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Legal Conundrum in the Plight of Pacific Island Countries: Climate Change, Displacement and Human Rights

Paulina Tandiono

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in the Plight of Pacific Island Countries:
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INTRODUCTION

“But in succeeding time prodigious earthquakes and deluges taking place, ...and the Atlantic island itself, being absorbed in the sea, entirely disappeared.” - Plato, 360 BC (in Taylor, 1944, p. 104)

So tells the story of Atlantis, the legendary island which sank beneath the sea. Although a mere legend, it may to some extent portray the reality in decades to come. The Pacific island countries (hereinafter “**PICs**”) are already located in the regions which are among the most vulnerable to environmental disasters in both frequency and intensity (Mauritius Strategy, 2011, para. 21). And this is exacerbated by climate change impacts, in particular sea-level rise. Most PICs comprise of low-lying land with the average elevation of just a few meters above sea level (Barnett in Humphreys, 2010, p. 265), rendering them the firsts in line to face the global menace of climate change. The Intergovernmental Panel on Climate Change (hereinafter “**IPCC**”) has noted that due to sea-level rise, low-lying areas will increasingly experience adverse impacts such as submergence, coastal flooding and coastal erosion (2014, p. 17). A one-meter sea-level rise by 2100 could even render some island countries uninhabitable and displace tens of millions of people (IPCC, 2014a, p. 1618). Ultimately, if the sea level keeps rising, the whole territories of PICs might slip beneath the waves, never to be seen again—a similar fate that befell Atlantis. To date, the total submersion of a country may be unprecedented but by no means impossible. Just as recent as May 2016, 5 islands in Solomon Islands were washed away (The Guardian, 2016), giving a real taste of what is to come.

That climate hazards threaten to displace human is hardly a new phenomenon even in the context of sea-level rise. In 2005, Papua New Guinea’s Carteret Islands were reportedly the first low-lying islands to evacuate their population due to the ever-rising water; the islanders then resettled in another larger island (UNSG, 2009, para. 71). As tragic as it is, this is nowhere near the gravity and complexity of what is looming in the horizon for the PICs. Unlike in Carteret Islands, the people under the threat of displacement in PICs constitute the whole population of a country. Not to mention that there is no internal flight alternative due to the absence of high land (Kiribati National Adaptation Programme of Action (hereinafter “**NAPA**”), 2007, p. 4; Tuvalu NAPA, 2007, p. 13), consequently, the people would have no choice but to cross border.

Since this phenomenon stretches the prevailing conception of displacement, it generates a set of legal questions. In the event of cross-border displacement, can the conventional legal frameworks—refugee law, stateless law, human rights law—accommodate the protection of the affected persons? What is the status, if any, accorded to them under international law? What kind of protection, if any, are they entitled to? Who, if any, should afford that protection?

This dissertation attempts to answer the questions above by arguing how the currently existing legal frameworks prove either inapplicable or inadequate to protect the people of PICs. Firstly, section II argues that as their movement is climate change induced, they do not meet refugee definition, which is strictly political in nature, so as to be able to access its protection. Likewise, in section III, they cannot be deemed stateless because total submersion of a state's territory does not necessarily mean extinction of statehood and by extension, its nationality. In any event, the people might be displaced way before total submersion, foreclosing any question of statelessness from the first place. Section IV argues that the people of PICs qualify for protection under human rights law, as does anybody, but because state discretion stands in the way, it fails to offer protection that truly accommodates their needs as displaced persons. In view of this protection gap, section V argues for the need to adopt a rights-based approach which transforms protection into entitlement by drawing legal principles from environmental law. In doing so, it seeks to invoke state responsibility for the displacement of the people, which would then give rise to the obligation to make reparation in the form of protection—a new concept of climate reparation. Finally, by drawing lesson from the ongoing refugee crisis, the section VI argues that the best step forward is to adopt an international guideline in order to provide systematic and coordinated international response.

Much of the tone of this dissertation may be future-oriented. However, it does not make the discussion any less relevant because as stated by the Chairperson of the Nansen Conference, while the precise number, location and timing of such movement are still uncertain, there is growing evidence that they will be *substantial* in the years to come (2011, para. 5). After all, being fully prepared—is it not the best way to deal with a potentially catastrophic problem?

I. CONCEPTUALIZING THE ISSUE

At the outset, Kālin has proposed a typology for climate change induced environmental conditions that may trigger displacement: (in McAdam, 2010, p. 85-86)

1. sudden-onset disasters,
2. slow-onset environmental degradation,
3. 'sinking' small island states,
4. areas designated by the government as prohibited for human habitation,
5. unrest disturbing public order, violence and armed conflict.

Based on this oft-cited typology, without denying nor downplaying environmental conditions elsewhere, this dissertation will focus on the third typology: 'sinking' small island states. It seeks to narrow its discussion on the potential displacement in PICs, which are the 22 island countries and territories in the tropical Pacific Ocean as can be seen below:

