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An Insecure Climate for Human Security? Climate-Induced Displacement and International Law

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I. INTRODUCTION

Around the globe, large numbers of people face a credible risk of displacement due to climate change. Island nations across the Central Pacific, South Pacific, and the Indian Ocean, as well as large tracts of land from Bangladesh to Egypt, risk partial or complete submergence by the middle of this century. Shoreline erosion, coastal flooding, increasing salinity and the particular vulnerability of small islands to rising sea levels and increased severe weather events¹ compromise their continued habitability, impacting upon agricultural viability, vital infrastructure and services, the stability of governance, and ultimately human settlement.²

Whether, and how, people displaced by climate change are protected by international law is unclear. When faced with a novel challenge such as climate-induced displacement, international law might be brought to bear in different ways. To borrow from Higgins (writing in the context of terrorism), whether one regards climate-induced displacement ‘as new international law, or as the application of a constantly developing international law to new problems—is at heart a jurisprudential question’.³

On the one hand, existing international legal principles might be applied to the situation of those displaced by climate change, regardless of any special characteristics of that affected group. For example, human rights law and international humanitarian law protections apply to all irrespective of whether one is displaced or at home; and there may (or may not) be a compelling policy interest in avoiding the proliferation and fragmentation of legal regimes developed for increasingly specialised sub-groups.

Alternatively, existing legal principles might be elongated, adapted, or particularised to respond to new circumstances, whether through creative interpretation or extrapolation by analogy. Thus, for example, norms developed to protect refugees have been transplanted across to address the similar situation (but for the fact of crossing an international border) of some internally displaced persons;⁴ while women, children, and the disabled are entitled to specialised treaty rights regimes at the same time as they fall within the protection of the general ‘human’ rights treaties such as the twin international covenants of 1966.⁵

A third strategy is to recognise the deficiency of existing legal norms when faced with a novel and pressing challenge, and to develop new norms in response—a route which is normally more difficult for lack of political will. That approach evidently carries risks, including that any agreement by States will reflect a lowest common denominator approach; or that any new standards will not be matched by the will or capacity to implement them (carrying legitimacy costs for the law as whole, and raising false hopes and expectations among affected groups); or conversely that efforts (and resources) favouring those displaced by climate change may dilute or overshadow existing legal standards and organisational mandates providing for the protection of other—perhaps more—vulnerable groups.

The latter concern, for instance, has been frequently expressed by the International Committee of the Red Cross in seeking to defend its treaty mandate to protect all civilians affected by armed conflict from any specialised regime which might seem to favour only those civilians who have been internally displaced⁶—some of whom, if they

¹ G. C. Hegerl and others, ‘Understanding and Attributing Climate Change’, in S. Solomon and others (eds), *Climate Change 2007: The Physical Science Basis: Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 2007); IPCC, November 2007; N. Stern, *The Economics of Climate Change: The Stern Review* (Cambridge: Cambridge University Press, 2007) vi–ix.

² N. Mimura and others, ‘Small Islands’ in M. L. Parry and others (eds), *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 2007), 689.

³ R. Higgins, ‘The General International Law of Terrorism’ in R. Higgins and M. Flory (eds.), *Terrorism and International Law* (London: Routledge, 1997), 13.

⁴ See Guiding Principles on Internal Displacement, UN Doc. E/CN.4/1998/53/Add.2 (11 February 1998).

⁵ See respectively Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC); Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, not yet in force); International Covenant on Civil and Political Rights (adopted 16 Dec 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

⁶ International Committee of the Red Cross, ‘ICRC Position on Internally Displaced Persons (IDPs), May 2006.

have found safety elsewhere in their country, may well be at less risk than those who remain at home but are caught up in the midst of hostilities. Equally, it is conceivable that those unable to move away from the negative effects of climate change—whether due to poverty, insecurity, disability, infirmity, or other factors—may well be in need of more assistance than those who are more mobile and better able to establish homes and livelihoods elsewhere.⁷

Those displaced by climate change are plainly entitled to enjoy the full range of civil, political, economic, social, and cultural rights set out in international and regional human rights treaties and customary international law,⁸ along with relevant protections stemming from humanitarian law and accruing indirectly from international environmental law. For the moment, however, those displaced by climate change are not yet recognised in international law as an identifiable group whose rights are expressly articulated,⁹ or as a formal legal category of people in need of special protection.

This paper first outlines the phenomenon of climate-induced displacement, with a focus on displacement from small island States (particularly in the Pacific), on which the impacts of climate change are well documented and keenly felt¹⁰ (although the

challenges manifested there have parallels in vastly different contexts).¹¹

The paper next reviews how existing international law applies to those displaced or at risk of displacement from the effects of climate change. In doing so, it highlights the gaps or limitations in the relevant applicable regimes of international refugee law, human rights law, humanitarian law, and environmental law. Attention is given to the prospects for legal protection in three different phases: pre-displacement (as rights are increasingly compromised and degraded); the moment of displacement and the upheaval which accompanies it; and post-displacement (in terms of what rights and legal status attach to displaced persons and what durable solutions are available).

Having identified the limitations of existing international law in responding to the needs of those displaced by climate change, this paper then focuses on whether the emerging concept of ‘human security’ could provide a useful framework for identifying and analysing the rights and interests at risk and for crafting responses to those risks. Viewing climate-induced displacement through a human security lens may bring significant strategic advantages, not least in helping to mobilise international action in support of the displaced, in holistically conceptualising the needs of the displaced, and in supplying flexible political solutions which can respond to immediate needs and provide much-needed domestic legitimation for the reception of an exceptional category of foreigners who fall outside the contours of regular migration programmes.

On the other hand, a ‘human security’ approach may also counter-productively displace and undermine binding legal protections, by substituting human rights standards and approaches for the discretionary, political ‘human security’

⁷ As a report prepared for the International Organization for Migration (IOM) correctly observed, ‘the ability to migrate is a function of mobility and resources (both financial and social)’, thus ‘the people most vulnerable to climate change are not necessarily the ones most likely to migrate’: O. Brown, ‘Migration and Climate Change’, IOM Migration Research Series No. 31 (Geneva: International Organization for Migration, 2008), 9.

⁸ Since States are obliged to respect their human rights obligations with respect to all people within their territory or jurisdiction: see *Lopez Burgos v. Uruguay*, Communication No. R.12/52 (1981); Human Rights Committee, ‘General Comment 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (21 April 2004), para 10; Concluding Observations of the Human Rights Committee: Israel, UN Doc. CCPR/C/79/Add.93 (18 August 1998) para 10; Concluding Observations of the Human Rights Committee: Israel, UN Doc. CCPR/CO/78/ISR (21 August 2003) para 11.

⁹ Cf women, children, refugees, indigenous peoples, migrant workers, stateless people.

¹⁰ See eg Mimura and others, ‘Small Islands’; J. Barnett and W. N. Adger, ‘Climate Dangers and Atoll Countries’, *Climatic Change*, 61 (2003), 321; N. Myers, ‘Environmental Refugees in a Globally Warmed World’, *BioScience*, 43 (1993), 752. Nevertheless, further observational data is still needed, since many of the projections are based on the IPCC’s first two studies based on simplistic scenarios (Mimura and others, ‘Small Islands’, 711), and understandings of adaptive capacity and adaptation options remain relatively underdeveloped: Mimura and others, ‘Small Islands’, 712.

¹¹ See eg Petition to the Inter American Commission on Human Rights Seeking Relief from Violations resulting from Global Warming caused by Acts and Omissions of the United States (7 December 2005) http://www.earthjustice.org/library/legal_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf; A. J. Dugmore, C. Keller and T. H. McGovern, ‘Have We Been Here Before? Climate Change, and the Contrasting Fates of Human Settlements in the Atlantic Islands’, Human Security and Climate Change, International Workshop, Asker, 21–23 June 2005; M. Mortimore, *Adapting to Drought: Farmers, Famines and Desertification in West Africa*, (Cambridge: Cambridge University Press, 1989).

agenda. The form and content of a human security approach in a given situation is shaped by the political choices of powerful States and driven by the preferences and priorities of donors and international agencies—an agenda which is accordingly negotiable, highly variable, and likely to generate gaps in protection. In an area that engages highly controversial questions of migration and border control for receiving States, pursuing a human security approach to climate induced-displacement is open to considerable manipulation in the service of national immigration priorities and parochial domestic political confrontations about the admission of foreigners.¹²

II. THE RISK OF CLIMATE-INDUCED DISPLACEMENT

Almost 20 years ago, the UN's Intergovernmental Panel on Climate Change (IPCC) warned that the gravest effects of climate change would likely be on human migration, with millions of people uprooted by shoreline erosion, coastal flooding, and agricultural disruption.¹³ The impacts of climate change on habitat are being felt in different ways around the world. Rising sea levels are threatening the very existence of small island States, while Inuit communities in North America and Greenland fear displacement due to melting ice.

Yet despite renewed concerns this century, underscored by increasingly compelling scientific data,¹⁴ climate-induced displacement has remained virtually unstudied by international lawyers. Existing academic literature on environmental displacement has tended to approach the issue from a scientific, political, or sociological perspective,¹⁵ but

there has been little rigorous legal analysis of the issue. The few relevant legal articles that have addressed the issue have typically done so through a narrow refugee law lens, focusing on environmental displacement generally rather than climate-induced displacement in particular. Furthermore, they have generally sought to squeeze the notion into the 1951 Refugee Convention framework,¹⁶ rather than re-thinking—or, importantly, theorising—the legal framework through which it is considered and international responses might be formulated.

The absence of legal scholarship on climate-induced displacement is partly a symptom of the inherent difficulties in conceptualizing the nature of the inquiry. For example, is climate-induced displacement properly conceived of as a refugee issue, a migration issue, a human rights issue, an environmental issue, a security issue, or a humanitarian issue (left to the political discretion of individual governments and regulated outside the 'law')? Since 1985, the term 'environmental refugees' has been floating about,¹⁷ but the choice of the term 'refugee' is highly controversial.¹⁸ Although it provides a useful descriptor of displacement, it does not accurately reflect in legal terms the status of those who move.¹⁹ Politically and legally, it is provocative, but it also reflects the

¹² Japan has been criticised for using a 'human security' approach as a means of diluting its formal human rights treaty obligations: see B. Edstroem 'Japan's Foreign Policy and Human Security', *Japan Forum*, 15 (2003), 209 [start page], 221 [pinpoint]; M. Fujioka, 'Japan's Human Rights Policy at Domestic and International Levels: Disconnecting Human Rights from Human Security', *Japan Forum*, 15 (2003), 287.

¹³ Intergovernmental Panel on Climate Change, *Climate Change: The IPCC Scientific Assessment: Final Report of Working Group I* (NY: Cambridge University Press, 1990).

¹⁴ Hegerl and others, 'Understanding and Attributing Climate Change'; Intergovernmental Panel on Climate Change, *Climate Change 2007: Synthesis Report. Summary for Policymakers* (2007); Stern, *The Economics of Climate Change*.

¹⁵ N. Myers, 'Environmental Refugees in a Globally Warmed World'; N. Myers, 'Environmentally-Induced Displacements: The State of the Art' in *Environmentally-Induced Population Displacements and Environmental*

Impacts Resulting from Mass Migration (IOM/UNHCR International Symposium, Geneva, 21–24 April 1996); N. Myers, 'Environmental Refugees: An Emergent Security Issue' (13th Economic Forum, Prague, 23–27 May 2005); R. Black, 'Environmental Refugees: Myth or Reality?' (2001) UNHCR *New Issues in Refugee Research*, WP 34; S. Castles, 'Environmental Change and Forced Migration: Making Sense of the Debate' (2002) UNHCR *New Issues in Refugee Research*, WP 70.

¹⁶ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, read in conjunction with Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267. See eg J. B. Cooper, 'Environmental Refugees: Meeting the Requirements of the Refugee Definition', *NYU Environmental LJ*, 6 (1998), 480; D. Keane, 'The Environmental Causes and Consequences of Migration: A Search for the Meaning of "Environmental Refugees"', *Georgetown Intl Environmental Law Rev*, 16 (2004), 209; C. M. Kozoll, 'Poisoning the Well: Persecution, the Environment, and Refugee Status', *Colorado J of Intl Environmental Law and Policy*, 15 (2004), 271.

¹⁷ See, for example, N. Myers and J. Kent, *Environmental Exodus: An Emergent Crisis in the Global Arena* (Washington DC: The Climate Institute, 1995); E. El-Hinnawi, *Environmental Refugees* (UN Environment Programme, 1985); A. Suhrke and A. Visentin, 'The Environmental Refugee: A New Approach', *Ecodecision* (1991), 73.

