regime of protection should not depend on whether or not climate refugees have crossed an international border.<sup>111</sup> For purposes of international law, however, this distinction is crucial. The moment climate refugees cross an international border, they become subject to international law. However, these two scholars (Bierman and Boas) seem to propose a completely different global governance mechanism irrespective of whether the victims have crossed an international border. They consider it unreasonable to bestow a different legal status where the victims have crossed an international border.<sup>112</sup>

Another reason not to differentiate between those who cross an international border and those who do not is that both groups are forced to flee their homes with similar grim consequences. Although they propose a *sui generis* regime specifically tailored for climate refugees, they also propose to extend the notion of who is considered a refugee to those who are forced to leave their villages and settlements because of climate change. “To deny people who have to give up their homes and flee their regions and countries the moral status of a refugee, and instead labeling them by such ingenious but misleading terms such as displaced persons is in our view disrespectful, denigrating and unjust.”<sup>113</sup>

Another issue of grave consequence is the situation of small island states, which may become completely submerged as a result of climate change induced sea level rise. If that happens, the present population of these countries will become stateless. While international

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.* See also Bierman & Boas, *Protecting Climate Refugees: The Case for a Global Protocol, Environment* (2008), available at <http://www.environmentmagazine.org/Archives/Back%20Issues/November-December%202008/Biermann-Boas-full.html>; David Hodgkinson et al., *Towards a Convention for Persons Displaced by Climate Change: Key Issues and Preliminary Responses*, *THE NEWCRITIC*, Sept. 2008, available at <http://www.ias.uwa.edu.au/new-critic/eight/?a=87815>

<sup>112</sup> See Biermann & Boas, *supra* note 13, at 13.

<sup>113</sup> *Id.* at 9.



law has dealt with state succession and the resulting legal situation, it has yet to deal with a situation where states completely disappear.

Bierman and Boas offer the following definition for climate refugees: "People who have to leave their habitats, immediately or in the near future, because of sudden or gradual alterations in their natural environment related to at least one of the three impacts of climate change: sea-level rise, extreme weather events, and drought and water scarcity."<sup>114</sup>

There are several problems associated with this definition. First, "near future" is vague and hard to define. Second, it is unclear what the authors mean by "gradual alterations" in the natural environment. Finally, there is a discrepancy between the terms "immediately or in the near future" and "sudden or gradual alterations" because by their very nature gradual alterations will take place over a period of time.

Bierman and Boas further argue that the plight of climate refugees relates essentially to economic development and, therefore, the UNDP and the World Bank should be in charge of protecting their rights in concert with adaptation programs prepared for each country.<sup>115</sup> Thus, according to this argument, the UNHCR's role would be limited to coordinating emergency responses and providing assistance in the event of international migration for those countries that cannot absorb the impacts of climate change (such as small island states). The writers propose a *sui generis* regime for the recognition, protection, and resettlement of climate refugees which must be built on a set of core principles: the principle of planned re-location and resettlement; the principle of resettlement instead of temporary asylum; the principle of collective rights for local populations; the principle of international assistance for domestic measures; and the principle of international burden-sharing.

The proposal to adopt a "Protocol on Recognition, Protection and Resettlement of Climate Refugees" within the UNFCCC<sup>116</sup> merits consideration as it could circumvent the lengthy negotiation processes associated with adopting new multilateral treaties. However, confining it to climate-related refugees may exclude a large number of people who are forced to migrate because the causal link between their migration and

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 17-18.

<sup>116</sup> *Id.*

climate change cannot be easily established or does not exist. In other words, environmentally displaced people will be excluded from this legal framework where there is no link with climate change. It would be far better to establish a legal framework to deal with all environmentally displaced people with specific principles governing those who have crossed an international border.

Several other proposals have been advanced to address the issue of “environmentally displaced persons.” Dana Falstrom critiques the arguments of proponents of including EDPs in the Refugee Convention because they do not fit under the traditional definition of refugee unless they meet the criteria on some ground other than environmental displacement:

There is an assumption that the burden of protecting these displaced persons will be balanced among the receiving states – a position that is dangerously misguided. . . . Unfortunately, these environmental disasters and corresponding migration tend to occur in those areas of the world least capable of handling the situation. To assume that receiving countries will be able to handle the influx is therefore grossly misguided.<sup>117</sup>

Furthermore, people forced to migrate can cause enormous environmental stress in the new location. For these reasons, Falstrom proposes the adoption of a new convention on Environmentally Displaced Persons using the Convention against Torture as a model which, she contends, provides a good balance between affirmative obligations for states and the rights the convention grants to individuals.<sup>118</sup> Similar to the Convention Against Torture, she proposes offering temporary protection to EDPs. She believes that the combination of affirmative acts, including legislative, administrative, and judicial measures, prompt and impartial investigations, educational and training initiatives, and extensive reporting requirements have all contributed to the success of the Convention. She notes that the proposed “Convention on the Protection of Environmentally Displaced Persons” should have the following features: (a) interim protections, (b) a definition of EDPs, (c) providing temporary rights in the receiving state, (d) positive state obligations such as addressing root causes of migration, (e) making certain acts illegal under domestic law (for

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<sup>117</sup> See Falstrom, *supra* note 62, at 16-17.

