

'THE HOUR WHEN THE SHIP COMES IN': A CONVENTION FOR PERSONS DISPLACED BY CLIMATE CHANGE¹

David Hodgkinson, Tess Burton, Heather Anderson and Lucy Young²

I INTRODUCTION

More than 40 million people live in the coastal region of Bangladesh, many of whom are dependent on the weather and natural resources. This region is especially vulnerable to frequent storms, cyclones, tidal surges and sea level rise. In November 2009, a climate poverty hearing panel in the coastal region of Bangladesh heard from 'climate witnesses' that '[t]housands of people become [c]limate [r]efugees and [are] forced to migrate in nearby cities and in the neighbouring countries illegally'.³ The hearing panel recommended that such climate refugees be 'allowed ... as legal migrants to [enter] developed countries as their localities are destroyed by adverse climate events and become unfit for living'.⁴ It is argued that, for Bangladesh,

no country in the world will face greater devastation from global warming, and nowhere will the potential political fallout be harder to manage. Millions of people will be permanently displaced, made into environmental refugees.⁵

At the end of his recent book *Storms of My Grandchildren*, James Hansen, perhaps the world's pre-eminent climate change scientist, refers to the effect of sea level rise on developing nations. He writes that '[t]he consequences for a nation such as Bangladesh, with 100 million people living within several meters of sea level, are too overwhelming, so I leave it to your imagination'.⁶ Hansen also refers to the plight of, and the consequences for, island nations that are near sea level. 'We can only hope', he says, 'that those nations responsible for the changing atmosphere and climate will provide immigration rights and property for the people displaced by the resulting chaos'.⁷

¹ 'Oh the time will come up/ When the winds will stop/ And the breeze will cease to be breathin'./ Like the stillness in the wind/ 'Fore the hurricane begins./ The hour when the ship comes in': Bob Dylan, 'When the Ship Comes In', *Lyrics 1962-1985* (1985) 142.

² David Hodgkinson is Special Counsel at law firm Clayton Utz; Executive Director, EcoCarbon; and general editor and a chapter author of the online service, *Climate Change Law and Policy in Australia* (LexisNexis, 2009). Tess Burton is research officer at the Victorian Parliament and a chapter author of *Climate Change Law and Policy in Australia*. Heather Anderson is a Law/Arts student at the University of Western Australia, and has also worked in native title (in both WA and Victoria) since 2007. Lucy Young is a solicitor with Legal Aid WA and the WA state convenor of a national Australian environment action network. We are grateful for the advice and assistance of Alex Coram, Simon Dawkins and Karen Blacklock in the research and preparation of this article.

³ Hearing Panel, *Recommendations of the Hearing Panel: Regional Climate Poverty Hearing*, Coastal Region of Bangladesh (14 November 2009), 5.

⁴ Ibid 6.

⁵ George Black, 'The Gathering Storm: What Happened When Global Warming Turns Millions of Destitute Muslims Into Environmental Refugees?' (Summer 2008) *Onearth* <<http://www.onearth.org/article/the-gathering-storm>> at 6 December 2009.

⁶ James Hansen, *Storms of My Grandchildren* (2009) 258.

⁷ Ibid.

In Bolivia, the Chacaltaya glacier has lost 80% of its surface area since 1982 and, in the Andes generally, if warming trends continue, many tropical glaciers will disappear within 20 years; amongst other things, the water supplies of over 70 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, water in El Alto is also running dry. While, 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'.⁸ They are problems which 'even money won't completely solve', Pablo Solón, Bolivia's ambassador to the United Nations, has said. 'What do you do when your glacier disappears or your island is under water?'⁹

And, 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 metre above sea level. Projected rises in sea levels would 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'.¹⁰ Throughout the Pacific generally, sea-level rise has 'generated plans for the relocation of populations ... in the face of looming catastrophe'.¹¹

In Bangladesh, Bolivia and the Maldives, and around the world, millions – perhaps hundreds of millions – of people will be displaced as a result of climate change. We propose a convention (the 'Convention') for climate change displaced persons (CCDPs) to address in a comprehensive way this displacement problem. Our convention proposal both builds on our 2008 research note¹² and adds to various proposals made thus far which attempt to deal with the problem.

Following this introduction, in Part II of the article, we outline the likely scale and nature of the climate change displacement problem. We also establish that neither climate change law nor refugee law adequately provide for CCDPs and that, for this and other reasons, a governance

⁸ 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.

⁹ Elisabeth Rosenthal, 'In Bolivia, Water and Ice Tell of Climate Change', *The New York Times* (New York City), 13 December 2009.

¹⁰ Randeep Ramesh, 'Paradise Almost Lost: Maldives Seek to Buy a New Homeland', *The Guardian* (London), 10 November 2008 <<http://www.guardian.co.uk/environment/2008/nov/10/maldives-climate-change>> at 6 December 2009.

¹¹ Stuart Beck and Michael K Dorsey, 'At the Water's Edge: Climate Justice, Small Islands and Sustainable Development' in Felix Dodds, Andrew Higham and Richard Sherman (eds), *Climate Change and Energy Insecurity: The Challenge for Peace, Security and Development* (2009) 138.

¹² David Hodgkinson et al, 'Towards a Convention for Persons Displaced by Climate Change: Key Issues and Preliminary Responses' (September 2008) 8 *The New Critic* <<http://www.ias.uwa.edu.au/new-critic/eight/hodgkinson>> at 6 December 2009.

framework for CCDPs is required. Part III examines existing proposals for an agreement to deal with climate change displacement and outlines the distinguishing features of our Convention.

In Part IV the global scope of the Convention, which provides for both internal and international displacement, is set out. It addresses the definition and designation of CCDPs; the operation of the Convention in terms of institutions, participants and obligations; funding obligations of Convention parties; human rights protections and humanitarian assistance; and the plight of small island states. The role of civil society in negotiation of the Convention is also addressed, as are some Convention implementation and management issues.

Part V provides a short summary of the Convention, followed by a brief conclusion.

II THE PROBLEM: CLIMATE CHANGE DISPLACEMENT AND INTERNATIONAL LAW

A *The Scale of the Problem*

The Intergovernmental Panel on Climate Change (IPCC)¹³ and the Stern Review,¹⁴ among many other studies, warn that the effects of climate change – including rising sea levels, heavier floods, more frequent and severe storms,¹⁵ drought and desertification – will cause large-scale population movements. Displacement, although relatively neglected in comparison with the ecological effects of climate change, presents an urgent problem for the international community.

The existence and the scope of the issue of climate 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.¹⁶ However, Myers' estimate is contested. As Brown observes, 'nobody really knows with any certainty what climate change will mean for human population distribution'.¹⁷

¹³ See Intergovernmental Panel on Climate Change, *Climate Change 2007 - The Physical Science Basis: Working Group I Contribution to the Fourth Assessment Report of the IPCC* (2007); *Climate Change 2007 - Impacts, Adaptation and Vulnerability: Working Group II Contribution to the Fourth Assessment Report of the IPCC* (2007); and *Climate Change 2007 - Mitigation of Climate Change: Working Group III Contribution to the Fourth Assessment Report of the IPCC* (2007).

¹⁴ Nicholas Stern, *The Economics of Climate Change: The Stern Review* (2007).

¹⁵ 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: A Comparative Analysis' (World Bank Policy Research Working Paper 4136, World Bank, 2007); Gordon McGranahan et al, 'The rising tide: assessing the risks of climate change and human settlements in low elevation coastal zones' (2007) 19(1) *Environment and Urbanization* 17; Nick Brooks et al, *Sea Level Rise: Coastal Impacts and Responses* (2006); German Advisory Council on Global Change, *The Future Oceans – Warming Up, Rising High, Turning Sour* (2006); and the World Bank, *Cities, Seas, and Storms* (2000).

¹⁶ Myers' estimate of 200 million climate migrants by 2050 has become the accepted figure. See, for instance, Norman Myers, 'Environmental Refugees: An Emergent Security Issue', 13th Economic Forum, Prague, 23 – 27 May 2005; Intergovernmental Panel on Climate Change, *Third Assessment Report of the Intergovernmental Panel on Climate Change* (2001). Stern describes Myers' assumptions as 'conservative': Stern, above n 14, 77. However, if it comes true, one in every forty-five people will have been displaced by climate change, a ten-fold increase over today's entire documented refugee

While the term 'climate change migration' implies that a direct causal line can be drawn between climate change and displacement, 'it has become evident ... that the assumption that climate variability leads to migration in a linear way is not supported by empirical investigation'.¹⁸ The category of climate migrants presumes an artificial mono-causality, whereas in reality, migration experts agree that migration decisions are based upon multiple determinants.¹⁹ The matrix of factors that impact upon a decision to migrate are complex and contingent, as Kniveton et al emphasise. Answering the question

of how climate change impacts migration depends on understanding: the socio-cultural-political-economic environments that communities exist in; the cognitive processes of the people experiencing the impact of climate change; the individual, household and community attitudes to migration and migration outcomes; and the type of climate stimulus that migration may be responding to.²⁰

McAdam observes that in attempting to determine the relationship between climate change and migration 'perhaps the most difficult variable to account for his human adaptive capacity or "resilience"'.²¹ Population, poverty and governance are key variables, argues Brown. Indeed, 'non-climatic drivers can be as important a determinant of the problem as the strength of the climate itself'.²² In other words, it appears that improving the capacity of a population to adapt to climate change would reduce the necessity of relying on migration as a solution to climatic change. The

and internally displaced populations: Oli Brown, *Climate Change and Forced Migration: Observations, Projections and Implications* (Human Development Report Office Occasional Paper 2007/17), 4. Myers has more recently revised the figure to closer to 250 million: see Christian Aid, *Human Tide: The Real Migration Crisis* (2007) 50, endnote 10. See, generally, Jane McAdam, 'Climate Change "Refugees" and International Law' (Paper presented to the New South Wales Bar Association, Sydney, 24 October 2007).

¹⁷ Brown, above n 16, 5. Migration academics have critiqued both the existing evidence of, and the assumptions which give rise to, the concept of 'environmental refugees', of which climate change displaced people are often conceptualised as a subset: see Richard Black, 'Environmental Refugees: Myth or Reality?' (New Issues in Refugee Research, UNHCR Working Paper, 1998) 34; Stephen Castles, 'Environmental Change and Forced Migration: Making Sense of the Debate' (New Issues in Refugee Research, UNHCR Working Paper 70, 2002). 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, for instance, Kniveton et al, 'Climate Change and Migration: Improving Methodologies to Estimate Flows' (International Organisation for Migration Research Series 33, 2008); Vikram Odedra Kolmannskog, *Future Floods of Refugees: A Comment on Climate Change, Conflict and Forced Migration* (2008); Etienne Piguet, 'Climate Change and Forced Migration: How Can International Policy Respond to Climate Change Induced Displacement?' (New Issues in Refugee Research, UNHCR Research Paper 153, 2008).

¹⁸ Kniveton et al, above n 17, 5.

¹⁹ Kolmannskog, above n 17, 4 and 11.

²⁰ Kniveton et al, above n 17, 57.

²¹ Jane McAdam, 'Environmental Migration Governance' (Paper 1, University of New South Wales Faculty of Law Research Series, 2009), 2.

²² Brown, above n 16, 11.

Stern Review states that 'the exact number who will actually be displaced or forced to migrate will depend on the level of investment, planning and resources'.²³

However, regardless of precise estimates, questions of geographic distribution, issues of linear causality and enhancement of adaptive capacity, there is a consensus in the literature that climate change will lead to 'major forced displacements' over time.²⁴ Pigué argues that forced displacement will:

result principally from rising sea levels, but will only progressively manifest itself over the coming centuries, with the exception of the flooding of certain islands. The increase in droughts and meteorological disasters predicted by climatic models will also have impacts in terms of migrations, but these will remain regional and short-term, and are at present difficult to estimate.²⁵

B *The Nature of the Problem*

As a 2009 report from the International Alliance of Research Universities (IARU) shows, 'key climate indicators are already moving beyond the patterns of natural variability within which contemporary society and economy have developed and thrived'. Such indicators include global mean surface temperature, sea level rise, and extreme climatic events. The IARU concludes that poor nations are particularly at risk, and that

[t]emperature rises above 2°C will be difficult for contemporary societies to cope with, and are likely to cause major societal and environmental disruptions through the rest of the century.²⁶

The Stern Review concluded that '[g]reater resource scarcity, desertification, risks of droughts and floods, and rising sea levels could drive many millions of people to migrate'.²⁷

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.²⁸ This section briefly considers the probable causes and locations of climate change displacement around the world. 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.²⁹ The

²³ Stern above n 14, 112.

²⁴ Pigué, above n 17, 8.

²⁵ Ibid.

²⁶ University of Copenhagen, *Synthesis Report from Climate Change: Global Risks, Challenges and Decisions* (2009) 6

²⁷ Stern, above n 14, 111.

²⁸ See Walter Kalin, 'The Climate Change-Displacement Nexus, 16 July 2008 <http://www.brookings.edu/speeches/2008/0716_climate_change_kalin.aspx> at 20 December 2009.

