

“IN THE FACE OF LOOMING CATASTROPHE”¹: A CONVENTION FOR CLIMATE CHANGE DISPLACED PERSONS

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1. Introduction

The coastal region of Bangladesh – particularly vulnerable to frequent storms, cyclones, tidal surges and sea-level rise – is home to more than 40 million people. In late 2009, a climate poverty hearing panel in this coastal region heard from “climate witnesses” that “[t]housands of people [have] become Climate Refugee[s] and [have been] forced to migrate [to] ... nearby cities and in the neighbouring countries illegally.”³ In the same year James Hansen, one of the world’s preeminent climate change scientists, wrote that, in terms of climate change, “[t]he consequences for a nation such as Bangladesh, with 100 million people living within several meters of sea level, are too overwhelming ...”. He also warned of the consequences of climate change for island nations that are near sea level, and expressed his hope that “those nations responsible for the changing atmosphere and climate will provide immigration rights and property for the people displaced by the resulting chaos.”⁴

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- ¹ In the Maldives the government announced in November 2008 that a portion of its annual budget would be invested in a fund to buy a new homeland. The Maldives is a fragile chain of 1,200 islands and coral atolls; more than 80% of the total land area is less than 1 meter above sea level. Projected rises in sea levels could make much of the country uninhabitable. Target countries being examined by the Maldives for resettlement include Sri Lanka and India, given their similar cultures to the Maldives, and Australia, “because of the amount of unoccupied land available”. The president of the Maldives stated that “[w]e do not want to leave ... but we also do not want to be climate refugees living in tents for decades”: Randeep Ramesh, *Paradise Almost Lost: Maldives Seek to Buy a New Homeland*, *The Guardian*, November 10, 2008, at 1. Throughout the Pacific generally, sea-level rise has “generated plans for the relocation of populations ... *in the face of looming catastrophe*” (Stuart Beck and Michael K Dorsey, *At the Water’s Edge: Climate Justice, Small Islands and Sustainable Development*, in CLIMATE CHANGE AND ENERGY INSECURITY 127, 138 (Felix Dodds et al. eds., 2009) (emphasis added).
- ² This chapter is based on research conducted over the past three years, and relies on and builds upon our previous journal articles on a convention for climate change displaced persons. See David Hodgkinson et al., “*The Hour When the Ship Comes In*”: *A Convention for Persons Displaced by Climate Change*, 36 *MONASH U. L. REV.* 69 (2010); Hodgkinson et al., *Copenhagen, Climate Change ‘Refugees’ and the Need for a Global Agreement*, (2009) 4 *PUBLIC POLICY* 155 (2009); Hodgkinson et al., *Towards a Convention for Persons Displaced by Climate Change*, 2008 *NEW CRITIC* 8. For more information on our ongoing climate change displaced persons convention project please see www.ccdpconvention.com. We especially thank Tess Burton for her research and her significant contribution to this project, and Heather Anderson for her work on threatened island nations.
- ³ Shaheed Hadis Park, “Declaration on Climate Change from the Coastal People of Bangladesh”, posting of Gouranga Nandy and Hasan Mehedi to Save the Coastlines, <http://savethecoastlines.blogspot.com/2010/01/climate-change-vioce-of-victims-from.html> (Nov. 14, 2009)
- ⁴ JAMES HANSEN, STORMS OF MY GRANDCHILDREN: THE TRUTH ABOUT THE COMING CLIMATE CHANGE CATASTROPHE AND OUR LAST CHANCE TO SAVE HUMANITY 258 (2009).

In Bangladesh, in small island nations, and around the world, millions of people may be displaced as a result of climate change. We propose a treaty or convention (“Convention”) for climate change displaced persons (CCDPs) to address this displacement problem. In this paper we outline the scale and nature of the climate change displacement problem and explain why we propose a multilateral governance framework. We then set out the detail of our proposed Convention – with specific reference to small or “threatened” island nations – and raise the possibility of such an international agreement forming part of a climate change “regime complex.” We also address arguments against a new treaty for climate change displacement.

2. Why a Convention?

2.1 Scale and nature of the problem

The Intergovernmental Panel on Climate Change (IPCC)⁵ and the Stern Review,⁶ among many other studies, warn that the effects of climate change – including rising sea levels, heavier floods, more frequent and severe storms,⁷ drought, and desertification – will cause large-scale population movements. Climate change displacement presents an urgent problem for the international community.

The existence and scale of climate change displacement are often established by reference to the likely numbers of displaced people; figures range from 50 million to 1 billion. The most-cited estimate, that of Norman Myers, is 200 million climate change migrants by 2050, or one person in every forty-five on the planet displaced.⁸ However, Myers’ estimate is contested and, as Brown observes, “nobody really knows with any certainty what climate change will mean for human population distribution.”⁹ Nonetheless, there is a consensus in the literature that climate change will lead to “major forced displacements” over time.¹⁰

⁵ See WORKING GROUP I, IPCC, 4TH ASSESSMENT REP., CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS (2007); WORKING GROUP II, IPCC, 4TH ASSESSMENT REP., CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY (2007); WORKING GROUP III, IPCC, 4TH ASSESSMENT REP., CLIMATE CHANGE 2007: MITIGATION OF CLIMATE CHANGE (2007).

⁶ NICHOLAS STERN, THE ECONOMICS OF CLIMATE CHANGE: THE STERN REVIEW (2007).

⁷ With particular reference to rising sea levels, heavier floods, and more frequent and severe storms, see SUSMITA DASGUPTA ET AL., THE IMPACT OF SEA LEVEL RISE ON DEVELOPING COUNTRIES (World Bank, Working Paper No. 4136, 2007); Gordon McGranahan et al., *The Rising Tide: Assessing the Risks of Climate Change and Human Settlements in Low Elevation Coastal Zones* (2007) 19 ENV'T & URBANIZATION 17 (2007); NICK BROOKS ET AL., GERMAN ADVISORY COUNCIL ON CLIMATE CHANGE, SEA LEVEL RISE: COASTAL IMPACTS AND RESPONSES (2006).

⁸ See NORMAN MYERS, ENVIRONMENTAL REFUGEES: AN EMERGENT SECURITY ISSUE (2005) . See also IPCC, CLIMATE CHANGE 2001: THIRD ASSESSMENT REPORT (2001). Stern describes Myers’ assumptions as “conservative”, STERN, *supra* note 6, at 91–2.

⁹ OLI BROWN, UNDP, HUMAN DEV. REP. OFF. OCCASIONAL PAPER NO. 17, CLIMATE CHANGE AND FORCED MIGRATION: OBSERVATIONS, PROJECTIONS AND IMPLICATIONS 5 (2007). A number of publications in the area of climate change displacement have accepted that migration is likely to occur as a consequence of climate change, but urged caution in relation to estimating the scale and extremity of the movements. See, e.g., KNIVETON ET AL., CLIMATE CHANGE AND MIGRATION: IMPROVING METHODOLOGIES TO ESTIMATE FLOWS (Int’l Org. for Migration, Research Series No. 33, 2008); VIKRAM ODEDRA

Any proposal for addressing the issue of climate change displacement must account for the different contexts and forms in which such migration is likely to occur.¹¹ There are three kinds of climate change impacts that are likely to have the greatest consequences in terms of human movement: sea level rise; increasingly severe weather events; and drought and desertification.¹² The IPCC has highlighted threatened island nations, the continent of Africa, mega-deltas (particularly those in Asia) and the polar regions as areas most exposed to climate change impacts.¹³

In terms of global sea level rise, it is likely that, for unmitigated emissions, such sea level rise will be at least one meter, with an upper limit of almost two meters. Furthermore, “several meters of sea level rise must be expected over the next few centuries.”¹⁴ Because of the irreversibility of sea level rise, migration is a significant potential consequence.