¹⁸ Interestingly, the Australian Labor Party uses the term 'climate change refugees', implying a sense of legal recognition and obligation: *Our Drowning Neighbours: Labor's Policy Discussion Paper on Climate Change in the Pacific* (ALP, 2006).

¹⁹ See, for example, Keane, 'The Environmental Causes and Consequences of Migration'.

law's inadequate response to dealing with displacement of this kind.

The analysis in this paper proceeds on two premises: first, that climate change is real and caused primarily by humans.²⁰ The second premise is that the effects of climate change are likely to induce some level of human displacement in various parts of the world,²¹ and, as the IPCC has noted, 'migration is the only option in response to sea-level rise that inundates islands and coastal settlements'.²²

The question of how many people are likely to be displaced by climate change has been extensively debated in the literature.²³ Estimates typically range from 50 to 250

million people by 2050, although there is a real need for further rigorous empirical research on this front, some of which an EC-commissioned study of 26 vulnerable States aims to produce when it reports in late 2008.²⁴ Exact numbers remain controversial, partly because scientists cannot predict with precision how quickly sea levels will rise, but also because the calculation of numbers depends upon how the scope of the phenomenon is defined.²⁵

This paper therefore puts to one side contestation about the quantification of numbers, not least because their calculation depends on different methods of projecting displacement; scientific uncertainty about precisely where and how the effects of climate change will manifest; unknowable human variables such as strategies to mitigate, adapt to, and cope with the effects of climate change in particular localities; and the classificatory issue of how to characterise those who move (as economic migrants, migrant workers, de facto refugees, or as some hybrid).²⁶ Just as the number of refugees in any given year has little bearing on the legal rights and entitlements of any particular refugee, so too should the legal treatment of those displaced by climate change not be dependent on the number of displaced persons at any given time.

As a legal study, this paper focuses on the risks, processes, and consequences of movement for those displaced, and the ensuing doctrinal analysis is not contingent on precise statistical figures. In practice, numbers may affect the capacity and willingness of States to uphold the legal rights of the displaced—one need only think of the millions of refugees languishing in refugee

²⁰ In 2007, the Intergovernmental Panel on Climate Change observed that '[m]ost of the observed increase in globally averaged temperatures since the mid-twentieth century is *very likely* due to the observed increase in anthropogenic greenhouse gas concentrations', which has '*very likely* ... contributed to a rise in mean sea level'. It is now more than 95% certain that global warming over the past 50 years is only explicable because of human activities. See respectively Intergovernmental Panel on Climate Change, 'Summary for Policymakers' in Solomon and others (eds), *Climate Change 2007: The Physical Science Basis* 10; Hegerl and others, 'Understanding and Attributing Climate Change', 729.

²¹ R. V. Cruz and others, 'Asia' in M. L. Parry and others (eds), *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 2007), 484, 488; W. N. Adger and others, 'Assessment of Adaptation Practices, Options, Constraints and Capacity' in Parry and others (eds), *Climate Change 2007: Impacts, Adaptation and Vulnerability*, 733–4; R. J. Nicholls and R. S. J. Tol, 'Impacts and Responses to Sea-Level Rise: A Global Analysis of the SRES Scenarios over the Twenty-First Century', *Philosophical Transactions of the Royal Society A*, 364 (2006), 1073. See also a report written by EU foreign policy chief, Javier Solana, and European commissioner for external relations, Benita Ferrero-Waldner, urging EU Member States to take urgent action against climate change 'threats', including increased migration: J. Solana, 'Before the Flood' *The Guardian* (10 March 2008) http://commentisfree.guardian.co.uk/javier_solana/2008/03/before_the_flood.html; I Traynor, 'EU Told to Prepare for Flood of Climate Change Migrants' (10 March 2008) <http://www.guardian.co.uk/environment/2008/mar/10/climatechange.eu>.

²² Cruz and others, 'Asia', 492. It has been argued that although adaptation to five metres of sea-level rise is technically possible, a lack of resources mean that realistically this is outside the scope of adaptation for many vulnerable States: R. S. J. Tol and others, 'Adaptation to Five Metres of Sea Level Rise', *Journal of Risk Research*, 9 (2006), 467.

²³ See Myers, 'Environmental Refugees in a Globally Warmed World'; Intergovernmental Panel on Climate Change, *Third Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 2001). In 2005, Myers revised his estimate, suggesting that it could be up to 200 million: Myers, 'Environmental Refugees: An Emergent Security Issue'. Sir Nicholas Stern described this as a 'conservative' assumption: Stern, *The Economics of Climate Change*, 77. Myers has more recently revised this figure as closer to 250 million: interview with Christian Aid (14 March 2007), cited in Christian Aid, *Human Tide: The Real Migration Crisis* (2007), 50 endnote 10. Christian Aid adopted this figure in its own estimates: 6. Cf Black, 'Environmental Refugees: Myth or Reality?'; Castles, 'Environmental Change and Forced Migration'. See also discussion in R. McLeman, 'Climate Change Migration, Refugee Protection and Adaptive Capacity-Building', *McGill Intl J of Sustainable Development Law and Policy*, 4 (2008) (forthcoming, copy with author); S. Byravan and S. Chella Rajan, 'Providing New Homes for Climate Change Exiles', *Climate Policy*, 6 (2006), 247.

²⁴ <http://www.each-for.eu>.

²⁵ See text to fnn 17–9 above. For example, are people forced to relocate after a cyclone (which may have been the partial result of changed weather patterns due to climate change) to be regarded as victims of a natural disaster (and therefore responded to through 'disaster' emergency response mechanisms, aid and assistance), or as forced migrants (and thus subsumed within the discourse and responses of 'forced migration')? A related numerical issue is whether the notion of 'displacement' encompasses loss of habitat alone, or extends to loss of livelihood (resulting, for example, from salt-encrusted agricultural plots or disappearing plant and animal species).

²⁶ These questions form part of McAdam's larger project on 'Climate Change "Refugees" and International Law: On or Off the World Map?':

http://www.gtcentre.unsw.edu.au/projects_partners/projects/ccril/index.asp.

camp in protracted refugee situations, in contrast to those few resettled permanently in third countries.²⁷

Pragmatically, the prospect of a very large number of people displaced by climate-change would certainly affect judgments by developed States about their own willingness to absorb the displaced into their own communities, and about the quality of protection such States are willing to offer, as well as the resources they are prepared to devote to the problem. Legal regimes must, of course, be realistic if they are to carry the support of the States that must implement them. But the legitimacy of legal regimes hinges not only upon the political limits imposed by States, but also on the quality (and humaneness) of treatment of those displaced; and the challenge for States will be to ensure that protection of displaced persons is not regressively degraded in proportion to increases in the number of displaced persons.

Ultimately, numbers may also influence the international, regional, and national allocation of institutional responsibilities for climate-induced displacement—for instance, a larger number evidently requires more institutional resources, capacity and experience; it may demand more definitive or precise legal mandates; and it would likely necessitate more attention to coordination between institutions, governments and other relevant actors.

Certainly, there are credible signs that climate-related displacement is likely in particular localities.²⁸ For example, Bangladesh is exposed to considerable land submersion due to a lack of resources and technology to prevent it,²⁹ with 17 million people currently living less than one metre above sea level. For Kiribati and Tuvalu,

whole-nation displacement is imminent largely as a result of rising sea levels,³⁰ as indeed is the possible physical extinction of the territory of the State itself—and with it the legal extinction of the legal personality of the State which hinges upon the existence of that territorial space.

Although small island States emit less than one per cent of global greenhouse gases, 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.³¹ The IPCC suggests that the overall vulnerability of small island States stems from four interrelated factors: (a) the degree of exposure to climate change; (b) a limited capacity to adapt to projected impacts; (c) the fact that adaptation is not a high priority, in light of other pressing problems;³² and (d) uncertainty surrounding global climate change projections and their local validity.³³

While climate change is not the sole contributing factor to island States' vulnerability,³⁴ a combination of poor socio-economic conditions (including high debt levels, failing economies, a malfunctioning of the rule of law, poor governance, corruption, and transnational organised crime); natural resource and space limitations (including population growth, ecosystem degradation,

²⁷ Nevertheless, while international refugee law has developed techniques for dealing with mass influx situations, the underlying normative legal framework of protection remains the same irrespective of numbers. See eg J.-F. Durieux and J. McAdam, 'Non-Refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies', *International J of Refugee Law*, 16 (2004), 4.

²⁸ Intergovernmental Panel on Climate Change, 'Summary for Policymakers' in *Climate Change 2007: Impacts, Adaptation and Vulnerability. Working Group II Contribution to the Intergovernmental Panel on Climate Change Fourth Assessment Report* (Cambridge: Cambridge University Press, 2007), 14–15.

²⁹ S. Butzengeiger and B. Horstmann, 'Sea-Level Rise in Bangladesh and the Netherlands: One Phenomenon, Many Consequences' (Germanwatch, 2004); World Bank, *Bangladesh: Climate Change and Sustainable Development* (Report No 21104 BD, 10 October 2000), chapter 2; Cruz and others, 'Asia', 481, 484.

³⁰ Mimura and others, 'Small Islands'.

³¹ Mimura and others, 'Small Islands', 692–3. The report additionally lists the impacts of globalization, pressures on infrastructure, a scarcity of fresh water, and, in the Pacific, internal and external political and economic processes, including the imposition of western adaptation models which are not readily transposable to the island context. These features have resulted in some small island States being recognised by the UN as Least Developed Countries or SIDS.

³² As Brown notes, of the 14 National Adaptation Programmes of Action (an initiative supported by the United Nations Framework Convention on Climate Change, which aims to assist Least Developed Countries to rank their priorities for adaptation to climate change) that had been submitted by 10 March 2007, not one referred to migration or relocation as a possible policy response: Brown, 'Migration and Climate Change', 38. The 14 States were Bangladesh, Bhutan, Burundi, Cambodia, Comoros, Djibouti, Haiti, Kiribati, Madagascar, Malawi, Mauritania, Niger, Samoa, and Senegal. See http://unfccc.int/national_reports/napa/items/2719.php.

³³ Mimura and others, 'Small Islands', 703, citing L. Nurse and others, 'Small Island States' in J. J. McCarthy and others (eds), *Climate Change 2001: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Third Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 2001), eg 17.1.2.

³⁴ Mimura and others, 'Small Islands', 690, 691. On whether the environment can ever be a sole cause for migration, see Black, 'Environmental Refugees: Myth or Reality?'; Castles, 'Environmental Change and Forced Migration'; J. Barnett, 'Security and Climate Change', *Global Environmental Change*, (2003), 7 [start page], 11 [pinpoint].

and competition for limited resources); and the impact of natural hazards such as tsunamis and storms, makes it difficult for such States to adapt to climate change.³⁵ For example, the cost of infrastructure and settlement protection is a significant proportion of their GDP, which most small island States cannot afford.³⁶ Thus, whereas another State without those additional pressures might be able to adapt to changes caused by climatic shifts, small island States are less able to mitigate or adapt to those variations and their impact is therefore disproportionately marked.³⁷ Ironically, the migration of skilled workers may further deplete human resources³⁸ (although may make a significant economic contribution through remittances, thereby increasing family resilience for those who remain).³⁹

By now it is evident that the causes of displacement are very complex and interdependent, and make legal attribution of climate ‘harm’⁴⁰—and therefore responsibility—very difficult to establish. While climate change may only be one of a number of factors, it may be the one that ‘breaks the camel’s back’. This paper does not deal in depth with the factual question whether movement is ever solely a product of climate change, or arises (as is most likely) from a combination of pressures resulting from the impacts of climate change on the environment, livelihoods, and communities, and the ways in which particular communities respond to those pressures—from effectively coping, to escalating into conflict over increasingly scarce land or water resources. It

is assumed here that climate-*induced*—or more accurately, climate-*related*—displacement will ordinarily be a product of a complexity of inter-related environmental processes and variable human responses.

As a contributing factor to displacement, the effects of climate change nonetheless warrant legal analysis. The two brief case studies below—the Inuit in the Arctic, and the Carteret Islanders in Papua New Guinea—illustrate how the effects of climate change on small communities in particular places disrupt their livelihoods and render them vulnerable to displacement. They also indicate how the effects of climate change are context specific and are not generalisable across all affected societies.

A. Inuit

In March 2007, the Inuit of the Arctic regions of the United States and Canada sought a declaration from the Inter-American Commission on Human Rights that the United States was responsible for irreparable changes to their environment.⁴¹ They argued that the impacts of global warming and climate change, caused by acts and omissions of the United States, violated their fundamental human rights, including their rights to the benefits of culture; to property; to the preservation of health, life, physical integrity, security, and a means of subsistence; and to residence, movement, and inviolability of the home.