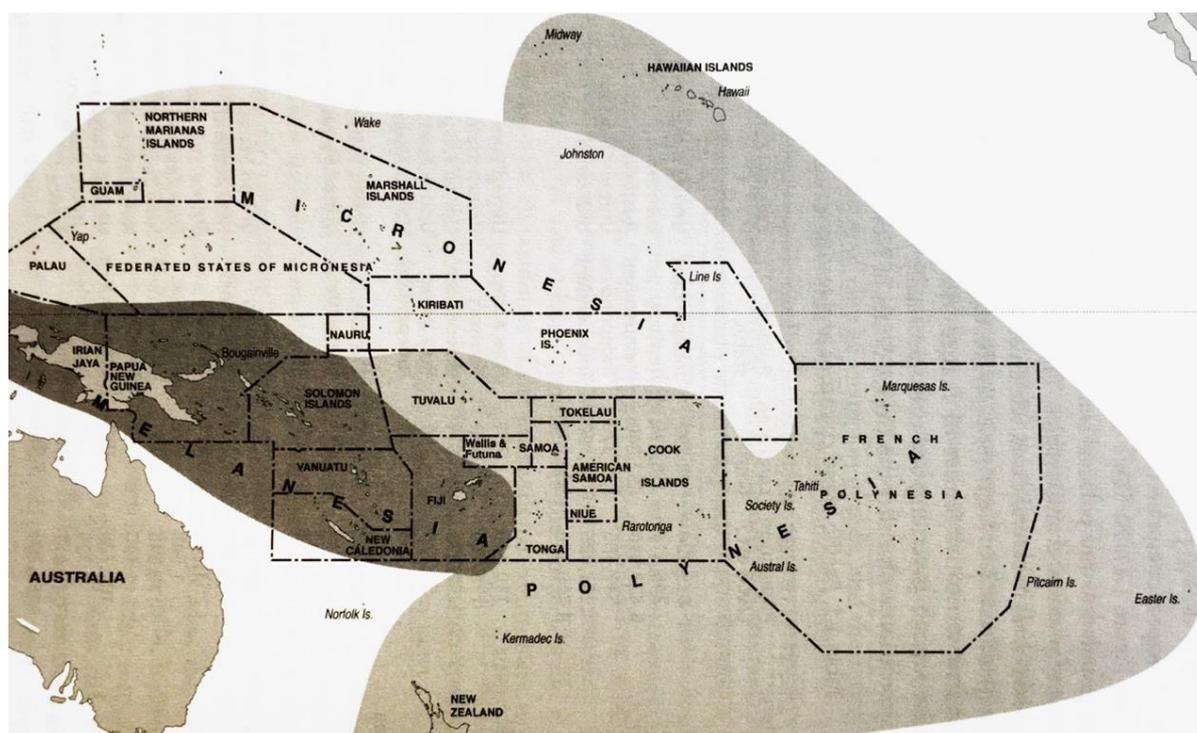


Figure 1 Pacific island countries (Barnett and Campbell, 2010, p. 6)

The link between climate change and displacement, however, has been the subject of much debate. Many commentators are skeptical that any given displacement may occur *solely* due to environmental factors. This discussion is important because the motivation behind a movement has significant bearing in international response. McAdam has pointed out that legal response is predicated on the nature of movement: a forced one

may activate other state's obligation to extend protection whereas a voluntary one does not (2012, p. 6). The problem is, insofar as environmental factors are concerned, it is difficult to draw a line between the two because environmental factors are closely linked to social, political and even economic ones (Castles, 2002, p. 5). For instance, as small islands are highly dependent on climate-sensitive sectors such as tourism, fisheries and agriculture (IPCC, 2014a, p. 1626), among the first to suffer from environmental degradation would be their economies, which then prompt people to move. Movement solely for economic reasons, clearly, is not 'forced'. In response to this, it bears noting that while the factors behind displacement are interrelated, they are arguably distinguishable. UNHCR has acknowledged that climate change is an impact multiplier and accelerator that, although not the sole cause, does trigger displacement (2011, para. 2), from which it can be deduced that among all the factors behind displacement, climate change can serve as a catalyst that actually realizes displacement, which would not have otherwise occurred without it. In such case, the resulting displacement can then be categorized as climate change induced. And particularly in the case of PICs, Piguet et al have stated that the danger posed by sea-level rise makes migration *definitive* (2011, p. 11). Therefore, climate change may not be the only cause of movement, but it is arguably the necessary one because for the people '*leaving is not an option, but a necessity*' (Guterres, 2007). Quest for economic opportunities, if any, would certainly not be at the forefront, rendering such movement unequivocally a forced one.

Moreover, one may wonder the need to even discuss cross-border displacement because environmental displacement usually takes place *within* the country concerned, not outside borders (UNHCR, 2011, para. 2). However, such might not be the case with PICs. Not only has sea level risen due to climate change, it will also continue rising beyond the 21st century (IPCC, 2013, p. 27-28). From as early as 1989, the Malé Declaration on Global Warming and Sea Level Rise acknowledged that even if climate change were to be brought to a standstill, however unrealistic, sea level would still continue to rise (Preamble para. 2). Now the islands in Tuvalu, for instance, rarely exceed 3 meters above mean sea level (Tuvalu NAPA, 2007, p. 13). The same applies in Kiribati (Kiribati NAPA, 2007, p. 4). Given their low-lying nature, it stands to reason that there is a real threat to the *whole* territory of PICs, rendering cross-border migration inevitable in the long run. Additionally, question on protection in the event of internal displacement has been quite comprehensively covered by the 1998 UN Guiding

Principles on Internal Displacement which, although does not explicitly mention climate change, does cover displacement due to natural disaster (para. 2). Cross-border displacement due to climate change, on the contrary, has yet to have any international legal coverage to date—and this lacuna is what the present dissertation seeks to delve into.

There is one important disclaimer though: by focusing on cross-border migration, this dissertation by no means downplays the importance of mitigation and adaptation measures as the *main* strategies in addressing climate change. Mitigation is the measures to minimize global warming by reducing emission levels whereas adaptation to strengthen the capacity of society and ecosystem to cope with climate change impacts (OHCHR, 2009, para. 12), all of which aim to prevent displacement in the first place. Some commentators have argued that discourse on displacement and relocation is premature owing to the uncertainties surrounding it and may even create the illusion that adaptation is pointless since the islands are to be eventually abandoned anyway (Barnett and O'Neill, 2012, p. 10; Barnett and Campbell, p. 155). However, both discourses—one on mitigation and adaptation and the other on displacement and relocation—are, arguably, not mutually exclusive. In fact, they complement each other. The 2011 Nansen Principles have envisaged that all efforts should be directed towards preventing displacement, *failing which*, towards assisting and protecting the people displaced (Nansen Conference, principle 4). In other words, preventing displacement is indeed the priority, but in case the measures to that end fail to deliver, those to assist displacement have to already be in place. In other words, relocation is—and truly should be—a matter of last resort, especially so when the people themselves wish to continue living in their countries *where possible* (Niue Declaration on Climate Change, 2008, preamble para. 5). In Kiribati, for instance, a majority of 65% has no wish to relocate (Uan and Anderson in Leckie, 2014, p. 247). Nevertheless, early preparation and preparedness in promoting and managing movement would avert a humanitarian catastrophe (UNHCR, 2009, p. 3), which is why the discourse to that effect remains important.

II. INTERNATIONAL REFUGEE LAW – TRANSPLANTING A NEW CATEGORY INTO PREEXISTING FRAMEWORK?

When it comes to displacement, it is almost intuitive that people turn to the refugee instrument first thing for protection. But to access the protection, climate change

displaced persons have to first meet the refugee criteria under the 1951 Convention Relating to the Status of Refugee (hereinafter “**Refugee Convention**”), which are strictly political in nature. Pursuant to its article 1(a)(2), refugee is one who “(a) *owing to well-founded fear of being persecuted* (b) *for reasons of race, religion, nationality, membership of a particular social group or political opinion*, (c) *is outside the country of his nationality and* (d) *is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.*” Some commentators have attempted to fit climate change displaced persons in this definition while some to expand it. The first attempt began way back in 1985 when El-Hinnawi coined the term ‘environmental refugee’ to describe those “*forced to leave temporarily or permanently because of a marked environmental disruption that jeopardized their existence and/or seriously affected the quality of their life*” (in Williams, 2008, p. 506). And it was not without any support. Myers, for instance, drew similarity between environmental refugees and refugees by arguing that one is not any less desperate than the other; both are just seeking a basic form of security to their lives (1995, p. 19). While those fleeing environmental degradation—the people of PICs in this case—shall receive *no less* protection than those fleeing persecution, it has to be conceded that they fall under different legal purviews.