Large delta systems and small island nations are particularly vulnerable to sea level rise. IPCC calculations have indicated that a rise in sea level of 45 centimeters would displace 5.5 million people, submerging more than 10% of Bangladesh.¹⁵ A study commissioned for the Stern Review estimates that 146 million people live at an altitude of less than one meter, with South Asian and East Asian populations being predominantly at risk.¹⁶ However, due to their lack of elevation above sea level, island States such as Tuvalu and Kiribati are perhaps the most threatened,¹⁷ and they also face the prospect of salt water intrusion, frequent flooding, and the like. It is a real possibility that small island nations in their entirety may become uninhabitable as a consequence of climate change.¹⁸

The impact of drought and desertification on Africa and Asia will be particularly harsh. The IPCC’s 2007 report estimates that yields from rain-fed agriculture in sub-Saharan Africa could fall by up to 50 per cent by 2020. Crop yields in central and south Asia could also fall by 30% by the middle of the twenty-first century.¹⁹

KOLMANNSSKOG, *FUTURE FLOODS OF REFUGEES* (2008); ETIENNE PIGUET, *CLIMATE CHANGE AND FORCED MIGRATION: HOW CAN INTERNATIONAL POLICY RESPOND TO CLIMATE CHANGE INDUCED DISPLACEMENT?* UNHCR, Research Paper No. 153, (2008).

¹⁰ PIGUET, *supra* note 9, at 8.

¹¹ See Walter Kälin, Speech at the ECOSOC Panel on Disaster Risk Reduction and Preparedness: The Climate Change-Displacement Nexus (Jul. 16, 2008), *available at* http://www.brookings.edu/speeches/2008/0716_climate_change_kalin.aspx.

¹² Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENVTL. L. REV. 349, 355 (2009).

¹³ KOLMANNSSKOG *supra* note 9, at 23.

¹⁴ IAN ALLISON ET AL., *THE COPENHAGEN DIAGNOSIS, 2009: UPDATING THE WORLD ON THE LATEST CLIMATE SCIENCE* 9 (2009).

¹⁵ WORKING GROUP II, IPCC, 3RD ASSESSMENT REP., *CLIMATE CHANGE 2001: IMPACTS, ADAPTATION AND VULNERABILITY* 569 (2001).

¹⁶ DAVID ANTHOFF ET AL., *GLOBAL AND REGIONAL EXPOSURE TO LARGE RISES IN SEA LEVEL* 8 (Tyndall Ctr. For Climate Change Research, Working Paper No. 96, 2006).

¹⁷ PIGUET *supra* note 9 at 8.

¹⁸ Docherty and Giannini, *supra* note 12, at 355.

¹⁹ WORKING GROUP II, IPCC, 4TH ASSESSMENT REP., *CLIMATE CHANGE 2007 — IMPACTS, ADAPTATION AND VULNERABILITY* 13 (2007).

2.2 Inadequate assistance and protection provisions in refugee law

Current protections under international law do not adequately provide for a number of the categories of person likely to be displaced by climate change.²⁰ International refugee lawyers generally agree that CCDPs would not be the subject of protection under the 1951 Convention Relating to the Status of Refugees (the “Refugee Convention”).²¹ The Refugee Convention, the most comprehensive articulation of refugee rights and State obligations, relies on a restrictive definition of a refugee as someone with a “well-founded fear of being persecuted for reasons of race, religion and nationality, membership of a particular social group or political opinion”, and who is “outside the country of his nationality.”²² It would be difficult to establish that a person displaced by climate change has been “persecuted,” as required by the Refugee Convention and defined by the existing jurisprudence.²³

Another concern with seeking protection for CCDPs under the Refugee Convention is that doing so would risk devaluing current protections for refugees.²⁴ Furthermore, to conflate the term “refugee” such that it includes both CCDPs and traditional refugees obscures fundamental differences of experience between the groups; most problematically, as a general rule, the nexus between CCDPs and their States will not have been severed through persecution. Such protections would also be insufficient; as set out at sections 3.1 and 3.2 below, most displacement due to climate change will be internal, meaning most CCDPs will not cross national borders.

2.3 The UNFCCC and displacement

(a) Limitations as a framework

Proposals for some kind of legal instrument designed to address the problem of climate change displacement seek, in various ways and for various reasons, to link that instrument with the United Nations Framework Convention on Climate Change (UNFCCC).²⁵ Yet neither the UNFCCC

²⁰ Docherty & Giannini, *supra* note 12, at 358; Office of the High Commissioner for Human Rights, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights*, at 19, UN Doc. A/HRC/10/61 (Jan. 15, 2009); Kälin *supra* note 11; Walter Kälin, *Displacement Caused by the Effects of Climate Change: Who Will Be Affected and What Are the Gaps in the Normative Framework for Their Protection?* (2008), available at http://www.brookings.edu/papers/2008/1016_climate_change_kalin.aspx. For a fuller consideration of the current international law regimes that may be applicable to climate change displacement, see Angela Williams, *Turning the Tide: Recognizing Climate Change Refugees in International Law* 30 LAW & POL’Y 502 (2008). For a discussion of the appropriateness of the United Nations Security Council as a forum for addressing climate change displacement see FRANK BIERMANN & Ingrid Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees* 21 (Global Governance, Working Paper No. 33, 2007).

²¹ See Williams, *supra* note 20, at 507-8.

²² Convention Relating to the Status of Refugees art 1A(2), Apr. 22, 1954, 189 U.N.T.S. 150.

²³ JANE MCADAM, CLIMATE CHANGE “REFUGEES” AND INTERNATIONAL LAW 4-5 (2007).

²⁴ 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, 214-17 (2004).

²⁵ United Nations Framework Convention on Climate Change, Mar. 21, 1994, 1771 U.N.T.S. 107. See generally BIERMANN & BOAS, *supra* note 20; Williams, *supra* note 20.

process nor its Kyoto Protocol²⁶ contemplates or addresses the issue of displacement. In our view, the UNFCCC – notwithstanding its expansion toward adaptation as well as mitigation – has limitations as a framework for dealing with climate change displacement. Displacement is not its focus; its concerns lie instead in the promotion of climate mitigation activities. Its structure and institutions are not designed to address displacement and the issues associated with it. Moreover, as the 2010 Cancun and 2011 Durban climate change conferences reveal, the UNFCCC cannot easily be altered to accommodate CCDPs; dealing with *existing* provisions is already problematic.

These arguments are put succinctly by Docherty and Giannini. Although they observe that the UNFCCC does apply directly to climate change, they also note that it has legal limitations for dealing with climate change displacement. As an environmental law treaty, the UNFCCC:

primarily concerns state-to-state relations; it does not discuss duties that States have to individuals or communities, such as those laid out in human rights or refugee law. It is also preventive in nature and less focused on the remedial actions that are needed in a refugee context. Finally, although the UNFCCC has an initiative to help States with adaptation to climate change, that program does not specifically deal with the situation of climate change refugees. Like the refugee regime, the UNFCCC was not designed for, and to date has not adequately dealt with, the problem of climate change refugees.²⁷

(b) Focus only on international/cross-border displacement

Furthermore, to the extent that the UNFCCC does consider displacement effects from climate change, its focus is strongly on international movement. A UNFCCC “non-paper” is one used by State parties as a starting point for work on negotiating texts, as well as a vehicle for comments and proposing revisions. Non-paper 41 on climate change adaptation, produced after the seventh session of the Ad Hoc Working Group on Long-Term Cooperative Action (AWG-LCA) under the UNFCCC in Barcelona in October 2009, refers to migration and displacement as follows:

All Parties [shall] [should] jointly undertake action under the Convention to enhance adaptation at the international level, including through ... (b) Activities related to migration and displacement or planned relocation of persons affected by climate change, while acknowledging the need to identify modalities of interstate cooperation to respond to the needs of affected populations who either cross an international frontier as a result of, or find themselves abroad and are unable to return owing to, the effects of climate change.²⁸

²⁶ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Feb. 16, 2005, 2303 U.N.T.S 148.