Like many indigenous peoples, the Inuit have an intimate relationship with the land. Their culture, economy and identity depend upon the ice and snow. In a 200 page petition, representatives for the Inuit Circumpolar Conference outlined how animals on which the Inuit rely are disappearing, damaging their subsistence harvest and health; thawing permafrost is causing landslides and complicating food storage; and travel is increasingly dangerous and difficult due to unpredictable weather, with the warmer climate making traditional

³⁵ See J. Connell, ‘Environmental Change, Economic Development, and Emigration in Tuvalu’, *Pacific Studies*, 22 (1999), 1; J. Connell, ‘Losing Ground? Tuvalu, the Greenhouse Effect and the Garbage Can’, 44 (2003) *Asia Pacific Viewpoint*, 89, cited in Mimura and others, ‘Small Islands’, 692, 711. There is also evidence that ‘islands which have been subject to substantial human modification are inherently more vulnerable than those that have not been modified’: 698.

³⁶ Mimura and others, ‘Small Islands’, 694; see also Stern, *The Economics of Climate Change*, C. Voigt-Graf, ‘Fijian Teachers on the Move: Causes, Implications and Policies’ 44 (2003), *Asia Pacific Viewpoint*, 163; T. N. Rasmussen, ‘Macroeconomic Implications of Natural Disasters in the Caribbean’, IMF Working Paper, WP/04/224 (December 2004).

³⁷ See egs in Brown, ‘Migration and Climate Change’, 18–19. Whereas the Netherlands can afford to raise the height of dykes or build new ones, Bangladesh lacks a similar capacity.

³⁸ Voigt-Graf, ‘Fijian Teachers on the Move’.

³⁹ M. Pelling and J. I. Uitto, ‘Small Island Developing States: Natural Disaster Vulnerability’, 3 (2001), *Environmental Hazards*, 49.

⁴⁰ Some suggest that the ‘coral reef crisis’ is ‘almost certainly the result of complex and synergistic interactions among global-scale climatic stresses and local-scale, human-imposed stresses (Buddemeier et al., 2004)’: Mimura and others, ‘Small Islands’, 699.

⁴¹ Petition to the Inter American Commission on Human Rights Seeking Relief from Violations resulting from Global Warming caused by Acts and Omissions of the United States (7 December 2005) http://www.earthjustice.org/library/legal_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf.

knowledge about the safety of sea ice unreliable, and more people drowning each year.

B. *Carteret Islands*

At the other end of the globe, inhabitants of Papua New Guinea's Carteret Islands are preparing to leave for mainland Bougainville, with rising sea levels making their traditional homeland uninhabitable.⁴² Not only are the islands expected to be submerged by 2015, but the islanders' traditional livelihoods are also being destroyed due to salt water contamination, severe storms and the destruction of ecosystems on which they depend. The islands are only one-and-a-half metres above sea level, and at high tide areas that were once fertile agricultural plots are submerged by the sea. This incursion of salt water 30 to 40 metres inland, which began in the late 1970s, has made their traditional livelihoods and food sources impossible, with traditional crops of bananas and sweet potato no longer able to grow. The constant wet ground has also led to an increase in mosquitoes, which has led to an increase in malaria.

The islanders' diet is limited now to fish, coconut, and seaweed, supplemented by rice delivered from the mainland once every six months. These changes to diet have led to increased rates of diabetes and diarrhoea. The people of the Carteret Islands see their relocation to Bougainville as the only viable option, despite the fact that it means uprooting cultural, family and traditional ties, leaving an ancestral home, and raising considerable funds to privately purchase land to which to move. Some of the islanders have indicated that they would rather drown than move at all.

But are the Carteret Islanders, or the Inuit people, 'refugees', or simply victims of environmental catastrophe, and is this relevant

to international responses? Do States have international legal obligations to 'protect' people displaced by climate change? Should flight from habitat destruction be viewed as another facet of traditional international protection, or as a new challenge requiring new solutions?

The answers to these questions are not straightforward, and depend upon a principled analysis of the obligations States have voluntarily accepted under an array of different treaties and practices.

III. LEGAL GAPS

A. *International Refugee Law*

Whereas traditional refugee movement is typically sudden,⁴³ movement induced by climate change generally takes place over a long period of time as land becomes increasingly unsustainable. Even where displacement is inevitable, it occurs as part of a *process*, which means that the pressures relating to viable land may become part of the need for relocation.

Yet, people forced to move as a result of climate change do not fit the international legal definition of 'refugee', which requires individuals already outside their country of origin to show that they have a well-founded fear of persecution *because of* their race, religion, nationality, political opinion or membership of a particular social group.⁴⁴ As a result, the rights, entitlements and protection options for people displaced by climate change (and whose governments are unable or unwilling to protect them) are uncertain in international law, and there is no international agency or institutional focal point, such as the United Nations High Commissioner for Refugees (UNHCR), with a specific mandate to assist them.

There are a number of definitional obstacles in applying the threshold of the Refugee Convention to people displaced by climate change. First, the requirement of exile poses an instant problem for those who have not yet moved but are facing habitat destruction, or who have moved but have not

⁴² See eg J. Stewart, 'Rising Seas Force Carteret Islanders out of Home', Lateline, ABC television (5 February 2007) Transcript <http://www.abc.net.au/lateline/content/2006/s1840956.htm>.

Though described as 'among the world's first environmental refugees', they are more accurately characterised as internally displaced people, since their movement does not require the crossing of an international border. On 'refugee' terminology in this context, see below; K. Romer, "'Environmental' Refugees?", *Forced Migration Review*, 25 (2006), 61. Much of the information on the Carteret Islands comes from a talk given by islander Ursula Rakova (Brown Street Community Hall, Newtown, 14 September 2007).

⁴³ Durieux and McAdam, 'Non-Refoulement through Time'.

⁴⁴ Refugee Convention, art 1A(2), read in conjunction with the 1967 Protocol.

crossed an international border. Many of those displaced by climate change will be 'internally displaced people' (IDPs), the subject of soft law principles rather than binding treaty obligations. It is important to note that the Guiding Principles on Internal Displacement expressly encompass people who have fled their homes due to natural or human-made disasters.

Yet, while UNHCR is the lead agency for IDPs, it deals only with IDPs forced to move as a result of conflict. There is an obvious institutional gap. Ironically, if the effects of climate change on vulnerable States are not addressed, there is a danger that scarcity of resources and increasing food insecurity may lead to conflict, as has been suggested occurred in Darfur.⁴⁵ It would be the ultimate irony if UNHCR's mandate were triggered due to inaction, as a non-violent situation escalated to one of conflict.

A second obstacle to locating environmental displacement within the framework of international refugee law is characterizing 'climate change' as *persecution*. Rising sea-levels, salination, and increasingly frequent storms, earthquakes and floods may be harmful, but they do not constitute 'persecution' in accordance with the meaning it has been ascribed in international and domestic law.⁴⁶ Even if it were possible to establish legal causation in this way, the Refugee Convention poses an additional hurdle for those displaced by climate change: namely, that persecution is *on account of* the individual's race, religion, nationality, political opinion, or membership of a particular social

group. Movement precipitated by climate change is inevitably indiscriminate, and an argument that such people might together constitute a 'particular social group' would be difficult to establish, for the reason that people must be connected by a fundamental, immutable characteristic other than the risk of persecution itself.⁴⁷

In the African context, where the regional OAU Convention contains a broader refugee definition than the 1951 Convention,⁴⁸ Edwards has queried whether seeking refuge on account of 'events seriously disturbing the public order' could encompass environmental catastrophes such as famine and drought.⁴⁹ While arguing that such an interpretation is theoretically possible, she notes that it is not supported by the *opinio juris* of African States. Although regional practice has been to permit people who cross an international border to flee a natural disaster to remain temporarily (eg Congolese fleeing eruption of Mount Nyiragongo in 2002 and fleeing to Rwanda), African governments have never characterised this as an obligation arising under the OAU Convention.⁵⁰ At most, the practice can be seen as 'contributing to the development of a right of temporary protection on humanitarian grounds under customary international law, rather than under treaty.'⁵¹ Whether there is yet sufficient *opinio juris* to support the development of this rule as

⁴⁵ Ban Ki Moon, 'A Climate Culprit in Darfur' (16 June 2007) www.washingtonpost.com A15. Others dispute the link between climate change and conflict as 'more theoretically than empirically driven, and motivated by Northern theoretical and strategic interests rather than informed by solid empirical research': Barnett, 'Security and Climate Change', 9–10, referring also to J. Barnett, 'Destabilising the Environment-Conflict Thesis', *Review of International Studies*, 26 (2000), 271; N. Gleditsch, 'Armed Conflict and the Environment: A Critique of the Literature', *J of Peace Research*, 35 (1998), 381.

⁴⁶ G. S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edition (Oxford: Oxford University Press, 2007), 90–134. Note, however, that Sweden has chosen to include a category of 'persons otherwise in need of protection' in its Aliens Act (which entered into force 31 March 2006), encompassing *inter alia* people who are 'unable to return to the country of origin because of an environmental disaster': Swedish Aliens Act, Ch. 4, s. 2(3). It is unclear if this would extend to people displaced by climate change, or whether it is intended only to cover people fleeing environmental disasters such as Chernobyl: see Brown, 'Migration and Climate Change', 39 referring to personal communication with Helené Lackenbauer (International Federation of Red Cross and Red Crescent Societies), who stated that parliamentary discussions of this category prior to the passing of the legislation referred to nuclear disasters.

⁴⁷ Goodwin-Gill and J McAdam, *The Refugee in International Law*, 79–80. Note, however, Foster's remark that: 'it is clear that the poor can properly be considered a PSG, such that if being poor makes one vulnerable to persecutory types of harm, whether socio-economic or not, then a refugee claim may be established': M Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge: Cambridge University Press, 2007) 310 (fn omitted). Even if this test could be met by certain people displaced by climate change, the difficulty would remain in establishing 'persecution' in the context of climate-induced displacement. Interestingly, the Marshall Islands and Kiribati have both eschewed the refugee label, fearing that it might lead to scattered, individual, and uncoordinated resettlement breaking down cultural integrity, heritage and—fundamentally—the sense of a State and people: See discussion in Barnett, 'Security and Climate Change', 12–13, citing G. Fraser, 'Sea-Level Rise, Hurricanes, It Is No Paradise on Small Islands' *The Earth Times* (15 November 2000); F. Pearce, 'Turning Back the Tide', *New Scientist*, 165 (2000), 44 [start page], 47 [pinpoint].

⁴⁸ Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45.

⁴⁹ A. Edwards, 'Refugee Status Determination in Africa', *RADIC*, 14 (2006), 204 [start page], 225–27 [pinpoint].

⁵⁰ Edwards, 'Refugee Status Determination in Africa', 227.

⁵¹ Edwards, 'Refugee Status Determination in Africa', 227. UNHCR similarly made clear that its assistance activities for people displaced by the Boxing Day tsunami did not fall within its formal protection mandate, but rather constituted 'time-limited humanitarian assistance' requested specially by the UN Secretary-General: UNHCR, 'Note on International Protection' UN Doc. A/AC.96/1008 (4 July 2005, para 36, cited in Edwards, 'Refugee Status Determination in Africa', 227.

regional custom, as opposed to a gesture of humanitarian goodwill, remains uncertain and is beyond the scope of the present paper. It remains clear, however, that refugee law and climate-induced displacement is not an easy fit, whether in the international or regional context.

It is therefore more useful to ask how certain protective principles, such as the principle that no one should be sent back to persecution or other forms of serious harm (*non-refoulement*)—and, importantly, how the status envisaged for refugees—might apply in the climate change context, rather than questioning how a person displaced by climate change might seek to characterise him/herself as a refugee under the 1951 Refugee Convention. This is where human rights law may assist.