²⁹ Bonnie Docherty and Tyler Giannini, 'Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees' (2009) 33 *Harvard Environmental Law Review* 349, 355.

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.³⁰

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'.³¹ The potential for migration as a consequence of sea level rise is considerable due to the irreversibility of the phenomenon. According to Piguet, the

localization of the consequences of rising sea levels is a relatively easy task because the configuration of coastlines, their altitude and population are well known and thus easy to integrate into geographical information systems that permit simulations and forecasts.³²

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.³³ 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.³⁴ 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.³⁵ It is a real prospect, in the case of small island states, that entire nations will disappear as a consequence of climate change.³⁶

Extreme weather events, such as hurricanes and floods, are likely to become more frequent and severe as a consequence of changing rainfall patterns and a more intense hydrological cycle.³⁷ Predicting the impacts of severe weather events is problematic, as Piguet explains:

[T]he total number of people threatened by an eventual increase of this kind of disaster is ... very difficult to estimate. No climate model is able to predict with accuracy whether or not the affected zones will be densely populated and whether the damage will have tragic consequences.³⁸

³⁰ Kolmannskog, above n 17, 23.

³¹ UNSW Climate Change Research Centre, *The Copenhagen Diagnosis: Updating the World on the Latest Climate Science* (2009) 9.

³² Piguet, above n 17, 7.

³³ Intergovernmental Panel on Climate Change, *Climate Change 2001: Impacts, Adaptation and Vulnerability* (2001), 569 cited in Angela Williams, 'Turning the Tide: Recognizing Climate Change Refugees in International Law' (2008) 30 *Law and Policy* 502, 505.

³⁴ David Anthoff et al, 'Global and Regional Exposure to Large Rises in Sea Level: A Sensitivity Analysis' (Working Paper No 96, Tyndall Centre for Climate Change Research, 2006) cited in Piguet, above n 17, 8.

³⁵ Piguet, above n 17, 8.

³⁶ Docherty and Giannini, above n 29, 355.

³⁷ Brown, above n 16, 8.

³⁸ Piguet, above n 17, 5.

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.³⁹ However, there is considerable controversy among migration researchers as to whether it is possible to predict the magnitude of displacement due to drought and desertification.⁴⁰

C Inadequate Provision at International Law

There is a broad consensus among lawyers considering the issue of climate change migration that current protections at international law do not adequately provide for a number of the categories of person likely to be displaced by climate change.⁴¹ 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').⁴² 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'.⁴³

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.⁴⁴ As Williams suggests, 'given the object and purpose of the agreement and the narrow applicability of the Refugee Convention intended by the parties', it is difficult to accept an extension of the refugee definition beyond 'political' persecution.⁴⁵ The list of persecutory bases is

³⁹ Intergovernmental Panel on Climate Change, *Climate Change 2007 – Impacts, Adaptation and Vulnerability: Working Group II Contribution to the Fourth Assessment Report* (2007) 10 – 11 cited in Brown, above n 16, 8.

⁴⁰ Piguet, above n 17, 6.

⁴¹ Docherty & Giannini, above n 29; 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*, A/HRC/10/61, 15 January 2009, 19; Kalin, above n 28; Representative of the Secretary General on the Human Rights of Internally Displaced Persons, 'Displacement Caused by the Effects of Climate Change: Who Will Be Affected and What Are the Gaps in the Normative Framework for Their Protection?' (Background Paper to the Office of the High Commissioner for Human Rights Study on the Relationship Between Climate Change and Human Rights, 10 October 2008 < http://www.brookings.edu/papers/2008/1016_climate_change_kalin.aspx > at 20 December 2009). For a fuller consideration of the current international law regimes that may be applicable to climate change displacement, see McAdam, above n 21; and Williams, above n 33. For a discussion of the appropriateness of the United Nations Security Council as a forum for addressing climate change displacement see Frank Biermann and Ingrid Boas, 'Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees' (Global Governance Working Paper No 33 – November 2007) 21.

⁴² See, for instance, McAdam, above n 16, 4–5; Williams, above n 33, 507 - 508.

⁴³ *1951 Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954), Article 1A(2).

⁴⁴ McAdam, above n 16, 4 – 5.

⁴⁵ Williams, above n 33, 508.

exhaustive, 'clearly setting the boundaries of the legal application of the Refugee Convention'.⁴⁶ Although government policies might 'inspire claims of contributory negligence or liability in respect of the refugee problem', this does not constitute persecution⁴⁷ and, in any event, a causal link between the specific emissions of a state and climate change events which result in displacement is difficult to establish. Further, although it has been argued that 'membership of a particular social group' may be extended to encompass that category of persons displaced by environmental causes', such contentions are likely to be a matter of academic interest only.⁴⁸

Another concern with regard to affording protection to persons displaced by climate change under the Convention is that to do so risks devaluing current protections for refugees.⁴⁹ Further, to conflate the term 'refugee' such that it includes both CCDPs and traditional refugees obscures fundamental differences of experience between the groups, including that the nexus between CCDPs and their states has not been severed through persecution.

While the reference to CCDPs as 'refugees' has some normative import and political utility,⁵⁰ it is without legal foundation. Instead, as Williams argues, it appears that CCDPs represent 'an independent category of refugee which requires specific and autonomous recognition by the international legal system'.⁵¹

Finally, the *United Nations Framework Convention for Climate Change*⁵² (the UNFCCC) does not contemplate or address the issue of climate change displacement, and could not be easily altered in order to accommodate CCDPs, as is demonstrated succinctly by Docherty and Giannini:

The UNFCCC applies directly to climate change, but it ... has legal limitations for dealing with climate change refugees. As an international 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

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ McAdam, above n 16, 4 – 5; and Williams, above n 33, 508 - 509. For arguments that the Refugee Convention does encompass 'environmental refugees' see Jessica Cooper, 'Environmental Refugees: Meeting the Requirements of the Refugee Convention' (1988) 6 *New York University Environmental Law Journal* 480; and Alex Aleinikoff, 'Protected Characteristics and Social Perceptions: An Analysis of the Meaning of "Membership of a Particular Social Group"' in Feller, Turk and Nicholson (eds), *Refugee Protection in International Law* (2003) 263.

⁴⁹ David Keane, 'The Environmental Causes and Consequences of Migration: A Search for the Meaning of "Environmental Refugees"' (2004) 16 *Georgetown International Environmental Law Review* 209, 214-217.

⁵⁰ See Biermann & Boas, above n 41, 8.

⁵¹ Williams, above n 33, 514.

⁵² *United Nations Framework Convention on Climate Change*, opened for signature 9 May, 1992, 1771 UNTS 107 (entered into force 21 March 1994), S Treaty Doc No 102-38; UN Doc. A/AC.237/18 (Part II) (Add. 1).

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.⁵³

D A 'Coherent Multilateral Governance Framework' is Needed

As McAdam notes, '[t]here is presently no coherent multilateral governance framework for environmental migration ... [regulation] is extremely fragmented and disparate'.⁵⁴ Neither existing climate change law (such as it is) nor refugee law adequately provide for CCDPs. Any new legal framework which addresses climate change displacement should provide for 'principles and solutions drawn from human rights, humanitarian assistance, and international environmental law'.⁵⁵

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.

III A SOLUTION: A GLOBAL AGREEMENT TO DEAL WITH CLIMATE CHANGE DISPLACEMENT

A Introduction

Substantive proposals for a new instrument providing for people displaced by climate change have been advanced by Docherty and Giannini,⁵⁶ Biermann and Boas,⁵⁷ Williams,⁵⁸ Betaille et al⁵⁹ and the authors of this paper.⁶⁰ 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.⁶¹ Similarly, all of the proposals identify that CCDPs do not fall within the scope of the existing refugee regime created by the Refugee Convention.⁶² However, they differ as to the most appropriate instrument to tackle that problem, and the scope and detail of that instrument. Williams proposes

⁵³ Docherty and Giannini, above n 29, 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' (at 394).

⁵⁴ McAdam, above n 21, 5.

⁵⁵ Docherty and Giannini, above n 29, 397.

⁵⁶ Docherty and Giannini, above n 29.

⁵⁷ Biermann and Boas, above n 41.

⁵⁸ Williams, above n 33.

⁵⁹ Julien Betaille et al, 'Draft Convention on the International Status of Environmentally-Displaced Persons' (2008) 4 *Revue Europeenne de Droit de L'Environnement* 395.

⁶⁰ Hodgkinson et al, above n 12.

⁶¹ Docherty and Giannini, above n 29, 352-354; Biermann and Boas, above n 41, 21; Williams, above n 33, 506.

⁶² Docherty and Giannini, above n 29, 359; Biermann and Boas, above n 41, 17-21; Williams, above n 33, 507-510.

regional agreements under an international framework agreement, Biermann and Boas propose a protocol to the UNFCCC, and Docherty and Giannini, Betaille et al and our earlier study propose global, stand alone agreements.

Part B below examines proposals thus far for an agreement to address climate change displacement. Part C introduces our Convention, outlines its comprehensive scope and particular innovations, and makes a number of claims for the Convention as against other proposals thus far to deal with the climate change displacement problem.

B *Convention Proposals thus far to Address the Problem*

Williams proposes the formation of regional agreements dealing with climate change displacement under an international umbrella agreement linked to the UNFCCC and drafted as part of a post-Kyoto agreement. She suggests that concerns for state sovereignty and disagreement as to the definition of climate change refugees (particularly the extension of protection to internally displaced persons) would preclude the formation of an international agreement.⁶³ Although the scope of each regional agreement would likely differ, Williams proposes a sliding scale of protection depending on the severity of the situation which would entail an assessment of the objective necessity of re-location.⁶⁴

A protocol to the UNFCCC to provide for assistance to climate refugees (the term used by Biermann and Boas) is proposed by Biermann and Boas. They identify four factors that distinguish climate refugees from political or economic refugees: they are unable to return to their homes; they are 'likely to migrate in large numbers and collectively'; they are predictable, because the need for relocation as a result of climate change impacts in particular areas is evident; and they have a moral claim for assistance against industrialised countries historically responsible for emissions.⁶⁵ Adopting these principles, Biermann and Boas propose a protocol providing for the recognition, protection and permanent resettlement of climate refugees displaced as a result of sea-level rise, extreme weather events, and drought and water scarcity. The protocol would extend protection to internally displaced persons as well as international migrants, and would be focused on long-term, planned, voluntary resettlement.⁶⁶

Docherty and Giannini propose a global, stand-alone convention to provide for climate change refugees displaced across national borders (but not displaced internally).⁶⁷ They identify three priorities in the design of the proposed instrument: providing guarantees of human rights protections and humanitarian assistance for designated climate change refugees; spreading the burden of providing assistance across affected states and the international community; and

⁶³ Williams, above n 33, 517-518.

⁶⁴ Ibid, 522.

⁶⁵ Biermann and Boas, above n 41, 15-16.

⁶⁶ Ibid, 25-30.

⁶⁷ Docherty and Giannini, above n 29, 361.

establishing institutions to administer the regime including a global fund, a coordinating agency and a body of scientific experts.⁶⁸

A convention proposed by Betaille et al aims to guarantee the rights of environmentally displaced persons (their term) and arrange for their reception and return.⁶⁹ The principles of the draft convention are those of common but differentiated responsibility; proximity, 'which requires the least separation of persons from their cultural area'; proportionality, which relates to an international system of financial aid; and effectiveness, which provides that in order to make the rights conferred by the convention effective, an agency created by the convention and the state parties shall develop policies to encourage temporarily resettled persons to 'establish normal conditions of life'.⁷⁰ Their convention applies to all environmentally displaced persons rather than the subset of CCDPs.

Finally, in addition to our earlier study,⁷¹ a 2008 report, *Climate Change as a Security Risk*, by the German Advisory Council on Global Change summarizes the state-of-the-art of science on climate change and assesses likely impacts of climate change on societies and states.⁷² Although a small part of its report, 'environmentally induced migration' is briefly considered. The report proposes 'an interdisciplinary, multilateral convention to regulate the legal status of environmental migrants', which could be linked with the Refugee Convention.⁷³ At a minimum such a convention would include the following and 'involve the entire international community':

acknowledgement of environmental damage as a cause of environmentally induced migration; protection of environmental migrants through the granting of at least temporary asylum; establishment of a formula for the distribution of environmental migrants which ensures that among potential host countries no individual states are overburdened; establishment of an equitable formula for the distribution of the costs of receiving refugees; equalization of the financial burdens of climate-related environmental degradation.⁷⁴

⁶⁸ Ibid, 350.

⁶⁹ Betaille et al, above n 59, Article 1.

⁷⁰ Ibid, Article 4.

⁷¹ Our study provided for a convention for the long-term resettlement of CCDPs, both internally within affected countries (as a priority) and internationally, including prior to displacement. Convention parties would provide assistance on the basis of equity and, as a principle, in accordance with their common but differentiated responsibilities; developed state parties to the proposed convention should take the lead in the provision of assistance. More specifically, such parties would assist CCDPs on the basis of the parties' historical greenhouse gas emissions by volume. The convention would provide for displacement flowing from both sudden events and slow-onset events. State parties would contribute to a fund to assist internal resettlement; enable responses to specific climate change events; and assist adaptation and mitigation by affected parties. An international organisation would be created under the Convention with responsibility for climate-induced displacement: Hodgkinson et al, above n 12.