<sup>118</sup> *Id.*

example, acts of environmental sabotage such as those caused by oil companies in Nigeria), and (f) undertaking educational activities such as providing information on sustainable agricultural practices and conservation of water.

While there is merit in this proposal, particularly in adopting a holistic approach to EPDs, it could take years before such an instrument is adopted. Furthermore, even if an instrument were to be adopted, it could take years before such an instrument becomes operational. The more practical solution seems to be to adopt a set of guiding principles or other soft law instrument, preferably under the auspices of the U.N. General Assembly, which would lay down the principles that should govern state conduct when dealing with EDPs. This would establish the foundation for a convention later on, or would at least contribute toward shaping state practice in this field. An immediate solution would be to expand the definition of IDPs to cover EDPs until such time that a set of guiding principles is adopted.

With regard to those people who will be forced to migrate as a result of climate change (the category called “climate refugees” in this article), the most viable solution is to include them in adaptation strategies and resettlement programs.<sup>119</sup> This way there would be minimal disruption to the communities that have to be uprooted, the communities that will be receiving climate refugees, and the legal system itself. However, this must be done with the participation of all concerned: “Planned adaptation initiatives, including resettlement programmes, may be necessary. These need to be worked out carefully in consultation with both the people needing to move and those already living in the resettlement area.”<sup>120</sup> Especially, in the case of small island states which are particularly vulnerable to climate change, migration (and resettlement) to foreign countries will become necessary.

## B. SOME EXAMPLES AND RESPONSES

Because small island states and low-lying states are particularly vulnerable to rising sea levels, some of these countries have taken proactive steps against climate change. Maldives, for example, has been at the forefront of action relating to climate change and human rights and

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<sup>119</sup> See McLeman, *supra* note 31, at 17.

<sup>120</sup> See Cecilia Tacoli, *supra* note 39, at 31.

recently initiated the adoption of a resolution on the subject at the Human Rights Council.<sup>121</sup> It fears that rising sea levels could submerge the islands,<sup>122</sup> leaving its population of 360,000 people homeless (as well as stateless). In another development, several government representatives, NGOs, and international organizations met in Maldives in 2006, and produced a “Protocol on Environmental Refugees: Recognition of Environmental Refugees in the 1951 Convention and 1967 Protocol Relating to the Status of Refugees.”<sup>123</sup> Unfortunately, no further information is available on this draft protocol and the text is not available for perusal. Already some small island states such as Carteret Islands, Tokelau, and Vanuatu have begun to permanently resettle people.<sup>124</sup>

Tuvalu, another small island state in the Pacific Ocean, threatened to file legal action against the United States and Australia for their contribution to global warming which, in turn, is causing the sea levels to rise. While not all coastal erosion and loss of land in Tuvalu may be due to climate change,<sup>125</sup> there is no doubt that climate change will have a drastic impact on this small island nation. In 2000, Tuvalu joined the UN with the specific objective of highlighting climate change issues and lobbying countries to ratify the Kyoto Protocol. Tuvalu also discussed the issue of immigration policies with New Zealand and Australia. Currently, New Zealand accepts 75 citizens between the age of 18-45 years annually from Tuvalu under its labor migration program.<sup>126</sup> Thus, it is apparent that New Zealand has not opened its doors to climate refugees. Furthermore, Australia has no current plans to admit climate immigrants into its borders.<sup>127</sup>

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<sup>121</sup> See Press Release, Ministry of Foreign Affairs, Maldives Initiated Climate Change and Human Rights Resolution at the UN Human Rights Council, *available at* <http://www.foreign.gov.mv/v2/news.php?news=2587>. For the text of the resolution, see Human Rights and Climate Change, Res. 7/23 (March 28, 2008) *available at* [http://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_7\\_23.pdf](http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_23.pdf).

<sup>122</sup> Ministry of Foreign Affairs, Republic of Maldives, *supra* note 119.

<sup>123</sup> See Renaud, et al., *supra* note 62, at 21 (the report refers to an unpublished working draft prepared by Michael See).

<sup>124</sup> See Scott Leckie, Director and Founder, Displacement Solutions, Speech at the UN Building in Male, Maldives: The Human Rights Implications of Climate Change: Where Next? (Mar. 7, 2008), *available at* [http://www.displacementsolutions.org/files/documents/Leckie\\_speech\\_Maldives\\_Mar08.pdf](http://www.displacementsolutions.org/files/documents/Leckie_speech_Maldives_Mar08.pdf).

<sup>125</sup> See Renaud et al., *supra* note 62, at 20.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 20-21.