B. *Human Rights Law*

International human rights law is of particular importance to climate-induced displacement for three reasons. First, it sets out minimum standards of treatment that States must afford to individuals within their territory or jurisdiction, and provides a means of assessing which rights are compromised by climate change and which national authorities have primary responsibility for responding to those rights at risk. Secondly, if those rights are at risk, human rights law may provide a legal basis on which protection may be sought (and granted) in another State (known as ‘complementary protection’).⁵² Thirdly, if relocation occurs, human rights law requires minimum standards of treatment to be observed in the host State, and is thus relevant to the legal status afforded to those displaced.⁵³

1 *Human rights law: standards of treatment*

On the first issue, the effects of climate change potentially impinge upon enjoyment of the full range of internationally protected human rights. In the extreme case of the extinction of island States and the permanent displacement of their inhabitants, the

fundamental right of a people to self-determination is threatened,⁵⁴ since the breakage of the link between the people and their land makes it difficult to sustain a continuing self-determination claim, unless a special regime of ‘people in exile’ were to be endorsed—and one can hardly imagine, for instance, Australia allowing the people of Tuvalu to subsist as an autonomous political entity within the territory of Australia, should Tuvaluans be relocated there. By extension, the right to have a nationality and not to become stateless is also affected if the State from which that nationality flows disappears.⁵⁵

If the territory of a State becomes uninhabitable or disappears altogether due to rising seas, do its (former) inhabitants become stateless as a matter of international law? Despite literal, physical statelessness being the factual outcome, the two international statelessness treaties do not anticipate this eventuality and therefore people affected in this way are not protected by the international statelessness regime.⁵⁶ The legal definition of ‘statelessness’ is premised on the denial of nationality through the operation of the law of a particular State, rather than through the disappearance of a State altogether.⁵⁷ It deliberately embodies a very narrow and legalistic understanding of statelessness, and does not even extend to the situation of *de facto* statelessness, namely where a person formally has a nationality, but which is ineffective in practice. Thus, the instruments’ tight juridical focus leaves little scope for arguing for a broader interpretation that would encompass people whose State disappears (unless, of course, the State formally withdrew nationality and through that act brought them within the legal concept of statelessness).

⁵⁴ See ICCPR, art 1(1); ICESCR, art 1(1).

⁵⁵ See Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217A (III), art 15 (UDHR); CRC, arts 7 and 8; ICCPR, art 24(3); American Convention on Human Rights (adopted 22

November 1969, entered into force 18 July 1978) 1144 UNTS 123, art 20; Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175.

⁵⁶ Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 1171 Convention on the Reduction of Statelessness.

⁵⁷ Convention relating to the Status of Stateless Persons, art 1(1): ‘For the purpose of this Convention, the term “stateless person” means a person who is not considered as a national by any State under the operation of its law.’

⁵² J. McAdam, *Complementary Protection in International Refugee Law* (Oxford: Oxford University Press, 2007).

⁵³ McAdam, *Complementary Protection in International Refugee Law*, chapter 6.

Rights of political participation and voting and political freedoms (expression, association, and assembly)⁵⁸ also suffer if island States disappear, or if their stability is so affected by climate change that their political institutions and structures disintegrate, rendering them unable to positively provide for and protect rights. Similar concerns arise in relation to the ability of affected States to fulfil their obligations to provide for social, economic, and cultural rights, from housing to health care to education.

So far as the right to life is concerned,⁵⁹ the Inter-American Commission on Human Rights has recognised that realisation of that right is necessarily linked to and dependent on the physical environment.⁶⁰ In serious cases, the cumulative effects of climate change on livelihoods, national economies, and the stability of government structures may render vulnerable States unable to fulfil their positive obligations to protect life in some areas. Likewise, every person has the right to an adequate standard of living under human rights law, including adequate food, clothing, housing and the continuous improvement of living conditions,⁶¹ and the right not to be deprived of means of subsistence.⁶² These can all be seen as necessary components of the right to life, which are compromised where global warming leads to the destruction of people's ability to hunt, fish, gather, or undertake subsistence farming.

People also have the right to enjoyment of the highest attainable standard of physical and mental health,⁶³ which may be compromised due to the effects of climate change on human health. The IPCC, for example, has projected that climate change-related exposures are likely to affect the health of millions of people, especially in States with low adaptive capacity, through increased instances of malaria; diarrheal disease; cardio-respiratory diseases; malnutrition; and increased deaths, disease, and injury due to

heat waves, floods, storms, fires, and droughts.⁶⁴

Ethnic, religious, linguistic, or indigenous⁶⁵ minorities must also be allowed to enjoy their own culture, practise their own religion, and use their own language,⁶⁶ all of which may be jeopardised by climate-induced displacement and the severing of those minorities from the roots of their practices. In particular, the Inter-American Commission on Human Rights has acknowledged that 'the use and enjoyment of the land and its resources are integral components of the physical and cultural survival of the indigenous communities'.⁶⁷ It has been argued that interference with these rights may lead to forced assimilation, which the right to culture is intended to prevent.⁶⁸

More specifically, under the 2007 United Nations Declaration on the Rights of Indigenous Peoples, it is recognised (though not yet in strict legally binding terms) that indigenous peoples have the right to maintain their distinctive and spiritual relationship with traditional lands and waters,⁶⁹ enjoy legal rights in land,⁷⁰ and have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.⁷¹ Further, indigenous peoples have the right to redress 'for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been ... damaged without their free, prior and informed consent'.⁷² To the extent that forced displacement arises from 'damage' caused by climate change to indigenous lands, there may be a right to redress in 'the form of

⁵⁸ ICCPR, arts 19, 21, 22, 25.

⁵⁹ ICCPR, art 6.

⁶⁰ *Report on the Human Rights Situation in Ecuador* OEA/Ser.L/V/II.96 Ch 8; *Yanomami case* (case 7615 of 5 March 1985), cited in annual report of the Inter-American Commission on Human Rights, 1984–85, OEA/Ser.L/V/II.66, Doc. 10 rev.1.

⁶¹ ICESCR, art 11.

⁶² ICCPR, art 1(2); ICESCR, art 1(2).

⁶³ ICESCR, art 12.

⁶⁴ Intergovernmental Panel on Climate Change, 'Summary for Policymakers' in *Climate Change 2007: Impacts, Adaptation and Vulnerability. Working Group II Contribution to the Intergovernmental Panel on Climate Change Fourth Assessment Report* (Cambridge: Cambridge University Press, 2007), 7.

⁶⁵ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 30.

⁶⁶ ICCPR, art 27.

⁶⁷ *Maya Indigenous Communities of the Toledo District (Belizé Maya)* Case 12.053 Inter-American Commission on Human Rights (2004), para 120.

⁶⁸ See Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin* 76, OEA/Ser.L/V/II.62, Doc. 10, rev. 3 (1983), para II.B.15.

⁶⁹ Declaration on the Rights of Indigenous Peoples, A/RES/61/295 (adopted 13 September 2007), art 25.

⁷⁰ Declaration on the Rights of Indigenous Peoples, art 26.

⁷¹ Declaration on the Rights of Indigenous Peoples, art 29.

⁷² Declaration on the Rights of Indigenous Peoples, art 28(1).

lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress'.⁷³

These are just some examples of the ways in which climate-induced displacement may *prima facie* engage concerns about the protection of human rights, and the analysis can arguably be extended in relation to many other rights. Here it is not suggested that the process of climate change itself is somehow responsible for rights violations; rather, the emphasis is on the effects of climate change in rendering States weak and unable to fulfil their obligations to protect and ensure rights.

There is a separate question whether, for instance, major carbon-emitting States could be thought responsible for violating the rights of those who live in areas susceptible to climate-induced displacement, and here international law is unlikely to be of assistance. One problem is that under human rights law, States generally only have human rights obligations to people already in their territory or within their jurisdiction (where the State is acting extraterritorially). Thus the United States or China might be considered responsible for their own carbon emissions which breach the human rights of persons within their territory or jurisdiction, but it is far more difficult to characterise carbon impacts on distant populations as violations of their rights.⁷⁴

At a stretch, the notion of being within a State's jurisdiction might be extended to encompass the impacts of a State's conduct wherever they may be felt, but that takes the scope of human rights obligations well beyond the accepted jurisprudence which requires that the State exercise 'effective control' in order to be held responsible.⁷⁵ If States are not responsible for the human rights impacts of aerial bombardment in a war zone because such activity does not constitute effective control over the victims of the bombing on the ground,⁷⁶ then it would seem very difficult indeed to claim that, by

permitting the emission of carbon in a factory in Guangdong, China is somehow exercising jurisdiction (that is, effective control) over distant Pacific islanders who suffer the effects of those emissions as carbon particles drift around the world.

2 *Human rights law as a basis for seeking protection in a third country*

The second key issue under human rights law is whether it provides a legal basis on which international protection may be sought by those displaced, analogous to the manner in which refugees gain protection abroad from persecution in their country of origin. As noted above, refugee law *stricto sensu* does not apply here, due to the artificiality in attempting to characterise climate-induced displacement as a form of persecution. Do the principles of complementary protection, based on human rights law, therefore provide a solution?

'Complementary protection' describes protection granted by States on the basis of an international protection need outside the 1951 Refugee Convention framework. Such protection may be based on a human rights treaty, such as the ICCPR, the Convention against Torture, or the Convention on the Rights of the Child, or on more general humanitarian principles, such as providing assistance to persons fleeing from generalised violence. Its chief function is to provide an alternative basis for eligibility for protection. Understood in this way, it does not mandate a lesser duration or quality of status, but simply assesses international protection needs on a wider basis than the 1951 Convention.

Even if a person forced to move due to climate change manages to reach the territory of another country, only a handful of human rights principles are presently recognised as giving rise to a protection obligation on the receiving State's part—in other words, preventing that person's return through the expanded principle of *non-refoulement*.⁷⁷ Although *non-refoulement* under treaty and

⁷³ Declaration on the Rights of Indigenous Peoples, art 28(2).

⁷⁴ On the question of causation and State responsibility, see R. Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility* (Leiden/Boston: Martinus Nijhoff Publishers, 2005), chapter 5.

⁷⁵ See inconsistencies with respect to the precise meaning of 'effective control': *Banković v. Belgium* (2001) 11 BHRC 435; *Ilaşcu v. Moldova and Russia* (2005) 40 EHRR 46.

⁷⁶ *Banković*.

⁷⁷ On this, see McAdam, *Complementary Protection in International Refugee Law*; Goodwin-Gill and McAdam, *The Refugee in International Law*, 345–54; E. Lauterpacht and D. Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in E. Feller, V. Türk and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003).

customary international law now encompasses non-return to persecution, torture or cruel, inhuman, or degrading treatment or punishment, this does not necessarily mean that it will assist a person displaced by climate change.

First, climate-induced displacement cannot meet the international definition of torture (defined as the infliction of severe pain or suffering by a public official for an enumerated purpose such as punishment or obtaining a confession).⁷⁸ Secondly, although climate-induced displacement jeopardises a number of human rights (as discussed above), current jurisprudence suggests that breaches of these rights will be insufficient to found a protection claim. Although it has been recognised that, in theory, any human rights violation under the European Convention on Human Rights could give rise to a *non-refoulement* obligation,⁷⁹ in most cases ‘it will be virtually impossible for an applicant to establish that control on immigration was disproportionate to any breach’ of a human right.⁸⁰ This is because unlike the absolute prohibition on returning someone to inhuman or degrading treatment, most other human rights provisions permit a balancing test between the interests of the individual and the State, thus placing protection from *refoulement* out of reach in all but the most exceptional circumstances.

While it may be therefore attempted to re-characterise the violated human right—for example, violation of the right to an adequate standard of living—as a form of inhuman treatment, which *is* a right giving rise to international protection, it is doubtful whether such violations which are not inflicted by the State being fled will be seen as giving rise to protection, or be regarded as constituting the kind of ill-treatment recognised to date as giving rise to a protection obligation on the part of a third State.⁸¹ Courts have carefully

circumscribed the meaning of ‘inhuman or degrading treatment’ so that it cannot be used as a remedy for general poverty, unemployment, or lack of resources or medical care except in the most exceptional circumstances.⁸²

Further, the traditional western approach of individualised decision-making about protection on technical legal grounds seems highly inappropriate to the situation of climate-induced displacement, in which the responsibility for displacement is highly diffuse (attributable to a large number of polluting States over many years, rather than to direct ill-treatment of a particular person by a certain government) and the numbers of those displaced may require group-based rather than individualised solutions. Additionally, unlike traditional protection, which responds to flight from harm that is inflicted or sanctioned by the home State, protection sought for climate-induced displacement is the inverse: people may demand protection *in* industrialised States precisely because they are seen to have a responsibility to assist those who have suffered as a result of their emissions over time.⁸³

C. International Environmental Law

While the jurisdictional scope of human rights law may limit its value in preventing or responding to climate-induced displacement, international environmental law is in some respects more promising. The global atmosphere and climate are a ‘common resource’ of vital interest to humanity.⁸⁴ International environmental law requires States to implement programs for mitigating greenhouse gas emissions;⁸⁵ to prevent, reduce

⁷⁸ See respectively ICCPR, art 7; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, arts 3 and 1.

