

## **COPENHAGEN, CLIMATE CHANGE ‘REFUGEES’ AND THE NEED FOR A GLOBAL AGREEMENT**

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The international climate change regime consists of the United Nations Framework Convention on Climate Change (the UNFCCC) and the Kyoto Protocol to the UNFCCC (‘Kyoto’). The UNFCCC provides a framework for future action and cooperation by states on climate change; Kyoto places quantifiable obligations upon states to decrease their levels of greenhouse gas (GHG) emissions.

In December 2009, state parties to the UNFCCC and Kyoto met in Copenhagen with the original aim of concluding negotiations on a new climate change agreement to enter into force when Kyoto’s first commitment period, which runs from 2008 to 2012, comes to an end. The result of the Copenhagen conference was a non-binding agreement which, while it contains emissions reduction pledges by all major economies (including China), ‘charts no clear path toward a treaty with binding commitments’ (Pew Center on Global Climate Change 2009: 1).

In terms of adaptation to the adverse effects of climate change the agreement provides that

developed countries shall provide adequate, predictable and sustainable financial resources, technology and capacity building to support the implementation of adaptation action in developing countries ... [and] especially in those that are particularly vulnerable ... least developed countries, small island developing States and Africa’ (UNFCCC 2009: Article 3).

Developed countries commit USD 30 billion for the first Kyoto ‘commitment period’ from 2010 to 2012 for adaptation and mitigation measures, and commit to a goal of ‘mobilizing jointly USD 100 million dollars a year by 2020’ (UNFCCC 2009: Article 8).

Notwithstanding the agreement’s focus on climate change adaptation, no specific provisions deal with the issue of climate change displacement. Such displacement is a form of adaptation that creates particular vulnerabilities requiring protection as well as assistance through international cooperation. And migration as a result of displacement is best understood as a form of adaptation to climate change.

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Around the world, millions – perhaps hundreds of millions – of people will be displaced as a result of climate change. We propose here a convention (the ‘Convention’) for climate change displaced persons (CCDPs) to address this displacement problem. Our convention proposal builds on our 2008 research note (Hodgkinson et al 2008) and adds to various proposals made thus far which attempt to deal with the problem.

In this article we first outline the UNFCCC and Kyoto processes and the results of the Copenhagen climate change conference. We state that neither the UNFCCC process nor the Copenhagen Accord contemplates or addresses the issue of displacement, notwithstanding their focus on adaptation, and note that the UNFCCC (a) is not designed for and cannot appropriately address the problem of

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climate change displacement; and (b) cannot easily be altered in order to accommodate CCDPs. We briefly outline the climate change displacement problem and establish why a governance framework for CCDPs is required. We then set out our Convention proposal.

A more detailed account of our CCDP convention proposal will appear this year in a special climate change issue of the Monash University Law Review (Hodgkinson et al 2010). This article, albeit with a different focus, significantly draws upon that account.

## **The UNFCCC and Kyoto**

### **UNFCCC**

The UNFCCC – the foundation of international cooperative efforts dealing with climate change – does not establish legally binding limits on GHG emissions for state parties to it (see, generally, Hodgkinson and Garner 2008: 34-39). Rather, parties commit to mitigate climate change ‘with the aim of returning individually or jointly to their 1990 levels ... [of] anthropogenic emissions’ of GHGs’ (UNFCCC 1992: Article 4.2(b)). UNFCCC Article 2 provides, in part, that

[t]he ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve ... stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.

The principle of ‘common but differentiated responsibilities and respective capabilities’ is a continuing theme throughout the UNFCCC; developed state parties are required to ‘take the lead in combating climate change and the adverse effects thereof’ (UNFCCC 1992: Article 3.1).

A detailed list of commitments is contained in the UNFCCC, some of which apply to all parties, and others which apply only to developed countries and other parties included in Annex I. Developed state parties must

adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs. These policies and measures will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions ... (UNFCCC 1992: Article 4.2(a)).