²⁷ Docherty & Giannini, *supra* note 12, at 358. They also note that attaching any climate change refugee protocol to the UNFCCC has three significant shortcomings: “the limits of the UNFCCC’s mandate, which is not focused on remedies; the historical reluctance to incorporate human rights issues explicitly into environmental treaties; and the UNFCCC’s track record of inaction,”: *supra* at 394.

²⁸ Ad Hoc Working Group on Long-Term Cooperative Action under the Convention, *Contact Group on Enhanced Action on Adaptation and its Means of Implementation 3-4*, (Non-paper No. 41, Draft Text, 2009), available at <http://www.stakeholderforum.org/fileadmin/files/Non-Paper%2041.pdf>. See also NORWEGIAN REFUGEE COUNCIL, CLIMATE CHANGED: PEOPLE DISPLACED 23 (2009),.

Although the Norwegian Refugee Council argues that “[i]t is important that the reference [in the non-paper] to the international level is not interpreted to mean that only cross-border movements are addressed,”²⁹ it is clear that, for the AWG-LCA, the emphasis is on international displacement. Yet, as we argue in this article, most displacement will likely occur within national borders.

2.4 Existing proposals to address the displacement problem are not complete or comprehensive

Proposals for a new instrument providing for people displaced by climate change have been advanced in varying levels of detail by Docherty and Giannini,³⁰ Biermann and Boas,³¹ Williams,³² Bétaille et al.,³³ the authors of this article and their colleagues,³⁴ and others.³⁵ All of the proposals agree that CCDPs do not fall within the scope of the existing refugee regime created by the Refugee Convention.³⁶ However, they differ as to the most appropriate instrument to tackle that problem and the scope and detail of that instrument. Although we do not provide a detailed summary of the various proposals, we do acknowledge at various points in this chapter the contributions made by these authors, and the extent to which we have considered and incorporated aspects of their proposals in our own. In our view, however, no proposal has offered a comprehensive, global approach to addressing the displacement problem; the proposal presented here, which builds on our earlier 2008, 2009 and 2010 studies, attempts to provide such an approach.

Any convention designed to deal with climate change displacement on a comprehensive basis must include both internal displacement – that which occurs within state borders, and is the most likely form of displacement – and international (or trans-border) displacement. Our Convention, although it necessarily distinguishes between internal and international displacement, provides for both.³⁷ For those displaced within state borders it institutes a mechanism for the provision of principled, non-discriminatory assistance. It also provides an original definition of “climate change displaced persons” and a “climate change event.”

The Convention attempts to prioritize methods for addressing the climate change displacement problem without affecting instruments not designed to deal with that problem, such as the UNFCCC and its Kyoto Protocol.

²⁹ NORWEGIAN REFUGEE COUNCIL *supra* note 28.

³⁰ Docherty & Giannini, *supra* note 12.

³¹ BIERMANN & BOAS, *supra* note 20.

³² Williams, *supra* note 20.

³³ Julien Bétaille et al., *Draft Convention on the International Status of Environmentally-Displaced Persons* 4 REVUE EUROPEENNE DE DROIT DE L'ENVIRONNEMENT 395 (2008).

³⁴ See text accompanying note 2.

³⁵ See ENVTL JUSTICE FOUND., NO PLACE LIKE HOME: WHERE NEXT FOR CLIMATE REFUGEES? (2008); Md Shamsuddoha & Rezaul Karim Chowdhury, *Climate Change Migrants*, 74 TIEMPO 1, 3 (2010)..

³⁶ Docherty & Giannini, *supra* note 12, at 359; BIERMANN & BOAS, *supra* note 20, at 17-21; Williams, *supra* note 20, at 507-10.

³⁷ “The issue of climate change IDPs [internally displaced persons] is beyond the scope” of Docherty and Giannini’s article, Docherty & Giannini, *supra* note 12, at 360.

Our Convention proposal provides specifically for the populations of threatened island nations that may become uninhabitable due to the effects of climate change, and differentiates such States from others which may be affected by large-scale displacement.

2.5 No 'coherent multilateral governance framework' exists

As summarized earlier, there is “no coherent multilateral governance framework for environmental migration ... [regulation] is extremely fragmented and disparate.”³⁸ Neither existing climate change law nor refugee law adequately provides for CCDPs. There has been no coordinated response by governments to address human displacement due to climate change--whether domestic or international, temporary or permanent. And given the nature and magnitude of the problem that climate change displacement presents, ad hoc measures based on existing domestic regimes may lead to inconsistency, confusion and conflict. The international community has an obvious interest, on security and economic grounds at the very least, in addressing the problem of human displacement in a coordinated fashion. This includes assisting in providing pre-emptive resettlement to those most at risk from impacts of climate change. Our Convention, in addition to providing a general framework for CCDP assistance – its main objective – would address gaps in the international regime of legal protections and humanitarian assistance currently applicable to CCDPs. It would do so by incorporating a mechanism for the provision of non-discriminatory assistance to internally displaced CCDPs, setting out a framework for the protection of those persons displaced across international borders, and identifying specific principles that should apply to the resettlement of persons from threatened island nations that may become uninhabitable.

3. A convention for climate change displaced persons

3.1 Introduction: Scope of convention

We propose a single, multilateral, stand-alone Convention to address the problem of climate change displacement, the scope of which – like the problem, both in terms of causation and consequences – is global; parties to the Convention would include both developed and developing States.

Although our Convention is a stand-alone instrument, it does draw on and adapt provisions of other instruments to adequately provide for, assist and protect those displaced by climate change. Adopting a multifaceted, cooperative and international approach to providing for, assisting and protecting CCDPs, our Convention encompasses those displaced internally *and* those who cross international borders. Migration experts state that most persons displaced by climate change will be unlikely to cross an international border.³⁹

³⁸ JANE MCADAM, ENVIRONMENTAL MIGRATION GOVERNANCE 5 (Univ. N.S.W. Faculty of Law Research Series, Research Paper No. 1, 2009).

³⁹ KNIVETON ET AL., *supra* note 9, at 29; CHRISTIAN AID, HUMAN TIDE: THE REAL MIGRATION CRISIS 6(2007); Brown, *supra* note 9, at 13; GERMAN ADVISORY COUNCIL ON GLOBAL CHANGE, CLIMATE CHANGE AS SECURITY RISK 18 (2007).

Developing State parties to the Convention – with economies dependent on the natural environment, but without resources to mitigate and adapt to the effects of climate change – will be those States most in need of displacement assistance. As the International Council on Human Rights Policy notes, “the most dramatic impacts of climate change are expected to occur in the world’s poorest countries;” indeed, these countries already experience such impacts.⁴⁰

Finally, the proposed Convention would provide for both temporary and permanent relocation. The need for relocation assistance and protection arises whether the relocation is temporary or permanent.

3.2 Convention provisions

Our Convention proposal is based on the following principles and provides for the following matters, all of which are more fully set out in this article:

- The Convention would provide a general framework for assistance to CCDPs, and would address gaps in current human rights, refugee and humanitarian law protections for CCDPs.
- Most people made homeless by climate change are expected to stay within their home countries. The Convention would encompass those displaced within States and those who cross international borders.
- Persons displaced *within* state borders would be subject to a framework of assistance in which obligations would be shared between the home State and the international community. In the case of CCDPs who have migrated *across* state borders, the Convention would outline the rights and obligations of the CCDP and the home and host States, while making it clear that the Convention itself would not oblige host states to accept CCDPS (see 3.5(b) below).
- The poorest countries in the world are likely to experience the most severe impacts of global warming. The Convention would provide for contributions to a fund for climate change displacement by developed State parties based on the principle, at least as a starting point, of “common but differentiated responsibilities.”⁴¹
- Recognising that current levels of scientific knowledge create causation issues regarding the extent to which climate change contributes to a particular weather event or population movement, the Convention would adopt a “very likely” standard.
- Rather than assigning rights and protections on the basis of the individual satisfaction of definitional criteria, as in the Refugee Convention, we believe that *en masse* designation of CCDP status is more appropriate to the characteristics of climate change migration.