⁷² German Advisory Council on Global Change, *Climate Change as a Security Risk* (2007).

⁷³ Ibid, 206.

⁷⁴ Ibid, 129.

C *Why another Proposal? Why our Convention?*

As we make clear throughout this article there is some consensus among the authors of convention proposals set out above to address the climate change displacement problem. We acknowledge at various points the contributions made by these authors – in particular, those by Docherty and Giannini,⁷⁵ and by Biermann and Boas⁷⁶ – and the extent to which we have taken account of and incorporated aspects of their proposals in our own. No proposal, however, 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.

Any convention designed to deal with the climate change displacement problem on a comprehensive basis must include internal displacement – that which occurs within state borders and the most likely form of displacement⁷⁷ – and international (or trans-border) displacement. Our Convention, while it necessarily distinguishes between internal and international displacement, provides for both.⁷⁸ 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 prioritise climate change displacement solutions without shaping instruments not designed to deal with the displacement problem.

Our Convention proposal provides specifically for the populations of small island states which may become uninhabitable due to the effects of climate change,⁷⁹ and differentiates such states from others which may be affected by large-scale displacement; it treats small island populations as a discrete group. It suggests that certain principles – proximity, for example, and the preservation of intangible culture – be applied to 'bilateral displacement agreements' to be made between small island states and host states.

Finally, our proposal sets out in some detail a sophisticated Convention governance and organisational structure and the roles and obligations of Convention participants and constituent bodies. The mechanics of the Convention's institutional operation and processes are examined and outlined both in narrative and diagrammatic form. The procedures through which offers of and requests for assistance are made are also described.

⁷⁵ Docherty and Giannini, above n 29.

⁷⁶ Biermann and Boas, above n 41. See also Biermann and Boas, 'Protecting Climate Refugees: The Case for a Global Protocol' (2008) 50 *Environment* 8.

⁷⁷ See Part IV, section A(2) below.

⁷⁸ 'The issue of climate change IDPs [internally displaced persons] is beyond the scope' of Docherty and Giannini's article: Docherty and Giannini, above n 29, 360.

⁷⁹ See Part IV, section F below.

IV A CONVENTION FOR PERSONS DISPLACED BY CLIMATE CHANGE

A *Scope of Proposed Convention*

1 *'A Global Governance Architecture'*

As Docherty and Giannini state, '[b]ecause the nature of climate change is global and humans play a contributory role, the international community should accept responsibility for mitigating climate-induced displacement'.⁸⁰ 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 consequences⁸¹ – is global; parties to the convention would include both developed and developing states. The convention, to use Biermann and Boas' term, provides for 'a global governance architecture for the protection and resettlement' of CCDPs.⁸²

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.⁸³ In our view, however, which reflects that of Docherty and Giannini, the UNFCCC 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, 'it does not discuss duties that states have to individuals or communities, such as those laid out in human rights or refugee law'.⁸⁴

Our Convention is a stand alone one (noting, however, that it would 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. The international community has an obvious interest in resolving the problem of human displacement in an orderly and coordinated fashion.

2 *Internal and International Displacement*

Migration experts state that most persons displaced by climate change will be unlikely to cross an international border;⁸⁵ 'most climate refugees are expected to remain within their home countries'.⁸⁶ Kniveton et al emphasise

⁸⁰ Docherty and Giannini, above n 29, 349.

⁸¹ Biermann and Boas, above n 41, 26. See also Biermann and Boas, above n 76, 13.

⁸² Biermann and Boas, above n 41, 31.

⁸³ Biermann and Boas, above n 41 and 76; Williams, above n 33.

⁸⁴ Docherty and Giannini, above n 29, 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' (at 394).

⁸⁵ Kniveton et al, above n 17, 29; Christian Aid, above n 16, 6; Brown, above n 16, 13; and German

a broad theoretical consensus that it is generally not the poorest people who migrate overseas because international migration is an expensive endeavour that demands resources for the journey and for the crossing of borders'.⁸⁷

The German Advisory Council on Global Change refers to 'environmentally induced migration' and its nature:

It is thought likely that most such migration currently takes place within national borders and that this will continue to be the case in future. Environmental migrants are therefore more likely to be internally displaced persons rather than migrants who cross national borders.⁸⁸

In our view, if – as migration experts assert – the reality is that most persons displaced by climate change will be relatively unlikely to cross an international border⁸⁹ (or, put another way, the people most vulnerable to climate change are not always the ones most likely to undertake trans-border migration⁹⁰), the 'means for facilitating ... assistance' to such persons cannot be 'beyond the scope' of proposals seeking to address climate change displacement.⁹¹ Further, it may be that perpetuating a narrow focus on 'displacement', particularly trans-border displacement, is to act implicitly within the preoccupations of the 'developed' world, with all of the attendant security concerns – and perhaps even the xenophobic reactions – that such a stance entails.

Adopting a multifaceted, cooperative and international approach⁹² to providing for, assisting and protecting CCDPs, our Convention encompasses those displaced internally (that is, within a country) *and* those who cross international borders – thus, both internal and international displacement. While it is necessary to distinguish between internally and internationally displaced persons in the context of climate change displacement,⁹³ and to make the same distinction in drafting a convention for CCDPs, the provisions of a convention would encompass and reflect careful consideration of both categories of displacement.

Advisory Council on Global Change, above n 72, 118.

⁸⁶ Biermann and Boas, above n 76, 11.

⁸⁷ Kniveton et al, above n 17, 28.

⁸⁸ German Advisory Council on Global Change, above n 72, 118.

⁸⁹ Kniveton et al, above n 17, 29; Christian Aid, above n 16, 6; and German Advisory Council on Global Change, above n 72, 118.

⁹⁰ Brown, above n 16, 13. See also Kniveton et al, who emphasise, 'a broad theoretical consensus that it is generally not the poorest people who migrate overseas because international migration is an expensive endeavour that demands resources for the journey and for the crossing of borders': above n 17, 20.

⁹¹ Docherty and Giannini, above n 29, 370. Docherty and Giannini state that '[t]he issue of climate change IDPs is beyond the scope of this Article, but it deserves attention as the international community develops ways to deal with climate change migration' (at 360).

⁹² McAdam states that '[d]espite the common call for a multifaceted, or cooperative or international approach, the literature does not spell out what this would look like or how it would be achieved': McAdam, above n 21, 28.

⁹³ Docherty and Giannini note that '[m]ost authors who define environmental refugee do *not* distinguish between people who migrate across or within borders': Docherty and Giannini, above n 29, 369 (emphasis added).

Docherty and Giannini note that 'ideally, at some point international law would provide the same assistance for both climate change refugees [those crossing international borders] and IDPs [internally displaced persons]';⁹⁴ the convention proposed by these authors provides assistance only for refugees on the basis that

adopting the Refugee Convention's distinction acknowledges international law's current emphasis on state sovereignty. It recognises that host states, to which refugees flee, are more likely to accept outside assistance than are home states, which may not want interference from the international community.⁹⁵

It seems to us, however, that under a convention in which requests for assistance can come from state parties to the convention, whether such parties be 'home' or 'host' states, and in which assistance can be offered by the climate change displacement organisation under the convention to home or host states (such offered assistance by the organisation to either be accepted or declined by the relevant state), contentious issues of sovereignty should be minimised – although we acknowledge that this may be an overly optimistic view of the convention's operation.

3 *Those in need of Displacement Assistance will be Developing State Parties to the Convention*

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.⁹⁶ For the developing world generally, the magnitude of the impacts – as the World Bank notes – are 'sobering': with regard only to sea level rise, displacement due to climate change will affect hundreds of millions of people.⁹⁷

It is 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 – who will be most in need of displacement assistance. Moreover, as mentioned above, the majority of displacement will be internal rather than across national borders; developing states, which already experience environmental degradation and natural disasters, will bear the additional burden of displacement. For these states, a 'vicious cycle links precarious access to natural resources, poor physical infrastructure ... [and] vulnerability to climate change-related harms'.⁹⁸ As the German Advisory Council on Global Change notes, '[m]ost cross-border environmentally induced migration will probably take the form of south-south migration; no trend towards large south-north migrations has been identified'.⁹⁹

⁹⁴ Ibid, 369-370. Docherty and Giannini also note that 'the means for facilitating such assistance are beyond the scope of this Article' (at 370).

⁹⁵ Docherty and Giannini, above n 29, 369.

⁹⁶ International Council on Human Rights Policy, *Climate Change and Human Rights: A Rough Guide* (2008) 1.

⁹⁷ Dasgupta et al, above n 15, 44.

⁹⁸ International Council on Human Rights Policy, above n 96.

⁹⁹ German Advisory Council on Global Change, above n 72, 118.

4 **Temporary and Permanent Relocation**

Both temporary and permanent relocation would be provided for under the proposed convention. In common with Biermann and Boas¹⁰⁰ we see little value in making a distinction, commonly made in the literature on refugees in the context of environmental-related migration, on whether relocation (or displacement) is temporary or permanent. The need for relocation assistance and protection arises whether or not the relocation is temporary or permanent. It should be noted that the Refugee Convention similarly makes no distinction between temporary and permanent relocation; protection is afforded refugees no matter whether displacement is short-term or permanent.¹⁰¹

5 **Causation: Climate Change Events and Displacement**

A number of issues of causation¹⁰² 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, as Docherty and Giannini note, for science to determine whether a particular environmental event was caused by climate change.¹⁰³ It is possible, however, as the Intergovernmental Panel on Climate Change (IPCC) shows, 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.¹⁰⁴ Further, scientific progress

in understanding how climate is changing in space and in time has been gained through improvements and extensions of numerous datasets and data analyses, broader geographical coverage, better understanding of uncertainties, and a wider variety of measurements',¹⁰⁵

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 (humans have contributed to climate change generally and, it is argued, should accept and bear some responsibility for dealing with displacement caused by, or resulting from, climate change). Just as science can't determine whether a particular environmental event was caused by climate change,

¹⁰⁰ Biermann and Boas, above n 41, 6.

¹⁰¹ Refugee Convention, above n 43, Article 1(A)(2).

¹⁰² As the word is generally understood.

¹⁰³ Docherty and Giannini, above n 29, 370.

¹⁰⁴ Intergovernmental Panel on Climate Change, *Fourth Assessment Report: Climate Change 2007: Synthesis Report* (2007) 53. 'Virtually certain' means a probability greater than 99%; 'extremely likely' means a probability greater than 95%; and 'very likely' means greater than 90% (at 27).

¹⁰⁵ Intergovernmental Panel on Climate Change, *Climate Change 2007: The Physical Science Basis, Summary for Policymakers, Contribution of Working Group I to the Fourth Assessment Report of the IPCC* (2007) 5.

neither can science determine 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 type of disruption'. Their definition references the IPCC's 'likelihood ranges' and

adopts the IPCC's 'more likely than not' standard in order to encompass the range of environmental disruptions most commonly associated with climate change and related displacement.¹⁰⁶

The 'more likely than not' standard means 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' standard¹⁰⁷ to identify certain phenomena and trends as consistent with climate change, and human contribution. The reasons for this higher standard are that it 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. However, as more fully set out below in Part IV, section C, 'Operation of the Convention', the Convention's proposed Climate Change Displacement Environment and Science Organisation (CCDESO), established in part to conduct climate change research, would continually assess the development of climate change science, and would advise the Convention's Climate Change Displacement Organisation (CCDO) of matters which would affect the standard adopted by the Convention, and related matters. With input from the CCDESO, and with the benefit of that organisation's links with the IPCC, the UNFCCC's Subsidiary Body for Scientific and Technological Advice, and climate change science and other research organisations, each biannual meeting of the CCDO Assembly would carefully consider the evolving climate change science, both generally and specifically with regard to sudden onset climate change events. For instance, scientific knowledge may evolve such that increased frequency and severity of sudden disasters can be attributed to anthropogenic climate change, in which case the operation of the Convention would be triggered by the prospect of future displacement as a result of such events. Again, these matters are more fully set out below.

Issues of causality also arise with respect to the question of whether climate change necessarily leads to migration, as previously discussed in Part II of this article. While there seems to be a consensus that sea level rise will result in population movements, there is considerable uncertainty amongst migration researchers as to whether drought and sudden weather events result in

¹⁰⁶ Docherty and Giannini, above n 29, 371.

¹⁰⁷ Greater than 90% probability.

displacement.¹⁰⁸ Kniveton et al summarise the state of the research on whether drought induces migration as follows:

The empirical results ... reveal that the nexus between drought and migration is not straightforward... the conceptualisation of drought-affected people as helpless victims who are left with no choice but to flee seems to be false. Depending on their socio-economic position, they might have the choice between a variety of coping strategies, including migration. On the other hand, they might be too poor to migrate at all.¹⁰⁹

As Kniveton and his coauthors suggest, adaptive capacity is integral to displacement decisions – and both adaptation and displacement are determined as much by available resources as by environmental factors. As discussed below in 'Definition and Designation of CCDPs', 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.¹¹⁰ 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 'climate change displaced people'. 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.¹¹¹ 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.

