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**08
INTERNATIONAL LAW AND
CLIMATE MIGRANTS:
A HUMAN RIGHTS PERSPECTIVE**

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INTERNATIONAL LAW AND CLIMATE MIGRANTS: A HUMAN RIGHTS PERSPECTIVE

Benoît Mayer¹

1. Introduction

1.1. Definition

There is no consensus on a definition of “climate” or “environmental migrants.”² A good starting point can be found in the IOM definition of *environmental* migrants as “persons or groups of persons 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.”³ This definition raises different issues: should *climate* migrants be singled out of the broader category of *environmental* migrants? Should temporarily and internally displaced persons be considered as well, or only permanent international migrants? Should one deal with “*displacement*,” “*migration*” or even “*relocation*”?

Another definitional issue concerns the degree of causal link between climate change and individual decisions to migrate, in particular in the frequent case where environmental factors coincide with economic, social or political ones. Dun and Gemenne note that the Refugee Convention does not require that persecution be the sole, nor even the main reason for displacement of political refugees, but merely that there *be* persecution.⁴

1.2. Scope of Projected Climate Migration

No estimation currently exists as for the scope of today’s climate migrations. For 2050, two estimations are often referred to:

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² See e.g.: Stavropoulou, “Drowned in Definitions?” (2008) 31 Forced Migrations Rev. 11; Richard Black, *Environmental Refugees: Myth or Reality?* (Working Paper No. 34) (UNHCR, 2001) at 13.

³ *Discussion Note: Migration and the Environment* (IOM, 2007), Document MC/INF/288, online: < http://www.iom.int/jahia/webdav/shared/shared/mainsite/about_iom/en/council/94/MC_INF_288.pdf > at para. 6 and 7. See also: “Migration, Climate Change and Environmental Degradation: Definitional Issues”, IOM website: < <http://www.iom.int/jahia/Jahia/activities/by-theme/migration-climate-change-environmental-degradation/definitional-issues> >.

⁴ *Convention relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 137, 19 U.S.T. 6259, online: < <http://www.unhcr.org/refworld/docid/3be01b964.html> > art. 1 (A) 2 and *Protocol Relating to the Status of Refugees*, 30 January 1967, 606 U.N.T.S. 267, online: < <http://www1.umn.edu/humanrts/instrree/v2prsr.htm> > art.1.2. See also, Olivia Dun & François Gemenne, “Defining ‘environmental migration’” (2008) 31 Forced Migrations Rev. 10, online: Forced Migrations < <http://www.fmreview.org/FMRpdfs/FMR31/FMR31.pdf> > at 10.

- Myers: 250 million climate migrants,⁵
- UN Secretary-General: "between 50 million and 350 million."⁶

These figures remain however extremely controversial.⁷ Moreover, most of climate migrants will be internally displaced. Yet, climate change will forcibly lead to international migration under certain circumstances, in particular those affecting Small Island or densely populated developing States.

2. International Rules Governing Climate Change Migration

2.1. Protection of Internally-Displaced Climate Migrants

At the universal level,⁸ there is no definition of IDPs in treaty law and one can only refer to a soft law document and an International Law Association's declaration.

- The *Guiding Principles on Internal Displacement*⁹ apply 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 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."¹⁰ This instrument contains numerous provisions to protect IDPs' human rights, amongst others, the right to "receive protection and humanitarian assistance."
- The *Declaration of International Law Principles on Internally Displaced Persons*, adopted by the International Law Association, applies to "persons internally displaced by whatever causes, such as natural or man-made disasters or large-scale developmental projects, whenever the responsible State or de facto authority fails,

⁵ Christian Aid, Interview with Norman Myers (London, 14 March 2007), cited in *Christian Aid, Human Tide: The Red Migration Crisis* (2007) at 48. See also previous estimation of 200 million: Norman Myers, "Environmental Refugees: An Emergent Security Issue" (Paper presented to the 13th OSCE Economic Forum, Prague, 23 May 2005), online: OSCE < http://www.osce.org/documents/eea/2005/05/14488_en.pdf >.