The UNFCCC entered into force on 21 March 1994. The Convention has received 193 instruments of ratification, as of 26 August 2009, including Australia and the United States.

### **Kyoto**

Kyoto provides a legal framework that addresses global climate change by placing quantifiable obligations upon states to decrease their levels of GHG emissions. It is the world’s primary climate change agreement and represents the culmination of international efforts to date to address the climate change problem (see, generally, Hodgkinson and Garner 2008: 34-64).

Parties to Kyoto are divided into two groups – Annex I and Non-Annex I – or, for the most part, developed and developing states. Unlike the UNFCCC, Kyoto sets legally binding limits on developed state parties' anthropogenic emissions of greenhouse gases and does so for the first commitment period from 2008 to 2012. In achieving these binding limits, the parties must implement policies and measures in accordance with their particular circumstances. Certain market-based 'flexibility mechanisms' (including international emissions trading) are provided for to achieve emissions reductions.

Article 3 of Kyoto states that developed state parties shall

individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B ... with a view to reducing their overall emissions of such gases by at least 5 percent below 1990 levels in the commitment period 2008 to 2012.

There are no Article 3 commitments for developing state parties.

Kyoto entered into force on 16 February 2005. 188 countries, including Australia (but excluding the US), and the EEC have either ratified, acceded to, approved or accepted the Protocol as at 26 August 2009.

### **A climate change framework post-2012**

The Kyoto first commitment period runs from 2008 to 2012; no further commitment periods are provided for. Instead, post-2012 commitment periods for developed state parties are to be established through negotiation (UNFCCC 1992: Article 3.9). The development of a post-2012 climate change legal framework began at COP 13 in Bali. The 'Bali Road Map' sets out in general terms a 'shared vision for long-term cooperative action;' substantive issues are not dealt with. Under the Bali Road Map, developed parties agree to consider 'nationally appropriate mitigation commitments or actions, including quantified emission limitation and reduction objectives,' and developing parties agree to consider 'measurable, reportable and verifiable' mitigation actions 'supported and enabled by technology, financing and capacity building' (UNFCCC 2007).

The Bali Road Map is not concerned with the form a post-Kyoto agreement could take. Possible legal options for a post-2012 agreement canvassed in the period leading up to Copenhagen included [a new protocol under the UNFCCC; amendments to the Kyoto Protocol; and new climate change agreement.

### **Copenhagen, December 2009**

The climate change conference held in Copenhagen from 7 to 19 December 2009 included the 15<sup>th</sup> Conference of the Parties (COP 15) to the UNFCCC and the 5<sup>th</sup> Conference of the Parties serving as the Meeting of the Parties to Kyoto (COP/MOP 5).<sup>2</sup> It also included (a) the 10<sup>th</sup> session of the Ad Hoc

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<sup>2</sup> The UNFCCC sets up a Conference of the Parties (COP), the 'supreme body of [the] Convention ...

Working Group on Further Commitments for Annex I parties [developed state parties] under Kyoto (AWG-KP 10); and (b) the 8<sup>th</sup> session of the Ad Hoc Working Group on Long-Term Cooperative Action under the UNFCCC (AWG-LCA 8). The former was established in 2005 under Kyoto Article 3.9 and considers emission reduction commitments of developed state parties for commitment periods subsequent to the first 2008-2012 commitment period; the latter was established in Bali in 2007 at COP 13 and COP/MOP 3 to focus on key elements of long-term cooperation: mitigation; adaptation; finance; and technology and capacity building.