⁷⁹ R v. *Special Adjudicator ex parte Ullah* [2004] UKHL 26, paras 24–5 (Lord Bingham), 49–50 (Lord Steyn), 67 (Lord Carswell).

⁸⁰ *Kacaj v. Secretary of State for the Home Department* [2002] EWCA Civ 314, para 26.

⁸¹ R v. *Special Adjudicator ex parte Ullah* [2004] UKHL 26; Human Rights Committee, ‘General Comment 15: The Position of Aliens under the Covenant’ (11 April 1986), para 5; see also Human Rights Committee, ‘General Comment 18: Non-Discrimination’ (10 November 1989).

⁸² D v. *United Kingdom* (1997) 24 EHRR 423; N v. *Secretary of State for the Home Department* [2005] UKHL 31; HLR v. *France* (1997) 20 EHRR 29, para 42; see also the views of Committee against Torture, as in *AD v. The Netherlands*, Communication No. 96/1997 (24 January 2000), UN Doc.

CAT/C/23/D/96/1997, para 7.2. See discussion in Goodwin-Gill and McAdam, *The Refugee in International Law*, 350–1.

⁸³ This is a variation on the argument made in the Inuit petition; see also Byravan and Chella Rajan, ‘Providing New Homes for Climate Change Exiles’.

⁸⁴ See Recommendations of the International Meeting of Legal and Policy Experts, Ottawa Canada, 19 EPL (1989), 78.

⁸⁵ eg Stockholm Declaration, principle 21; Convention on Long-Range Transboundary Air Pollution (adopted 13 November 1979, entered into force 16 March 1983) 1302 UNTS 217; Convention for the Protection of the Ozone Layer (adopted 22 March 1985, entered into force 22 September 1988) 1513 UNTS 293; UN Framework

and control pollution of the atmosphere and the marine environment;⁸⁶ and to conserve biodiversity.⁸⁷ The latter are relevant where displacement is due to a loss of livelihood or resources resulting from disappearing plant and animal species.

In general customary international law, every State has an obligation not to knowingly allow its territory to be used for acts that are contrary to the rights of other States.⁸⁸ Such a principle is particularised in the environmental field as an obligation on States to refrain from using their territory in a way that causes environmental harm beyond their borders, and the customary law principles of responsibility for transboundary environmental harm (of any kind) are well established.⁸⁹ As the principle was stated in the *Trail Smelter Arbitration*:

... no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence ...⁹⁰

Further specificity is provided by the concept of sustainable development, which imposes limits on the manner of realizing any emergent 'right' to development. For example, Principle 2 of the Rio Declaration mentions the responsibility of States to ensure that their sovereign right to exploit their resources does

'not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction', implying limitations on carbon emissions and the damage it causes by displacing vulnerable populations. Principle 3 indicates that the right to development 'must be fulfilled so as to equitably meet developmental and environmental needs of future generations, again suggesting limits on emissions which jeopardize the ability of future generations to live and develop in a healthy environment.

The essential difficulty in establishing responsibility for the damage caused by carbon emissions comes in identifying causation: which State(s) can be regarded as causing what damage to whom? Nonetheless, such obligations are beginning to provide a basis for some attempts to respond to climate change damage. In a recent claim brought by Inuit people, lawyers argued that that principle provided a context for assessing States' human rights obligations with respect to global warming, because the emission of greenhouse gases in one State causes harm in others.⁹¹ This carries a presumption that States should, at a minimum, engage in international efforts to address global warming, and by failing to ratify the Kyoto Protocol, States like the United States cannot be said to be doing so. Indeed, almost all environmental law agreements uphold a duty to cooperate.⁹² Mere ratification is not enough—States must ensure that the international system is sufficiently strong to protect human rights, which means that if this cannot be achieved through international collaboration alone, domestic measures must be taken to ensure that such rights are protected. As Judge Weeramantry stated in the *Danube Dam case*:

The protection of the environment is ... a vital part of contemporary human rights doctrine, for it is [an indispensable requirement] ... for numerous human rights such as the right to health and the right to life itself.⁹³

Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1993) 1771 UNTS 107; Kyoto Protocol to the Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005).

⁸⁶ eg Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) UN Doc. A/CONF/48/14/Rev.1 (16 June 1972), principle 21; Declaration of the United Nations Conference on the Human Environment (Rio Declaration) UN Doc. A/CONF/151/26/Rev.1 (1992), principle 2; UN Framework Convention on Climate Change; Kyoto Protocol; United Nations Law of the Sea Convention (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, arts 192–5.

⁸⁷ eg Biological Diversity Convention (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79.

⁸⁸ *Corfu Channel case* (UK v. Albania) 1949 ICJ 4, 22.

⁸⁹ See eg *Trail Smelter Arbitration* (*United States v. Canada*) 1938–41 3 RIAA 905; Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) UN Doc. A/CONF/48/14/Rev.1 (16 June 1972), principle 21; Declaration of the United Nations Conference on the Human Environment (Rio Declaration) UN Doc. A/CONF/151/26/Rev.1 (1992), principle 2; see also the International Law Commission's draft articles on the Prevention of Transboundary Harm from Hazardous Activities (2001), in *Report of the ILC* (2001) GAOR A/56/10; *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* 1996 ICJ 226, para 29.

⁹⁰ *Trail Smelter Arbitration*, 1965.

⁹¹ Earthjustice, 'Global Warming and Human Rights: Testimony of Martin Wagner before the Inter-American Commission on Human Rights' (1 March 2007), 3.

⁹² See eg Stockholm Declaration, principle 24; Rio Declaration, principles 7 and 27.

⁹³ *Case Concerning the Gabčíkovo-Nagymaros Project* (*Hungary v. Slovakia*) 1997 ICJ 92 (Separate Opinion of Judge Weeramantry), at para A(b).

While this statement does not necessarily suggest that there exists an independent human right to environment, it provides a persuasive, logical underpinning to the realization of human rights more generally, premising their fulfillment on the threshold question of whether the physical environment is capable of sustaining humans as rights-bearers. Indeed, despite formally recognising the links between human rights and the environment since at least 1972, when the Stockholm Declaration was adopted, international law does not expressly contain a human right to environment, although a number of human rights necessarily require an environment of a certain quality in order to be fulfilled.⁹⁴

Moreover, two regional human rights treaties, the 1981 African Charter on Human and Peoples' Rights and the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, do contain a right to environment. Article 24 of the African Charter provides that all peoples 'shall have the right to a general satisfactory environment favourable to their development', interpreted by the African Commission on Human and Peoples' Rights as obliging States to 'take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources'.⁹⁵ That this provision is expressed as a right attaching to 'peoples', rather than as an individual human right, means that the right is focused on safeguarding specific groups sharing a common cultural heritage (such as indigenous peoples), supporting international human rights principles that seek to safeguard the cultural and linguistic integrity of such groups.

By contrast, the Americas Additional Protocol provides in article 11 that: 'Everyone

shall have the right to live in a healthy environment and to have access to basic public services. The States Parties shall promote the protection, preservation, and improvement of the environment.' Though this is phrased as an individual right, it is not subject to individual petition to the Inter-American Commission on Human Rights.⁹⁶ Accordingly, the most that can be said is that international law recognises a close link between the protection of the environment and realising human rights.⁹⁷

An environmental law approach has other limitations in addressing climate-induced displacement. First, the plane of legal responsibility is primarily between States, and individuals enjoy lesser legal capacity than under human rights law. Secondly, there is considerable difficulty in quantifying the harm caused by the carbon emissions of any particular State, and identifying causation between emissions and detrimental effects, when all States have contributed to emissions at some point. Thirdly, there remain difficulties in establishing the accountability of corporations for carbon emissions in a legal system in which States remain the primary duty-bearers.

Creative arguments have, however, been made on the causation issue. Some scholars have suggested that people living in areas which are likely to be rendered uninhabitable due to climate change should have the early option of migrating to other countries, in numbers roughly proportionate to the host countries' cumulative greenhouse gas emissions.⁹⁸ This would mean that, per year, the US (as the highest emitter) would take in 866,000 people, while Italy (as the 10th highest emitter) would take 8,600. While these figures may initially seem high, they are comparable to the actual numbers of immigrants already absorbed by those States each year.

⁹⁴ Asia Pacific Forum, 'Human Rights and the Environment: Background Paper' APF 12 (2007) 26. See also D. Shelton, 'Environmental Rights', and P. Alston, 'Peoples' Rights: Their Rise and Fall', in P. Alston (ed), *Peoples' Rights* (Oxford: Oxford University Press, 2001); Meeting of Experts on Human Rights and the Environment, Final Text (16 January 2002) (see also background papers at www.unhcr.ch/environment/); P. Birnie and A. Boyle, *International Law and the Environment* (Oxford: Oxford University Press, 2002), 252-267.

⁹⁵ *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria* Communication No. 155/96 (2001), para 54 <http://www1.umn.edu/humanrts/africa/comcases/155-96.html>.

⁹⁶ Pursuant to the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (adopted 17 November 1988) OAS Treaty Series 69, art 19(6).

⁹⁷ Ramcharan suggests that the right to life implies a right to environment and a concomitant obligation on States 'to take effective measures to prevent and to safeguard against the occurrence of environmental hazards which threaten the lives of human beings': B. G. Ramcharan (ed.), *The Right to Life in International Law* (Dordrecht/Boston: Martinus Nijhoff Publishers, 1985) 13, as (mis)cited in Asia Pacific Forum, 'Human Rights and the Environment', 34.

⁹⁸ Byravan and Chella Rajan, 'Providing New Homes for Climate Change Exiles', 249.

This approach attempts to apportion responsibility for climate-induced displacement according to the State's share of responsibility for carbon emissions. While a seemingly neat solution, it hardly accounts for the complexity of contributory causes in any given displacement situation, and overlooks the role of intervening factors and other human actors in determining how the effects of climate change manifest themselves in a particular place. Such a blunt approach is also unlikely to garner genuine political support.

D International Humanitarian Law

International humanitarian law may be relevant in situations where climate-related displacement is connected with international or non-international armed conflict. As others have suggested,⁹⁹ there is considerable potential for armed conflicts to arise from the effects of climate change, in particular increasing competition over scarce resources such as agricultural land and water supplies. Again, while the causes of any conflict are multiple and complex, climate change may be a contributing factor in some situations.

While humanitarian law provides for the protection of civilians affected by conflict, rules are relatively sparse when it comes to the specific protection of those displaced by conflict. Humanitarian law permits the evacuation or relocation of civilians for specified safety or security purposes,¹⁰⁰ and provides for their return after the causes of displacement no longer exist. It prohibits unlawful displacement of civilians, although it says little expressly about remedies (including restitution or compensation) for losses suffered as a result of displacement.

It is, however, noteworthy that the International Committee of the Red Cross has

attempted to identify customary rules on the treatment of displaced persons in armed conflict, including a right to voluntary return in safety to one's home after the reasons for displacement cease to exist, and a right to have one's property respected.¹⁰¹ In addition, there are other efforts currently underway to develop the law concerning on restitution and compensation for those affected by armed conflict,¹⁰² although the focus is not on developing broader principles relating to return and reintegration of those displaced by conflict (as for instance, UNHCR has established principles on return, repatriation, reintegration and resettlement of refugees).

In the context of climate-induced displacement connected with conflict, the essential point is that humanitarian law pays little attention to the causes of conflict or displacement. Consistent with its humanitarian emphasis on neutrality, humanitarian law applies equally to all civilians affected by conflict, regardless of the reasons underlying their displacement. Consequently, while humanitarian law provides basic protections for those displaced during an armed conflict, it provides no specific relief for those displaced in conflicts brought about by climate change causes.

E Institutional Framework

Finally, the absence of an institution with responsibility for climate-induced displacement also poses a challenge. Although the United Nations Environment Programme introduced the issue of environmental displacement on to the international agenda over 20 years ago, there remains no international organization charged with official responsibility for the issue.

While UNHCR might seem the obvious contender, it is already responsible for over 20 million refugees and other people of concern (including asylum seekers, returnees and IDPs). Each year it relies on donations and the goodwill of States to provide it with funds to carry out its work in over 100 countries,

⁹⁹ See D. Zhang and others, 'Global Climate Change, War, and Population Decline in Recent Human History', Proceedings of the National Academy of Sciences of the United States of America, vol. 104, no. 49 (4 December 2007); International Alert, 'A Climate of Conflict: The Links between Climate Change, Peace and War' (London, November 2007); J. Barnett, 'Security and Climate Change: Towards an Improved Understanding', Paper at an International Workshop on Human Security and Climate Change (Oslo, 20–21 June 2005); Barnett, 'Security and Climate Change'.