⁶ United Nations, *Report of the Secretary-General on Climate change and its possible security implications*, 11 September 2009, UN document A/64/350, online: Islands First < http://www.islandsfirst.org/updates/sqreport_cc_security.pdf > at para. 54.

⁷ See generally, Dominic Kniveton *et al.*, "Challenges and Approaches to Measuring the Migration-Environment Nexus," in Frank Laczko and Christine Aghazarm eds., *Migration, Environment and Climate Change: Assessing the Evidence* (2009) at 41.

⁸ On 23 October 2009, African States signed the "African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa" ("Kampala Convention"). The Convention will enter into force after ratification by fifteen States. So far (12 March 2011), it has been ratified by one single State (Uganda) (see African Union website at < <http://www.africa-union.org/root/au/documents/treaties/list/Convention%20on%20IDPs%20-%20displaced.pdf> >).

⁹ *Guiding Principles on Internal Displacement*, Commission on Human Rights, 54th Session, U.N. Doc. E/CN.4/1998/53/Add.2 (1998), online: UNHCR < <http://www.unhcr.org/43ce1cff2.html> >.

¹⁰ *Guiding Principles on Internal Displacement*, Commission on Human Rights, 54th Session, U.N. Doc. E/CN.4/1998/53/Add.2 (1998), online: UNHCR < <http://www.unhcr.org/43ce1cff2.html> >, Scope and purpose, para. 2. On the application of the guiding principles by States, see: Phil Orchard, "Protection of Internally Displaced Persons: Soft Law as a Norm-Generating Mechanism" (2010) 36 *Rev. Int'l Studies* 281.

for reasons that violate fundamental human rights, to protect and assist those victims."¹¹

The UNHCR has so far interpreted its mandate on IDP protection as limited to those IDPs who, if they had reached an international border, would be refugees.¹² Moreover, due to its limited resources, the UNHCR has constantly considered that it "does not have a general competence for internally displaced persons"¹³ and its intervention is far from automatic.¹⁴ As it will be seen in the next section, this results in excluding most of the climate change induced IDPs from the UNHCR's protection.

2.2. Refugee Law: Inapplicability and Exceptions

2.2.1. The Absence of Political Persecution

The definition of "political refugees" resulted in the exclusion of environmental migrants from the Convention's scope. Some authors have argued that the Convention's drafters "recognized natural calamities as major causes of human migrations and purposefully declined to extend refugee status to the victims of such events."¹⁵ Although this does not appear in the *Travaux Préparatoires* of the 1951 Convention,¹⁶ the debate on environmental "refugees" was not unknown at the time. Thus, a 1953 report by Jacques Vernant already mentioned that condition of a "well founded fear of being persecuted,"¹⁷ relating to an action or inaction of a government, "excludes victims of natural disasters from the definition of the Refugee known to international law."¹⁸

2.2.2. Specific Circumstances leading to the Protection of Climate Migrants as Political Refugees

- Finland and Sweden have adopted domestic legal provisions granting subsidiary protection to anyone who, "by reason of an environmental catastrophe, cannot return to his home country."¹⁹

¹¹ *Declaration of International Law Principles on Internally Displaced Persons*, International Law Association, 29 July 2000, online: UNHCR < <http://www.unhcr.org/refworld/docid/42808e5b4.html> > art. 1 para. 2.

¹² See e.g.: David Keane, "Environmental Causes and Consequences of Migration: A Search for the Meaning of Environmental Refugees" (2003) 16 *Geo. Int'l Env'tl. L. Rev.* 217 at 217; "Internally Displaced People", UNHCR website, online: < <http://www.unhcr.org/pages/49c3646c146.html> > ("Even if they have fled for similar reasons as refugees [...], IDPs legally remain under the protection of their own government"); *UNHCR's Role with Internally Displaced Persons*, IOM/33/93-FOM/33/93, 28 April 1993, §8.

¹³ See e.g., UNHCR's Role with Internally Displaced Persons, *supra* note 12, §3.