The sole result of the Copenhagen climate change conference – a conference ‘marked by bitter divisions, confusion and setbacks’ (Pew Center on Global Climate Change 2009: 2) and acrimonious discussions (IISD 2009: 1) – was the Copenhagen Accord, a two and a half page political agreement negotiated directly by heads of state and one not based on the draft negotiation texts prepared by the Ad Hoc Working Groups. The main elements of the Accord were an ‘aspirational’ agreement

that deep cuts in global emissions are required ... with a view to reduce global emissions so as to hold the increase in global temperature below 2 degrees Celsius, and to take action to meet this objective ... on the basis of equity (UNFCCC 2009: Article 2)

and an agreement on the part of developed state parties to commit to emissions reduction targets for 2020, such mitigation pledges to be submitted by the end of January 2010. Under this ‘portfolio of domestic commitments’ approach, ‘each nation commits and registers to abide by its domestic climate commitments, whether those are in the form of laws or regulations or multi-year development plans’ (Stavins 2009). These mitigation provisions for developed state parties were

widely seen as “clearly weak” and “a step backwards from the Kyoto Protocol.” Developed countries do not commit themselves to legally-binding emission reductions. Similarly, there is no quantification of a long-term global goal for emission reductions, or specific timing for global emissions to peak. Instead, the agreement suggests a bottom-up approach whereby developed and developing countries submit their pledges for information purposes to the Convention ... (IISD 2009: 29).

However, the adaptation and financing provisions of the Accord (Articles 3 and 8), which were identified earlier in the introduction to this article, are clearly more substantive than those dealing with mitigation.

COP 15 and COP/MOP 5 only ‘take note’ of the Accord; it is a political agreement, with no reference to it being a ‘legally binding instrument’. While ‘the accord ultimately won formal recognition

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[which] shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention’ (Article 7.2) and establishes a process, under Article 17(1), by which the COP can adopt protocols to the UNFCCC (Kyoto, for example). In 2005, the same year in which Kyoto entered into force, UNFCCC state parties met for COP 11 in Montreal. As a part of the UNFCCC’s annual conference, and running in parallel with COP 11, the first meeting of the parties to Kyoto (COP/MOP 1) was convened. Past decisions on Kyoto had previously had been undertaken by the COP. On the entry into force of Kyoto the COP/MOP became Kyoto’s supreme body.

despite the lack of full consensus,' many participants questioned 'the prospects for significant further progress within a fully global, procedurally bound UN process' (Pew Center on Global Climate Change 2009: 2).

### **Displacement not addressed**

As previously mentioned, neither the UNFCCC process nor the Copenhagen Accord contemplate or address the issue of displacement. In our view, the UNFCCC – notwithstanding its focus on adaptation – has limitations as a framework for dealing with climate change displacement. Displacement is not its focus; its concerns lie elsewhere. Its structure and institutions are not designed to address displacement and the issues associated with it. Moreover, as the Copenhagen climate change conference reveals, the UNFCCC cannot easily be altered in order to accommodate CCDPs; dealing with *existing* provisions is already problematic.

These arguments are put succinctly by Docherty and Giannini. While they note 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 (Docherty and Giannini 2009: 358).

In the following section we outline the climate change displacement problem and establish why a governance framework for CCDPs is required. We then set out our Convention proposal.

### **The Climate Change Displacement Problem**

The Intergovernmental Panel on Climate Change (IPCC)(IPCC 2007) and the Stern Review (Stern 2007), among many other studies, warn that the effects of climate change – including rising sea levels, heavier floods, more frequent and severe storms (Dasgupta 2007; McGranahan et al 2007; Brooks 2006), 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 Myers, is 200 million climate change migrants by 2050, or one person in every forty-five displaced (Myers 2005). However, Myers' estimate is contested and, as Brown observes, 'nobody really knows with any certainty what climate change will mean for human population distribution' (Brown 2007: 5). Nonetheless, there is a consensus in the literature that climate change will lead to 'major forced displacements' over time (Piguet 2007: 8).