¹⁰⁸ See Part II, section B above. Some, but not all, of this uncertainty relates to long-term or permanent displacement only.

¹⁰⁹ Kniveton et al, above n 17, 34.

¹¹⁰ See Part IV, section E.

¹¹¹ These channels include the Office for the Coordination of Humanitarian Affairs, a UN Disaster Relief Co-ordinator, an Inter-Agency Standing Committee, a UN Central Revolving Fund and the International Red Cross Movement: Benito Muller, 'An FCCC Impact Response Instrument as Part of a Balanced Global Climate Change Regime', 2002 <http://www.oxfordclimatepolicy.org/publications/iri.pdf.C.R.N>. at 19 December 2009.

B Definition and Designation of CCDPs

A key focus of the literature on climate change displacement has been on the question of whether and how persons displaced by climate change should be defined. It is a concern that stems in part from a broader debate on the nature and legitimacy of the concept of 'environmental refugees'.¹¹² The term 'environmental refugees' came to prominence with a 1985 report by the United Nations Environment Programme (UNEP). The UNEP report defined environmental refugees as

those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption/natural or triggered by people that jeopardized their existence and/or seriously affected the quality of their lives.¹¹³

The concept has been further popularised by Myers, who refers to environmental refugees as those 'who can no longer gain a secure livelihood in their erstwhile homelands' and 'who in their desperation feel that they have no alternative but to seek sanctuary elsewhere'.¹¹⁴

Subsequent to the UNEP report, various proposals have been made for a definition of 'environmental refugees'. A series of recurrent themes commonly structure such proposals. Firstly, proposals for definitions of 'environmental refugees' will generally consider the nature of the migration, such as whether it was forced or voluntary; temporary or permanent; and within or external to state boundaries. Secondly, they are also likely to be informed by the character of the environmental change giving rise to the migration, whether the change is sudden or gradual, and, in some cases, whether the change is natural or induced by humans.¹¹⁵

A number of proposals have now been made that seek to define persons displaced by climate change. Biermann and Boas define climate refugees as

people who have to leave their habitats, immediately or in the near future, because of sudden or gradual alterations in their natural environment related to at least one of three impacts of climate change: sea-level rise, extreme weather events, and drought and water scarcity.¹¹⁶

¹¹² The debate about the legitimacy of the term 'refugee' relates to its appropriateness when applied to cases of environmental exodus: Brown, above n 16, 6; Biermann & Boas, above n 41, 6-8; Docherty and Giannini, above n 29, 363; Keane, above n 49, 215; and Kolmanskog, above n 17, 8-9. This article follows the recommendation of the UNHCR that the term 'refugee' is inappropriate in an environmental context and adopts the terminology of 'climate change displaced person or 'CCDP'.
¹¹³ Essam El-Hinawi, *Environmental Refugees* (1985) 4.

¹¹⁴ Norman Myers, 'Environmental Refugees in a Globally Warmed World' (1993) 43 *BioScience* 752.

¹¹⁵ Biermann and Boas, above n 41, 3 – 6; Docherty and Giannini, above n 29, 363 – 6; Williams, above n 33, 506-7.

¹¹⁶ Biermann & Boas, above n 41, 8. Biermann and Boas do not make distinctions based on the character of the migration; they do not distinguish between internal and international migrants; they do not view a distinction between permanent and temporary migrants as relevant; and they do not include voluntariness as a criteria. Their definition is instead restricted with reference to the cause of relocation. They exclude climate change impacts that have a marginal link with forced migration, such as heat waves; migration caused by measures related to the mitigation of or adaptation to global

Docherty and Giannini define a climate refugee as

an individual who is forced to flee his or her home and to relocate temporarily or permanently across a national boundary as the result of sudden or gradual environmental disruption that is consistent with climate change and to which humans more likely than not contributed.¹¹⁷

Williams proposes a definition incorporating gradual recognition and correlating levels of protection on a sliding scale, allowing differing degrees of protection to be accorded depending on the severity of the situation.¹¹⁸

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'; in other words, at what point is a person compelled to move, as opposed to exercising their own free choice, when they leave a situation of encroaching desertification or sea-level rise? The underlying concern, which is less often stated, is associated with denial by developed countries of the legitimacy of 'economic migration' and a related fear of 'opening the floodgates' to immigrants from developing nations. However, as a given economy is bound up with its environment, it may be overly ambitious to attempt to distinguish between economic 'pull' and environmental 'push' explanations for population movement, especially where the attempt is based on an individualised definition with reference to subjective criteria.¹¹⁹

Proposals for definitions of 'environmental' and 'climate change' displaced persons have advanced a range of strategies for addressing the question of how to distinguish forced from voluntary migration in cases of gradual environmental degradation. For instance, the sliding scale of protection proposed by Williams corresponds to an assessment of the severity of existing environmental damage. CCDPs relocating because an area becomes inhabitable would be accorded 'acute' status and receive the highest level of protection, whereas CCDPs who relocate but 'could remain within that same environment albeit under increasingly onerous and challenging conditions' would receive a lower level of protection.¹²⁰ Williams' sliding scale definition of climate change displacement affords rights based on the degree to which displacement is 'forced' by existing environmental circumstances.

warming, such as construction of dams; migration related to other types of environmental degradation (such as pollution) or disasters unrelated to human activities (such as volcano eruptions); and migration caused by secondary or indirect impacts of climate change, such as conflicts over natural resources.

¹¹⁷ Docherty and Giannini, above n 29, 361.

¹¹⁸ Williams, above n 33, 522-3.

¹¹⁹ Brown, above n 16, 5; Kolmannskog, above n 17, 11-2.

¹²⁰ Williams, above n 33, 522. Williams suggests that each 'regional association' could agree on its own definition of CCDPs to identify the scope of individual regional agreements, but also suggests a 'definitional approach' allowing a 'certain degree of flexibility'.

Similarly, Renaud et al distinguish between three categories of environmentally displaced people: (a) environmentally motivated migrants who 'may leave' a steadily deteriorating environment in order to pre-empt the worst (examples include the depopulation of old mining and industrial areas); (b) environmentally forced migrants who 'have to leave' in order to avoid the worst (examples include sea-level rise and desertification); (c) environmental refugees who flee the worst (examples include floods, droughts and hurricanes). The distinction is based on the point of departure and would include an assessment of the 'coping capacity' of the affected community as well as the nature of the environmental event.¹²¹

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. Further, when developing criteria to determine when a movement is no longer voluntary,

the point of departure should not be the subjective motives of individuals or communities for their decision to move but rather the question as to whether in light of the prevailing circumstances and the particular vulnerabilities of the persons concerned it would be appropriate to require them to go back to their homes.¹²²

The salient 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.

There has, historically, been a focus on definitions in literature on climate change and environmental displacement. This focus may be partly explained as an effort to disentangle 'environmental' from 'economic migration'. However, the preoccupation with definitions may also have arisen as a consequence of the centrality of the definition of a 'refugee' to the assignment of protection under the Refugee Convention. In the context of that instrument, the definition of a 'refugee' gives expression to the fundamental principle that international protection has been triggered on the basis that a relationship between an individual and their nation has been damaged or severed in certain prescribed ways. The construction of a convention for CCDPs around definitional criteria or the individual processing of 'asylum' claims is not the optimal solution for the problem of climate change displacement for two reasons. The first is that, as discussed in Part II, it is unlikely to be possible to attribute an individual decision to migrate solely or perhaps even directly to climate change. The second is that climate change impacts and any corresponding displacement are likely to

¹²¹ Fabrice Renaud et al, 'Control, Adapt or Flee: How to Face Environmental Migration' (Intersections Publication Series of United Nations University Institute for Environment and Human Security, No.5/2007), 29 -31.

¹²² Representative of the Secretary General on the Human Rights of Internally Displaced Persons, 'Displacement Caused by the Effects of Climate Change: who will be affected and what are the gaps in the normative frameworks for their protection' (Background Paper to the Office of the High Commissioner for Human Rights Study on the Relationship Between Climate Change and Human Rights, 10 October 2008), 7.

be felt on a mass-scale, as opposed to an individualised basis. Climate change is better understood as affecting entire communities rather than certain individuals, although some persons in those communities will no doubt be more affected than others.

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'.¹²³

Based on earlier discussion in the 'Causation: Climate Change Events and Displacement' section of this article, and the above discussion, the definition of CCDPs we propose is as follows:

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.

We define a 'climate change event' 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. As a consequence, the definition of a 'climate change displaced person' is thus less pivotal in the context of our proposal than it is to the Refugee Convention.¹²⁴ Further, as the designation would be made through prescribed Convention processes, it would obviate the need to construct an elaborate definitional mechanism that would specifically address 'slow-onset' climate change events.

An approach that prioritises *en masse* designations finds support in other publications on climate change induced migration. McAdam argues that the 'traditional western approach of individualised decision-making on technical legal grounds seems highly inappropriate to the situation we are presently facing'.¹²⁵ Similarly, Docherty and Giannini state that, in general, 'group status determination of climate change refugees would be preferable, and the climate change refugee instrument should make it the default while still allowing for individual status determination'.¹²⁶

¹²³ Castles, above n 17, 9.

¹²⁴ A shift away from individual rights towards mass recognition creates new dilemmas, however, particularly the prospect of discrimination against particular populations by host countries and the attenuation of rights that often accompanies acceptance of refugees *en masse* by recipient states. We attempt to address these dilemmas in the section on 'protection and assistance'. Moreover, a system premised on individual rights determined by definitional criteria arguably may allow the individual asylum seeker more agency – to determine whether to flee and where to seek asylum. We try to compensate for this by advocating active public participation in all levels of decision-making under our Convention.

¹²⁵ McAdam, above n 16, 9.

¹²⁶ Docherty and Giannini, above n 29, 374.

Moreover, the proposals of both Docherty and Giannini and Biermann and Boas move away from a reliance on definitional criteria as a trigger for protection and rather seek to construct an international architecture to determine the status of CCDPs.

C *Operation of the Convention: Institutions, Participants and Obligations*

Sections A and B above outlined the scope of our Convention in terms of global coverage, internal and international displacement, temporary and permanent relocation, issues of causation, sudden and slow-onset climate change events, and definition and designation of CCDPs. This section of the Article sets out the operation of the Convention through a focus on its institutional organisation. Through that focus, the obligations of the Convention participants – state parties generally, both developed and developing; home and host state parties; the climate change displacement organisation established under the Convention and its organs; and civil society – become clear.

Docherty and Giannini¹²⁷ and Bataille et al¹²⁸ provide some detail regarding administrative bodies as part of their proposals for an agreement to address the climate change displacement problem. Biermann and Boas (proposing a network of agencies including the United Nations Development Programme, the United Nations Environment Programme, the United Nations High Commissioner for Refugees and the World Bank¹²⁹) and Williams (proposing a subsidiary body located within the UNFCCC¹³⁰) address administrative bodies only briefly.

For Docherty and Giannini, a convention for displaced persons would create a global fund for the provision of financial assistance,¹³¹ together with a body of scientific experts and a coordinating agency, modelled on the UNHCR.¹³² The purpose of the co-ordinating agency would be to work with states to prevent refugee crises, assist host states to provide humanitarian aid and fulfil human rights obligations, and assist with the repatriation or permanent resettlement of refugees.¹³³

Bataille et al's draft convention provides for each state party to create a national commission to make status determinations at first instance.¹³⁴ The convention provides for the creation of a World Agency for Environmentally Displaced Persons (WAEP) to oversee the application of the convention, including conducting studies on displacement and providing assistance directed to preventing and limiting displacement and promoting the rapid return of environmentally displaced people.¹³⁵ A High Authority, a Scientific Council and a Secretariat are created to assist the WAEP.

While these proposals describe discrete coordinating agencies or agencies to administer the convention, no proposal attempts to set out in detail the operation of a climate change

¹²⁷ Docherty and Giannini, above n 29, 384-391.

¹²⁸ Bataille et al, above n 59, ch 3.

¹²⁹ Biermann and Boas, above n 41, 28-29.

¹³⁰ Williams, above n 33, 519.

¹³¹ Docherty and Giannini, above n 29, 383.

¹³² Ibid, 384.

¹³³ Ibid, 388.

¹³⁴ Bataille et al, above n 59, Article 12. The national commission consists of 9 members named by the judiciary.

¹³⁵ Bataille et al, above n 59, Article 11.

displacement organisation and its constituent bodies, and how those bodies work together and interact. Our proposal attempts to remedy this gap by putting forward a climate change displacement organisation structure and, within that structure, setting out the roles and obligations of convention participants both in narrative and diagrammatic form. 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, and including government and non-government organisations.

1 Climate Change Displacement Organisation

The Convention would create a Climate Change Displacement Organisation (CCDO), the proposed operation of which is set out in detail below. The CCDO would consist 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 operation of each of these bodies and groups, their roles and functions, and relationship with each other is set out below. The diagram on page [insert] sets out the structure of the CCDO and the operation of its constituent bodies.