¹⁴ See Catherine Phuong, *The International Protection of Internally Displaced Persons* (2004) at 84.

¹⁵ Jeanhee Hong, "Refugees of the 21st Century: Environmental Injustice" (2001) 10 *Cornell J. L. & Pub. Pol'y* 323, online: < <http://www.lawschool.cornell.edu/research/JLPP/upload/Hong-323.pdf> > at 332.

¹⁶ See generally, Guy S. Goodwin-Gill & Jane McAdam, *The Refugee in International Law* (2007).

¹⁷ *Convention relating to the Status of Refugees*, *supra* note 4, art. 1 (A) 2, and *Protocol Relating to the Status of Refugees*, *supra* note 4, art.1.2.

¹⁸ Jacques Vernant, *The Refugee in the Post-War World* (1953) at 7, cited in Jeanhee Hong, *supra* note 15, at 331.

¹⁹ *Swedish 2005 Aliens Act*, SFS 2005:716, Chapter 4, sect. 2, para. 3, online: Swedish Government (official translation in English) < <http://www.sweden.gov.se/content/1/c6/06/61/22/bfb61014.pdf> >. See also: *Finnish Aliens Act*, 301/2004, Sect. 88a(1), online: Finnish Ministry of the Interior (unofficial translation) < <http://www.finlex.fi/en/laki/kaannokset/2004/en20040301.pdf> >.

- Climate migrants persecuted by their government, for instance through a policy hostile to internal displacements, could be recognized as political refugees.

2.3. Statelessness Law: Open Questions and an Insufficient Answer

2.3.1. Open Questions: When Would Climate Migrants be Considered Stateless?

Statelessness could be invoked in the case of low lying Small Island Developing States, such as Tuvalu and the Maldives, hugely affected by sea level rises. It would require that a State's territory, population or government disappear. Yet, a low lying island's territory would become uninhabitable before being totally submerged. Therefore, the first "missing" element of statehood would be likely to be a population residing on the State's territory.²⁰

2.3.2. An Insufficient Answer: Statelessness as an Inadequate Status for Climate Migrants

The *Convention relating to the Status of Stateless Persons*, ratified by only 65 States,²¹ prohibits expulsion of stateless persons *lawfully staying on the territory*, except on ground of national security or public order.²² In contrast, the *Refugee Convention* provides that States "shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization."²³

The 1961 *Convention on the Reduction of Statelessness* claims that it is "desirable to reduce statelessness by international agreement."²⁴ Yet, this provision alone does not create any enforceable right to a nationality and can hardly be materialized into some concrete protection.

2.4. International Migration Law's "Inexistence"

Several existing instruments on international migrations merely recall migrants' equal right to enjoy their human rights, except for political ones, like nationals.

²⁰ In this sense, see: Jane McAdam, "Disappearing States', Statelessness and the Boundaries of International Law" in Jane McAdam (ed.), *Climate Change and Displacement: Multidisciplinary Perspective* (2010). See also: UNHCR, "Climate Change and Statelessness: an Overview", submission to the 6th session of the Ad Hoc Working Group on Long-Term Cooperative Action (AWG-LCA 6) under the UN Framework Convention on Climate Change (UNFCCC) 1 to 12 June 2009, Bonn, Germany, online: < <http://unfccc.int/resource/docs/2009/smsn/igo/048.pdf> > at 2.

²¹ UN Treaty Database, online: < <http://treaties.un.org> >, as of 6 July 2010.

²² *Convention relating to the Status of Stateless Persons*, 28 September 1954, 360 U.N.T.S. 117, online: < <http://www2.ohchr.org/english/law/stateless.htm> > art. 31.

²³ *Convention relating to the Status of Refugees*, *supra* note 4, art. 31.

²⁴ *Convention on the Reduction of Statelessness*, 30 August 1961, 989 U.N.T.S. 175, online: UNHCR < <http://www.unhcr.org/refworld/docid/3ae6b39620.html> >, preamble recital 2. See also art. 15 of the Universal Declaration on Human Rights.