Any proposal for addressing the issue of climate change displacement should take account of the different contexts and forms that such migration is likely to take (Kalin 2008). There are three kinds of climate change impacts that are likely to have the greatest consequences in terms of human movement: sea level rise; increasing severe weather events; and drought and desertification (Docherty and Giannini 2009: 355). The IPCC has highlighted small island states, the continent of Africa, mega-deltas (particularly those in Asia) and the polar regions as areas most exposed to climate change (Kolmannskog 2008: 23).

Global sea level this century is likely to rise twice as much as projected by the IPCC in its 2007 report. It is likely that, for unmitigated emissions, such sea level rise will exceed one metre, with an upper limit of about two metres. Further, 'several metres of sea level rise must be expected over the next few centuries' (Allison 2009: 9). The potential for migration as a consequence of sea level rise is considerable due to the irreversibility of the phenomenon.

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 centimetres would displace 5.5 million people, submerging over 10 percent of Bangladesh (IPCC 2001: 569 cited in Williams 2008: 505). A study commissioned for the Stern Review estimates that 146 million people live at an altitude of less than 1 metre with South Asian and East Asian populations being predominantly at risk (Anthoff et al 2006 cited in Piguet 2007: 8). However, due to their elevation only centimetres above sea level, Pacific states such as Tuvalu and Kiribati face the prospect of submersion in the short-term (Piguet 2007: 8) It is a real prospect, in the case of small island states, that entire nations will disappear as a consequence of climate change (Docherty and Giannini 2009: 355).

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 per cent by the middle of the twenty-first century (IPCC 2007b: 10-11 cited in Brown 2007: 8)

### **A 'Coherent Multilateral Governance Framework'**

Current protections at international law do not adequately provide for a number of the categories of person likely to be displaced by climate change (Docherty and Giannini 2009: 358; UN Human Rights Council 2009: 19; Kalin 2008). International refugee lawyers generally agree that persons displaced by climate change would not be the subject of protection under the 1951 Convention relating to the Status of Refugees (the 'Refugee Convention') (McAdam 2007: 4-5; Williams 2008: 507-508). The Refugee Convention, the most comprehensive articulation of refugee rights and State obligations, relies upon 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 is 'outside the country of his nationality' (Refugee Convention 1951: Article 1A(2)). The core issue is that 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 (McAdam 2007: 4-5). And, as mentioned, the UNFCCC has significant limitations as a framework for dealing with CCDPs.

There is, then, ‘no coherent multilateral governance framework for environmental migration ... [regulation] is extremely fragmented and disparate’ (McAdam 2009: 5). Neither existing climate change law nor refugee law adequately provides for CCDPs. Our Convention, in addition to providing a general framework for CCDP assistance, would address gaps in the international regime of human rights protections and humanitarian assistance as it currently applies to CCDPs. It would do so by setting out a framework for the protection of those persons displaced across international borders, incorporating a mechanism for the provision of non-discriminatory assistance to internally displaced CCDPs, as well as identifying specific principles which should apply to the resettlement of persons from small island states which will become uninhabitable.

## **A Global Agreement for Climate Change Displacement**

Proposals for a new instrument providing for people displaced by climate change have been advanced by Docherty and Giannini (2009), Biermann and Boas (2007), Williams (2008), Bétaille et al (2008) and the authors of this paper (Hodgkinson et al 2008). All of the proposals cite the scale of the climate change displacement problem as a justification for the development of a new international agreement of some kind (Docherty and Giannini 2009: 352-354; Bierman and Boas 2007: 21; Williams 2008: 506). Similarly, all of the proposals identify that CCDPs do not fall within the scope of the existing refugee regime created by the Refugee Convention (Docherty and Giannini 2009: 359; Biermann and Boas 2007: 17-21; Williams 2008: 507-510). However, they differ as to the most appropriate instrument to tackle that problem, and the scope and detail of that instrument. While we don’t provide a detailed summary of the various proposals, we do acknowledge at various points the contributions made by these authors and the extent to which we have taken account of and incorporated aspects of their proposals in our own. In our view, however, no proposal has offered a comprehensive, global solution to the displacement problem; our proposal, which builds on our earlier 2008 study, attempts to provide such a solution.