⁴⁰ INT’L COUNCIL ON HUMAN RIGHTS POLICY, CLIMATE CHANGE AND HUMAN RIGHTS1 (2008).

⁴¹ See *infra* Section 3.5(d).

- Because of the necessity of integrating complex issues of causation and evolving science into decision-making in respect of climate change migration, our proposal calls for the creation of a modest institutional architecture for designating members of a particular population as CCDPs.
- The very real prospect of entire States becoming uninhabitable differentiates the plight of threatened island nations from other regions in which there is likely to be large-scale displacement, and requires specific consideration. We propose to apply the principles of proximity, self-determination and the safe-guarding of intangible culture to guide bilateral displacement agreements between threatened island nations and host States. Such agreements would be negotiated by States under the aegis of the Climate Change Displacement Organisation, the organisation established under the Convention.

The Convention contemplates the collaborative provision of pre-emptive assistance (and, if necessary, resettlement) to those most at risk from the impacts of climate change. Provision of assistance under the Convention could thus be described as “anticipatory adaptation.”

These matters are set out in more detail later.

3.3 Causation

Several issues arise with respect to the provision of assistance and protection for persons displaced by climate change. The first is the extent to which climate change *causes* the event giving rise to the displacement. It is not possible at present for science to determine whether some environmental events were caused by climate change.⁴² However, the IPCC for example identifies (a) increased incidence of extreme high sea level (excluding tsunamis); (b) intense tropical cyclone activity increases; and (c) areas affected by drought increases, as ‘likely’ to be a result of climate change, that is, with more than 66% probability.⁴³ Climate change science continues to evolve. Any instrument that seeks to address migration induced by climate change events must be based on scientific evidence, but also must be sufficiently flexible to reflect developments in scientific understanding over time.

A second issue is the extent to which humans contribute to particular climate change events. Docherty and Giannini argue that science can determine the likelihood that humans “contributed to a type of disruption”. Their definition references the IPCC’s “likelihood ranges” and adopts the IPCC’s “more likely than not” standard (a probability greater than 50%).⁴⁴

The Convention would recognise problems with (a) determining the extent to which climate change causes an event giving rise to displacement; and (b) establishing the extent to which humans contribute to particular or general climate change events. The Convention would adopt a “very

⁴² Docherty & Giannini, *supra* note 12, at 370.

⁴³ IPCC, CLIMATE CHANGE 2007: SYNTHESIS REPORT 53 (2007); “Virtually certain” means a probability greater than 99%; “extremely likely” means a probability greater than 95%; and “very likely” means greater than 90%, *supra*, at 27.

⁴⁴ Docherty & Giannini, *supra* note 12, at 371.

likely” standard (greater than 90% probability) to identify “climate change events” (see section 3.4 below) as caused by human-induced climate change. This higher standard provides increased certainty and targeted resource allocation, vital in the context of a convention that could potentially apply to hundreds of millions of people, and would be applied by a proposed climate change displacement organization (see section 3.5 below).

By adopting the “very likely” standard, and in light of the current state of climate change science, we anticipate that requests from state parties attracting the operation of our Convention would overwhelmingly concern slow-onset, gradual displacement, which is more likely to be established as induced by anthropogenic climate change than a sudden disaster.

Issues of causation also arise with respect to the question of whether climate change necessarily leads to migration. Adaptive capacity is integral to displacement decisions – and both adaptation and displacement are determined as much by available resources as by environmental factors. The Convention would largely operate prospectively: assistance to CCDPs would be based on an assessment of their environment becoming uninhabitable due to a “climate change event” such that resettlement measures and assistance were necessary.

Because of the necessity of integrating complex issues of causation and evolving science into decision-making in respect of climate change migration, our proposal involves the creation of a modest institutional architecture for designating a particular population as CCDPs. Although the scope of our Convention includes those persons displaced as a result of sudden climate change events (or impacts), as a practical matter the proposed Convention’s machinery may not be suited to immediately reacting to an unforeseen disaster. Attempts to apply the Convention in such situations may prevent the operation of existing and more effective disaster relief and management programs. Multiple channels already exist to provide aid, assistance, and protection to those displaced by sudden environmental impacts.

3.4 Definition and designation of CCDPs

Proposals for definitions of “climate change displaced persons”⁴⁵ have advanced a range of strategies for addressing the question of how to distinguish forced from voluntary migration in cases of gradual environmental degradation. In our view, prospective migration based on the likely consequences of climate change (that is, “voluntary migration”) is as coerced as migration in response to climate change impacts that immediately render a particular area uninhabitable. In other words, population movements based on the conclusion that a region will no longer be habitable in the future also constitute “forced” migration. The important question *then* becomes institutional rather than definitional and is focused on constructing and administering a set of processes to determine the likely contribution of climate change to both prospective and responsive climate change movements.

⁴⁵ BIERMANN & BOAS, *supra* note 20, at 8; Docherty & Giannini, *supra* note 12, at 361; Williams, *supra* note 20, at 522-23.

Rather than assigning rights and protections on the basis of the individual satisfaction of definition-based criteria, we propose more workable (in our view) *en masse* designations of the status of CCDPs through a process of request and determination by States and Convention institutions. Such an approach would nevertheless require a definition of CCDPs because, as Castles observes,

we cannot get around definitional categories ... easily, for definitions are crucial in guiding the policies of governments and international agencies towards mobile people.⁴⁶

We propose, then, the following CCDP definition:

CCDPs are groups of people whose habitual homes have or will become temporarily or permanently uninhabitable as a consequence of a climate change event.

A “climate change event” is defined as “sudden or gradual environmental disruption that is very likely caused by human-induced climate change.”

Under our Convention, assistance and protection would not be triggered solely by fulfilling the requirements of a definition, but rather through an international process of status designation informed by scientific studies, affected communities, States, and international institutions.

3.5 Summary of the Convention’s operation

(a) Organization

Although other proposals⁴⁷ describe discrete agencies to administer their respective conventions, no proposal has attempted to set out in detail the operation of a climate change displacement organisation and its constituent bodies, and how those bodies would work together and interact. Our proposal attempts to remedy this gap by putting forward a modest climate change displacement organisational structure and, within that structure, setting out the roles and obligations of Convention participants. Although we envisage a single, stand-alone convention with a global scope, the Convention’s governance structure also contemplates a role for regional committees and multi-disciplinary collaborations across developed and developing States, including government and non-government organisations.

Our Convention proposal would create a Climate Change Displacement Organisation (CCDO) that would comprise a Council and an administrative body, with links to or direct associations with climate change science research organizations. Climate change displacement implementation groups would also be formed to facilitate resettlement.⁴⁸

⁴⁶ STEPHEN CASTLES, ENVIRONMENTAL CHANGE AND FORCED MIGRATION 9 (UNHCR, Working Paper No 70, 2002).

⁴⁷ Docherty & Giannini, *supra* note 12, at 384-91; BIERMANN & BOAS, *supra* note 20, at 28-29; Williams, *supra* note 20, at 519.

⁴⁸ Further detail on CCDO institutions, participants and obligations can be found in Hodgkinson et al., *supra* note 2, at 91-97, from which this section draws. Note, however, that this chapter substantially modifies the CCDO structure set out in that article.

(b) State parties: Offers of and requests for assistance, and designations

The Convention framework contemplates that States providing displacement assistance funding and States receiving such funding would be parties to the Convention. The Convention limits the provision of assistance to developing State parties. A developing State party would make a request to the CCDO for internal or international resettlement assistance. That State party would, at the time of making a request for assistance, also request or apply for *en masse* designation of the status of CCDPs by the CCDO. In the case of international resettlement assistance, a “host” State request for assistance would reference the relevant “home” State request. It would also be open to the CCDO (through the CCDO Council) to offer assistance to developing State parties without a request from those parties.