1. *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*,²⁵
2. UN General Assembly's *Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live*,²⁶
3. Several ILO conventions.²⁷

These international instruments mainly recall internationally recognized human rights in the specific case of migrant workers or aliens, and their low rate of ratification shows that few states are actually keen to recognize and protect even the basic human rights in the case of economic migrants. In other words, the status of "migrant" does not provide climate migrants with any additional protection.

3. How Climate Migrants' Human Rights May be Affected

3.1. Human Rights in the Course of Climate Migration

3.1.1. Human Rights of Potential Climate Migrants in their Place of Origin

Climate migration can be caused by three scenarios:

1. **Low-lying Small Islands developing States**, mainly threatened by sea level rise or sea water infiltration, and drought. Example: The Maldives, Tuvalu.
2. **Low-lying coastal areas**, in particular deltas. Example: Bangladesh, Vietnam, Egypt, Nigeria.
3. **Desertification and land degradation**, in particular in African Sahel. Example: Niger, Nigeria.

More violent and more frequent natural disasters exacerbated by climate change would further threaten affected populations.

²⁵ *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 18 December 1990, 2220 U.N.T.S. 93, 30 ILM 1517, entered into force 1 July 2003, online: Office of the UNHCR < <http://www2.ohchr.org/english/law/cmw.htm> > (article 2 defines a migrant worker as "a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national" but it provides some exceptions, in particular for frontier and seasonal workers).

²⁶ *Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live*, GA Res. 40/144, UN GAOR, 40th Sess., UN Doc. A/RES/40/144 (1985), online: < <http://www.unhcr.org/refworld/docid/3b00f00864.html> > (art. 2 para. 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").

²⁷ *C97 Migration for Employment Convention (Revised)*, 1 July 1949, 120 U.N.T.S. 70, online: University of Minnesota < <http://www1.umn.edu/humanrts/instree/migrationemployment.html> > (art. 11 defines a "migrant for employment" as "a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment", thus excluding undocumented migrants); *C143 Migrant Workers (Supplementary Provisions) Convention*, 24 June 1975, 1120 UNTS 77, online: ILO < <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C143> > (art. 11 adopts a definition of migrant workers similar to that of the migrant for employment).

The following human rights of potential climate migrants may be affected in their place of origin:

- First generation rights:
 - o right to life,
 - o freedom from inhuman or degrading treatment.
- Second generation rights:
 - o right to an adequate standard of living, including adequate food, clothing and housing.
 - o right to the highest attainable standard of physical and mental health.
 - o right to culture, work and education.
- Third generation rights (mainly in non-binding international instruments):
 - o right to a healthy environment,
 - o right to natural resources,
 - o right to social and economic development.

The State of origin must take necessary actions to respect, protect and fulfill its population's rights. However, the State of origin may simply be unable to respond to certain changes in climatic conditions.

3.1.2. Human Rights of Climate Migrants during their Attempted Migration

In addition to affected rights in the place of origin, restrictions to internal displacements of affected populations may constitute violations of the "right to liberty of movement and freedom to choose his residence."²⁸

3.1.3. Rights Issues in the Place of Destination

Climate migrants may suffer further violations of their fundamental rights once they have arrived at their place of destination.

- First generation rights:
 - o Freedom from discrimination,
 - o Right to family life (family reunification),
 - o Arguably, the right to some form of political participation and incorporation, such as the right to a nationality.
- Second generation rights:
 - o Cultural rights,²⁹
 - o Freedom from discrimination,
 - o Equal rights to social assistance – considering climate migrants' specific needs.
- Third generation rights (mainly in non-binding international instruments):
 - o Collective rights, such as the right to self-determination.

²⁸ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171, Art. 12.1.

²⁹ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, 6 I.L.M. 368, art. 27: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

Climate migrants' collective and cultural rights are particularly at stake.³⁰ Enabling successful incorporation of a whole displaced population to a completely different society is a social and political challenge.