Refugee law was by no means conceived to cover all kinds of asylum seekers. By inserting ‘persecution’ as the requirement, the drafters have effectively limited Refugee Convention’s humanitarian scope as it will, consequently, not afford universal protection to just *any* asylum seekers (*A and Another v. Minister for Immigration & Ethnic Affairs*, 1997, p. 248). There may not be fixed definition of persecution under international law, but the general consensus is that it involves severe ill-treatment either committed or tolerated by the country of origin (Goodwin-Gill and McAdam, 2007, p. 99; *Horvath v. Secretary of State for the Home Department*, 2000, p. 5), highlighting its political nature. Therefore, without persecution, those fleeing natural disaster—by extension, climate change impacts—do not qualify as refugees under Refugee Convention (*Canada v. Ward*, 1993, p. 732; *Minister for Immigration and Multicultural Affairs v. Haji Ibrahim*, 2000, para. 140). Cooper has attempted to shift the focus from the natural aspect of climate change by instilling political element in it. She argues that developed countries are persecuting millions of people by refusing to put serious effort in fighting global warming thus knowingly exposing them to the harm of sea-level rise (1998, p. 520). Two weaknesses can be identified from this seemingly convincing argument: an absence of

motivation and a conceptual error.

Firstly, assuming without conceding that environmental degradation can be considered persecution, as per the refugee criteria persecution shall be inflicted *by virtue of* Convention grounds: race, religion, nationality, membership of a particular social group or political opinion. However, the Australian court has held that there is really no basis to conclude that developed countries' reluctance in fighting global warming was *intentionally* directed against residents of low-lying countries *for any Convention grounds* (*Refugee Review Tribunal*, 2009, para. 51), therefore failing the criterion. Cooper further argues that the people who are adversely affected can constitute 'a particular social group' for their lack of political power to protect their own environment (1998, p. 525), but this is arguably a misconception. Such argument is premised on the fact that it is the persecution—or their inability to prevent it—that designates the affected persons into a particular social group. However, quite the contrary, it shall be the people's membership in a particular social group that makes them the target of persecution, not the other way around. The characteristics leading to such membership shall exist independently of the risk to persecution (Goodwin-Gill and McAdam, 2007, p. 80). Otherwise, if risk to persecution alone automatically grants membership to a particular social group, the whole requirement of 'Convention grounds' would be, arguably, rendered meaningless. After all, members of a particular social group have been defined as those who share certain characteristics for which they are perceived different by the rest of the society (*X, Y, Z v. Minister voor Immigratie en Asiel*, 2013, para. 45). In climate change context, who is being perceived different by whom? Climate change does not discriminate; it affects *everyone* in PICs. The New Zealand court has adjudged that since the effects of environmental degradation in Kiribati were faced by the population *generally*, there were no Convention grounds for persecution (*AF (Kiribati)*, 2013, para. 75).

Secondly, lying at the heart of refugee law is the principle of surrogacy: only when the protection of one's own country is lost will the international community be engaged to offer the substitute (*Canada v. Ward*, 1993, p. 716; *Horvath v. Secretary of State for the Home Department*, 2000, p. 3). In other words, upon failure to access protection from persecution in home countries, the persecuted turn to the international community for a back-up protection. Returning to Cooper's argument, assuming that the international

community is indeed the persecutor, it is rather absurd if the persecuted flee their country—which is at no fault for their persecution—to seek protection from their own persecutors, those who cause their suffering in the first place. Her argument is thus conceptually incompatible with the underlying rationale of refugee law. The attempts to fit climate change displaced persons into refugee definition have thus met with little success.

Others have suggested to expand the refugee definition (Conisbee and Sims, 2003, p. 26). However, doing so might at best work in legal vacuum and at worst undermine the existing protection of recognized refugees. From adopting more and more restrictive asylum policies to crafting ways circumventing their existing obligation under the Convention¹, states' attitude towards asylum seekers has been anything but hospitable. In light of such '*widespread xenophobic*' attitude among states (Piguet et al, 2011, p. 18), it stands to reason that broadening the *specific* category of refugee is unrealistic; states would be unwilling to subscribe to and/or implement such expansion, consequently leaving climate change displaced persons in legal limbo. Worse still, such effort may potentially undermine the existing refugee framework as a whole (UNHCR, 2009, p. 8-9). Modifying refugee definition means renegotiating the Convention, which, considering the prevailing political climate on refugees, may pave a way for states to lower the protection standards therein, putting refugee protection effort under further stress than it already is.

Lastly, in determining climate change displaced persons' status under international law, it is of paramount importance to take into account not only the objective characteristics but also their perceptions of themselves. In some PICs, the refugee label has been resoundingly rejected due to the concomitant negative connotations: sense of helplessness, lack of dignity, life in camps and having no prospects for the future, to name a few (McAdam and Loughry, 2009, paras. 4-8). The former President of Kiribati has powerfully stated that:

“We don't want to lose our dignity. We're sacrificing much by being displaced, in any case. So we don't want to lose that, whatever dignity is left. So the last thing we want to be called is ‘refugee’. We're going to

¹ For US interdiction of the Haitians, see *Chris Sale et al v. Haitian Centers Council, Inc., et al*, 1993. For UK airport clearance of the Roma, see *Regina v. Immigration Officer at Prague Airport ex parte European Roma Rights Centre*, 2004. For Italy's interdiction of Somali and Eritrean asylum seekers back to Libya, see *Hirsi Jamaa and Others v. Italy*, 2012.

be given as a matter of right something that we deserve, because they've taken away what we have." - Anote Tong, 2009 (in McAdam, 2012, p. 41)

Hence, it does not feel morally right to shove the refugee label to the people of PICs particularly when they—those directly affected through no fault of theirs—see it as degrading and refuse to be considered as such.

Those fleeing machetes, guns and tanks are no less entitled to protection as those fleeing sea-level rise and shortage of fresh water as both are running for their lives. Nevertheless, forcing to apply Refugee Convention, which was not drafted with environmental degradation in mind, to climate change displaced persons would defy the ‘*ordinary meaning of the term*’ refugee (VCLT, 1969, article 31(1)). Even worse, it might risk shaking the already precarious edifice of the Refugee Convention. It is undeniable that the people of PICs need protection; Refugee Convention is just not the one to afford it.