### **Scope**

We propose a single, 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 (Biermann and Boas 2007: 26; Biermann and Boas 2008: 13); parties to the convention would include both developed and developing states.

Many 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 UNFCCC (Biermann and Boas 2007, 2008). In our view, however, the UNFCCC has limitations as a framework for dealing with climate change displacement. Displacement is not its focus, and its structure and institutions are not designed to address displacement and the issues associated with it. It also ‘does not discuss duties that states have to individuals or communities’ (Docherty and Giannini 2009: 358).

While our Convention is a stand alone instrument, it does draw upon and adapt provisions of other instruments to adequately provide for, assist and protect those displaced by climate change. There

has been no coordinated response by governments to address human displacement, whether domestic or international, temporary or permanent, due to climate change. Given the nature and magnitude of the problem which climate change displacement presents, ad hoc measures based on existing domestic regimes are likely to lead to inconsistency, confusion and conflict.

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. It should be noted that many migration experts state that most persons displaced by climate change will be unlikely to cross an international border (Kniveton et al 2008: 29; Christian Aid 2007: 6; Brown 2007: 13; German Advisory Council on Global Change 2007: 118); ‘most climate refugees are expected to remain within their home countries’ (Biermann and Boas 2008: 11).

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 (International Council on Human Rights Policy 2008: 1).

Finally, both temporary and permanent relocation would be provided for under the proposed convention. The need for relocation assistance and protection arises whether or not the relocation is temporary or permanent.

### **Causation**

A number of issues arise with respect to the provision of protection and assistance for persons displaced by climate change. The first is the extent to which climate change causes the event giving rise to the displacement. At the moment it is not possible for science to determine whether a particular environmental event was caused by climate change (Docherty and Giannini 2009: 370). It is possible, however, to identify certain phenomena and trends as consistent with climate change. So, for example, the IPCC 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’, that is, with more than sixty-six percent probability (IPCC 2007d: 53).<sup>3</sup> Climate change science continues to evolve. Any instrument that seeks to address migration induced by climate change events must be based on scientific evidence as to whether those events are consistent with climate change and 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. Science can determine neither whether a particular environmental event was caused by climate change nor the extent to which humans contributed to specific climate change events. Docherty and Giannini, however, argue that science can determine the likelihood that humans ‘contributed to a

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<sup>3</sup> ‘Virtually certain’ means a probability greater than 99%; ‘extremely likely’ means a probability greater than 95%; and ‘very likely means greater than 90% (IPCCC 2007d: 27).

type of disruption'. Their definition references the IPCC's 'likelihood ranges' and adopts the IPCC's 'more likely than not' standard (Docherty and Giannini 2009: 371) (a probability greater than 50%).

While the focus of our Convention is persons displaced by climate change, the convention would recognise problems with (a) determining the extent to which climate change causes an event giving rise to displacement; (b) identifying certain phenomena and trends as consistent with climate change; and (c) the extent to which humans contribute to particular or general climate change events. Our Convention would adopt a 'very likely' standard (greater than 90% probability) to identify certain phenomena and trends as consistent with climate change, and human contribution. This higher standard provides increased certainty and targeted resource allocation in the context of a convention that could apply to hundreds of millions of people.

By adopting the standard of 'very likely', 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 able to be established as induced by anthropogenic climate change than a sudden disaster.

Issues of causality also arise with respect to the question of whether climate change necessarily leads to migration, as previously discussed. Adaptive capacity is integral to displacement decisions – and both adaptation and displacement are determined as much by available resources as by environmental factors. Our Convention would address the causality issues associated with the multi-factorial nature of population movements by adopting an objective rather than a subjective approach. In addition, our Convention would largely operate prospectively; assistance to CCDPs would be based on an assessment of whether their environment was likely to become inhabitable 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.