Operational guidelines for the implementation of the Convention would also be drafted, the guidelines to be periodically revised to reflect the decisions of the CCDO Council and changes arising as a result of the operation of the Convention and practices adopted. These operational guidelines could be modelled on the Operational Guidelines for the Implementation of the World Heritage Convention or similar guidelines.¹³⁶

2 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. A developing state party (a home or a host state) to the convention would make a request, using documentation prepared by the CCDO, to the CCDO for internal or international resettlement assistance, as the case may be, referencing a relevant home state request, if any (in the case of a host state). That state party would, at the time of making a request for assistance, also request *en masse* designation of the status of 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 of and assistance to CCDPs into future planning programs; and consulting with potential or actual CCDPs and their representative organizations in the collection of data, the development of policy and its implementation.

It would be open to the CCDO (through the CCDO Council) to offer assistance to developing state parties without a request from those parties. It is also open to civil society within state parties to the

¹³⁶ United Nations Educational, Scientific and Cultural Organisation, *Operational Guidelines for the Implementation of the World Heritage Convention* (2008).

Convention to request CCDO assistance, but such requests must be authorised and submitted by the relevant state party.

State parties, developed and developing, would form national climate change displacement committees (their title, form and function to be determined by the relevant state) to inform CCDO decision making at the national level as a basis for participation in the Convention. Parties would also provide a delegate (an 'ambassador' or a 'representative') to the CCDO Assembly, an assembly of state parties to the Convention which would meet every 2 years. State parties would also provide members, as applicable, on a rotating basis to the CCDO Council.

3 CCDO Assembly

The governing body of the CCDO would be the CCDO Assembly, comprising representatives of all state parties to the Convention. The Assembly would meet biannually (every two years), and elect a president for a term or terms and on conditions to be determined. It would ratify developed state party's financial contributions to the Climate Change Displacement Fund after advice from (a) the Climate Change Displacement Fund; and (b) the Climate Change Displacement Environment and Science Organisation, such advice received through the Council. Funding from developed state parties would be provided on a biannual basis to coincide with Assembly meetings. Developed state parties would also fund the CCDO itself.

The Assembly would confirm (a) the CCDO chief executive officer and representative state parties, both developing and developed, to the CCDO Council; and (b) state party appointments to the Climate Change Displacement Fund (CCDF).

Finally, the Assembly would, with advice and recommendations from the Climate Change Displacement Environment and Science Organisation (CCDESO), review the state of climate change science at every biannual meeting, with particular focus on implications for sudden disruption and displacement (see Part IV, section A(5) above on sudden and slow-onset events).

Appeal Committee

The CCDO Assembly would determine members of its Appeal Committee to hear appeals from developing state parties against funding/assistance decisions of the CCDO Council.

4 CCDO Council

The CCDO Council's main functions would be to (a) assess developing state party (home or host state¹³⁷), requests for internal and international resettlement assistance, including the making of *en masse* designations; (b) confirm the level and terms of that assistance, and assistance to be provided to Climate Change Displacement Implementation Group organisations; and (c) set the direction and guide the operations of the CCDO. Determinations of the Council, including those related to designations, would be informed by information and guidance provided by the CCDF and the CCDESO.

¹³⁷ Host states almost always, in our view, developing state parties.

The Council would be chaired by a Chief Executive Officer. Membership of the Council would comprise a small number of representatives from developed and developing state parties to the convention, together with individuals with relevant institutional or subject matter experience, from the private sector, civil society and academic institutions. These individuals would be appointed by the developed and developing state members of the Council. The number of individuals so appointed could equal the total number of developed and developing state members of the Council.

Regional Committees

Williams¹³⁸ outlines the virtues of regional initiatives and cooperation to address 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'.¹³⁹ Williams also notes that a regional structure 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'.¹⁴⁰ While we have not taken up regional initiatives as a formal part of our Convention, there are clear virtues in formalising regional arrangements such that any climate change displacement organisation can be fully informed and take account of regional developments. McAdam notes that responses on a regional basis might 'be more appropriate and culturally sensitive ... taking into account the particular features of the threatened population'.¹⁴¹

Accordingly, on terms to be established by the Council and the relevant regional committees themselves, we propose the establishment of regional Council committees which would (a) inform Council and CCDO decision-making of regional perspectives, views and developments; (b) work closely with Climate Change Displacement Implementation Groups (see below); and (c) enable the unique situation of small island states to be addressed, in part through involvement with concluding small island states' bilateral displacement agreements.

5. *Climate Change Displacement Fund*

The CCDF, with members appointed by the CCDO Council, and with oversight from a committee of developed and developing state parties to the Convention, would propose to the Council (a) the level of developed state parties' biannual contributions to the Fund; and (b) the level of assistance funding to developing state parties and Climate Change Displacement Implementation Group (CCDIG) organisations (see 7. below), and provide related advice on funding displacement assistance and requests for funding. After a Council decision to provide assistance, the Fund would (a) disburse funds based on the agreement concluded between the recipient state party and the CCDO; and (b) work with the recipient and the relevant CCDIG on the deployment of the funds.

¹³⁸ Williams, above n 33, 517-523.

¹³⁹ Ibid, 519.

¹⁴⁰ Ibid, 521.

¹⁴¹ McAdam, above n 21, 7-8.

6 Climate Change Displacement Environment and Science Organisation

As discussed earlier problems exist regarding the extent to which climate change causes an event giving rise to displacement, identification of certain phenomena and trends as consistent with climate change ('more likely than not', 'likely', 'very likely' etc), and the extent to which humans contribute to particular climate change events.¹⁴² Further, '[t]he recognition of human contribution must work within the parameters of existing and evolving science'.¹⁴³

The CCDES0, with members appointed by the Council, would advise (a) the CCDO on climate change science matters as they affected displacement (both sudden, given the discussion above,¹⁴⁴ and slow onset); and (b) the Fund on developed state parties' contributions to the Fund and the level of funding assistance to developing state parties and CCDIGs. The CCDES0 would monitor state parties' emissions levels to assist in the determination of such party's financial contributions to the Fund. Given these advisory, assessment and monitoring roles, the work of the CCDES0 is crucial to decisions made by the CCDO.

The CCDES0 would be established as a significant climate change science and displacement research organisation, itself conducting climate change research and contributing to the evolution of climate change science, with research output available to convention parties. It would establish links with the Intergovernmental Panel on Climate Change, the UNFCCC's Subsidiary Body for Scientific and Technological Advice, and climate change science and other research organisations around the world, thus contributing to what McAdam refers to as 'institutionalized cooperation'. This is discussed again below with regard to the CCDIG.

7 Climate Change Displacement Implementation Groups

We propose dedicated CCDIGs under the Convention to effect resettlement. Members of each CCDIG would consist of the affected state (in the event of internal displacement); the home and host state (in the event of international resettlement); local and state (if applicable) governments; international organisations; relevant UN bodies, again if applicable; and the CCDO, representatives of which would lead each CCDIG. CCDIGs would also work with civil society in home and host states, and work closely with regional committees.¹⁴⁵

Each CCDIG would represent a form of what Jane McAdam refers to as 'institutionalized cooperation'.¹⁴⁶ McAdam notes that

¹⁴² See note 104.

¹⁴³ Docherty and Giannini, above n 29, 371.

¹⁴⁴ See Part IV, section 5.

¹⁴⁵ For issues associated with coordinating efforts to address environmental displacement see, generally, Tracey King, 'Environmental Displacement: Coordinating Efforts to Find Solutions' (2006) 18 *Georgetown International Environmental Law Review* 543. King proposes an international coordinating mechanism for environmental displacement which would coordinate the work of organisations that currently focus on such displacement. It is not necessary, in King's view, to create a new organisation to specifically deal with environmental displacement.

¹⁴⁶ McAdam, above n 21, 23.

[b]ecause there are numerous cross-cutting and intersecting issues raised by climate-induced displacement which relate to a variety of institutional different mandates ... the concept risks being dealt with in an ad hoc and fragmented manner.¹⁴⁷

In our view the formalised CCDO-led CCDIG approach would result in 'a comprehensive and coherent multilateral framework'¹⁴⁸ within which assistance and protection would be provided to CCDPs around the world.

8. Permanent Secretariat

In order to discharge their functions, both the Assembly and the Council (the Council in particular) would be supported by a CCDO secretariat consisting of a permanent staff and supplemented by contract and other staff as required. The secretariat would also support the CCDF, the CCDES and each CCDIG.

D Financing

1. Existing Proposals

Existing proposals, no matter the level of detail of those proposals, all set out ways in which provision of displacement assistance can be financed, or funded. Biermann and Boas,¹⁴⁹ Betaille et al,¹⁵⁰ and Docherty and Giannini¹⁵¹ make proposals for a global fund to manage international financial assistance with regard to climate change displacement. Biermann and Boas propose the creation of an independent Climate Refugee Protection and Resettlement Fund.¹⁵² All funds would be provided on a grant basis and would be additional to grants already promised to existing funds. Eligibility for assistance under the fund would be determined according to the principle of 'full incremental costs', whereby in situations where the causal links with climate change are undisputed, such as displacement caused by sea-level rise, the fund would reimburse the full agreed incremental costs incurred. Where climate change is only one factor causing environmental degradation, the fund would pay for only part of the protection and relocation costs.¹⁵³ Biermann and Boas further propose innovative income-raising mechanisms such as an international air travel levy which could be used as a source of funds; this suggests that states would not be required to make mandatory payments under the proposal.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Biermann and Boas, above n 41, 29.

¹⁵⁰ Betaille et al, above n 59, Article 11(4).

¹⁵¹ Docherty and Giannini, above n 29, 385. Docherty and Giannini note that, while the proposals vary as to the role and management of the fund, the proposals 'illustrate growing support for establishing such a mechanism'.

¹⁵² Biermann, above n 41, 29.

¹⁵³ Ibid, 30.

Docherty and Giannini's proposed convention would determine obligatory state contributions, collect payments and distribute funds to states in need.¹⁵⁴ Funds would be provided to home and host states for mitigation as well as assistance following displacement.¹⁵⁵

The convention drafted by Betaille et al advocate similarly creates a World Fund for the Environmentally Displaced (WFED). The purpose of the WFED is to provide assistance for the settlement and repatriation of environmentally displaced people. Under the draft convention, funds can be granted to home states and host states as well as non-governmental organisations and local governments.¹⁵⁶ The WFED would be supported by 'voluntary contributions from states and private actors', and 'mandatory contributions funded by a tax based principally on the causes of sudden or gradual environmental disaster susceptible of creating environmental displacements'.¹⁵⁷

2. *Our Convention*

We propose that developed state parties to the Convention make mandatory, or binding, financial contributions to the Climate Change Displacement Fund (the operation of which was set out earlier), 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 CCDESO 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.¹⁵⁸

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.¹⁵⁹

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'. This has a number of implications, including the

¹⁵⁴ Docherty and Giannini, above n 29, 385.

¹⁵⁵ Ibid, 387.

¹⁵⁶ Betaille et al, above n 59, Article 11(4)(a).

¹⁵⁷ Ibid, Article 11(4)(b). They do not provide further detail about the proposed tax so it is not clear if it would also be determined based on the principle of common but differentiated responsibilities.

¹⁵⁸ The detailed operation of the Climate Change Displacement Organisation, of which both the Fund and the CCDESO form a part, is set out above at Part IV, section C.

¹⁵⁹ Centre for International Sustainable Development Law (CISDL), 'The Principle of Common But Differentiated Responsibilities: Origins and Scope', 26 August 2002 <www.cisdsl.org/pdf/brief_common.pdf> at 6 December 2009.

imposition of environmental obligations which differ between states. This principle underpins the obligations of state parties to the Convention.

State practice and legal precedent supports the principle of common but differentiated responsibilities. 194 state parties to the UNFCCC¹⁶⁰ acknowledge that

the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities ...¹⁶¹

and agree that, in stabilising the level of greenhouse gas concentrations in the atmosphere, they should

protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.¹⁶²

The *Rio Declaration on Environment and Development* similarly incorporates the common but differentiated responsibilities principle.¹⁶³

Our proposal that funding should be apportioned on the basis of the common but differentiated responsibilities principle finds support in other major proposals for climate change displacement instruments. The principle and its application are considered by Docherty and Giannini, Biermann and Boas, and Muller¹⁶⁴ in varying detail. Docherty and Giannini argue that the liability of each state should be determined according to it.¹⁶⁵ Biermann and Boas state that the principle of common but differentiated responsibility should be adopted into a new agreement, but do not discuss the standard as a way of apportioning payments to the fund or in the context of the fund specifically.¹⁶⁶ And Muller notes, with reference to the binding nature of contributions, that

[t]he acknowledged common but differentiated responsibilities for climate change phenomena make the funding of climate-related disaster relief a prime candidate for a

¹⁶⁰ UNFCCC, above n 52.

¹⁶¹ UNFCCC, above n 52, recitals.

¹⁶² Ibid, Article 3(1).