III. STATELESS LAW – STATEHOOD TO SINK WITH THE ISLANDS?

“...one cannot contemplate a State as a kind of disembodied spirit. ...there must be some portion of the earth’s surface which its people inhabit and over which its Government exercises authority.” – Philip C. Jessup, 1948 (UNSC, 1948, p. 41)

The protection of stateless persons is covered by the 1954 Convention Relating to the Status of Stateless Persons (hereinafter “**Stateless Convention**”) and the 1961 Convention on the Reduction of Statelessness.² To qualify for the protection under the abovementioned Conventions, the people of PICs have to be stateless in the first place, but are they? Pursuant to article 1 of Stateless Convention, stateless person is one ‘*who is not considered as a national by any State under the operation of its law*’. It has been argued that if PICs were to be wholly submerged under water, their nationalities would also cease as there would no longer be a state of which the people could be citizens (Park, 2011, p. 4). Indeed, article 1 of the 1933 Montevideo Convention on the Rights and Duties of States (hereinafter “**Montevideo Convention**”) has listed 4 requirements

² Stateless persons can also access protection under Refugee Convention provided that they fulfil the refugee definition (Refugee Convention, art. 1(a)(2)). However, since the previous section has argued on the absence of persecution and Convention grounds, this section does not refer to Refugee Convention anymore.

to being a state: permanent population, defined territory, government and capacity to enter into relations with the other states. Based on this, if PICs lose their territories to the waves permanently, they may become extinct as they no longer have territories to be effectively governed (Crawford, 2006, p. 46) and consequently the people would be rendered stateless. Such line of argument, however, fails to take into account the prevailing presumption of continuity of statehood in international law and the factual reality of PICs situation.

Firstly, presumption of continuity of statehood means that statehood is not necessarily extinguished by substantial changes in population, territory, government or even a combination of all three (Crawford, 2006, p. 700). The Sovereign Military Order of Malta is the most oft-cited example for the application of the presumption in the event of territorial loss. Despite its loss of territory to invaders in 1523 and 1798,³ not once has it been considered ‘extinct’ by the international community. For instance, in *Association of Italian Knights of the Order of Malta v. Piccoli*, the Court of Cassation in Italy recognized the Order as a sovereign international subject *though deprived of territory* (1974, p. 308). Its diplomatic representatives were also treated by other states as those of a *sovereign state* at all times, including when it remained without territory (Crawford, 2006, p. 231; Park, 2011, p. 8). UNHCR has endorsed this presumption by confirming that statehood is not automatically lost even with the loss of habitable territory due to climate change (2011, para. 30). Therefore, despite the total submersion of their territories, PICs’ statehood would persist and so would their nationalities.

Secondly and in any event, UNHCR has stated that territory under the threat of sea-level rise would most likely become completely uninhabitable *long before* its full submersion (UNHCR, 2009, p. 2), meaning that the whole population would be displaced long before question on statelessness would even arise. Indeed, sea level rise has been expected to exacerbate inundation, storm surge, erosion and other coastal hazards, threatening all the infrastructures, settlements and facilities that support the *livelihood* of the people (IPCC, 2014, p. 15). And this prediction seems to be materializing already; livelihoods in PICs are slowly becoming untenable. In 2011, for instance, both Tuvalu

³ Upon losing the war to Sultan Suleiman the Magnificent, the Order was forced to leave its territory—then the island of Rhodes—in 1523. It remained without any territory of its own until 1530 when it was granted the island of Malta. In 1798, however, the Order again lost its territory to French invaders under Napoleon Bonaparte (Official website of the Order of Malta).

and Tokelau declared state of emergencies due to shortage of fresh water caused by climate change related events (The Guardian, 2011). This does not bode well for the territories' habitability in the near future, threatening to drive the people away without fully inundating the islands.

The sinking island narrative might seem, at *prima facie* value, to render the people from PICs stateless. However, state practice has been consistent to indicate the otherwise: territorial disappearance does not automatically cause state extinction and by extension, its nationality. Not to mention the fact that these people would most likely be displaced due to uninhabitability, way before any submersion would take place thereby ruling out question of statelessness from the first place.

IV. INTERNATIONAL HUMAN RIGHTS LAW – HOW RELIABLE?

The previous sections have discussed that as unfortunate as it is, climate change displaced persons cannot be regarded as refugees nor stateless persons and hence fall beyond the protection offered by the respective frameworks. Nonetheless, it does not mean they are without any protection whatsoever. Philosophically speaking, everyone is entitled to human rights by virtue of being human (Griffin, 2001, p. 2) with no precondition of prior status, which is also found in international human rights instruments through the recognition that human rights '*derive from the inherent dignity of the human person*' (ICCPR, 1966, preamble para. 2). Therefore, under their human rights obligation, states have to extend protection even to those who do not meet refugee definition but are in need of international protection nevertheless—known as complementary protection (UNHCR, 2005, para. i). As discussed below, the said protection only encompasses non-refoulement and minimum basic human rights standards. This section would discuss the high threshold in applying non-refoulement in climate change context and the inadequacy of the protection standards.

Too high of a threshold

The principle of non-refoulement is enshrined in article 33 of Refugee Convention which prohibits states from '*expelling or returning a refugee... to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*' Although originated from Refugee Convention, this principle finds its counterparts in numerous

human rights instruments: article 7 of ICCPR 1966, article 3 of ECHR 1950 and article 3 of CAT 1984 to name a few. Under the said articles, any extradition, expulsion or deportation of individuals to third countries shall not expose them to the risk of torture, inhuman or degrading treatment (*Chahal v. UK*, 1996, para. 74). It is thus clear that under human rights law, it does not matter if one qualifies as refugee or not; he/she shall be protected from refoulement so long as there are risks when returned.

Applying this to the issue at hand, climate change displaced persons must show that the environmental conditions back in their countries have reached such critical point that it would be *inhuman or degrading* if returned to live there (Kolmannskog and Trebbi, 2010, p. 726). However, it is first worth noting that the adverse effects of climate change do not strike overnight; environmental degradation gradually intensifies from low quality environment at one end of the spectrum and uninhabitability at the other end. Inhuman or degrading treatment is easier to establish in the more extreme case of uninhabitability. In *Al-Saadoon and Mufdhi v. UK*, the ECtHR held that by returning the applicants to Iraq where they faced charges that carried *the risk of death penalty*, UK has subjected them to inhuman treatment (2010, para. 144). Likewise, it can be argued that returning the people of PICs to an uninhabitable environment is as good as sending them to their demise hence would constitute an inhuman treatment or even violate their right to life (ICCPR, 1966, article 6). If a risk of being sentenced to death penalty is sufficient in establishing violation of human rights upon return, arguably, let alone the risk of death itself.