Under certain circumstances, huge flows of climate migrants could lead to very high density of population. This would probably be the case in Bangladesh, a State already densely populated and which is losing much inhabitable territory.³¹

3.2. Corollary States Obligations

3.2.1. States' Obligation to Protect their Population and Failure as the "Raison d'être" of Climate Migration

Climate migration, as *forced* migration resulting from Human Rights violation, necessarily relates to a State's inability or unwillingness to secure climate migrants' rights. The Human Rights obligations of States consist in ensuring that their population can stay on their territory, and is instinctively conceived as leading to "adaptation in situ" solutions. However, even with substantial international support, there are some circumstances under which adaptation *in situ* is not a solution, as it would be too costly or too dangerous: dikes can break.³² Under such circumstances, one must fully understand 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."³³ Therefore, wherever a State is unable to guarantee successful adaptation *in situ*, it must organize internal relocation with respect for the human rights of climate migrants. However, a State could be unable to organize a sustainable resettlement if a substantial part of their territory is affected. In other words, **"adaptation" should include not only "adaptation in situ," but also, under certain circumstances, assisted migration.** States will have to adopt specific standards, policies and programs of action to further such ends.

3.2.2. Potential Destination States' Obligation not to Turn Back Migrants to Inhuman or Degrading Treatment

Under International Human Rights law, States must protect only those persons who fall under their "jurisdiction" or within their control.³⁴ As a

³⁰ Tuvalu's Prime Minister expressed his fear that "[r]esettlement would destroy the very fabric of our nationhood and culture." In Apisai Ielemia, "A Threat To Our Human Rights: Tuvalu's Perspective On Climate Change" (2007) 44 UN Chronicle 18.

³¹ See e.g.: Jane McAdam & Ben Saul, "Displacement with Dignity: International Law and Policy Responses to Climate Change Migration and Security in Bangladesh" (2010) 53 German YB Int'l L. 1; Robert J. Nicholls *et al.* "Coastal systems and low-lying areas" in M.L. Parry *et al.* (eds.), *Contribution of Working Group II to the Fourth Assessment Report of the IPCC* (Cambridge University Press, 2007) 315 at 333; Lynne Peebles "The Bigger Kahuna: Are More Frequent and Higher Extreme Ocean Waves a By-Product of Global Warming?" *Scientific American* (2 February 2010).

³² See e.g.: Oli Brown, *Migration and Climate Change* (Geneva: IOM, 2008) at 38.

³³ W.N. Adger *et al.*, "Adaptation to climate change in the developing world" (2003) 3 *Progress in Development Studies* 179 at 189.

³⁴ See eg, European Convention on Human Rights, art. 1; International Covenant on Civil and Political Rights, art. 2.1; Office of the High Commissioner for Human Rights, General Comment No. 23: *The rights of minorities* (Art. 27), 4 August 1994, U.N. Doc. CCPR/C/21/Rev.1/Add.5, §4, and General Comment No. 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*,

corollary, however, once a migrant has entered their territory, even in case of illegal entry, States have to protect their human rights. In particular, destination States must not expel climate migrants to a country where they would be exposed to the danger of inhuman or degrading treatment.³⁵

3.2.3. International Community's International Responsibility to Protect?

Arguably, the responsibility to protect, which was primarily recognized in the case of "genocide, war crimes, ethnic cleansing and crimes against humanity,"³⁶ could also be invoked as a legal basis for third States "soft obligation" to intervene when a State is unable or unwilling to protect its population's human rights. Such obligation could include funding, but also intervening "in a timely and decisive manner."³⁷ Yet, in the current state of international law, no binding obligation can be found in any "hard law" instrument, and even soft-law instruments limited the responsibility to protect to the context of major crimes. Thus, the international responsibility to protect is perhaps a useful political argument, but not a legal one.

3.2.4. Principle of International Cooperation

One of the purposes of the United Nations is to "achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."³⁸ Numerous other instruments, including the International Covenant on Economic, Social and Cultural Rights, encourage such an international cooperation.³⁹ The major difficulty might be to transform an abstract obligation for States to cooperate in a concrete commitment in specific programs.