Low lying cities such as Dhaka, Bangkok, and Calcutta are also vulnerable to sea level rise. Often cited examples of climate change related displacements include the Carteret Islands in Papua New Guinea, Lateu Village in Vanuatu, Shishmaref Village in Alaska, and Lohachara Island in the Hooghly River in India.<sup>128</sup> However, it has been alleged that the human rights of those who were resettled have not been fully respected.<sup>129</sup> This begs the question how the international community would deal with millions of displaced people if it cannot even properly resettle a few communities.

## VI. CONCLUSION

While it is probably not advisable to devise a separate legal regime exclusively for climate refugees, the notion, however, is attractive because it seems more manageable than other proposals. The most plausible way to address the issue of climate refugees is to include them within adaptation strategies for each country. Addressing it within the framework of the UNFCCC is another option, which would leave the administrative aspects to the Conference of Parties. While global climate change would result in unprecedented consequences giving rise to significant numbers of people migrating for climate-related reasons, there will be people who migrate as a result of environmental degradation, unconnected with global climate change or where the causal link between the migration and climate change cannot be easily established. In its effort to extend legal protection to those affected by climate change, the international community may overlook those people who will be displaced for reasons unconnected with climate change. Narrowing the focus to climate refugees will force us to establish the causal link between the event triggering migration and global climate change. It would also force us to categorize these people according to the reason for migration, whether it is climate related, or due to other environmental degradation. Devising separate legal regimes for different categories of displacement is unwieldy, impractical, and costly.

This article did not even address another category of displaced people – those who are forcibly displaced as a result of development

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<sup>128</sup> See Leckie, *supra* note 122.

<sup>129</sup> *Id.*

projects. This category of people also amounts to sizeable numbers.<sup>130</sup> The international community will be forced very soon to devise a legal and institutional framework for those displaced people who are not covered by the Geneva Convention on Refugees, rather than deal with them on an *ad hoc* basis. However, until a suitable legal framework is devised it will be necessary to coordinate the efforts of various international organizations and specialized agencies that address some aspect of this problem. Therefore, the proposal to establish an “International Coordinating Mechanism for Environmental Displacement” merits consideration.<sup>131</sup>

Reviewing existing literature on environmental and climate refugees, the Norwegian Refugee Council concluded that while climate change impacts are likely to contribute to an increase in forced migration, climate change and environmental factors are only two factors among several root causes of conflict and forced migration.<sup>132</sup> The Council also warns that the term “climate refugees” and the predicted numbers of refugees are misleading, because it is not possible to isolate climate change as the cause of forced migration. Moreover, the term climate refugee is legally inaccurate.<sup>133</sup> It is unlikely that this term is used in literature with legal connotations. On the contrary, the term is used to describe a group of people who will be displaced either internally or across international borders as a result of climate change, particularly due to sea level rise.

Climate change and environmental factors will not generally be the sole reasons why people migrate. Those living in low-lying cities would normally move within their country; however, we cannot ignore the plight of those living in small island states. The Norwegian Refugee Council report recognizes this situation and notes that small island states such as Tuvalu will become submerged as a result of rising sea levels associated with climate change.<sup>134</sup> The islanders will become stateless persons in every sense of the term. In this situation, the report recognizes that migration or relocation to other states will be the only

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<sup>130</sup> See, e.g., RICHARD BLACK, *REFUGEES, ENVIRONMENT AND DEVELOPMENT* (1998).

<sup>131</sup> See King, *supra* note 62.

<sup>132</sup> See VIKRAM OEDRA KOLMANNSSKOG, NORWEGIAN REFUGEE COUNCIL, *FUTURE FLOODS OF REFUGEES: A COMMENT ON CLIMATE CHANGE, CONFLICT AND FORCED MIGRATION* (2008), available at [http://www.nrc.no/arch/\\_img/9268480.pdf](http://www.nrc.no/arch/_img/9268480.pdf)

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

realistic option.<sup>135</sup> Such situations must be governed by international law; however, international law is yet to address the legal situation that arises where states become completely extinct without a successor state.

The international community has been accused of playing a game of political “pass-the-parcel” with regard to climate refugees: “No one wants to be left holding the problem of climate refugees.”<sup>136</sup> However, it is becoming increasingly clear that *millions* of people will be displaced as a result of climate change, and at present there is no international legal framework governing them. This legal vacuum should be addressed before the problem is thrust upon the international community. The best possible way to address this issue is through adaptation strategies for each country with the assistance of an adaptation fund. However, where people have to be relocated across international borders, international law will have to protect these migrants in the host country. Nationality, language, and culture, particularly in relation to indigenous communities, will be some of the critical issues that will have to be addressed.

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<sup>135</sup> See *id.*

<sup>136</sup> Megan Rowling, *Climate Refugees in Political Pass-the-Parcel*, REUTERS, Mar. 13, 2008, <http://www.alertnet.org/thenews/newsdesk/L10842290.htm>.