Because of the necessity of integrating complex issues of causality and evolving science into decision-making in respect of climate change migration, our proposal involves the creation of a sophisticated institutional architecture for designating a particular population as CCDPs. While 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 or 'architecture' may not be suited to immediately reacting to an unforeseen disaster. Indeed, attempts to apply the Convention in such situations may prevent the operation of existing and more effective disaster relief and management programs. Multiple channels through which aid, assistance and protection are provided to those displaced by sudden environmental impacts already exist in the international arena. Moreover, as discussed above, the science of climate change is currently unable to attribute a particular sudden climatic event to anthropogenic causes with any degree of certainty.

## **Definition and designation of CCDPs**

Attempts to instigate regimes for the protection of both ‘environmental’ and ‘climate change’ displaced persons raise the issue of whether and how to include migration due to gradual environmental change, as opposed to sudden disasters. The core question is when migration as a consequence of slow-onset environmental events can be said to be ‘forced’ rather than ‘voluntary’.

Proposals for definitions of ‘climate change’ displaced persons (Biermann and Boas 2007: 8; Docherty and Giannini 2009: 361; Williams 2008: 522-523) 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 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 due to the effects of climate change, a region *will* no longer be inhabitable 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.

Rather than assigning rights and protections on the basis of the individual satisfaction of definition-based criteria, we propose *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’ (Castles 2002: 9).

We propose the following CCDP definition:

CCDPs are groups of people whose habitual homes have become – or will, on the balance of probabilities, 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 consistent with climate change and to which humans very likely contributed’.

Under our Convention, protection and assistance 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.

## **Climate Change Displacement Organisation**

While other proposals (Docherty and Giannini 2009: 384-391; Bétaille et al 2008: ch 3; Biermann and Boas 2007: 28-29; Williams 2008: 519) describe discrete agencies to administer the convention, no proposal attempts to set out in detail the operation of a climate change displacement organisation and its constituent bodies, and how those bodies work together and interact. Our Convention would create a Climate Change Displacement Organisation (CCDO) consisting of four core bodies: an

Assembly, a Council, a Climate Change Displacement Fund, and a Climate Change Displacement Environment and Science Organisation. Climate Change Displacement Implementation Groups would also be formed to facilitate resettlement.

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 to the convention would make a request to the CCDO for internal or international resettlement assistance (in the case of a host state, referencing a relevant home state request, if any). That state party would, at the time of making a request for assistance, also request *en masse* designation of the status of CCDPs.

Further detail on CCDO institutions, participants and obligations can be found in Hodgkinson et al (2010).

### **Financing**

Existing proposals all set out ways in which provision of displacement assistance can be financed, or funded (Biermann and Boas 2007: 29, 30; Bétaille et al 2008: Articles 11(4), 11(4)(a) and 11(4)(b); Docherty and Giannini 2009: 385 and 387). We propose that developed state parties to the Convention make mandatory financial contributions to the Climate Change Displacement Fund, and that such contributions are made on the basis that states and state parties to the Convention have common but differentiated responsibilities. In determining the hard issue of the level of specific state party contributions to the Fund, the CCDES0 would advise the Fund with regard to those contributions, with reference to emissions levels (whether historical or current, per capita etc), the capacity of states to pay, and other matters. The Fund would then propose the level of state parties' biannual contributions to the Council for ratification by the Assembly.

The principle of 'common but differentiated responsibilities', the basis upon 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 (Centre for International Sustainable Development Law 2002).

This principle underpins the obligations of state parties to the Convention. State practice and legal precedent supports the principle of common but differentiated responsibilities. 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 (Muller 2002: 3; Docherty and Giannini 2009: 386; Biermann and Boas 2007: 26, 28-29).