Things, however, are much less clear-cut at the other end of the spectrum, when the environment is of *low quality but still habitable*. In such case, the risk people from PICs face upon return is not towards their right to life or right to be free from inhuman or degrading treatment anymore—which are civil-political rights. Rather, they face risk towards the rights to adequate standard of living and to the highest attainable standard of health (ICESCR, 1966, art. 11 and 12 respectively)—which are socio-economic. To activate state's non-refoulement obligation, it is then necessary to prove that potential breach of socio-economic rights can constitute an inhumane or degrading treatment, which is legally challenging to say the least. The seminal case of *D v. UK* may shed some light on such cross-classification. The case concerns whether UK may remove D, who was terminally ill from AIDS, back to his country of origin, St Kitts. The Court noted that exposing the applicant to the inadequacy of medical treatment as well as the

health and sanitation problems which beset the population there would further reduce his already limited life expectancy, thereby subjecting him to risk of inhuman treatment (1997, para. 52). At first, this case could be seen as paving the way for non-political harm to be classified as inhuman or degrading treatment, but not for long. Similar claims in the cases that follow turned out to be rejected.⁴ It turns out that the Court adopted a restrictive attitude in *D v. UK* by emphasizing the *exceptional circumstances* of the applicant such as the critical stage of his illness, the lack of moral and social support in St Kitts and the close relationship with his present environment in the UK (para. 53), effectively excluding similar claims in the future. Insofar as the harm emanates from a *naturally occurring* illness and the lack of resources to deal with it, the Court decided to maintain very high threshold, even higher than that from politically motivated acts (*N v. UK*, 2008, para. 43).

Such high threshold is also adopted in, borrowing from ECtHR's term, '*naturally occurring*' climate change context. The Supreme Court of New Zealand has recently held that while Kiribati undoubtedly faces environmental challenges due to climate change, returning the applicant there does not amount to a violation of inhuman or degrading treatment (*Ioane Teitiota* case, 2015, para. 12). This indicates that the environmental condition has to be so severe that people live below a minimum subsistence level (McAdam, 2012, p. 74) for them to be protected against return. On the one hand, the possibility of invoking protection against refoulement for non-political harm is worth celebrating. On the other hand, such high threshold implies that these people are expected to endure the low quality environment until it reaches a point of destitution—is it not unduly harsh, particularly when they are already suffering from climate change impacts that they contribute the least to? Today, climate change effects have been felt in PICs: more frequent and intense storms, drought, extreme weather events, accelerating sea level rise and other life-threatening impacts (AOSIS Declaration, 2014, para. 17). It is about time that people's means of subsistence would be severely diminished. The question is how severe does it have to be before returning them there would be prohibited by international human rights law?

⁴ See *Henao v. the Netherlands*, 2003; *Ndangoya v. Sweden*, 2004; *N v. UK*, 2008. All the applicants were suffering from HIV/AIDS and requested for non-removal due to the lack of medical treatment in their home countries. However, the Court decided that their removal to Columbia, Tanzania and Uganda respectively would not expose them to the risk of inhuman or degrading treatment.

Inadequacy of the protection afforded

The protection offered by human rights law contains some normative gaps. The first and foremost is that it does not provide legal status to climate change displaced persons in the host country (OHCHR, 2009, para. 60). The UK Immigration Appeal Tribunal has stated that:

“A successful claimant under the Refugee Convention is recognized as a refugee... which entitles him to a grant of indefinite leave to remain. By contrast, a successful claimant under the Human Rights Convention, even if found to be unremovable..., is not entitled to receive any status.”
(*Indra Gurung v. Secretary of State for the Home Department*, 2002, para. 145)

Without a status, the people of PICs basically do not have the basis to claim the right to stay. Under UDHR 1948, the right to seek asylum (article 14) and the right to nationality (article 15) are unfortunately not accompanied by the correlative obligations on state's part to grant asylum nor nationality, which, as affirmed by the ICJ, are for every state to settle by its own (*Nottebohm* case, 1955, p. 20). In other words, without a status granted by international law, the granting of the right to stay remains in the domain of state discretion. And this has been criticized for its failure to provide a *predictable* protection tool (Kälin & Schrepfer, 2012, p. 46). In 2014, for instance, the New Zealand Immigration and Protection Tribunal did grant resident visas to a family who claimed that they fled the adverse effects of climate change in Tuvalu (*AD (Tuvalu)* case, para. 37). But, again, this can hardly set a precedent for claiming the right to stay. The Tribunal held that it is the *cumulative basis* of climate change effects, the appellants' dense family network in New Zealand and their New Zealand-based mother's complete dependence on them that makes them qualified for a resident visa (paras. 30-31), apparently setting a high threshold to foreclose similar claims in the future. Therefore, it can be concluded that human rights law does not dictate a status for people who qualify for complementary protection. State can choose to grant or not to grant any status. Consequently, those who are already in the host state's territory would be in legal limbo for God-knows-how-long.

Additionally, the inadequacy of protection under human rights law is not only on the absence of right to stay, but also the minimalist nature of guarantee to other rights. For example, articles 14 and 15 ICCPR may guarantee fairness in judicial proceedings, yet

both provisions do not deal with the more fundamental question of access to courts, which is covered in article 16 of Refugee Convention (McAdam, 2007, p. 203). Aside from this, Refugee Convention also requires state parties to provide identity papers and travel documents (art. 27 and 28), which are vital for refugees to fulfil their freedom of movement, whereas ICCPR is completely silent on the same issue. It can thus be observed that while human rights law widens the eligibility of protection, it does not afford protection that is tailored to the needs of displaced persons. McAdam identifies a trade-off at play in complementary protection: states may be willing to admit more persons to their territories under human rights law yet they do so by conferring rights at a lower level than those under Refugee Convention (2007, p. 200-201).

To conclude, among the three protection frameworks discussed thus far, international human rights law may appear to be the most accessible to PICs' displaced population, despite its high threshold, because it puts emphasis on future potential harm in affording protection, rather than past harm. However, under this law, protection against refoulement seems to be an end in itself. It is ill-equipped to afford more nuanced protection beyond the realm of non-removal: guaranteeing their right to stay.