26 May 2004, U.N. Doc. CCPR/C/21/Rev.1/Add.13; Interamerican Convention on Human Rights, art. 1; Convention on the Rights of the Child, art. 2.1.

³⁵ Cf. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987, art. 3. See generally: Wouters, C. W. *International Legal Standards for the Protection from Refoulement: A Legal Analysis on the Prohibitions on Refoulement Contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights, and the Convention Against Torture* (Antwerp: Intersentia, 2009).

³⁶ United Nations, *Report of the Secretary-General on the Responsibility to Protect*, 12 January 2009, UN Document A/63/677, online: Global Center for the Responsibility to Protect < <http://globalr2p.org/pdf/SGR2PEng.pdf> > para. 11(a).

³⁷ *Ibid.* para. 11(c).

³⁸ *Charter of the United Nations*, 26 June 1945, art. 1§3.

³⁹ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993U.N.T.S.3, 6I.L.M.368, art.11, 15, 22, 23; General Assembly resolution 2625 (XXV), *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, 24 October 1970; General Assembly resolution 3281 (XXIX), *Charter of Economic Rights and Duties of States*, 12 December 1974; General Assembly resolution 55/2, *United Nations Millennium Declaration*, 18 September 2000, §2. See also, e.g.: CESCR General comment 3, *The nature of States parties obligations (Art. 2, par.1)*, 14 December 1990, UN Doc. E/1991/23, §13-14; Felipe Gómez Isa, "Transnational obligations in the field of economic, social and cultural rights" (2009) 18 *Revista electrónica de estudios internacionales*.

4. International Financial Support for Climate Migrants

4.1. "Adaptation", as opposed to Displacement?

The UN Framework Convention on Climate Change (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."⁴⁰ This provision, recalled in the Kyoto Protocol,⁴¹ indicates neither what is to be funded, nor what adaptation shall mean. Arguably, displacement can be considered as a strategy of adaptation to environmental change. The main financial actors in climate change adaptation have constantly privileged "adaptation" (Global Environmental Facility, GEF) and "climate resilience" (World Bank). Up to now, these two institutions seem always to have implicitly excluded migration and relocation from their adaptation objectives. The Cancun Conference of the States Parties to the UNFCCC, which marked a great step forward, referred to "[m]easures 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" as one of the priorities of "Enhanced Action on Adaptation."⁴² Yet, this did not change the fact that the UNFCCC does not finance any relocation program – only research.

4.2. Possibilities of Partial Funding by other Institutions

Potentially, funding for climate migration could stem from three other spheres: humanitarian assistance, migration organizations and development aid. Yet, none of these institutions addresses the core of climate migration financial needs. In particular, extending the competence of the UNHCR would probably endanger refugees' specific protection⁴³ while eluding the specific needs of climate migrations (in particular regarding collective and cultural rights and the impossibility of a future return to the country of origin).

⁴⁰ *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 U.N.T.S. 107, 31 I.L.M. 848, entered into force on 21 March 1994, online: < http://unfccc.int/essential_background/convention/background/items/1349.php > art. 4.4.

⁴¹ Kyoto Protocol to the UNFCCC, entered into force on 16 February 2005, art. 12.8

⁴² COP16, 29 November-10 December 2010, *Outcome of the work of the Ad Hoc Working Group on long-term Cooperative Action under the Convention*, §14(f).

⁴³ See: Kara K. Moberg, "Extending Refugee Definitions to Cover Environmentally Displaced Persons Displaces Necessary Protection" (2009) 94 Iowa L. Rev. 1107, online: < http://www.uiowa.edu/~ilr/issues/ILR_94-3_Moberg.pdf > at 22.