¹⁰⁰ See eg Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, art 49(2); 1977 Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of the Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, art 17(1).

¹⁰¹ J-M. Henckaerts and L. Dowald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge: Cambridge University Press, 2004), chapter 38: 'Displacement and Displaced Persons' (rules 129-133).

¹⁰² See the work of the International Law Association's International Committee for the Compensation of Victims of War.

and it has experienced significant budgetary crises over the years. Is it the appropriate agency to tackle the issue of climate-induced displacement? From a legal standpoint, it presently has no mandate to do so, although the General Assembly is empowered to entrust UNHCR with additional functions, just as it allocated the protection of certain IDPs to UNHCR in the 1990s (for instance, in the Balkans).¹⁰³

From a practical point of view, there are real doubts whether UNHCR has the resources, expertise and capacity to assume a protection or assistance function for over double the number of people for whom it already cares. Nonetheless, UNHCR is seen as the institution with the greatest experience in the area, as when it assisted after the Indian Ocean tsunami in 2004, even though it was not formally mandated to do so. On the other hand, the root causes for displacement are very different. UNHCR is already overburdened and financially under-resourced to carry out its existing protection functions. Tellingly, the newly created UN website on climate change does not feature a single human rights-related agency on its list of interested UN parties.

Nevertheless, UNHCR may play a crucial role in harnessing action at the international level. At the meeting of States at UNHCR's Executive Committee in 2007, the High Commissioner for Refugees, António Guterres, told States that: 'We see more and more people forced to move because of extreme deprivation, environmental degradation and climate change', noting that

natural disasters occur more frequently and are of greater magnitude and devastating impact. Almost every model of the long-term effects of climate change predicts a continued expansion of desertification, to the point of destroying livelihood prospects in many parts of the globe. And for each centimeter the sea level rises, there will be one million more displaced. The international community seems no more adept at dealing with these causes than it is at preventing conflict and persecution.

¹⁰³ Goodwin-Gill and McAdam, *The Refugee in International Law*, 32–5, 485–8.

While recognizing that answers to this complex dilemma go well beyond UNHCR's own mandate, he considered it UNHCR's 'duty to alert states to these problems and help find answers to the new challenges they represent.'¹⁰⁴

Because there are numerous cross-cutting and intersecting issues raised by climate-induced displacement which relate to a variety of institutional different mandates (such as protection, human rights, indigenous rights, cultural rights, and the environment), there is a risk that the concept will be dealt with in an ad hoc and fragmented manner—if at all—rather than through a single organization with a focused, holistic approach.

On the other hand, precisely because of the complexity of climate-induced displacement, an inter-agency approach with a central UN focal point or coordinator—perhaps the Office for the Coordination of Humanitarian Affairs (OCHA)—would be the more pragmatic, palatable and resource-efficient approach. As needed, the additional expertise of inter-governmental agencies such as the International Organisation for Migration (IOM) could be tasked with specific functions, subject always to appropriate supervision of the human rights implications of their activities.

IV. A HUMAN SECURITY APPROACH?

The forgoing analysis has highlighted some of the limitations in existing international law in responding to the threat, occurrence and consequences of climate-induced displacement. The question then becomes whether any other concepts may assist in confronting the challenge—in particular, the emerging concept of human security—in order to help fill some of the gaps in the international legal framework.

A. The Concept of Human Security

The basic concept of human security is now well known. It seeks to change 'traditional security approaches by conceiving of security

¹⁰⁴ Opening Statement by Mr António Guterres, United Nations High Commissioner for Refugees, at the Fifty-eighth Session of the Executive Committee of the High Commissioner's Programme (Geneva, 1 October 2007).

issues not just in terms of state security, but primarily in terms of human needs'.¹⁰⁵ Those needs were initially articulated by the UN Development Programme (UNDP) in its *Human Development Report* of 1994, although their origins reach back much further.¹⁰⁶ The UNDP defined human security in terms of 'freedom from fear' and 'freedom from want', including 'safety from such chronic threats as hunger, disease and repression' as well as 'protection from sudden and hurtful disruptions in the patterns of daily life'.¹⁰⁷ The UNDP's seven core components of human security included economic, food, health, environmental, personal, community, and political security. In ensuing debates about the content of human security, different proponents of the concept emphasised different elements and commentators remain divided on the content and emphasis of the concept.¹⁰⁸

Despite its contested scope, human security has continued to gain international support, even influencing the practice of the UN Security Council in the 1990s.¹⁰⁹ In 2000, States in the UN Millennium Declaration committed themselves to advancing 'freedom from fear' and 'freedom from want', and in 2003, the Commission on Human Security defined human security as protecting:

the vital core of all human lives in ways that enhance freedoms and human fulfilment It means protecting people from critical (severe) and pervasive (widespread) threats and situations ... [and] creating ... systems that together give people the building blocks of survival, livelihood and dignity.¹¹⁰

According to the Commission, human security is achieved not only by the absence of

violent conflict, but through 'human rights, good governance, access to education and healthcare and ensuring that each individual has opportunities to fulfil his or her own potential'. It further requires reducing poverty, ensuring economic growth, preventing conflict, and achieving freedom from want, freedom from fear, and the freedom of future generations to inherit a healthy natural environment.¹¹¹ The Commission even regards 'crime' as a source of human insecurity,¹¹² although it is far from clear why domestic crime should be considered of international concern where domestic justice systems are effectively functioning.

Structurally, the Commission called on the Security Council to accordingly broaden its understanding of threats to security beyond those already recognised in the 1990s as attracting the Council's mandate (such as mass refugee movements, HIV/AIDS, and serious rights violations).¹¹³ It also called for human security to be 'mainstreamed in the work of global, regional and national security organisations'.¹¹⁴ An implicit consequence of the new security agenda is the potential for triggering the Security Council's enforcement powers under Chapter VII of the UN Charter in response to non-traditional threats.

In the lead up to the United Nation's 60th anniversary year, in December 2004 the UN High-Level Panel on Threats, Challenges and Change supported a wide view of the scope of threats to security, stating that: 'Any event or process that leads to large-scale death or lessening of life chances and undermines States as the basic unit of the international system is a threat to international security'.¹¹⁵ It then identified six major global threats to security: (a) economic and social threats (including poverty, infectious disease, and environmental degradation); (b) inter-State conflict; (c) internal conflict (including civil war, genocide, and large-scale atrocities); (d)

¹⁰⁵ D. Newman, 'A Human Security Council? Applying a "Human Security" Agenda to Security Council Reform', *Ottawa L Rev*, 31 (2000), 213; see also UNDP, *Human Development Report 1994* (NY: Oxford University Press, 1994), 22–33; Commission on Global Governance, *Our Global Neighbourhood: Report of the Commission* (Oxford: Oxford University Press, 1995), 79–80.

¹⁰⁶ See A. Acharya, 'Human Security: East versus West', *International Journal*, 56 (2001), 442 [start], 444 [pinpt]; J. Busumtwi-Sam, 'Development and Human Security: Whose Security, and From What?', *International Journal*, 57 (2002), 253 [start], 257–8 [pinpt].

¹⁰⁷ UNDP, *Human Development Report 1994*, 23.

¹⁰⁸ See J. Dedring, 'Human Security and the UN Security Council', in *Conflict and Human Security: A Search for New Approaches of Peace-building* (2004), PISHU English Research Report Series No. 19, 47–52; Acharya, 'Human Security: East versus West', 447.

¹⁰⁹ See Dedring, 'Human Security and the UN Security Council'.

¹¹⁰ Commission on Human Security, *Human Security Now* (New York, 2003), 4.

¹¹¹ Commission on Human Security, *Human Security Now*, 4.

¹¹² Commission on Human Security, *Human Security Now*, 6; see also S. Pickard, 'When Does Crime Become a Threat to International Peace and Security?', *Florida J Intl L*, 12 (1998), 1.

¹¹³ Commission on Human Security, *Human Security Now*, 131.

¹¹⁴ Commission on Human Security, *Human Security Now*, 131; see also S. Ogata and J. Cels, 'Human Security: Protecting and Empowering the People', *Global Governance*, 9 (2003), 273.

¹¹⁵ Report of the High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (United Nations, December 2004), 2.

weapons of mass destruction; (e) terrorism; and (f) transnational organised crime. Most of these were recognised as threats to security in the practice of the Security Council from the 1990s onwards.¹¹⁶

The most radical expansion of the security agenda has been in regarding economic and social concerns, such as poverty, infectious disease, environmental degradation, and organised crime, as threats to peace or security. In late March 2005, in his report on progress towards the Millennium Development Goals, *In larger freedom*, then UN Secretary-General Kofi Annan supported this widening of the security agenda.¹¹⁷ According to the Secretary-General, the ‘new security consensus’ reflected a commitment to ‘freedom from want’ and ‘freedom from fear’, and recognised that ‘threats are interlinked, that development, security and human rights are mutually independent’.¹¹⁸ Like traditional inter-State wars, these wider threats ‘can have equally catastrophic consequences’, causing death, lessening life chances on a large scale, and undermining the State.¹¹⁹ The former Secretary-General believed not only that poverty and human rights violations are threats to human development, but they can also precipitate traditional security threats such as war.

While poverty and denial of human rights may not be said to ‘cause’ civil war, terrorism or organized crime, they all greatly increase the risk of instability and violence. Similarly, war and atrocities are far from the only reasons that countries are trapped in poverty, but they undoubtedly set back development.¹²⁰

¹¹⁶ See eg UN Security Council resolutions 713 (1991) and 724 (1991) (Balkans); 733 (1992) (Somalia); 788 (1992) (Liberia); 748 (1992) (Lockerbie bombing); 841 and 875 (1993) (Haiti); 688 (1991) (Kurds); 1265 (1999) and 1296 (2000) (civilians); 1261 (1999), 1314 (2000), 1379 (2001), 1460 (2003), and 1539 (2004) (children); 1325 (2000) (women); 1308 (2000), preamble (HIV/AIDS); 1502 (2003) (humanitarian workers); 1467 (2003) (arms and mercenaries); 255 (1968) and 984 (1995) (nuclear weapons); 1540 (2004) (weapons of mass destruction); see also UN Security Council Presidential Statement, UN Doc. S/24111 (1992); M. Odello, ‘Commentary on the United Nations High-Level Panel on Threats, Challenges and Change’, *J of Conflict and Security L*, 10 (2005), 231 [start], 232–7 [pint].

¹¹⁷ UN Secretary-General’s Report, ‘In Larger Freedom: Towards Development, Security and Human Rights for All’, UNGA (59th Session), 21 March 2005, UN Doc. A/59/2005.

¹¹⁸ UN Secretary-General’s Report, ‘In Larger Freedom’, annex para 6(a).

¹¹⁹ UN Secretary-General’s Report, ‘In Larger Freedom’, para 78.

¹²⁰ UN Secretary-General’s Report, ‘In Larger Freedom’, para 16.

Examples of human insecurity given by the Secretary-General included the one billion people living below the extreme poverty level of one dollar per day; the 20,000 people who die from poverty each day; the victims of HIV/AIDS, an illness which has killed 20 million people and infected 40 million; and the 25 million IDPs and 12 million refugees. In his view, the world has the resources, knowledge, and technology necessary to end poverty and ensure development.¹²¹ In light of the reference to IDPs, one might add to this list the prospect of climate-induced displacement, which engages similar ‘security’ issues.¹²²

In September 2005, in its World Summit Outcome in the follow-up to the Millennium Summit, the UN General Assembly endorsed the human security approach. The Summit Outcome recognised the need to build a new security consensus and to translate it into action (including addressing root causes of insecurity) and acknowledged that ‘development, peace and security and human rights are interlinked and mutually reinforcing’.¹²³ It stated further:

We stress the right of people to live in freedom and dignity, free from poverty and despair. We recognise that all individuals, in particular vulnerable people, are entitled to freedom from fear and freedom from want, with an equal opportunity to enjoy all their rights and fully develop their human potential. To this end, we commit ourselves to discussing and defining the notion of human security in the General Assembly.¹²⁴

In calling for definition of human security, the Summit Outcome acknowledged that ambiguity affects the concept and needs to be clarified. The lack of clarity and conceptual

¹²¹ UN Secretary-General’s Report, ‘In Larger Freedom’, para 27.

¹²² The International Organization for Migration, in conjunction with the Greek Chairmanship of the Human Security Network, recently held a conference examining the links between human security and climate-induced movement: ‘Background Paper’ for ‘Climate Change, Environmental Degradation and Migration: Addressing Vulnerabilities and Harnessing Opportunities’ Conference, 19 February 2008, organized by the Greek Chairmanship of the Human Security Network with the International Organization for Migration, <http://www.iom.int/jahia/Jahia/pid/1944>.