Bilateral displacement agreements would be concluded under the aegis of the Convention between home and host States. The Convention would not compel States to either sign such agreements or to accept CCDPs.

Developing State parties may also make financial and other requests for assistance in fulfilling their Convention obligations. These obligations would include collecting data on climate change displacement; integrating protection and assistance for CCDPs into future planning programs; and consulting with potential or actual CCDPs and their representative organizations in the collection of data and the development and implementation of policy.

Again, then, the Convention would largely operate prospectively: assistance to CCDPs would be based on a “bottom-up/top-down” assessment of the likelihood of their environment becoming uninhabitable due to events consistent with anthropogenic climate change, such that resettlement measures and assistance were necessary. In other words, displacement is viewed as a form of adaptation that creates particular vulnerabilities requiring protection as well as assistance through international cooperation. As Mastrandrea and Schneider note,

[s]uccess in adaptation to climate change will come from the mating of top-down and bottom-up assessment. Scientific projections are *most useful* when joined with the intimate knowledge of existing vulnerabilities that stakeholders possess ... Detailed bottom-up studies provide understanding of the structural, institutional, psychological, financial, legal, and cultural frameworks of affected sectors [and] ... communities.⁴⁹

(c) Regional committees

Williams⁵⁰ outlines the clear virtues of regional initiatives and cooperation in addressing the plight of persons displaced by climate change, including the ability to assess

current vulnerabilities to climate change impacts, along with information exchange on traditional coping practices, diversified livelihoods, and current government and local interventions.⁵¹

⁴⁹ MICHAEL D. MASTRANDREA & STEPHEN H. SCHNEIDER, PREPARING FOR CLIMATE CHANGE 87 (2010); emphasis added.

⁵⁰ Williams, *supra* note 20, at 517-23.

A regional structure, Williams notes, would allow “for various levels of engagement and development by States, depending on the individual capacity of each country involved and the (perceived) severity of the problem in that area.”⁵² McAdam observes that responses on a regional basis might “be more appropriate and culturally sensitive ... taking into account the particular features of the threatened population.”⁵³

Accordingly, we propose the establishment of regional committees that would inform CCDO decision-makers about regional perspectives and enable the unique situation of threatened island States to be addressed, in part through the conclusion of bilateral displacement agreements.

(d) Financing

We propose that developed State parties to the Convention make mandatory financial contributions to a climate change displacement fund (supervised by the CCDO), and that such contributions are made on the basis that, at least as a starting point, States and State parties to the Convention have common but differentiated responsibilities.⁵⁴ This principle of “common but differentiated responsibilities”:

recognizes historical differences in the contributions of developed and developing States to global environmental problems, and differences in their respective economic and technical capacity to tackle these problems.⁵⁵

State practice and legal precedent support the general principle of common but differentiated responsibilities, which underpins the obligations of State parties to the Convention. Our proposal that funding should be apportioned on the basis of the common but differentiated responsibilities principle also finds support in other proposals for climate change displacement instruments.⁵⁶

⁵¹ *Id.* at 519.

⁵² *Id.* at 521.

⁵³ MCADAM, *supra* note 38, at 7-8.

⁵⁴ The principle of “common but differentiated responsibilities”, the basis on which developed State parties make contributions to the Fund, “recognises historical differences in the contributions of developed and developing states to global environmental problems, and differences in their respective economic and technical capacity to tackle these problems”. As the McGill Centre for International Sustainable Development Law notes, the principle has two basic elements: “the common responsibility of states for the protection of the environment, or parts of it, at the national, regional and global levels” and “the need to take into account the different circumstances, particularly each State’s contribution to the evolution of a particular problem and its ability to prevent, reduce and control the threat”. CTR. FOR INT’L SUSTAINABLE DEV. LAW, THE PRINCIPLE OF COMMON BUT DIFFERENTIATED RESPONSIBILITIES (2002), *available at* www.cisd.org/pdf/brief_common.pdf. This has a number of implications, including the imposition of environmental obligations that differ between states.

⁵⁵ *Id.*

⁵⁶ BENITO MÜLLER, AN FCCC IMPACT RESPONSE INSTRUMENT AS PART OF A BALANCED GLOBAL CLIMATE CHANGE REGIME (2002), *available at* www.oxfordclimatepolicy.org/publications/documents/iri.pdf; Docherty & Giannini, *supra* note 12, at 386; BIERMANN & BOAS, *supra* note 20, at 26, 28-29. The inhabitants of the Alaskan island of Shishmaref face displacement, and their relocation dilemma

We recognise various limitations to the principle, however, and the hard issue of the level of specific state party contributions to the Fund would largely be determined during negotiations. We also recognize, of course, that adaptation funding is difficult to come by, as the UNFCCC process has revealed— whether through USD 30 billion in “fast start financing” (FSF) from developed States, or through a developed-state commitment to provide USD 100 billion each year by 2020. FSF has not met even modest expectations, and the question of where to find USD 100 billion per year has proven to be divisive. Furthermore, the Copenhagen Accord is vague on climate finance sources for adaptation.⁵⁷

3.6 Assistance and protection

(a) Introduction

The vulnerability of displaced people has long been recognized as a serious issue by the international community and is reflected in the Refugee Convention, the Guiding Principles on Internal Displacement (the “Guiding Principles”),⁵⁸ international humanitarian law, human rights law, and customary law. According to the International Council on Human Rights Policy, climate change is likely to exacerbate existing human rights vulnerabilities and resource inequities. Our proposed Convention not only provides a framework for the provision of adaptive assistance to CCDPs but also addresses gaps in existing protections, as well as identifying principles that should apply to the resettlement of persons from threatened island nations.

Again, most climate change displacement is likely to occur within state borders. The Guiding Principles provide a coherent statement of the matrix of human rights and humanitarian protections that are applicable to internally displaced persons. However, it is our view that because climate change is a global problem, the international community has an obligation to provide assistance to CCDPs regardless of whether their movement has a trans-border dimension. We therefore propose a Convention that incorporates a mechanism for the provision of aid and assistance to internal CCDPs.

highlights some of the problems associated with adaptation funding: “The future of the Shishmaref community has yet to be determined, but two possible solutions have emerged. The first involves moving it to small towns around Nome and Kotzebue, 200 miles to the south and east, respectively, to take advantage of their urban infrastructure. With an estimated cost of \$100 million ... this is the less expensive alternative and the one favoured by the state of Alaska and federal funding agencies. The second alternative, estimated to cost \$200 million, would involve relocating the village to the mainland only 12 miles from Sarichef. The village would be fully recreated in an uninhabited area called Tin Creek that would be safe from erosion. “The state will never pay the extra cost”, says Jonathon Weyiouanna, ‘[w]e’ll have to find other funding. If we fail, we’ll disappear. Our special culture, our community traditions like sharing and respect for our ancestors, our subsistence economy - everything that makes us a unique community will perish in a city like Nome, which is foreign to Inupiaq culture.’ The community’s struggle can be summed up in these words: relocate to Tin Creek or disappear.” Guy-Pierre Chomette, *Alaska, the Kigiqtaamiut in Jeopardy*, in CLIMATE REFUGEES 22-23 (Collectif Argos eds., 2010).

⁵⁷ CLIMATE ACTION NETWORK FRANCE ET AL., CLIMATE CHANGE NEGOTIATIONS: TIME TO FILL THE AMBITION DEFICIT (2011).

⁵⁸ UNHCR, *Guiding Principles on International Displacement*, U.N. Doc. E/CN.4/1998/53/Add.2 (1998).