IO	Fund	Purpose	Relation to Climate Migration
UNFCCC	SPA (GEF)	Concrete adaptation projects and NAPAs.	Could intervene if climate migration = adaptation strategy
	SCCF (GEF)	Adaptation projects in developing countries.	Could intervene if climate migration = adaptation strategy
	LDCF (GEF)	NAPAs in 48 LDCs.	Could intervene if climate migration = adaptation strategy
	AF	Finance all adaptation activities.	Could intervene if climate migration = adaptation strategy
WB	PPCR	Finance climate resilience in development (NAPA).	Could intervene if climate migration = adaptation strategy
OCHA	GHC	Humanitarian assistance and emergency disasters relief.	Responses to various vulnerabilities of climate migrants
	CERF	Humanitarian assistance after natural disasters and armed conflicts.	Responses to various vulnerabilities of climate migrants
	ERF	Country-based funds to provide flexible humanitarian finance.	Useful to address sudden onset event induced-migration
	CHF	Predictable humanitarian funding on a country level.	Useful to address slow onset event induced-migration
IASC	-	Network of humanitarian IOs / strengthen coordination of humanitarian assistance.	Example of inter-agencies architecture in a specific goal
UNHCR	-	Providing protection and assistance for refugees and forced migrants.	Could intervene if climate migration = forced migrants
IOM	-	Promote human and orderly migration / assistance to migrants.	Ongoing research and development of assistance for CM
UNDP	-	Sustainable development / poverty reduction / governance / crisis prevention and recovery.	Could intervene in prevention and recovering of climate migration
SFDCC (WBG)	-	Coordination of WBG bodies to address development challenges induced by climate change.	Example of inter-agency architecture in a specific goal

Source: Siméon de Hey, Global Governance to Address Climate Migration, presentation at Marseilles, 15 June 2010, <http://www.afd-chine.org/jahia/webdav/site/afd/users/administrateur/public/Portail%20Mediterranee/Migration-MENA/10-de-Hey.pdf> .

4.3. Promising Initiatives at the Regional Level: the Asian Development Bank (ADB)

The ADB has funded research projects on “support to climate-induced migrations”⁴⁴ and is “studying the possibility of creating a financial facility that will address climate change-induced migration among its developing member-countries.”⁴⁵ In February 2011, the ADB launched “the first

⁴⁴ ADB, “Policy Options to Support Climate-Induced Migration,” Project Number: 43181-01, Research and Development Technical Assistance (RTA), December 2009, online: < <http://www.adb.org/Documents/TARs/REG/43181-REG-TAR.pdf> > .

⁴⁵ Brian Thomas, “Asian Development Bank mulls new financing for climate-induced migration,” 5 April 2010, Blog *Carbon Based Climate Change Adaptation*, online: < <http://carbon-based-ghg.blogspot.com/2010/04/asian-development-bank-mulls-new.html> > .

international project designed to generate policy options for addressing climate-induced migration."⁴⁶

5. Ad hoc Bilateral or Regional Agreements

Universal negotiations might be unable to succeed in an agreement on climate induced migrations which would at the same time be ambitious enough to effectively protect climate migrants and yet acceptable by a sufficient number of States – including potential host States. Regional and bilateral negotiations on a specific migration flow might be more promising, as neighboring States might prefer controlled migration rather than illegal trafficking, criminality and political instability.

Yet, achievements of regional or bilateral negotiations so far have been very disappointing.⁴⁷ India built a 4,000 km long fence of barbed wire along its border from Bangladesh to prevent any illegal migration.⁴⁸ Tuvalu has repeatedly but always unsuccessfully called for assistance with relocation, going as far as threatening Australia and the USA with filing a complaint before the ICJ.⁴⁹ As part of its Pacific Access Country immigration program, New Zealand allowed 75 residents from this tiny island to migrate each year; yet, "applicants must be 18 to 45, have an 'acceptable' offer of employment and meet a minimum English language requirement."⁵⁰ Furthermore, New Zealand released a communiqué emphasizing that "there is no link between the PAC quota and climate change."⁵¹ Thus, New Zealand, like probably all potential host countries, rejects any program allowing climate change induced immigration.