¹²³ UN General Assembly (60th Session), 2005 World Summit Outcome, UN Doc. A/60/L.1 (20 September 2005), paras 8–9.

¹²⁴ UN General Assembly (60th Session), 2005 World Summit Outcome, para 143.

confusion encourages States to exploit the concept for their own purposes, including playing it off against existing legal norms.

B *Advantages of a Human Security Approach*

What is gained by elevating problems such as climate-induced displacement to the field of 'human security', or to put it another way, to 'securitise' the problem? First, there is considerable conceptual attraction in re-focusing international attention on grave daily human needs and away from the high politics of 'national security' and narrow military or geo-strategic concerns. Indeed, strategically, one aim of treating issues as security threats is to invoke a sense of crisis and urgency about those issues, in the same way that war or military violence heightens international concern, and hopefully triggers international action to confront the problem.

Human security is, therefore, partly a rhetorical or polemical attempt to capture the attention of international civil society, including through the global media, which is typically more interested in the sensational, televisual spectacles of war or terrorism than the uneventful daily grind of poverty, malaria, or poor sanitation. The phrase neatly encapsulates a sense of compassion ('human') and realpolitik ('security'), which serves the useful polemical purpose of being difficult to oppose. Securitisation is premised on a tacit 'admission of a moral deficit', since it endorses an approach which frames developmental issues in terms of their potential impact on western security interests.¹²⁵

A further impulse underlying the new security agenda is a cultural and political reaction against western domination of the international security discourse, and an attempt to retrieve or reclaim the agenda in the interests of the developing world. In focusing on military violence, security discourse has disproportionately reflected the interests of developed States, which are not beset by the same economic and social problems faced by developing countries and are thus less concerned about them. Moreover, developed countries have historically wielded the greatest military power

and have had a greater stake in regulating military violence by, or against, themselves.

A security agenda which speaks and appeals to the billions of people living in developing countries could arguably enhance the legitimacy of the security agenda and boost the standing of institutions such as the UN Security Council. Such efforts are particularly pertinent in the context of climate induced-displacement, since historically the largest carbon-emitters have been developed States, whereas those who are experiencing the effects of climate change most acutely—and who have least capacity to adapt to it—are developing or smaller countries, whose interests are not necessarily reflected in the high politics of the Security Council.

Paradoxically, this criticism of international security policy is an *attack* on international law as 'discipline of crisis' (rather than a 'politics of everyday life'),¹²⁶ and simultaneously an *affirmation* of that sense of crisis. International law has historically focused on reducing violence and on 'the public realm, of war and conflict and violence',¹²⁷ obscuring other sources of insecurity such as the less spectacular harm of poverty or disease. Others have argued that repetitive media images of chaos, catastrophe and disorder shape narrow conceptions of security, focused on State sovereignty, the inviolability of borders and national interests.¹²⁸ As Koskenniemi writes,

It is hard to justify the attention given and the resources allocated to the 'fight against terrorism' in the aftermath of the attacks on New York and Washington in September 2001 in which nearly 3,000 people lost their lives, while simultaneously six million children under five years old die annually of malnutrition by causes that could be prevented by existing economic and technical resources. What become a 'crisis' in the world and will involve the political energy and resources of the international system is determined in a thoroughly Western-dominated process ...¹²⁹

¹²⁶ H. Charlesworth, 'International Law: A Discipline of Crisis', *MLR*, 65 (2002), 377 [start], 387 [pinpt].

¹²⁷ Charlesworth, 'International Law', 386.

¹²⁸ A. Orford, 'The Politics of Collective Security', *Michigan J Intl L*, 17 (1996), 373 [start], 395, 401 [pinpt].

¹²⁹ M. Koskenniemi, 'What is International Law For?', in M. Evans (ed), *International Law* (Oxford: Oxford University Press, 2003) 95–96.

¹²⁵ Busumtwi-Sam, 'Development and Human Security', 266.

The concentration on terrorism at the expense of more pressing human needs concerns illustrates the extent to which the Council reflects the interests of a few powerful States—an ‘instrumentalisation’ of the Council¹³⁰—rather than the values of international community as a whole. Death by terrorism or paramilitaries is vastly more significant in the security calculus than death by tuberculosis, famine, or as a result of the failure to respond to the gradual harm caused by climate change. By contrast, as UNDP argues: ‘For most people today, a feeling of insecurity arises more from worries about daily life than from the dread of a cataclysmic world event’.¹³¹ This statement remains accurate even after 11 September 2001, which involved localised acts against a limited class of targets.

A consequence of the human security agenda is its implicit potential for activating the enforcement powers of the Security Council. Treating development issues as threats to security may increase the legitimacy of the Security Council in the eyes of those who criticise its narrow emphasis on regulating physical violence, and provide a vital new mechanism through which States can be compelled to respond to the climate change challenge. Just as the Security Council imposed Resolution 1373 (2001), which effectively placed the obligations of the 1999 Terrorist Financing Convention upon even non-party States to that treaty,¹³² so too could an emboldened Security Council (for example) demand universal compliance with Kyoto Protocol, or binding measures taken in response to the challenge of climate-induced displacement.

C. *Critiques of Human Security*

The promise of a human security response to climate-induced displacement is tempered by the costs of such an approach. Conceptually,

the idea of human security is startling in its breadth and ambition. Some central criticisms are that ‘human security’ is ahistorical and not new but faddishly relabels existing concepts;¹³³ that it is too vague or ambiguous to be operatively useful; that it is an unrealistic panacea which claims too much and delivers too little; and that it reflects a new imposition of western liberal individualism on different cultures.¹³⁴

There is certainly appeal in the view that prioritising everything means prioritising nothing.¹³⁵ Indeed there is a lingering sense that human security is a messy concoction of disparate problems, which have little in common but a slender rhetorical connection. By lumping together climate-induced displacement with every other human problem now re-characterised as a human security issue, there is a serious risk of the specific needs of that group evaporating into the ether of the numerous other pressing issues competing for international and donor attention.

There is also a radical critique that human security masks hegemonic relations in important ways:

Discourses of extended security have been interpreted by the major aid donors in such a way as to preserve the legitimacy of the existing structures, institutions, and processes of the global political economy, to avoid any meaningful reform, and to distract attention away from the contradictions of contemporary neoliberal globalization that may be complicit in the generation of insecurities for vulnerable individuals and groups worldwide.¹³⁶

Such criticism is pertinent to climate-induced displacement if the focus of the new security response centres on managing the consequences of climate change (that is, by resettling the displaced, housing, feeding

¹³⁰ N. Krisch, ‘Hegemony and the Law on the Use of Force’, Paper at ESIL Conference, Florence, 13–15 May 2004, 18–19; see also N. Krisch, ‘The Rise and Fall of Collective Security: Terrorism, US Hegemony, and the Plight of the Security Council’, in C. Walter, S. Vöneky, V. Röben and F. Schorkopf (eds), *Terrorism as a Challenge for National and International Law: Security versus Liberty* (Heidelberg: Springer, 2004), 879.

¹³¹ UNDP, *Human Development Report 1994*, 22.

¹³² International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002).

¹³³ Dewi Fortuna Anwar argues that what are now regarded as non-traditional security threats have long been considered the primary security concerns of most South and Southeast Asian countries: ‘Non-Traditional Security in Asia: 2nd Regional Plenary Meeting’, Report of Meeting, Institute of Defence and Strategic Studies (Singapore, 3–4 December 2004), 7.

¹³⁴ For critical approaches, see eg R. Paris, ‘Human Security: Paradigm Shift or Hot Air?’, *International Security*, 26 (2001), 67; Yuen Foong Khong, ‘Human Security: A Shotgun Approach to Alleviating Human Misery’, *Global Governance*, 7 (2001), 231.

¹³⁵ Yuen Foong Khong, ‘Human Security’, 232–4.

¹³⁶ Busumtwi-Sam, ‘Development and Human Security’, 254.

them, and so on) rather than on the root causes which precipitated displacement (that is, the failure of major western economies and emerging powers such as China and India to control their carbon emissions, precisely because of their preference for immediate economic growth).

Further, there a realist view that developmental issues have been securitised precisely because of the threat they are predicted to pose to (traditional) national security in the long-term.¹³⁷ For example, a 2003 Pentagon report found that climate change should be elevated to a US national security concern because of its 'potentially dire consequences', including resource constraints (particularly food, water, and energy shortages) provoking widespread conflict.¹³⁸ The focus here has shifted from the human security of those most seriously affected by those resource constraints (vulnerable populations largely living outside the US) to the national interests of one State (and its desire to arrogate resources to itself). The concept of human security is not always benign, but may be manipulable in the service of national self-interest.

Recent research in Asia has increasingly questioned how and why some issues become 'securitised' and who is doing the securitising,¹³⁹ and whether securitisation politicises or depoliticises developmental issues.¹⁴⁰ For instance, securitising migrants and the displaced may actually make them more vulnerable and insecure.¹⁴¹ In another context, if refugees who endanger the 'security' of the country of refuge can be returned to persecution under the exception to *non-refoulement* in refugee law,¹⁴² then those who threaten human security might be denied

protection. Potentially, this could dramatically widen the grounds for lawfully returning a person to persecution—or refusing resettlement in the case of climate-induced displacement—allowing States to send back those who transmit disease, degrade the environment, or generate poverty.

By *securitising* non-traditional threats, proponents of human security reaffirm and revalidate the emphasis of international law on issues of spectacle and crisis, by merely redefining (rather than challenging) that emphasis. As a result, internationally important issues which hover beneath the 'human security' threshold may increasingly struggle for attention. Thus those displaced by climate change may come to be privileged over those displaced for other reasons—or indeed over those not displaced at all but facing graver risks than the displaced (which may include those left behind without sustainable livelihoods in places badly affected by climate change).

D. Human Security May Undermine Human Rights

A human security agenda may have a number of potentially adverse consequences for international law. In relation to international human rights law, the idea of human security is not particularly useful or meaningful, and may even counter-productively distract governments from fulfilling their existing legal obligations. International human rights law (including economic, social, and cultural rights) already covers much of the essential subject matter of human security.¹⁴³ Human rights are binding legal rules designed to lift people out of poverty by guaranteeing an adequate standard of living, health care, education, and employment; by protecting political participation, freedom of expression, and cultural life; and by ensuring liberty and security of person and generally aiming to preserve and respect human dignity and autonomy. Legally, States are internationally

¹³⁷ Busumtwi-Sam, 'Development and Human Security', 259–60.

¹³⁸ P. Schwartz and D. Randall, 'An Abrupt Climate Change Scenario and Its Implications for United States National Security', Report to the Pentagon (October 2003), 3.

¹³⁹ 'Non-Traditional Security in Asia: 2nd Regional Plenary Meeting', Report of Meeting, Institute of Defence and Strategic Studies (Singapore, 3–4 December 2004); 'Non-Traditional Security in Asia: The Dynamics of Securitization', Report of Workshop, Institute of Defence and Strategic Studies (Singapore, 2–4 September 2004); J. Laki, 'Non-Traditional Security Issues: Securitization of Transnational Crime in Asia', IDSS Working Paper No. 98 (January 2006).

¹⁴⁰ S. Mallick and R. Sen, 'The Incidence of Corruption in India: Is the Neglect of Governance Endangering Human Security in South Asia?', IDSS Working Paper No. 103 (January 2006).

¹⁴¹ Tasneem Siddiqui, in 'Non-Traditional Security in Asia: 2nd Regional Plenary Meeting', 15.

¹⁴² Refugee Convention, art 33(2).

¹⁴³ See eg L. Doswald-Beck, 'Human Security: Can It Be Attained?', *ASIL Proc*, 97 (2003), 93; see also J. Almqvist, 'Rethinking Security and Human Rights in the Struggle against Terrorism', Paper presented at the ESIL Forum Workshop on 'Human Rights under Threat' (Florence, 27 May 2005), 7 (questioning whether 'human security is entirely comfortable with human rights-based approaches and so whether it endorses the complete body of international human rights law').

responsible for ensuring and protecting human rights.

The rhetoric of human security may obscure or displace these existing legal standards and replace them with a more ambiguous, non-binding, discretionary political agenda for realising human security. In international politics, everything is negotiable, which means that anything can also be traded away in the bargaining process. The 2005 World Summit is an example in point, where progress towards binding targets on achieving the Millennium Development Goals was subject to last minute devaluation and diminution by some non-committal, powerful States. By contrast, hard-won agreement on basic human rights was secured long ago. Emphasising human security overshadows legal rights and potentially unravels them.