Although our Convention applies to both internal and trans-border displacement, it would take account of the clear distinction drawn in international refugee law between refugees and the internally displaced. The distinction arises primarily from the principles of state sovereignty and non-interference, which are fundamental to the international legal system.⁵⁹ Our Convention, then, would distinguish among specific rights and protections on the basis of internal and international displacement. Certain ambit provisions, however, should be applicable to persons displaced both internally and across recognized state borders.

The Convention would provide a framework for the provision of assistance to and protection of persons *internally displaced* due to climate change, in which obligations are shared between the home State and the international community. In the case of those displaced *across* borders, our Convention would outline rights of the CCDP and obligations of the host State. Rather than distinguishing between temporary and permanent displacement, the Convention we envisage would allow rights to be gradually accrued based on the duration of the displacement.

Finally, because of their unique circumstances, persons from threatened island nations should be accorded treatment based on a further set of principles that include proximity, self-determination and the preservation of their culture. These principles are set out at section 3.7.

(b) Internal displacement

Protection and assistance provisions for those internally displaced are set out in the Guiding Principles rather than in a binding convention or United Nations Security Council resolution. The Guiding Principles apply to “persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence” for reasons including “natural or human made disasters” and “who have not crossed an internationally recognised State border.”⁶⁰ The Guiding Principles recognise that national authorities have the primary duty and responsibility to provide protection and assistance to IDPs.

Our Convention proposal draws on a range of international law frameworks and precedents, including the Guiding Principles. It adopts a model in which the primary responsibility for CCDPs rests with their own State. It is founded on the recognition in international and human rights law that, although “different States have different capacities,” States are responsible for caring for their own people.⁶¹

Climate change induced displacement is also a matter of global responsibility, however, regardless of whether such displacement occurs across national borders. The international community should therefore be obliged to cooperate in the provision of assistance and protection to internally displaced CCDPs. On request by the home State and in accordance with Convention

⁵⁹ CATHERINE PHUONG, THE INTERNATIONAL PROTECTION OF INTERNALLY DISPLACED PERSONS 22 (2004).

⁶⁰ UNHCR, *supra* note 58. *See also* INT’L LAW ASS’N, LONDON DECLARATION OF INTERNATIONAL LAW PRINCIPLES ON INTERNALLY DISPLACED PERSONS, (2000), *available at* www.unhcr.org/refworld/docid/42808e5b4.html.

⁶¹ Docherty & Giannini, *supra* note 12, at 380.

provisions, other parties to the Convention would be required to provide assistance in cases of internal displacement.

Although the emphasis of a global CCDP instrument should be less on the protection of persons outside their States, and more on supporting governments, local communities and agencies in assisting those within their own territory,⁶² displacement does make people vulnerable to abuses of their human rights.⁶³ Docherty and Giannini identify the Convention on Cluster Munitions as providing a model framework that requires the provision of “tangible assistance as well as protection of abstract rights.”⁶⁴ Based on the Convention on Cluster Munitions precedent, state parties would be required to provide CCDPs under their jurisdiction with a practicable level of age and gender-sensitive assistance, including emergency services, evacuation and relocation, medical assistance, housing, food, measures necessary for social and economic inclusion, property restitution where possible, and the facilitation of family reunion. Moreover, in fulfilling their obligations under the Convention, each State Party would be precluded from discriminating against or among CCDPs.

Again, the operation of our Convention would, in many ways, be prospective. State parties to the Convention would be obliged to collect reliable and relevant data on climate change displacement; adopt a general policy which integrates assistance and protection for CCDPs into future comprehensive planning programs; disseminate information on likely climate change displacement and state policy toward potential or actual CCDPs; and closely consult with and actively involve potential or actual CCDPs and their representative organizations in the collection of data, the development of policy and its implementation. The Convention would, therefore, provide a forum for the provision of pre-emptive adaptive resettlement to populations most vulnerable to the impacts of climate change.

As a result, assistance under the Convention would have an adaptive quality, rather than simply facilitating the provision of humanitarian aid; such an approach correlates with the insight that migration is best understood as a form of adaptation to climate change.⁶⁵ Situating displacement within the spectrum of adaptive possibilities enables assistance efforts to address the needs of those most vulnerable to climate change, who may otherwise lack the resources to move themselves from climate change threats.

(c) International displacement

Both the Refugee Convention and customary international law recognize that, in certain circumstances, the international community is responsible for the provision of rights and assistance to persons displaced across international borders and unable to rely on their own nation for

⁶² BIERMANN & BOAS, *supra* note 12, at 26.

⁶³ See Nils Geissler, ‘The International Protection of Internally Displaced Persons’ (1999) 11 INT’LJ. REFUGEE LAW 451, 452; PHUONG, *supra* note 59, at 43.

⁶⁴ Docherty & Giannini, *supra* note 12, at 378.

⁶⁵ Brown, *supra* note 9, at 25.

protection. Again, however, there currently exists no provision in international law for most persons migrating across borders as a consequence of climate change.

Docherty and Giannini identify the Refugee Convention as a useful model for what kinds of human rights protections to include in a new instrument for CCDPs because it provides the “most comprehensive codification of the rights of refugees yet attempted on the international level.”⁶⁶ We endorse Docherty and Giannini’s argument that any treaty for CCDPs should be premised on the rights and protections that States *have already agreed to accord to traditional refugees*. As such, our Convention would guarantee a range of civil, political, economic, social, and cultural rights, based on a principle of non-discrimination. Further, CCDPs should be guaranteed a minimum standard of treatment at least equivalent to aliens in the host country. However, analogously to the Refugee Convention, certain rights should be afforded to CCDPs at the same level as those enjoyed by nationals in the host country and, in some cases, rights should be afforded based on an absolute standard, rather than being contingent on existing rights in host nations. Rights relating to movement are especially significant to CCDPs, and in particular, CCDPs should enjoy the right to *non-refoulement*, a core principle of refugee law under Article 33 of the Refugee Convention. In the context of the new instrument, *non-refoulement* would prohibit the forcible return of a refugee to a situation in which “climate-induced environmental change would threaten the refugee’s life or ability to survive.”⁶⁷

Following the Refugee Convention, the rights of CCDPs displaced across international borders should expand on an incremental basis, with further rights accruing the longer that CCDPs remain in a host nation. Adoption of the Refugee Convention model of a gradually deepening set of rights enables the Convention to flexibly adapt to changing environmental conditions and scientific knowledge. As proposed by Docherty and Giannini, those displaced across borders would remain eligible for assistance until they acquired a new nationality, voluntarily returned to their home country, or refused to return when it was safe for them to do so.⁶⁸

Any instrument for CCDPs should ensure that basic survival needs are met. Again, a duty of international cooperation and assistance, based on the principle that climate change is a global problem, is equally applicable to CCDPs who cross borders *and* to those who remain within their own States.

3.7 Threatened island nations

Rising sea levels and the prospect of island nations becoming uninhabitable are among the most visible consequences of climate change. McAdam suggests that “their small physical size, exposure to natural disasters and climate extremes, very open economies and low adaptive capacity make them particularly susceptible, and less resilient, to climate change.”⁶⁹ The populations of such threatened island nations may not only be displaced but may also see the effective disappearance of

⁶⁶ Docherty & Giannini, *supra* note 12, at 376.

⁶⁷ *Id.* at 377.

⁶⁸ *Id.* at 369.

⁶⁹ MCADAM, *supra* note 38, at 10.

their homelands. As a result, although they may amount only to a fraction of the total number of likely CCDPs, the interests and expectations of the populations of these island nations have a high profile in the international system.

The possibility of effective loss of homelands differentiates threatened island nations from other regions in which there is likely to be large-scale displacement, and requires specific consideration. It may also signify the end of unique ways of life that are intimately connected to precarious physical landscapes. Such a scenario is unprecedented, and existing legal regimes do not adequately articulate the rights that should be accorded to CCDPs from threatened island nations in order to recognize this loss. We propose that the principles of (a) proximity; (b) self-determination; and (c) the safeguarding of intangible culture, should be applicable to regional bilateral displacement agreements between threatened island nations and host States, negotiated under the Convention framework.