V. A RIGHTS-BASED APPROACH – ENVIRONMENTAL LAW TO FILL THE GAP?

The preceding section has identified a legal lacuna in accommodating climate change displaced persons' need for a guarantee of their right to stay in a new place, among others. So long as this remains within state's discretion, they would forever be at the complete mercy of states with no certainty towards the future. To change this status quo, this dissertation argues on the need to adopt a rights-based approach. Borrowing the definition from the UN Special Rapporteur on the Protection of Persons in the Event of Disasters:

“a rights-based approach deals with situations not simply in terms of human needs, but in terms of society's obligation to respond to the inalienable rights of individuals, empowers them to demand justice as a right, not as a charity, and gives communities a moral basis from which to claim international assistance when needed.” (2008, para. 12)

In other words, this approach seeks to transform human needs into an entitlement, ‘*a right, not a charity*’. And this is precisely where environmental law can arguably fill the

gap through the notion of state responsibility in the event of transboundary damage from acts not prohibited under international law (Louka, 2006, p. 476-477). In sinking island context, state responsibility would serve as the basis upon which the displaced persons may claim—and not plead—international assistance from climate change impacts generated by states’ emission of greenhouse gases (hereinafter “**GHG**”).

The need to invoke state responsibility

It has been widely acknowledged that while small island developing states are among those that contribute the least to climate change, they are among those that would suffer the most from its adverse effects (Declaration of Barbados, 1994, sec. 1.III.2; IPCC, 2007, p. 413-414). All the more ironic is that PICs are among those included as the Least Developed Countries (UN Committee for Development Policy, 2016),⁵ meaning they have the least resources to deal with it. Thus far, they have been vocal about the threat of climate change to their very existence and plead for assistance in migration (The Guardian, 2015) yet it has largely gone unheeded by the international community. Their immediate neighbor, Australia, for instance, maintained that there was no evidence to suggest that PIC populations were in any imminent danger of being displaced by rising sea levels (Sydney Morning Herald, 2006). Williams has argued that by refusing to acknowledge this phenomenon, states are actually absolving themselves of any responsibility to deal with the problematic issues of climate change displacement (2008, p. 517). In other words, by turning deaf ears, states are seeking to avert having to share the burden. This way, PICs are thus caught up in a vicious circle: not only do they have few resources to prepare for climate change displacement, they are also less able to effectively lobby the international community to assist, which results in being less equipped to deal with it (Humphreys, 2010, p. 1-2).

One may point to the numerous international legal instruments that require international cooperation: from the more general 1945 UN Charter which calls for international cooperation in solving humanitarian problems (article 1(3)) to the more specific 1992 UNFCCC on international cooperation in responding to climate change effects (preamble para. 6). UNHCR has also stressed its importance in climate change displacement context

⁵ Such as Kiribati, Solomon Islands, Tuvalu and Vanuatu.

(UNHCR, 2011, para. 43). However, with such broad language and no specific set of actions, there is virtually no way to transform this so-called obligation into real action. States cannot be held liable for their intransigence anyway. All these, arguably, demonstrate the need to invoke state responsibility.

Establishing state responsibility in the context of climate change

Dating back to 1972, the Stockholm Declaration—output of the first global conference on environment—has proclaimed that there is ‘*a fundamental right to... adequate conditions of life in an environment of a quality that permits a life of dignity and well-being*’ (Principle 1), establishing the link between environment and human rights. Throughout the development, the interface between the two acquires more recognition in recent instruments,⁶ culminating in the 2011 Human Rights Council Resolution 18/22 which reiterates that ‘*climate change... has adverse implications for the full enjoyment of human rights*’ (para. 1). More particularly, the Resolution explicitly recognizes that climate change impacts could hamper a wide range of rights encompassing the right to life, right to the highest attainable standard of health, right to adequate housing, right to self-determination and right to safe drinking water and sanitation (*ibid*, Preamble para. 13). This in turn has triggered litigations on climate change as a violation of human rights against states. The *Inuit’s Petition to the Inter-American Commission on Human Rights against US* in 2005 was the first of its kind and was followed by the *Arctic Athabaskan Peoples’ Petition against Canada* in 2013 in the same court.⁷ *Ipsa facto*, it can be established that given its severity, climate change impacts threaten the human rights of the population of PICs as it would slowly deprive the people of their means of subsistence (ICCPR and ICESCR, 1966, art. 1(2)). The question now is can the international community be held responsible for such violation?

Under international law, state responsibility can only be invoked if the allegedly injurious act is (a) attributable to the state and (b) a breach of international obligation (DASR,

⁶ See Malé Declaration on Human Dimension of Climate Change, 2007; Human Rights Council Resolution 7/23, 2008 and 10/4, 2009; Dhaka Ministerial Declaration of the Climate Vulnerable Forum, 2011 and Suva Declaration on Climate Change, 2015.

⁷ The Commission rejected to consider the Inuit’s petition in 2006 because the information provided was insufficient for making a determination while the Arctic Athabaskan Peoples’ petition is still currently being reviewed.

2011, art. 2). There are accordingly two legal hurdles. First, the preceding paragraph may have established that climate change impacts threaten the human rights of the PICs population, but there is still a missing link in attributing violation of rights which takes place in the territory of PICs to GHG emission which takes place elsewhere. Human rights instruments have set forth that state is only responsible for the rights of individuals ‘*within its territory and subject to its jurisdiction*’ (ICCPR, 1966, art. 2(1)) yet neither situation applies to the people affected vis-à-vis the international community. Second, emitting GHG, as harmful as it is to other people’s rights, by no means constitutes a breach of state’s international obligation. I would argue that the no-harm principle under international environmental law may fill these gaps.

A cornerstone of international environmental law (Atapattu, 2016, p. 63), the no-harm principle is derived from the landmark *Trail Smelter* case which established that ‘*no state has the right to use or permit the use of its territory in such a manner as to cause injury ...to the territory of another when it is of serious consequence and the injury is established by clear and convincing evidence*’ (1941, p. 1965). The ICJ has also recognized this principle by similarly articulating that every state has ‘*the obligation not to knowingly allow its territory to be used for acts contrary to the rights of other states*’ (*Corfu Channel case*, 1949, p. 22). Since then, it has featured in many international legal instruments concerning the environment.⁸ The principle basically envisages that states can be held responsible for the harm occurring in other states *irrespective of* the legality of the act causing it (Epiney in Piguet et al, 2011, p. 402). Therefore, if we apply this in climate change context, although emitting GHG *per se* is not a breach of any international obligation, the international community shall be held responsible for the harm—violation of rights—that takes place in other states—PICs—due to their emission.