¹⁶³ Principle 7 of the Rio Declaration on Environment and Development, 'State Cooperation to Protect Ecosystem', provides that 'States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command': A/CONF.151/26 (Vol I) - Rio Declaration Principle 22 and Agenda 21, Chapter 26.4 <<http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>> at 21 December 2009.

¹⁶⁴ Benito Muller, 'An FCCC Impact Response Instrument as part of a Balanced Global Climate Change Regime' (Paper presented at the Tata Energy Research Institute, New Delhi, May 2002) 3.

¹⁶⁵ Docherty and Giannini, above n 29, 386.

¹⁶⁶ Biermann and Boas, above n 41, 26 and 28-29.

transformation from relying on voluntary charitable donations to being based on binding contributions ... The contributions could be proportionate to the parties' differentiated responsibilities and their ability to pay ...¹⁶⁷

Finally, although not examined here in any detail, the German Advisory Council on Global Change in its report on the security risks of climate change considers 'environmentally induced migration' in its 'conflict constellation' and suggests the application of the 'common but differentiated responsibility' principle as a way of creating 'an equitable formula for distributing the costs of receiving refugees among the whole international community'.¹⁶⁸

E *Protection and Assistance*

1 *Introduction*

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'),¹⁶⁹ 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:

The worst effects of climate change are likely to be felt by those individuals and groups whose rights protections are already precarious. This is partly coincidence. As it happens, the most dramatic impacts of climate change are expected to occur (and are already being experienced) in the world's poorest countries, where rights protections too are often weak. But the effect is also causal and mutually reinforcing. Populations whose rights are poorly protected are likely to be less well-equipped to understand or prepare for climate change effects; less able to lobby effectively for government or international actions; and more likely to lack the resources needed to adapt to expected alterations of their environmental and economic situation. A vicious cycle links precarious access to natural resources, poor physical infrastructure, weak rights protections and vulnerability to climate change-related harms.

At another level, the close relation between climate change and human rights vulnerability has a common economic root. Rights protections are inevitably weakest in resource-poor contexts. But resource shortages also limit the capacity (of governments as well as individuals) to respond and adapt to climate change. Worse, where governments are poorly

¹⁶⁷ Muller, above n 164, 3.

¹⁶⁸ The report states that '[i]n order to achieve a fair and efficient distribution of costs, this distribution formula should be based on the international legal principle of common but differentiated responsibilities. According to this principle, the principal responsibility for bearing the costs lies with the countries that contribute most to causing global greenhouse gas emissions and that also have the greatest financial resources ... At the same time, because environmentally induced migration is multi-causal, additional criteria should be defined in order to achieve a burden-sharing arrangement that is as fair as possible': German Advisory Council on Global Change, above note 72, 206.

¹⁶⁹ United Nations Refugee Agency (UNHCR), *Guiding Principles on Internal Displacement*, E/CN.4/1998/53/Add.2(1998).

resourced, climate change harms will tend to impact populations unevenly and unequally, in ways that are de facto discriminatory because the private capacity of individuals to resist and adapt differs greatly.¹⁷⁰

Recognition that CCDPs will require protection and assistance addressed to their particular circumstances and special needs can be found in recent proposals for legal solutions to climate change migration. Docherty and Giannini argue for the establishment of protections for the human rights of those who fall within the ambit of their proposed instrument, which pertains only to trans-border displacement. Their convention would ensure a minimum standard of treatment for CCDPs, such treatment to be provided in a non-discriminatory manner. In addition, Docherty and Giannini assert that an instrument for CCDPs should go beyond the Refugee Convention to require humanitarian aid in order to guarantee that basic survival needs are met.¹⁷¹

As opposed to Docherty and Giannini's global convention for transborder displacement with rights protections modelled on the Refugee Convention, Williams emphasises that most displacement will be internal and argues for regionally-based protocols to the UNFCCC; she does not seek to pre-empt the rights which might be contained within those instruments. However, consistent with her emphasis on the predominantly internal nature of climate change displacement, she contends that a regionalised approach could have the benefit of implementing the existing framework for internally displaced persons (IDPs), who have not crossed an internationally recognised state border, into discourse on climate change displacement.¹⁷²

Betaille et al's proposal for an international convention for environmentally displaced people (EDPs) would institute a comprehensive framework of human rights protections consisting of three tiers: global rights for all EDPs; rights for temporary EDPs and rights for permanent EDPs. Under the Betaille et al model, all EDPs would be entitled to rights to information and participation, assistance, water and food aid, housing, health care, juridical personality, to retain the civil and political rights of their State of origin, respect for the family, education and training, work and family unity. In addition, those EDPs that are temporarily displaced would have rights to safe shelter, reintegration, return and prolonged shelter. Further rights for permanently displaced EDPS would include rights to resettlement and nationality.¹⁷³ By contrast, while Biermann and Boas refer to the 'protection' of persons displaced by climate change, they conceptualise that protection as involving the provision of 'international assistance and funding for domestic support and resettlement programs of affected countries that have requested such support'.¹⁷⁴ For Biermann and Boas, the emphasis of a global CCDP instrument is less on the protection of persons outside their own State, and more to do with

¹⁷⁰ International Council on Human Rights Policy, *Climate Change and Human Rights: A Rough Guide* (2008) 1.

¹⁷¹ Docherty and Giannini, above n 29, 378.

¹⁷² Williams, above n 33, 521.

¹⁷³ Betaille et al, above n 59, ch 2.

¹⁷⁴ Biermann and Boas, above n 76, 13.

supporting governments, local communities and agencies in protecting people within their own territory.¹⁷⁵

By extrapolating from existing norms, our Convention would address gaps in the international regime of human rights protections and humanitarian assistance as it currently applies to CCDPs. In a recent submission to the Office of the High Commissioner for Human Rights, the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons concluded that existing human rights norms and the Guiding Principles provide sufficient protection for those forcibly displaced inside their own country where their place of origin has become uninhabitable or been declared too dangerous for habitation. However, there is 'a need to clarify or even develop the normative framework applicable to' situations including persons moving outside their country as a consequence of slow onset disasters or in the wake of designation of their place of origin as a high risk zone too dangerous for human habitation. Further, there is currently no provision at international law for persons leaving 'sinking island states' and moving across internationally recognised state borders.¹⁷⁶ While the proposed Convention provides a general framework for the provision of assistance to CCDPs, regardless of the nature of their displacement, it addresses gaps in existing protections by articulating a normative framework for the protection of those persons displaced across international borders, as well as identifying principles which should apply to the resettlement of persons from 'sinking' small island states (see Part IV, section F below).

Most climate change displacement is likely to occur within state borders.¹⁷⁷ 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 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. Such a mechanism would recognise that in order to adequately address the special needs of CCDPs both broad-based assistance and human rights protections are required.¹⁷⁸

Our Convention would apply to both internal and trans-border displacement. However, unlike the proposals of Biermann and Boas, and Betaille, we take account of the clear distinction that is drawn in international refugee law between refugees and the internally displaced. Refugees must be outside their country of origin and unable or unwilling to take advantage of the protection of that country in order to be eligible for protection and assistance by the international community.¹⁷⁹ By contrast, IDPs who have not crossed an internally recognised state border remain primarily the responsibility of their own nation. The distinction arises primarily from the principles of state sovereignty and non-interference, which are fundamental to the international legal system.¹⁸⁰ Our

¹⁷⁵ Biermann and Boas, above n 41, 26.

¹⁷⁶ Representative of the Secretary General on the Human Rights of Internally Displaced Persons, above n 122, 6.

¹⁷⁷ See Part IV, section A(2) above.

¹⁷⁸ Docherty and Giannini, above n 29, 379.

¹⁷⁹ Guy Goodwin-Gill & Jane McAdam, *The Refugee in International Law* (3rd ed, 2007) 37.

¹⁸⁰ Catherine Phuong, *The International Protection of Internally Displaced Persons*. (1st ed, 2004) 22.

Convention would recognise the principle of state sovereignty and non-intervention by operating within the existing distinction at international law between trans-border and internal displacement.

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 principle that non-discriminatory international assistance should be provided is equally applicable to both categories of displacement.

A Convention for CCDPs will be most effective if it recognises the agency of persons who are displaced by climate change or likely to become so displaced and facilitates regionally and locally-based planning and action. Such an approach also accords with recognition in both human rights and international environmental law of rights to information and public participation.¹⁸¹ The *Rio Declaration on Environment and Development* includes the principle that:

Environmental issues are best handled with the participation of all concerned citizens... At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities ... States shall facilitate and encourage public awareness and participation by making information widely available.¹⁸²

Our Convention would require state parties 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. Rights of information and participation with respect to matters relating to climate change displacement should be equally applicable to persons displaced across State borders as a consequence of global warming.

In addition to the provisions outlined above, 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, as is the case in Betaille's proposal, the Convention we envisage would allow rights to be gradually accrued based on the duration of the displacement. In this way, State

¹⁸¹ *Universal Declaration of Human Rights*, Articles 19 and 21, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71, Articles 19, 22 and 25; International Council on Human Rights Policy, above n 170, 49.

¹⁸² *Rio Declaration on Environment and Development*, above n 163, Principle 10. See also the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, opened for signature 28 June 1998, 2161 UNTS 447 (entered into force 30 October 2001); the *Universal Declaration of Human Rights*, above n 181, Articles 19, 21; and the *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171, (entered into force 23 March 1976), Articles 19, 22, 25.

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, as discussed in Part IV, section F below.

2 Internal Displacement

(a) Internal Displacement at International Law

According to Hathaway, IDPs are excluded from the refugee definition firstly, because the problem of internal displacement remains the primary responsibility of the state and secondly, because intervention would constitute a violation of national sovereignty as the problems raised by internally displaced persons are invariably part of the internal affairs of state.¹⁸³ Rather than a binding convention or United Nations Security Council resolution, protection and assistance to IDPs is provided through the Guiding Principles.¹⁸⁴

The Guiding Principles were developed by the Special Representative of the Secretary General on the human rights issues related to internally displaced persons and submitted to the Human Rights Commission in 1998.¹⁸⁵ They 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'.¹⁸⁶ The Guiding Principles recognise that national authorities have the primary duty and responsibility to provide protection and assistance to IDPs. Concerns regarding sovereignty and unwanted action by international agencies were addressed through the requirement that international intervention be requested by the Secretary-General or competent principal organs of the UN and consented to by the State concerned.¹⁸⁷

The Guiding Principles are not binding,¹⁸⁸ but have been recognised by the UN General Assembly as 'an important international framework for the protection of internally displaced persons'.¹⁸⁹ They are expressed to be reflective of and consistent with international human rights law and international humanitarian law.¹⁹⁰ It is claimed that the Guiding Principles do not extend existing humanitarian or human rights principles, but rather codify them and clarify their application to

¹⁸³ James Hathaway, *The Law of Refugee Status*, (1st ed, 1991) 30 -1 cited in Phuong above n 180, 22.

¹⁸⁴ UNHCR, above n 169.

¹⁸⁵ Ibid.

¹⁸⁶ See also the *London Declaration of International Law Principles on Internally Displaced Persons*, International Law Association, *Declaration of International Law Principles on Internally Displaced Persons*, 29 July 2000, available at: <http://www.unhcr.org/refworld/docid/42808e5b4.html> at 18 December 2009.

¹⁸⁷ Williams, above n 33, 511, referring to United Nations General Assembly Resolutions 47/105, UN Doc A/RES/47/105 (16 December 1992); 48/116, UN Doc A/RES/48/116 (24 March 1994), UN Doc A/RES/49/169 (24 February 1995).

¹⁸⁸ The Guiding Principles are neither a convention nor a UN General Assembly declaration.

¹⁸⁹ United Nations General Assembly Resolution 60/1, UN Doc A/RES/60/1 (24 October 2005).

¹⁹⁰ United Nations Refugee Agency (UNHCR), *Guiding Principles on International Displacement*, E/CN.4/1998/53/Add.2(1998).

situations of internal displacement and natural disaster.¹⁹¹ It is therefore possible to 'cite a multitude of existing legal provisions for almost every principle' in the Guiding Principles.¹⁹² The result, suggests international legal scholar, Catherine Phuong, is that the status of the Guiding Principles is 'confusing' at international law:

On the one hand, [the Guiding Principles are] clearly a non-legally binding instrument to which state consent to be bound has never been expressed. On the other hand ... the Guiding Principles are a restatement of binding norms contained in existing international treaties and/or customary international law.¹⁹³

It has been argued that the non-binding status of the Guiding Principles is their most significant weakness.¹⁹⁴ States cannot be held accountable if they disregard the Guiding Principles and therefore the Guiding Principles cannot be invoked in legal proceedings at the domestic level.¹⁹⁵ However, Kalin asserts that:

One should, however, not overestimate this weakness as it is always possible to invoke the hard law that lies behind the Guiding Principles where necessary. The Representative's experience has shown that it is much easier to negotiate with governments if the questions of violations does [sic] not loom in the background but, instead, problems can be approached by looking at what kind of guidance is provided by international standards.¹⁹⁶

The dilemma represented by the 'soft law' status¹⁹⁷ of the Guiding Principles is that while their flexibility as to the introduction of substantive commitments can result in tokenistic policies at the national level, it is precisely their lack of formal legal status which enables their intervention in the first place, while creating the potential for the development of 'bottom up' national policies and customary law norms.¹⁹⁸

(b) Protection and Assistance Provisions in the Convention

Our Convention proposal draws on a range of international law frameworks and precedents, including the underlying logic of the Guiding Principles and the distinction between internal and trans-border displacement in refugee law. It would provide a framework for the provision of protection and assistance to persons internally displaced due to climate change. It adopts a model in

¹⁹¹ Phuong, above n 180, 66. Phuong argues, however, that in some cases the Guiding Principles progressively develop internal law, such as including a prohibition on *non-refoulement* for the internally displaced.