### **Protection and assistance**

The vulnerability of displaced people has long been recognised by the international community and is reflected in the Refugee Convention, the Guiding Principles on Internal Displacement (the 'Guiding

Principles’) (UNHCR 1988), international humanitarian, human rights 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, while it provides a general framework for the provision of assistance to CCDPs, also addresses gaps in existing protections, as well as identifying principles which should apply to the resettlement of persons from ‘sinking’ small island states.

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 IDPs. 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 non-discriminatory aid to internal CCDPs.

While our Convention would apply to both internal and trans-border displacement, it would take account of the clear distinction that is 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 (Phuong 2004: 22). Our Convention would distinguish between the explicit provision of rights and protections on the basis of internal and international displacement. Certain ambit provisions, however, should be applicable to both persons displaced both internally and across recognised state borders.

The Convention would provide a framework for the provision of protection and assistance to persons internally displaced due to climate change, in which obligations are shared between the home State and the international community. In the case of ‘international’ CCDPs, our Convention would outline rights of the CCDP and obligations of the host State, borrowing from the Refugee Convention. 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. In this way, State obligations to CCDPs would remain flexible and responsive to environmental changes. Finally, due to their unique circumstances, persons from small island states should be accorded treatment based on a further set of principles which include proximity, self-determination and the preservation of their culture.

*(i) Internal displacement*

Protection and assistance to IDPs is provided through the Guiding Principles rather than 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’. 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 underlying logic of the Guiding Principles. It adopts a model in which the primary

responsibility for CCDPs rests with their own State. It would be founded on the recognition in international and human rights law that, while 'different States have different capacities', states are responsible for caring for their own people (Docherty and Giannini 2009: 380). The Convention would therefore recognise that national authorities have the primary duty and responsibility to provide protection and humanitarian assistance to CCDPs within their jurisdiction.

Climate change induced displacement is also a matter of global responsibility, regardless of whether such displacement crosses a national border. The international community should therefore be obliged to cooperate in the provision of protection and assistance to internally displaced CCDPs. Upon request by the home State and in accordance with the Convention, other parties to the Convention would be required to provide assistance in cases of internal displacement.

While the emphasis of a global CCDP instrument should be less on the protection of persons outside their states, and more to do with supporting governments, local communities and agencies in protecting people within their own territory (Biermann and Boas 2007: 26), displacement does make people vulnerable, including to infractions and abuses of their human rights (Geissler 1999: 452; Phuong 2004: 43). 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' (2009: 378). Based on the Convention on Cluster Munitions precedent, state parties would be required, with respect to CCDPs in areas under their jurisdiction and control, to provide (to the extent practicable) 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 should be precluded from discriminating against or among CCDPs.

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 the protection of and assistance to CCDPs into future comprehensive planning programs; disseminate information on likely climate change displacement and its general policy to 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.

Assistance under the Convention would, thus, 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 (Brown 2007: 25). Situating displacement within the spectrum of adaptive possibilities enables assistance to address the needs of those most vulnerable to climate change who may otherwise lack the resources to move themselves from climate change threats.

(ii) *International displacement*

The protection of a comprehensive set of human rights and humanitarian entitlements for different categories of migrants is by no means a new phenomenon in international law. Both the Refugee Convention and customary international law recognise that, in certain circumstances, the international community is responsible for the provision of rights and assistance for persons displaced across international borders and unable to rely upon their own nation for protection. However, as previously discussed, there currently exists no provision at 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 of 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’ (Docherty and Giannini 2009: 376). 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 should 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, analogous to the Refugee Convention, certain rights afforded to CCDPs should be those of 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 ‘climate-induced environmental change would threaten the refugee’s life or ability to survive’ (Docherty and Giannini 2009: 377). To Docherty and Giannini’s proposal we would add a principle of proximity that requires the least separation of persons from their cultural area.