A major difficulty with regional or bilateral negotiations is that it splits the burden of organizing climate change induced migration from the historical responsibility for climate change or global responsibility to promote human rights. If countries are ready to pay "their part" of the cake, they are probably not ready to accept the whole responsibility of a relocation program. New Zealand's communiqué concluded on a reminder that this country "made a voluntary commitment of NZ\$5 million per year to assist with climate change projects *in* developing countries."⁵² The further step of accepting climate change induced immigrants may require support by the

⁴⁶ "Climate-induced Migration: Mitigating Risks, Creating Opportunities, 22 February 2011, online: < <http://adb.org/SocialDevelopment/climate-migration/default.asp> >.

⁴⁷ See generally: Susan Martin, "Climate Change and International Migration", the German Marshall Fund of the United States, June 2010, online: <http://www.gmfus.org/galleries/default-file/Martin_V3.pdf>.

⁴⁸ See e.g.: Lisa Friedman, "A global 'national security' issue lurks at Bangladesh's border," 23 March 2009, E&E Publishing: Bhomra, online: <<http://www.scribd.com/doc/13651961/India-Fence-Along-Bangladesh>>; Jane McAdam & Ben Saul, *supra* note 31.

⁴⁹ See e.g.: Apisai Ielemia, "A Threat To Our Human Rights: Tuvalu's Perspective On Climate Change" (2007) 44 UN Chronicle 18; Kalinga Seneviratne, "Tiny Tuvalu Steps up Threat to Sue Australia, U.S." *Inter Press Service* (5 September 2002), online: Common Dreams < <http://www.commondreams.org/headlines02/0905-02.htm> >.

⁵⁰ Emma Brindal "Asia-Pacific: Justice for Climate Refugees" (2007) 32 Alt. L. J. 240.

⁵¹ New Zealand Ministry of Foreign Affairs and Trade, "New Zealand's immigration relationship with Tuvalu", 4 August 2009, online: < <http://www.mfat.govt.nz/Foreign-Relations/Pacific/NZ-Tuvalu-immigration.php> >.

⁵² *Ibid.*

international community. States are unlikely to adopt a substantive international convention on climate change induced migration, and such a Convention would arguably not be “the” answer.⁵³ In contrast, a light international legal framework may be sufficient to greatly help bilateral and regional negotiations. Such an international legal framework, excluding any hard law instrument, could consist, for instance, in a resolution of the United Nations General Assembly adopting universal standards and creating a financial tool and a small agency in charge of facilitating negotiations.⁵⁴

6. Conclusion

There might be some possible financial and expertise sources for climate migration in several existing institutions. Yet, *coordination by an explicitly dedicated agency* is missing, which is especially problematic considering the extreme variety of local situations. In addition, existing institutions would not have *sufficient financial capacities* for the very wide-spread needs of estimated 200 million climate migrants in the next four decades (compare with the current 16 million refugees and 26 million IDPs). A medium-term objective could be to engage States in the drafting of an international soft-law instrument on climate migrations, which would create an *ad hoc* organization and organize large funding. This should be done at a global level to allow efficient and fair burden sharing.

But, more fundamentally, States will have to decide between two options: protecting *climate* or *environmental* migrants. Both options have their pro and cons. On the one hand, if States decide to focus on their international human rights obligations, *environmental* migrants should be protected by all States, depending on their financial capacities. On the other hand, *climate* migrants are undoubtedly victims of an anthropogenic climate change: the burden of their relocation should be supported by historical and current polluters. If the first option would protect more persons, focusing on *climate* migrants would lead to a deeper consideration for permanent relocation as well as, probably, a greater commitment of the international community.⁵⁵

⁵³ See: Jane McAdam, “Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer” (2011) 23 Int’l J. Refugee L. 2.

⁵⁴ See: Benoît Mayer, “The International Legal Challenges of Climate-induced Migrations: Proposal for an International Legal Framework” (2011) 22:3 Colo. J. Int’l Envtl. L & Pol’y (*forthcoming*), online: < <http://ssrn.com/abstract=1755622> >.

⁵⁵ See: Benoît Mayer, “Fraternity, Responsibility and Sustainability: Different Grounds for a Legal Protection of Climate (or Environmental) Migrants”, Legal Symposium in honor of Justice Charles D. Gonthier, Montreal, 20 May 2011 (*forthcoming*).

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