Proponents of human security seek to deflect these criticisms by asserting that human rights and human security are complementary. According to the Commission on Human Security, 'human security helps identify the rights at stake in a particular situation'.¹⁴⁴ Similarly, von Tigerstrom argues that the concept that may assist in 'the interpretation and development of legal norms', and is a narrower (and therefore presumably, more targeted) idea connected to the most basic human rights of survival, livelihood, and basic dignity.¹⁴⁵ Yet, such arguments are superfluous, since human rights law itself is already capable of identifying when rights are applicable in a particular context, and indeed has developed a sophisticated and nuanced international and comparative jurisprudence for doing so. A more philosophical defence of complementarity is made by Sen, who argues that the 'descriptive richness' of human security joins with the force of 'ethical claims' made by human rights:

The basically normative nature of the concept of human rights leaves open the

question of which particular freedoms are crucial enough to count as human rights that society should acknowledge, safeguard and promote. This is where human security can make a significant contribution by identifying the importance of freedom from basic insecurities ...¹⁴⁶

This argument too is misplaced, since it reduces human rights to ethical claims and ignores their legal force and validity. The idea of human security is not necessary for society to identify and prioritise the most important rights; again, human rights law itself already has highly developed legal techniques for accomplishing this. First, human rights are indivisible, so civil and political rights cannot be privileged exclusively over economic, social, and cultural rights. Secondly, core human rights are regarded as peremptory norms (*jus cogens*) under customary international law, establishing a well-developed hierarchy of fundamental rights and freedoms, without any need for the intervention of a human security analysis. Thirdly, human rights law establishes a range of permissible limitations on rights where this is necessary to secure other basic public goods; while in public emergencies, only certain rights may be suspended under the law of derogation, again helping to identify the most basic rights.¹⁴⁷

Sen's view of human security not only diminishes the legal stature of rights to mere ethical claims, but invites a dangerous revision of (in his words) 'which particular freedoms are crucial enough to count as human rights that society should acknowledge'. While the law is not (and can never be) exhaustively settled on this basic normative question, the jurisprudence is comprehensive and self-sustaining without needing a human security agenda. There is 'little evidence to date that human rights theory or practice has responded' to the human security agenda¹⁴⁸ precisely because that agenda offers nothing that does not already exist in human rights law.

¹⁴⁴ Commission on Human Security, *Human Security Now*, 10.

¹⁴⁵ B. von Tigerstrom, *Human Security and International Law: Prospects and Problems* (Oxford/Portland: Hart Publishing, 2007) 42. She relies on S. Alkire, 'Conceptual Framework for Human Security (Excerpt: Working Definition and Executive Summary)' (16 February 2002) <http://www.humansecurity-chs.org/activities/outreach/frame.pdf> 2, 6. Von Tigerstrom also states that in some respects, the human security approach goes further than human rights law: 43.

¹⁴⁶ A. Sen, in Commission on Human Security, *Human Security Now*, 9.

¹⁴⁷ See ICCPR, arts 4, 12, 17, 18, 22.

¹⁴⁸ K. Boyle and S. Simonsen, 'Human Security, Human Rights and Disarmament', *Disarmament Forum*, 3 (2004), 1 [start], 5 [pinpt].

In a different sense, the new security agenda may be viewed precisely as a reaction against increasing dissatisfaction with human rights norms, seen by some as floundering in the face of numerous challenges: weak enforcement institutions and under-implementation at the national level; the pursuit of civil and political rights at the expense of economic, social, and cultural rights, or developmental rights; cultural relativist challenges to their universality and indivisibility; the inherent ambiguity of rights themselves; debilitating rights-litigiousness in some countries; and the politicisation of judiciaries expected to enforce rights. In this light, the human security agenda may be directed towards reclaiming the core objective of human rights—human dignity—through prisms other than a predominantly rights-based one.

Even so, it is important to acknowledge that the drafters of the main international human rights treaties deliberately incorporated the substance of ‘human security’ into human rights law. The political ideal of ‘freedom from fear’ was first articulated as one of four freedoms in a speech by US President Franklin D Roosevelt in 1941, though it referred in a limited way to the need to reduce global armaments to eliminate aggression.¹⁴⁹ The preamble to the 1948 Universal Declaration of Human Rights thus states that ‘freedom from fear and want’ is part of the ‘the highest aspiration of the common people’, while the preambles of the ICCPR and ICESCR similarly refer to ‘the ideal of free human beings enjoying freedom from fear and want’. The idea that freedom from fear is an international value deserving of protection has also been advanced by UNDP as an aspect of human development,¹⁵⁰ and the new African Court on Human and Peoples’ Rights ‘will address the need to build a just, united and peaceful Continent free from fear, want and ignorance’.¹⁵¹ Some of the drafters of the UDHR also understood the

right to liberty and ‘security’ of person (in article 3) as extending beyond mere freedom from arbitrary detention to encompass any harm to the physical integrity of the person. It was arguably intended to protect against many of the key threats to ‘human security’.

E. The Gap in Human Rights Protection

As noted earlier, human rights law is not particularised to address the circumstances of those specifically displaced by the effects of climate change. There are, however, the 1998 UN Guiding Principles on Internally Displaced Persons, which seek to apply existing human rights, refugee, and humanitarian law norms to the special needs and circumstances of internally displaced persons. To that extent, a non-binding template exists which can assist in framing a response to those internally displaced by climate change, since those Guidelines cover any form of human-induced displacement.

The larger difficulty comes in dealing with those externally displaced by climate change, in circumstances where they do not qualify as refugees or for protection from return to torture or cruel, inhuman, or degrading treatment. Here a genuine gap in human rights protection may arise in the sense that such people are not entitled to any permanent legal status or durable solutions in the country to which they move, and will be unlikely to meet national immigration law admission criteria.

However, it does not follow that a diffuse, politicised ‘human security’ response will provide a solution for people in this category. Rather, a more fruitful path may be to further develop and extend the existing legal standards relating to ‘complementary protection’,¹⁵² grounded in the human rights treaties, so that legal status accrues not only to those leaving their countries for fear of persecution or torture, but also due to the effects of climate change on survival, the sustainability of livelihoods, the maintenance of basic human health, and the overriding preservation of human dignity.

To this end, it is worthwhile recalling that although climate-induced displacement

¹⁴⁹ US President F. Roosevelt, State of the Union Address, 77th US Congress, 6 January 1941, (1941) 87 Congressional Record, pt I. The ‘four essential human freedoms’ were freedom of speech, freedom of worship, freedom from want, and freedom from fear. The ideal was also popularised in a wartime painting by Norman Rockwell, *Freedom from Fear* (1943).

¹⁵⁰ UNDP, *Human Development Report 1994*, 23.

¹⁵¹ Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (adopted June 1998, entered into force 1 January 2004).

¹⁵² See McAdam, *Complementary Protection in International Refugee Law* on the existing scope of complementary protection in international law.

challenges the contemporary assumptions which the international community has made about protection needs, those assumptions were not self-evident when the international legal protection regime began to be constructed in the 1920s. The strong human rights imperative which we now associate with refugeehood only emerged in the language of protection in the 1940s, 20 years after the international community first attempted to regulate the flow of externally displaced people. Similarly, this is not the first time that the world has been faced by mass displacement. At the end of the Second World War, some 66 million people were displaced across Europe by a multitude of causes, with millions more in China.¹⁵³ At that time, the international community ‘responded with vision and imagination to tackle what must have seemed like an intractable problem.’¹⁵⁴ The law must therefore respond to the changing causes of displacement without being hamstrung by what appear to be the legal limits of protection at any given moment.

V. A RESPONSIBILITY TO PROTECT?

Alongside—or perhaps within—the human security concept sits the emerging doctrine of the ‘responsibility to protect’ (R2P),¹⁵⁵ which emphasises that while the primary responsibility for the protection of a State’s people lies with the State itself, the sovereign principle of non-intervention must yield to an *international* responsibility to protect where a population is suffering serious harm (whether due to internal war, insurgency, repression, or State failure) and the State is unwilling or unable to halt or avert it.¹⁵⁶

Applying the R2P framework to climate-induced displacement may appear to assist in conceptualising the problem, to the extent that the effects of climate change can be seen to drive State failure which then results in serious harm to a population. The difficulty in applying R2P is that it is primarily designed

to respond to direct human-made harms inflicted on a population by particular actors (States or private groups), rather than dealing with longer-term, diffuse, accumulating, and multi-causal phenomena like climate change.

Assuming for the moment that R2P could be so extended to populations affected by climate change, the doctrine encompasses three specific responsibilities: the responsibility to prevent (that is, to address the root causes); the responsibility to react (to respond with appropriate measures such as sanctions or military intervention); and the responsibility to rebuild (to provide assistance with recovery, reconstruction, and reconciliation).¹⁵⁷

This schema might be applied to climate-induced displacement to recognise a responsibility of the international community to seriously address carbon emissions; to take appropriate and effective measures to protect those displaced by climate change (and indeed those affected by climate change but not displaced by it); and to sustainably rebuild communities displaced by climate change, by providing permanent and durable solutions.

Like human security, R2P falls short of a legal norm but is intended to guide State action in responding to serious threats to communities. R2P has considerable support among States, and there is a concerted effort by some governments, NGOs, and international organisations to ‘operationalise’ it so as to transform the theoretical doctrine into working programme of action.

R2P is more promising than ‘human security’ in addressing climate-induced displacement because it is a relatively well-defined and circumscribed doctrine, built around the existing planks of international law and intended to harmonise with the role of the UN Security Council under the UN Charter, rather than to subvert it. As a concept it is more precise and workable than the nebulous idea of ‘human security’, from which concrete standards do not yet flow.

On the other hand, some of the criticisms of human security cross over to taint R2P—foremost that it is a discretionary political agenda, subject to political whims and pragmatic tendencies, and which lacks the

¹⁵³ UNHCR, *The State of the World’s Refugees: Fifty Years of Humanitarian Action* (Oxford: Oxford University Press, 2000), 13.

¹⁵⁴ Christian Aid, *Human Tide: The Real Migration Crisis* (2007), 3.

¹⁵⁵ Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (December 2001) xi.

¹⁵⁶ Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, December 2001, xi.

¹⁵⁷ Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, December 2001, xi.

binding force of hard law, at least until such time as it crystallises (if ever) into customary law norms. Soft norms evidently constrain action too, though the tendency (particularly in the human rights field) is to take them less seriously than harder rules. The other danger inherent in R2P is its militant tendencies towards protecting human rights through violence, which is an inapt paradigm for climate-induced displacement.

VI. CONCLUSION

The status, treatment, and protection of people displaced due to the effects of climate change are uncertain under international law. There are no specific rules or special categories for those displaced by the effects of climate change, although existing principles of international refugee law, human rights law, humanitarian law, and environmental law may provide some measure of protection. This paper has been concerned not so much with finding ways to hold individual States accountable for breaches, but rather to pinpoint their responsibilities to demonstrate how forced movement due to climate change should be addressed from a legal perspective. It is intended to guide action, in terms of showing that there is a need to do something, as well as to shape what is done.

An alternative framework of analysis is to deploy the emerging concept of ‘human security’ in dealing with climate-induced displacement. To a large extent, human security is a ‘political project ... built on the already existing precedents within international law’.¹⁵⁸ Political projects to build support for human rights norms are always welcome, but there is a danger that the development of the political project—which often takes on a life of its own—will come to overshadow, dilute, or erode the norms which it is supposed to be uplifting.

In our view, human rights law offers a more useful framework for analysing rights at risk, although the implications of that analysis in terms of assisting and protecting the displaced remain less certain. A complementary protection analysis—seeking

to identify rights to which the principle of *non-refoulement* might extend—provides one option, and while it may not lead to satisfactory results on the current jurisprudence, there is considerable potential for the progressive development of human rights law principles to address the needs of those displaced by climate change.

It is dangerous to see the law as *the* solution; ultimately, even getting acknowledgement of legal obligations requires a political response. At this stage, the law may assist us by setting out the minimum standards by which States should inform their responsibilities towards impending climate-induced displacement, providing a principled legal framework for examining States’ responses and a threshold against which their actions may be assessed.

¹⁵⁸ H. Owens and B. Arneil, ‘Human Security Paradigm Shift: A New Lens on Canadian Foreign Policy’, *Canadian Foreign Policy*, 7 (1999) 1 [start], 9 [pinpt] (emphasis added), cited in von Tigerstrom, *Human Security and International Law*, 4.