¹⁹² Walter Kalin, 'How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework', Brookings/CUNY Project on Internal Displacement, 19 December 2001, 6.

¹⁹³ Phuong, above n 180, 73.

¹⁹⁴ Ibid, 66.

¹⁹⁵ Kalin, above n 192, 7.

¹⁹⁶ Ibid.

¹⁹⁷ The Guiding Principles do not constitute typical soft law in the sense of recommendations that rest on the consensus of States: Ibid, 6.

¹⁹⁸ Williams, above n 33, 511-512.

which the primary responsibility for CCDPs rests with their own State. However, in recognising that climate change displacement is a global problem and a shared responsibility, our Convention draws on 'the accepted legal principle of international cooperation and assistance' in acknowledging the duty of the international community to assist in the provision of protection and aid in respect of climate change displacement occurring within State borders.¹⁹⁹

Our Convention 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.²⁰⁰ Thus, international refugee law incorporates an 'ambulatory principle ... obliging States to exercise care in their domestic affairs in light of other States' legal interests, and to cooperate in the solution of refugee problems'.²⁰¹ 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.²⁰² Further, as Docherty and Giannini argue, the instrument should require the home State to help prevent a refugee crisis, by either attempting to eliminate the need for migration or by preparing to handle it in an organised way. Such a requirement is consonant with the international law principle that states are responsible for preventing forced migrations.²⁰³

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. The international and customary law right to offer institutional protection would also be applicable.²⁰⁴

Of relevance to the proposed Convention is the conclusion underpinning the formulation of the Guiding Principles that IDPs are already entitled as individuals to protection and assistance under a range of human rights and humanitarian law instruments.²⁰⁵ Thus, as the Inter-Agency Standing Committee Operational Guidelines on Human Rights and Natural Disasters states:

Persons affected by natural disasters, including those displaced by such events, remain, as residents and most often citizens of the country in which they are living, entitled to the protection of all guarantees of international human rights subscribed to by the State concerned. They are also entitled to, if applicable, the protection of the guarantees of international humanitarian law or customary international law. People do not lose, as a

¹⁹⁹ Docherty and Giannini, above n 29, 383.

²⁰⁰ Ibid, 380.

²⁰¹ Guy Goodwin-Gill and Jane McAdam, above n 179, 3; Docherty and Giannini, above n 29, 380.

²⁰² This obligation is drawn from United Nations Refugee Agency (UNHCR), *Guiding Principles on International Displacement*, E/CN.4/1998/53/Add.2 (1998), Principle 3.

²⁰³ Docherty and Giannini, above n 29, 381.

²⁰⁴ See Nils Geissler, 'The International Protection of Internally Displaced Persons' (1999) 11 *International Journal of Refugee Law* 451, 471.

²⁰⁵ 'Internally Displaced Persons, Report of the Representative of the Secretary-General, Mr Francis M Deng, Compilation and Analysis of Legal Norms' UN Doc E/CN.4/1996/52/Add.2 (1995).

consequence of their being displaced or otherwise affected by the disaster, the rights of the population at large.²⁰⁶

The United Nations High Commissioner for Human Rights notes that

[p]ersons affected by displacement within national borders are entitled to the full range of human rights guarantees by a given State, including protecting against arbitrary or forced displacement and rights related to housing and property restitution for displaced persons.²⁰⁷

An area of ambiguity in the application of the obligations codified in the Guiding Principles arises in relation to the question of whether slow-onset disasters due to climate change constitute 'forced displacement'.²⁰⁸ As discussed at Part IV, section B, our Convention rests on an understanding of forced migration that encompasses gradual environmental degradation due to climate change.

As well as being responsive to existing principles of international law, our Convention would be targeted to the particular needs and characteristics associated with persons internally displaced due to climate change. As Biermann and Boas argue, CCDPs are not displaced as a consequence of political, religious, ethnic or otherwise discriminatory persecution or violence. Rather, in principle, they continue to enjoy State protection.²⁰⁹ It was similarly argued with respect to the inclusion of the 'man made or natural disaster criterion' in the Guiding Principles that persons displaced by natural disasters are generally likely to face problems associated with economic and social rights, rather than those associated with more conventional refugee situations.²¹⁰ Further, government authorities usually routinely appeal for international assistance for the victims of natural disasters, rather than attempting to hinder non-discriminatory provision of aid, as is more likely to occur in cases of civil war and internal strife.²¹¹ As Biermann and Boas also contend,

²⁰⁶ Inter-Agency Standing Committee, *Protecting Persons Affected by Natural Disasters: IASC Operational Guidelines on Human Rights and Natural Disasters*, June 2006, 9. Note that international human rights treaties, and most national constitutions, typically allow for the derogation of many human rights in times of emergency: International Council on Human Rights Policy, above n 170, 5. Some human rights, however, are non-derogable under any circumstances, including the right to life, the prohibition of cruel, inhuman and degrading treatment or punishment, the prohibition of slavery and the prohibition of the retroactive application of penal law. Difficulties also arise where states have not ratified the relevant treaties or have invoked limitation clauses. For a detailed description of gaps and areas of ambiguity in international law concerning IDPs see Geissler, above n 204; 'Internally Displaced Persons, Report of the Representative of the Secretary-General, Mr Francis M Deng, Compilation and Analysis of Legal Norms' UN Doc E/CN.4/1996/52/Add.2 (1995) [410] – [415].

²⁰⁷ 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*, A/HRC/10/61, 15 January 2009, 19.

²⁰⁸ Ibid.

²⁰⁹ Biermann and Boas, above n 76, 11.

²¹⁰ Geissler, above n 204, 455-6.

²¹¹ 'Internally Displaced Persons, Report of the Representative of the Secretary-General, Mr Francis M Deng, Compilation and Analysis of Legal Norms' UN Doc E/CN.4/1996/52/Add.2 (1995) [368]. This generalisation does not always hold true, as was demonstrated in May 2008 when the Burmese government obstructed the provision to its citizens of international aid after areas of the country had been devastated by Cyclone Nargis. However, given that the purpose of the proposed Convention is

[t]he protection of climate refugees is therefore essentially a development issue that requires large-scale, long-term planned resettlement programs for groups of affected people, mostly within their own territory'.²¹²

Therefore, 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.²¹³

Nevertheless, displacement makes people vulnerable, including to infractions and abuses of their human rights.²¹⁴ 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'.²¹⁵ 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. As discussed at the introduction to this Part IV, section E, 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. The principles of information dissemination, public participation and civil society involvement would assist in ensuring that adaptive solutions were 'bottom up', generated by communities in order to maximise their effectiveness and appropriateness.

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

to address a gap in international law in relation to a certain category of persons, the proposal presented here does not provide the appropriate forum in which to institute or extend general innovations in international law to facilitate forcible interventions by the international community on humanitarian grounds in order to address the situation exemplified by Burma.

²¹² Biermann and Boas, above n 76, 11.

²¹³ Biermann and Boas, above n 41, 26.

²¹⁴ Geissler, above n 204, 452; Phuong, above n 180, 43.

²¹⁵ Docherty and Giannini, above n 29, 378; *Convention on Cluster Munitions*, opened for signature 3 December 2008 (see <<http://www.clustermunitionsdublin.ie/pdf/ENGLISHfinaltext.pdf>> at 19 December 2009).

migration is best understood as a form of adaptation to climate change.²¹⁶ 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.

3 *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'.²¹⁷ They justify borrowing from the 1951 Convention as it provides an international law precedent 'which is as applicable to climate change refugees as to traditional refugees, because it is well-established and difficult to challenge'.²¹⁸

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, analogously to the 1951 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.²¹⁹ 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 1951 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

²¹⁶ Brown, above n 16, 25.

²¹⁷ Docherty and Giannini, above n 29, 376.

²¹⁸ Ibid.

²¹⁹ Each of the rights and principles enunciated here are explored in greater depth in Docherty and Giannini, above n 29, 376-8. James Hathaway explains that under the Refugee Convention, 'the standard of treatment owed to refugees is defined through a combination of absolute and contingent criteria. A few rights are guaranteed absolutely to refugees and must be respected even if the host government does not extend these rights to anyone else, including its own citizens. More commonly, the standard for compliance varies as a function of the relevant treatment afforded another group under the laws and practices of the receiving country': *The Rights of Refugees Under International Law* (1st ed, 2005) 155. As is the case with the Refugee Convention, rights would be accorded under a Convention for CCDPs on both an absolute and contingent basis.

change would threaten the refugee's life or ability to survive'.²²⁰ To Docherty and Giannini's proposal we would add a principle of proximity that requires the least separation of persons from their cultural area.²²¹

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. Hathaway describes the operation of the 1951 Convention as follows:

Most fundamentally, the refugee rights regime is not simply a list of duties owed by state parties equally to all refugees. An attempt is instead made to grant enhanced rights as the bond strengthens between a particular refugee and the state party in which he or she is present. While all refugees benefit from a number of core rights, additional entitlements accrue as a function of the nature and duration of the attachment to the asylum state.²²²

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.²²³

We concur with Docherty and Giannini that persons fleeing climate change-induced disasters or degradation require humanitarian aid as well as human rights protections. Any instrument for CCDPs should 'go beyond the Refugee Convention to guarantee that basic survival needs are met'.²²⁴ 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. Provision should be made for the international community to render assistance to host states in the protection of the rights afforded under the proposed Convention, where necessary.²²⁵

F *The Plight of Small Island States*

Rising sea levels and the submersion of islands are perhaps the most publicly recognisable consequences of climate change. The populations of small island states may not only be displaced but will likely see the disappearance of their homelands.²²⁶ As a result, although they will amount

²²⁰ Docherty and Giannini, above n 29, 377.

²²¹ Ibid, 398.

²²² Hathaway, above n 219, 155

²²³ Docherty and Giannini above n 29, 369.

²²⁴ Ibid, 378.

²²⁵ The mechanisms by which such assistance would be provided are discussed [*reference to DH's section*].

²²⁶ A number of legal considerations are raised here. The background paper submitted by the Representative of the Secretary General on the Human Rights of Internally Displaced Persons, 'Displacement Caused by the Effects of Climate Change', above n 176, considers that those Islanders who move abroad will be left in 'a legal limbo'. It states that 'it is also unclear as to whether provisions on statelessness would apply as it remains to be seen whether those affected become stateless

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. Indeed, just prior to the UNFCCC climate change conference in Copenhagen in December, 2009, the Alliance of Small Island States (AOSIS) issued a communiqué in which it demanded increased financing for the mitigation of climate change. The AOSIS made it clear that failure by developed states to act on these demands would be viewed as 'benign genocide'.²²⁷ With its slow-onset focus, our Convention is well suited to render the international assistance required to accommodate the very particular needs of small island state CCDPs.

Small island states have been identified by the IPCC as particularly vulnerable to the effects of climate change.²²⁸ 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'.²²⁹ This vulnerability is, however, coupled with their low emissions, creating a situation whereby some of the smallest contributors to climate change face the largest risk of displacement. In this way, the plight of small island state populations symbolises the imperative of ensuring that there is an effective international framework for the protection of, and provision of assistance to, CCDPs.

The very real prospect of 'entire nations disappearing'²³⁰ 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 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 in relation to climate change displacement, such agreements negotiated under the aegis of the CCDO, with involvement of CCDO regional committees. These principles are discussed below.

persons under international law. These persons do not become stateless as long as there is some remaining part of their territory of their State, and even where a whole country disappears it is not certain that they become stateless in the legal sense. Statelessness means to be without nationality, not without state'. In any event, the international law of statelessness does not provide adequate protection (ibid, 5).

²²⁷ Linda Mottram, 'Climate change negligence will lead to "benign genocide"', ABC News Radio, 22 September 2009 <<http://www.abc.net.au/news/stories/2009/09/22/2693588.htm>> at 20 December 2009.

²²⁸ McAdam, above n 21, 10.

²²⁹ Ibid.

²³⁰ Docherty and Giannini, above n 29, 355-356.

1 Proximity

Betaille et al suggest 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.²³¹ Proximate resettlement of small island state nationals may be particularly appropriate given their strong connections to both land and seascapes. As such, developed nations including Australia and the United States may be preferential host states for small island state nationals. A principle of proximate resettlement should guide bilateral agreements between AOSIS states and developed states in the region.