Such approach is not without challenges though. Some commentators have identified the absence of direct causation between states’ GHG emission and climate change since the latter may be caused by a multitude of factors including strictly-natural causes (Lewis in Breakey et al, 2015, p. 186; Kälin and Schrepfer, 2012, p. 10), which means that the resulting violation of rights cannot be attributed to other states so as invoke their responsibility. Decades ago, it would be difficult to rebut this. Today, however, there is

⁸ See Stockholm Declaration, 1972, principle 21 and UNFCCC, 1992, Preamble para. 8 among others.

increasingly robust scientific basis of human contribution as the *dominant* factor in causing climate change. According to IPCC, climate change, particularly sea-level rise, is *very likely* due to human influence (IPCC, 2007a, p. 6). In just 6 years, IPCC upgrades its level of confidence on human influence to *extremely likely* (2013, p. 17). This goes to show that it is indeed human and not the nature itself that contributes dominantly to climate change. And by human, I mean the international community particularly developed countries as conceded by the 195 state parties to the 1992 UNFCCC: '*the largest share of historical and current global emissions of greenhouse gases has originated in developed countries*' (Preamble para. 3).

Another challenge may also arise in this respect. Some commentators have argued that the *cumulative nature* of GHG emission renders it nearly impossible to attribute a particular climate change impact to the emission of a particular state since all states have contributed at some point (Lewis in Breakey et al, 2015, p 186; Kälin and Schrepfer, 2012, p. 77; McAdam, 2012, p. 97). In other words, the international community, in particular the developed countries, may be the dominant contributors, but climate change impacts would not have materialized without the contribution of the PICs themselves. However, article 47 DASR has confirmed that although several states are responsible, the responsibility of each state may be invoked separately. Epiney has also shared similar view that collective responsibility does not automatically mean that international responsibility on the part of some states cannot be established (in Piguet et al, 2011, p. 408). Therefore, while such concern is true to a large extent, it does not, arguably, deny the existence of responsibility on the part of the international community.

Climate reparation as a solution

It is a long-standing principle under international law that '*any breach of engagement involves an obligation to make reparation*' (*Chorzów Factory* case, 1928, p. 29). Based on this, responsible state is under the obligation to make full reparation for the injury caused (DASR, 2001, art. 31). When applied in the context of climate change displacement, however, this principle contains a legal gap. Epiney rightly pointed out that the notion of state responsibility only establishes a link for the country of origin to claim reparation from the country of destination; it does not in any way guarantee protection of the displaced persons (in Piguet et al, 2011, p. 405). Indeed, if we look closely, pursuant to article 34 DASR, reparation only encompasses restitution, compensation and

satisfaction—none of which triggers the obligation to protect. Firstly, restitution is the obligation to re-establish the condition that existed before the injurious act was committed (DASR, 2001, art. 35). However, restitution is ‘*materially impossible*’ (para (a)) in the matter at hand since climate change impacts as we all know are irreversible; at most states can mitigate further damage by cutting their GHG emission but not reverse the damage already done. In the event that restitution is not possible, compensation serves as an alternative. The ICJ has affirmed state’s right under international law to obtain compensation for the damage caused by responsible state (*Gabčíkovo-Nagymaros Project* case, 1997, para. 152). While it may be the most commonly sought form of reparation in international practice (Commentary to art. 36 DASR, 2011, para. 2) compensation is arguably ill-fitted to the needs of climate change displaced persons. It may help PICs in accommodating the financial needs of its people during displacement but it is both insufficient and unsustainable as it does not provide a long-term durable solution in the host country; what these people really need is a right to stay permanently and start life anew. The last form of reparation is satisfaction. However, it manifests itself in rather symbolic forms, such as acknowledgment of breach, expression of regret and formal apology among others (DASR, 2011, art. 37(2)). Although to some extent required to restore the dignity of the PICs, mere symbolic act is far from fulfilling the needs of the displaced persons. Therefore, the existing legal framework of reparation is acutely inadequate to remedy the current protection gap.

What is the use of invoking state responsibility if it cannot be translated into some form of reparation the victims can rightfully claim then? To deal with this, firstly, I would like to emphasize the need to think ‘*outside legal and political boxes*’ (Burkett, 2009, p. 521). Instead of forcing reparation response to fit the narrow framework under DASR, I would argue to stretch it to meet the ‘human needs’ aspect of the rights-based approach defined earlier in this section. Broadly speaking, reparation is actually an act that seeks to correct past harms and improve the lives of those injured into the future (Brophy, 2006, p. 9). Using this definition, Burkett introduces her climate reparation concept:

“...*the effort to assess the harm caused by the past emissions of the major polluters and to improve the lives of the climate vulnerable through direct programs, policies and/or mechanisms... to contemplate a better livelihood in light of future climate challenges.*” (2009, p. 523)

The forward-looking nature of this definition sets it apart from the conventional legal concept of reparation in that it stretches the concept to accommodate the needs of the people for a better life in the future instead of merely seeking to wipe out the consequences of the injurious act (Commentary to art. 35 DASR, 2011, para. 3). Applying this to displacement context, reparation shall therefore take the form of admitting the displaced persons and affording full-fledged protection based on their needs to live a better life in the future. Although it may appear new, this concept is arguably not unfounded as it can find support in article 3(2) of the 1992 UNFCCC which envisages that *specific needs* of the countries that would have to bear a disproportionate burden of climate change should be given full consideration.

To sum up, the legal gap in the existing protection frameworks would render PICs' displaced population utterly helpless at the mercy of other states. To avoid such situation, there is a need to transform protection into a right not a charity by having recourse to international environmental law. Its no-harm principle would arguably enable these vulnerable people to invoke the responsibility of the international community for the violation of their rights through GHG emission and hence rightfully claim reparation in the form of protection.

VI. THE STEPS AHEAD - AN INTERNATIONAL GUIDELINE?

This section argues on the need to codify protection of climate change displaced persons in the form of a guideline. Given the multitude of stakeholders whose interests may diverge, it is imperative to ensure systematic and coordinated response under the spirit of burden-sharing. Kälin and Schrepfer have cautioned against the danger of ad hoc and unsystematic operational response as it bears many risks for the rights of the affected people (2012, p. 43). The ongoing global refugee crisis may serve as a lesson. The absence of a consistent policy response across Europe, for instance, has placed unduly heavy burdens on the states located at external borders, such as Italy, Hungary and most notably Greece, which prompted them to adopt a series of restrictive measures—including push-backs, construction of fences, interdiction in the water, use of detention and even police violence at border—to deter refugees and migrants from coming (Breen, 2016, p. 21-22). Consequently, the people are subjected to widespread violation of their rights, in contravention of the states' obligations under refugee law and human rights law (*ibid*). The same holds true in climate change context. While it is an issue of

international significance, the most immediate impacts would be felt regionally (Williams, 2008, p. 518-519). Pre-existing migration routes and low level of resources typically serve as the motivations to favor nearby destinations (Popp in Piguet and Laczko, 2014, p. 230), which would likely be New Zealand and Australia in this case given their long-standing migration links.⁹ Without an international guideline on coordination and cooperation in sharing the burden, countries like New Zealand and Australia face the risk of being overburdened and the history of violation of rights that we see today may, alas, repeat itself.