(a) Proximity

It has been suggested that a climate change treaty should be implemented with recourse to a principle of proximity that requires the least separation of persons from their cultural area.⁷⁰ Proximate resettlement of threatened island nationals may be particularly appropriate given their strong connections to both land and seascapes. A principle of proximate resettlement should *guide* bilateral agreements between threatened island nations (home States) and host States in the relevant region.

As an alternative to the most proximate location for resettlement, small island populations may wish to migrate to a State with a sizeable or established community of migrants from their nation, such as the population of Kiribati Islanders in New Zealand.

(b) Self-determination

A second guiding principle that could inform resettlement is self-determination. Self-determination is enshrined in the United Nations International Covenant on Economic, Social and Cultural Rights. Article 1 states that

[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.⁷¹

This articulation of self-determination is particularly useful in the context of threatened island nations. We consider self-determination relevant to two distinct elements of relocation: (a) *when* people will abandon their territories; and (b) *where* people choose to resettle.⁷² First, the

⁷⁰ Docherty & Giannini, *supra* note 12, at 358.

⁷¹ United Nations International Covenant on Economic, Social and Cultural Rights art. 1, Jan. 3, 1976, 993 U.N.T.S 3.

⁷² It is probable that the former would operate on an individual basis, whereas the latter would be on a population basis.

proposed Convention would recognize that citizens of threatened island nations may want to remain in their home States for as long as practicable. Adaptation strategies could be funded through the capacity of the proposed Convention's fund to provide prospective resources for persons likely to be displaced by climate change

In this regard we note the work of Barnett and Campbell in *Climate Change and Small Island States*:

[F]ocusing on large-scale adjustments in social systems or large-scale engineering works is likely to be a less effective and efficient approach to adaptation ... than multiple small-scale processes to build adaptive capacity at the community ... local government ... and national government levels ... These approaches do not mean that the international community [is] ... absolved of responsibility for adaptation ... [A]daptation responses ... are likely to have major costs, little if any of which should be borne by communities forced to take adaptive action.⁷³

The principle of self-determination should also apply to the second aspect of relocation: the destination to which threatened island nation CCDPs relocate. Although proximity is also one factor here, collective self-determination should inform agreements between threatened island nations and host States. Threatened island nations' preferences may relate to existing migration patterns or proximity and should, to the extent possible, be supported or respected.

Our aim, above all, is to enable people to make the choice themselves whether to remain in their homes for as long as possible or to seek out new, more stable, communities elsewhere, while continuing to plan for future potential resettlement activities by larger groups of people.

(c) Preservation of intangible culture

Finally, our Convention would recognise the effects of climate change on populations as reflected in our inclusion of *en masse* CCDP designations. Finding, as Docherty and Giannini do, that "group status determinations ... increase opportunities to formulate solutions that would keep the integrity of a group intact, which could help preserve cultures and national identities,"⁷⁴ our Convention emphasises the importance of the maintenance of the CCDP group's social and cultural cohesion in their host country.

For CCDPs from threatened island nations, the protection of cultural autonomy is of particular concern given that their State may effectively cease to exist. Although there exists no explicit protection of refugees' cultural autonomy in current international legal regimes, the protection of social and cultural rights in the Refugee Convention may be invoked as a useful precedent. Together with the Refugee Convention, the Convention for the Safeguarding of the Intangible Cultural Heritage is also relevant. Its purpose, as set out in Article 1, is to (a) safeguard intangible cultural heritage; (b) ensure respect for the intangible cultural heritage of the

⁷³ JON BARNETT & JOHN CAMPBELL, CLIMATE CHANGE AND SMALL ISLAND STATES 182-83 (2010).

⁷⁴ Docherty & Giannini, *supra* note 12, at 375.

communities, groups, and individuals concerned; (c) raise awareness of the importance of intangible cultural heritage; and (d) provide for international cooperation and assistance.⁷⁵

4. Is 'advocacy for a new treaty' misplaced?

McAdam argues that "advocacy for a new treaty to address climate-related movement is presently misplaced for a number of reasons."⁷⁶ This section summarises the arguments that McAdam makes and briefly responds with reference to our proposed Convention. In our view, the structure and emphasis of our Convention mean that a number of McAdam's arguments against treaties generally do not apply.

4.1 Empirical evidence on movement

McAdam states that

- "Treaty proposals are premised on certain assumptions about climate change and human movement that are not borne out in the empirical studies ... which show that movement is likely to be predominantly internal and/or gradual, rather than in the nature of refugee 'flight'."⁷⁷
- "The rationale behind a treaty is to address international movement."⁷⁸
- If a treaty is thought desirable, "it is important that it be viewed as one of a number of mechanisms that may respond to climate-induced displacement, rather than as *the* solution (which is often how it is posited)."⁷⁹

The assumptions that McAdam claims for treaty proposals in general are not those that underlie our proposed Convention. As we make clear, any proposal for addressing the issue of climate change displacement must take account of the different contexts and forms that such migration is likely to take.⁸⁰ Thus, although our Convention encompasses both internal and international displacement, our proposal is based on empirical consensus that most movement will occur internally, rather than across international borders.⁸¹ The rationale behind our treaty thus avoids McAdam's complaint about treaties as solely addressing international movement. Indeed, a focus of our proposed Convention is on regional responses, action, and agreements. Further, our proposal anticipates that requests from state parties to the Convention would mostly concern slow-onset, gradual displacement and, indeed, should not be treated like "refugee 'flight'".⁸² In response

⁷⁵ Convention for the Safeguarding of the Intangible Cultural Heritage art. 1, Apr. 20, 2006, 2368 U.N.T.S 3.

⁷⁶ Jane McAdam, *Swimming against the Tide: Why a Climate Change Displacement Treaty is Not the Answer*, 23 INT'L J. REFUGEE LAW 2, 4 (2011).

⁷⁷ *Id.* at 8.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

to McAdam’s third criticism, our Convention provides a general framework for CCDP assistance as one element of a wider international climate change “regime complex”⁸³

4.2 Climate change as a cause of movement

McAdam also notes that “it is conceptually problematic and empirically flawed in most cases to suggest that climate change alone *causes* migration” and that “it would seem both practically impossible and conceptually arbitrary to attempt to differentiate between those displaced people who deserve ‘protection’ on account of climate change and those who are victims of ‘mere’ economic or environmental hardship.”⁸⁴

As we state, our proposed Convention recognizes problems with determining the extent to which climate change causes an event giving rise to displacement and so adopts a “very likely” standard.⁸⁵ Our Convention creates an institutional architecture for designating a particular population as CCDPs because of the necessity of integrating issues of causation and evolving science into decision-making in respect of climate change migration.⁸⁶ We acknowledge that causation will be a difficult issue, but note that similarly complex questions of causation have been resolved in other contexts; complexity of a pursuit does not necessarily render that pursuit any the less worthwhile.

We also note that the UNFCCC appears to have resolved issues of practicality and arbitrariness in its focus on adaptation assistance or “protection” to address the effects of climate change; State parties agree specifically to cooperate “in preparing for adaptation to the impacts of climate change.”⁸⁷

More so than other worldwide global economic and environmental problems, there is some international recognition that responsibility for the effects of human-induced climate change is global and, in particular, that it rests with developed countries. Despite the difficulties⁸⁸ to date in concluding and then giving effect to the UNFCCC and its Kyoto Protocol, it may be that the international community is more likely to provide assistance to communities displaced by climate change rather than by other economic and environmental factors. Although this provision of aid may be arbitrary in some cases, it represents an opportunity to provide assistance to affected populations that should not be ignored.