2 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

All 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.²³²

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 referring to two distinct elements of relocation: (a) *when* will people abandon their territories; and (b) *where* will people choose to resettle.²³³ First, the proposed Convention recognises that small island state nationals may want to remain in their home states for as long as it is practicable. This is certainly suggested by the AOSIS's calls for further financing to mitigate the effects of climate change. Anthropological studies have also indicated that small island state nationals desire to remain, despite the impending threat.²³⁴ 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 to this discussion, 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. The preferences of small island state CCDPs should inform agreements between State parties as to the location of resettlement.

²³¹ Ibid, 398.

²³² *United Nations International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), Article 1.

²³³ It is probable that the former would operate on an individual basis while the latter would be on a population basis.

²³⁴ C Mortreux and J Barnett, 'Climate change, migration and adaptation in Funafuti, Tuvalu' (2009) 19 *Global Environmental Change* 105-112.

3 *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',²³⁵ 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. The Refugee Convention accords refugees treatment 'at least as favourable as that accorded to their nationals with respect to freedom to practice their religion and freedom as regards the religious education of their children'.²³⁶ Significantly, the Refugee Convention here provides the standard of protection to be that of a national (thereby pointing to its importance in the eyes of the international community). It also provides for intergenerational transmission, and the non-interference of this transmission. This extension is further supported by the Refugee Convention's provision of a right of association,²³⁷ freedom of movement²³⁸ and a right to the same protection as is accorded to nationals of that country of their cultural and intellectual property (such as inventions, designs or models, trade marks, trade names, literary, artistic, and scientific works).²³⁹ Betaille et al also argue that any international instrument for environmental refugees should provide for populations to 'constitute themselves collectively and maintain their collective identity'.²⁴⁰

As well as the Refugee Convention, there exists another international agreement for the protection of culture which might be usefully deployed in the context of small island states, the *Convention for the Safeguarding of the Intangible Cultural Heritage*. This Convention was adopted at the General Conference of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) in October 2003 and has 118 State parties. Its purpose is:

- (a) to safeguard the intangible cultural heritage;
- (b) to ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned;
- (c) to raise awareness at the local, national and international levels of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof;
- (d) to provide for international cooperation and assistance.²⁴¹

²³⁵ Docherty and Giannini, above n 29, 375.

²³⁶ Refugee Convention, note 43 above, Article 4.

²³⁷ Ibid, Article 15.

²³⁸ Ibid, Article 29.

²³⁹ Ibid, Article 14.

²⁴⁰ Betaille et al, above n 59, Article 8(2).

²⁴¹ *Convention for the Safeguarding of the Intangible Cultural Heritage*, Article 1, opened for signature 17

The *Convention for the Safeguarding of the Intangible Cultural Heritage* defines 'intangible cultural heritage' as the

practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage.²⁴²

Intangible cultural heritage is recognised as intergenerational and closely tied to a population's identity. Safeguarding this heritage involves

measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, *preservation*, protection, promotion, enhancement, transmission... as well as the revitalization of the various aspects of such heritage.²⁴³

Globalisation is sometimes referred to as a threat to intangible cultural heritage because its processes, such as the rapid transfer of information, tend towards the homogenisation of different cultures. Climate change could similarly be conceived as a threat to intangible cultural heritage. Indeed, rising sea levels attributed to climate change may force populations to relocate from disappearing island nations. In these circumstances, CCDPs risk losing a unique way of life (their intangible culture) which is no longer preserved by the laws and institutions of their home state. People, rather than physical artefacts, serve to transmit intangible culture. As such, the legal protection of CCDPs' cultural autonomy may be regarded as a mechanism of preservation under the UNESCO Convention. Safeguarding intangible culture in the circumstances faced by small island states, therefore, can further support the relocation of entire populations and social groups.

G Civil Society in Negotiation of the Convention

As discussed, like Docherty and Giannini,²⁴⁴ we envisage civil society (non-governmental organisations, business and other professional associations, advocacy groups, and other non-profit organisations and coalitions) playing a significant role under the Convention, both generally in the context of displacement and specifically in terms of the operation of CCDIGs. We also envisage a significant role for civil society in the negotiation of the Convention and in the design of the framework within which it would operate; recent experience suggests that the role of civil society can be vital not only in the process of drafting and negotiating a treaty but also in securing its ratification.

The 'Ottawa Process', launched in October 1996, the main elements of which included a

October 2003, MISC/2003/CLT/CH4 (entered into force 20 April 2006).

²⁴² Ibid, Article 2 (1).

²⁴³ Ibid, Article 2 (3).

²⁴⁴ See Docherty and Giannini, above n 29, 398-400, for a detailed consideration of the role of civil society.

government-civil society partnership, non-traditional diplomacy with an extensive role for NGOs, a focus on shared humanitarian aims and not narrow national interests, and the intense dedication of numerous individuals inside and outside of government,²⁴⁵

led to the signing of the Mine Ban Treaty²⁴⁶ just over a year later; the treaty entered into force on 1 March 1999. It 'became binding international law more quickly than any other multilateral disarmament or humanitarian law instrument'.²⁴⁷ The work of the Mine Ban Treaty continues to be driven by both government and civil society.

The 'Oslo Process', based on the Ottawa Process, has been similarly successful, and resulted in the *Convention on Cluster Munitions* in May 2008. The first global conference on cluster munitions had been held in Oslo just over a year earlier, in February 2007. A main feature of the Oslo Process was the active participation in discussions and final negotiations of civil society, represented by UN organisations, the International Committee of the Red Cross and the Cluster Munitions Coalition. Over 100 civil society and NGO representatives participated in the February, 2007 meeting. 'NGOs were given high visibility speaking slots and intervened on the same basis as states',²⁴⁸ and draft treaty texts were developed in consultation with NGOs.

It is clear from an examination of the Ottawa and Oslo processes that the participation of states and civil society was vital. These processes, it seems to us, also provide useful models for the inclusion of not only civil society but also those states most at risk from the effects of climate change, most vulnerable to the displacement of populations, such as small island states, in the negotiation and formation of the Convention. The Ottawa Process demonstrated that

change is most likely to be effected through concerted action. The mine ban movement also demonstrated that it is possible for small and medium size countries, acting in concert with civil society, to provide global leadership and achieve major diplomatic results, even in the face of opposition from major powers. It showed that it is possible to work outside of traditional diplomatic forums, practices, and methods and still achieve success multilaterally.²⁴⁹

²⁴⁵ Stephen D Goose, Mary Wareham and Jody Williams, 'Banning Landmines and Beyond' in Jody Williams, Stephen D Goose and Mary Wareham (eds), *Banning Landmines: Disarmament, Citizen Diplomacy, and Human Security* (2008) 6.

²⁴⁶ *The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction*, opened for signature 18 September 1997, 36 ILM 1507 (entered into force 1 March 1999).

²⁴⁷ Alexander Kmentt, 'A Beacon of Light: The Mine Ban Treaty Since 1997', in Jody Williams, Stephen D Goose and Mary Wareham (eds), above n 245, 18.

²⁴⁸ Stephen D Goose, 'Cluster Munitions in the Crosshairs: In Pursuit of a Prohibition', in Jody Williams, Stephen D Goose and Mary Wareham (eds), above n 245, 227.

²⁴⁹ Jody Williams and Stephen D Goose, 'Citizen Diplomacy and the Ottawa Process: A Lasting Model?' in Jody Williams, Stephen D Goose and Mary Wareham (eds), above n 245, p 182.

H *Implementation and Management*

In their 2007 paper 'Control, Adapt or Flee: How to Face Environmental Migration', Renaud et al propose the implementation of a number of policy suggestions to address the relationship between environmental change and forced migrations. Their policy suggestions include programmes to achieve a better understanding of the cause and effect between environmental degradation and forced migration, and a framework to recognise environmental refugees either in existing environmental treaties or in a separate convention.²⁵⁰ Further,

individuals who are clearly displaced by environmental degradation processes ... should be protected adequately by an international mechanism that would afford them certain rights. Bilateral agreements ... should be systematised ... for the most pressing environmental degradation issues.²⁵¹

Renaud et al also propose an international mechanism to provide aid to environmental refugees, especially in the context of the displacement of whole communities, and the creation of institutions to assist the flux of forced environmental migrants nationally and internationally.²⁵²

McAdam notes that, despite calls such as those from Renaud and his co-authors for 'a multifaceted, or cooperative or international approach, the literature does not spell out what this would look like or how it would be achieved'.²⁵³ Detailed proposals that do set out mechanisms to address displacement ignore or don't deal in detail with important facets. Again, that by Docherty and Giannini, for example, ignores what will very likely be the most common form of climate change displacement – that which occurs internally within a country – as 'beyond the scope' of their study.²⁵⁴

Our proposal for a convention for CCDPs does deal with internal displacement. It does, as Renaud et al suggest, propose bilateral agreements. It does adopt a multifaceted, international approach, and we do spell out what such a convention would look like.

The International Organization for Migration sets out four principles for effective environmental migration management. They are proactive policy and early action; comprehensive and coherent policies; bilateral and regional cooperation; and multi-stakeholder partnerships involving civil society.²⁵⁵ Our Convention implements these principles.

²⁵⁰ Renaud et al, above n 121, 34.

²⁵¹ Ibid.

²⁵² Ibid, 35.

²⁵³ McAdam, above n 21, 28.

²⁵⁴ Docherty and Giannini, above n 29, 370. Docherty and Giannini do, however, welcome in-depth analysis, research and examination regarding the issue of climate change internally displaced persons: *ibid*, 360, note 65.

²⁵⁵ International Organization for Migration, *Discussion Note: Migration and the Environment*, MC/INF/288, Ninety-Fourth Session, 1 November 2007, 7.

V SUMMARY OF CONVENTION

We propose in this article a single, stand alone convention, which is global in scope; parties to it would include both developed and developing states. Our Convention would encompass those displaced internally (and most climate change displacement is likely to occur within state borders) and those who cross international borders, either temporarily or permanently, with a particular focus on those displaced as a result of small island states becoming uninhabitable. It would create an institutional architecture for designating a particular population as CCDPs; we propose *en masse* designations of CCDP status through a process of request and determination by states and Convention processes. The scope of the Convention encompasses displacement as a result of both sudden climate change events, or impacts, and slow-onset, gradual displacement.

Our Convention would create a Climate Change Displacement Organisation (CCDO) with obligations for developed and developing state parties to the Convention and for 'home' and 'host states', together with civil society. It sets out in detail the architecture of the CCDO and the operation of its constituent parts. It also sets out a role for regional cooperation and multidisciplinary collaborations. One of the CCDO bodies contemplated by the Convention is a Climate Change Displacement Fund. Under the Convention developed state parties would make mandatory financial contributions to that Fund. Such contributions would be made on the basis of parties' common but differentiated responsibilities.

A general framework for the provision of CCDP assistance, as well as addressing gaps in the international regime of human rights protections and humanitarian assistance as it currently applies to CCDPs, would be provided under our Convention. The instrument we propose would operate within the existing international law distinction between internal and trans-border displacement. It would institute a mechanism for the provision of principled, non-discriminatory assistance to CCDPs displaced within national borders. Persons migrating across state boundaries due to climate change would be entitled to a set of rights modelled on the Refugee Convention.

Finally, our Convention contemplates the provision of pre-emptive resettlement to those most at risk in terms of the impacts of climate change. Provision of assistance under the Convention would, thus, have an adaptive quality.

It has been suggested that Australia should take the lead in international efforts to develop a framework for responding to climate change displacement. The broader region in which Australia is situated accounts for 60% of the world's population; it's a region that will be significantly affected by the effects of climate change, perhaps most dramatically by sea level rise. As Corlett notes, to take such a lead 'is not to concede that mitigation and adaptation efforts are beyond us'. Rather,

planning for a future of mass displacement due to climate change gives us the opportunity – before millions of people are on the move throughout the world because of climate change; before we, and other nations, become tempted to erect walls to keep them at bay; before we start to say as though as a reflex that “we will decide who comes and the circumstances

in which they come” – to develop frameworks and institutions that might not only be politically realistic, but also based on principles that promote human rights and dignity.²⁵⁶

VI CONCLUSION: 'WILL THE TIGER GET ME?'

Our Convention is, again, in many ways prospective. It would establish a framework within which adaptive assistance to those vulnerable to climate change impacts could be provided. As Boas and Biermann state, the protection of CCDPs requires large-scale, long-term planning.²⁵⁷ This in itself presents challenges because, for example, like many others,

Bangladeshis think mainly of tomorrow. Will there be enough rice? Enough clean drinking water? Will the tiger get me? All of us have the same human tendency to plan for the next day, next week, next year. Projecting ... developments 10, 20, 50 years into the future is a chancy business, as imprecise a science in its way as the modelling of climate change. But those are undoubtedly the terms, and the timescales, on which we now have to think.²⁵⁸

²⁵⁶ David Corlett, *Stormy Weather: The Challenge of Climate Change and Displacement* (2008) 87.

²⁵⁷ Biermann and Boas, above n 76, 11.

²⁵⁸ Black, 'The Gathering Storm', above n 5.