Following the Refugee Convention, the rights of CCDPs displaced across international borders should expand on an incremental basis, with rights accruing the longer the longer CCDPs remain in a host nation. Adoption of the Refugee Convention model of a gradually deepening of set of rights enables the Convention to flexibly adapt to changing environmental conditions and scientific knowledge. As proposed by Docherty and Giannini, international CCDPs 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 (Docherty and Giannini 2009: 369).

Any instrument for CCDPs should ‘go beyond the Refugee Convention to guarantee that basic survival needs are met’ (Docherty and Giannini 2009: 378). Again, a duty of international cooperation and assistance, based on the principle that climate change is a global problem, is equally applicable to both CCDPs who cross state borders and to those who remain within their own nations.

## Small island states

Rising sea levels and the submersion of islands are perhaps the most publicly recognisable 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’ (2009: 10). The populations of small island states may not only be displaced but will likely see the disappearance of their homelands. As a result, although they will amount only to a fraction of the total number of likely CCDPs, the interests and expectations of the populations of these small island states have a high profile.

The very real prospect of entire nations disappearing differentiates the plight of small island states from other regions in which there is likely to be large-scale displacement, and requires specific consideration. The complete loss of a physical territory signals the practical end of those states’ national sovereignty and the particular protections and rights of their people. More broadly, it signifies the end of unique ways of life which 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 small island states in order to recognise this loss. We propose that the principles of proximity, self-determination and the safe-guarding of intangible culture should be applicable to bilateral displacement agreements between small island states and host states, such agreements to be negotiated under the aegis of the CCDO.

### *(i) Proximity*

It has been suggested that a climate change convention should be implemented with recourse to a principle of proximity which requires the least separation of persons from their cultural area (Docherty and Giannini 2009: 358). Proximate resettlement of small island state nationals may be particularly appropriate given their strong connections to both land and seascapes. A principle of proximate resettlement should guide bilateral agreements between small island states and developed states in the relevant region.

### *(ii) Self-determination*

A second guiding principle which should inform small island state 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’.

In the context of small island state relocation, this articulation of self-determination is particularly useful. We consider self-determination of various forms of development as relevant to two distinct elements of relocation: (a) *when* will people abandon their territories; and (b) *where* will people choose to resettle. First, the proposed Convention recognises that small island state nationals may want to remain in their home states for as long as practicable. The capacity of the proposed Convention’s fund to provide prospective resources for persons likely to be displaced by climate change would enable adaptation funding to be provided to small island state CCDPs.

The principle of self-determination should also apply to the second aspect of relocation: the destination to which small island state CCDPs relocate. While proximity is also relevant here, collective self-determination should inform agreements between small island states and host states. Small island states' preferences may relate to existing migration patterns or proximity and should, to the extent possible, be adhered to.

*(iii) Preservation of intangible culture*

Our Convention recognises the effects of climate change on populations as well as individuals. This is 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' (2009: 375) our Convention emphasises the importance of the maintenance of the CCDP group's social and cultural cohesion in their host country.

For small island state CCDPs, the protection of cultural autonomy is of particular concern given their territory may 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 communities, groups and individuals concerned; (c) to raise awareness of the importance of intangible cultural heritage; and (d) to provide for international cooperation and assistance.

### **Conclusion: CCDPs and the UNFCCC**

A UNFCCC 'non-paper' can be used as a tool 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 7<sup>th</sup> seventh session of the Ad Hoc Working Group on Long-Term Cooperative Action under the UNFCCC in Barcelona 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 (Norwegian Refugee Council 2009: 23).

While 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' (2009: 23), it's clear that, for the AWG-LCA, emphasis is on international displacement. Yet, as we have argued in this article, most displacement will likely occur within national borders.

While a focus of the UNFCCC is adaptation, it is not concerned with or designed for climate change displacement and, as a framework for dealing with displacement, it has clear limitations. Further, COP 15 and COP/MOP 5 in Copenhagen did not address displacement. We have argued here that a global governance framework is required. We propose a convention for climate change displaced persons.

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