4.3 Political obstacles to a new treaty

McAdam notes that “States presently seem to lack the political will to negotiate a new instrument requiring them to provide international protection to additional groups of people” and asks why States would “be willing to commit to, and realize protection for, people displaced by

⁸³ See discussion *infra*.

⁸⁴ McAdam, *supra* note 76, at 12, 13.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ UNFCCC, *supra* note 25, Art. 4.1(e); see also *supra* Art. 4.8, 4.9.

⁸⁸ Difficulties that could be addressed through development of a climate change “regime complex”.

climate change” (a “compelling” answer provided by McAdam is that “an instrument would provide a basis for calling for shared responsibility”).⁸⁹ Again, the assumptions that McAdam claims for treaty proposals in general are not those of our Convention; the underlying basis of our proposal is *not* “to provide a rights-based framework for people forced to move when the impacts of climate change render life and livelihoods at home impossible.”⁹⁰ Our Convention would not require States to provide protection to additional groups of people; it contemplates above all the collaborative provision of pre-emptive *adaptation* assistance, in part because evidence strongly suggests that most displacement will take place internally, within a State. Provision of protection to “additional groups” – or, put another way, States’ acceptance of those *internationally* displaced – would be effected through bilateral displacement agreements between home and host States, concluded under the aegis of the Convention, and which host States would not be compelled to sign. No treaty requirement upon a host state to accept CCDPs would exist.

McAdam further notes – and we agree – that “even if a treaty text could be agreed upon, its ratification, implementation and enforcement could not easily be compelled.”⁹¹ We also agree that “[a]ny treaty is necessarily an instrument of compromise and, even once achieved, States must demonstrate sufficient political will to ratify, implement and enforce it,”⁹² and that “[i]f a treaty is nonetheless thought desirable, it is important that it be viewed as one of a number of mechanisms that may respond to climate-induced displacement, rather than as *the* solution.”⁹³

It should also be noted that there are clear benefits to be found just in the process of discussing or negotiating a treaty; such conversations emphasize the urgency of the displacement problem and global responsibility. They also, of course, do not rule out other ways of addressing the displacement problem.

Finally, a further concern noted by McAdam is that

if a treaty becomes the *main* focus of international policy development, attention may shift from ... alternative and additional responses that may enable people to remain in their homes for as long as possible (which is the predominant wish among affected communities), or to move safely within their own countries, or to migrate in a planned manner over time.⁹⁴

Our aim, of course, through a treaty, is just that: to enable people to remain in their homes for as long as possible, to move safely within their own countries, or to migrate in a planned manner over time.

⁸⁹ McAdam, *supra* note 76, at 15-16.

⁹⁰ *Id.* at 7.

⁹¹ *Id.* at 17.

⁹² *Id.* at 25.

⁹³ *Id.* at 8.

⁹⁴ *Id.* at 5.

5. A “regime complex” or “building blocks” approach

Japan, Russia, and Canada⁹⁵ have said they will not extend emissions cuts beyond 31 December 2012 (beyond the Kyoto Protocol’s first commitment period) unless all major emitters sign up to a binding deal.⁹⁶ As the Climate Group notes,

The rejection by Japan, Russia and Canada of any further Kyoto commitments indicates that the likelihood of a comprehensive and environmentally effective post-2012 Kyoto outcome is diminishing. The EU and other industrialised Kyoto parties, such as Australia, are likely to find it difficult to justify to domestic audiences further Kyoto commitments in the absence of these three key countries. As the continuation of the [Kyoto] Protocol remains [important] ... for developing countries, the future of Kyoto will remain a flash point for disagreement.⁹⁷

The current UNFCCC negotiating process is unlikely to make significant progress unless something changes in the positions of major developed and developing States and the relationship between them regarding climate change. Moreover, even if a deal were possible among “large” emitters, the UNFCCC’s consensus decision-making model allows a relatively small group of countries to block agreement. One alternative approach

to moving forward would be to split the climate change problem up into different pieces and address ... the pieces in more specialized forums [this happens already with aviation] ... more progress may be possible in specialized forums, which have long traditions of cooperation, than in the UNFCCC.⁹⁸

As Bodansky notes, “since an agreement among the major emitters is unlikely anytime soon, we should seek progress where we can, through whatever means and in any forums that are available.”⁹⁹

Robert Keohane and David Victor, after stating that “[t]here is no integrated, comprehensive regime governing efforts to limit the extent of climate change,” propose a “climate change regime complex”—a loosely coupled set of specific regimes. They say that efforts to “build an effective, legitimate, and adaptable comprehensive regime are unlikely to succeed” and argue that a climate change regime complex has advantages in terms of adaptability and flexibility, characteristics that are

particularly important in an environment of high uncertainty, such as in the case of climate change where the most demanding international commitments are interdependent yet governments vary widely in their interest and ability to implement such commitments.¹⁰⁰

⁹⁵ All parties to the Kyoto Protocol.

⁹⁶ *Extra UN climate talks set for April in Bangkok*, REUTERS, Jan. 29, 2011, <http://www.reuters.com/article/2011/01/28/us-climate-talks-idUSTRE70R1WK20110128>.

⁹⁷ THE CLIMATE GROUP, POST- CANCUN ANALYSIS, 6(2011), available at http://www.theclimategroup.org/assets/files/Post-Cancun-Analysis_1.pdf

⁹⁸ DANIEL BODANSKY, THE INTERNATIONAL CLIMATE CHANGE REGIME: THE ROAD FROM COPENHAGEN, 5 (2010), available at <http://belfercenter.ksg.harvard.edu/files/Bodansky-VP-October-2010-3.pdf>.

⁹⁹ *Id.* at 6.

It is an argument put forward by others – a group from the London School of Economics and Political Science and Keele University, for example, refers to a “building blocks approach” that develops different elements of climate governance in an incremental fashion and embeds them in an international framework.¹⁰¹ Although outside the scope of this chapter, it may be that any climate change displacement treaty could form one element of such a climate governance approach.

6. A treaty for climate change displaced persons?

In Bolivia, the Chacaltaya glacier has lost 80% of its surface area since 1982. In the Andes generally, if warming trends continue, many tropical glaciers may disappear within twenty years; amongst other things, the water supplies for more than seventy million people would be threatened. Residents of the Bolivian town of Palca, reliant on glacier meltwater for survival, are migrating to the city of El Alto and other locations. However, the water in El Alto is also running dry. Although, at present, “there is not a major problem in El Alto because the additional glacial melt has compensated for the demand, providing more water flow”, the Bolivian Vice Minister of Water Resources states, “We’re going to begin to have problems”.¹⁰² They are problems that “even money won’t completely solve”, Pablo Solón, Bolivia’s ambassador to the United Nations, has said.

Ambassador Solon asks this question: “What do you do when your glacier disappears or your island is under water?”¹⁰³ We propose in this chapter a treaty for climate change displaced persons that sets out a framework for the collaborative provision of pre-emptive adaptation assistance – and, if necessary, relocation – *before* glaciers melt and *before* islands are under water.

¹⁰⁰ ROBERT O. KEOHANE & DAVID VICTOR, THE REGIME COMPLEX FOR CLIMATE CHANGE, 1 (Harvard Project on Int’l Climate Agreements, Discussion Paper 10-33, 2010).

¹⁰¹ Robert Falkner et al., *International Climate Policy after Copenhagen: Towards a ‘Building Blocks’ Approach* 1 GLOBAL POLICY 252 (2010).

¹⁰² Carolyn Kormann, ‘Retreat of Andean Glaciers Foretells Global Water Woes’ (9 April 2009) *Yale Environment* 360 <<http://e360.yale.edu/content/feature.msp?id=2139>> at 6 December 2009.

¹⁰³ Elisabeth Rosenthal, *In Bolivia, Water and Ice Tell of Climate Change*, N.Y. TIMES, Dec. 14, 2009, at A1.