Instead of a guideline, some commentators have argued in favor of a climate change displacement protocol to the UNFCCC to build support from the existing parties to the Convention (Biermann and Boas, 2010, p. 76). This would have been ideal had it not for its political infeasibility. The way towards the 1997 Kyoto Protocol under UNFCCC, for instance, has been a 10 years' worth of uphill struggle. There was a palpable North-South tension in which developing nations generally refused to undertake reduction as it would limit their already-less dynamic growth while most developed countries also refused to do so unless their less developed counterparts did the same (Simonelli in Breakey, 2015, p. 222). Adding climate change displacement—both climate change and migration are already highly sensitive issues for developed vis-à-vis developing states—could arguably exacerbate the already-deep schism between the two group of states. The resulting lack of consensus at the negotiating table may lead to ratification gaps and consequently result in legal vacuum (Kälin & Schrepfer, 2012, p. 70). Alternatively, if ratification were to be an end in itself, state obligation would have to be set to a lowest common denominator. Either way, it would result in a politically visible but legally powerless instrument.

Soft law such as a guideline, on the other hand, may be the answer. Rather than a drawback, its non-binding character can be an advantage. During his tenure as the UN Secretary General's Representative on the Human Rights of Internally Displaced Persons, Kälin has observed first-hand that it was much easier to negotiate with states when '*question of violation does not loom in the background*' (2001, p. 7) because states

⁹ For example, New Zealand annually offers Pacific Access Category Resident Visa for a certain quota of people from PICs to work and live indefinitely there (Official website of New Zealand Immigration) and Australia has Seasonal Worker Programme that allows people from PICs to work temporarily there (Official website of Australian Government Department of Immigration and Border Protection).

generally frowned upon imposed obligation on how they should treat those on their own territory. Soft law allows states to balance their interest in maintaining their sovereignty and the need to govern their international relations (Kälin and Schrepfer, 2012, p. 71). The 1998 UN Guiding Principles on Internal Displacement (hereinafter the “**Guiding Principles**”) may serve as a perfect example for the current purpose. It was drafted based on the desire to avoid lengthy negotiations concomitant in the making of a binding instrument (Solomon and Aarner in Gerrard and Wannier, 2013, p. 264). However, it bears noting that although non-binding in nature, the Guiding Principles is actually built upon existing international principles derived from human rights and humanitarian law (Williams, 2008, p. 511). In other words, it is the output of tailoring existing legal norms to a new context so one can always invoke the norms behind it if need be. More importantly, throughout the passage of time, not only has the Guiding Principles earned the status as an ‘*important international framework for the protection of IDPs*’ (UNGA Res 60/1, 2005, para. 132), it has also been incorporated in the national legislation of many countries¹⁰ and inspired the adoption of regional instruments on IDPs.¹¹ At the rate this is going, the Guiding Principles is increasingly becoming an international benchmark for protection of IDPs and, as Williams argued, may in time emerge as a new customary international law (2008, p. 512).

By the same token, a guideline is more suitable for cross-border climate change displacement context. What transpired in the 2015 Paris climate talks shall attest to the absence of political will to adopt a binding agreement on the issue. In the Draft Paris Outcome, there was actually a provision on the establishment of a climate change displacement coordination facility ‘*to help coordinate efforts to address climate change induced displacement, migration and planned relocation*’ (2015, art. 5(3)). However, to the dismay of many, this was completely omitted in the adopted text of the 2015 Paris Agreement (The Guardian, 2015a). The 2010 Cancun Agreements under UNFCCC remained the first binding international agreement to explicitly refer to climate change

¹⁰ See Kälin and Schrepfer, 2012, p.23 and the accompanying note.

States with national legislation on internal displacement or particular aspects thereof:

Africa: Angola, Burundi, Liberia, Sierra Leone, Sudan, Uganda

Americas: Columbia, Peru, Guatemala, USA

Asia: India, Iraq, Sri Lanka, Nepal, Tajikistan, Philippines, Yemen

Europe: Armenia, Azerbaijan, Bosnia-Herzegovina, Georgia, Serbia, Russia, Turkey

¹¹ See Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons, 2006, and Kampala Convention for the Protection and Assistance of Internally Displaced Persons in Africa, 2009.

displacement (art. 14(f)) and the last so far. In light of this, states would be more receptive to a non-binding guideline. It arguably serves the best of both worlds: retaining state sovereignty as well as governing displacement issues. It would enable states to negotiate at ease and serve as a basis for policy making while slowly hardening into binding hard laws nationally, regionally and eventually internationally. Therefore, instead of going down the seemingly fast yet bumpy lane of binding treaty from the beginning, a soft-law approach is more auspicious, as can be observed from its internal counterpart.

CONCLUSION

Climate change displacement, as the name suggests, is a cross-cutting issue encompassing climate change, displacement and human rights. Independently, these issues are far from being new. In fact, each has been quite comprehensively dealt with in its respective legal framework: environmental law, refugee law and human rights law. When happening all at once, however, they form a relatively new phenomenon beyond the reach of any existing framework. Any exclusive reliance on one such framework is consequently bound to be futile. To effectively confront the issue, there is a need to move beyond the labels of law and holistically deduce specific relevant norms from existing legal frameworks. After all, pursuant to the 1969 Vienna Convention on the Law of Treaties, the general rule of interpretation is to take into account *all* relevant rules of international law that are applicable in the given issue (art. 31(3)(c)).

In the context of cross-border climate change displacement, existing frameworks can only address the ‘what’, ‘when’ and ‘who’ separately. Refugee law determines the kind of protection that accommodates the need of a displaced person—the ‘what’. Human rights law determines if one is in need of protection based on the potential harm if returned—the ‘when’. Finally, environmental law establishes state responsibility for climate change so as to trigger the obligation to extend protection—the ‘who’. Only when all of these are cumulatively transplanted in international response would the protection towards climate change displaced persons become effective.

To guarantee systematic, coordinated and swift response, there is a need to incorporate all the above—the what, when and who—into an international guideline. A lesson to be drawn from the ongoing refugee crisis is that fragmented approach tends to result in a

lose-lose situation for all the stakeholders: vulnerability of the affected persons, instability and insecurity in host countries and tension among states. On the contrary, a prepared and harmonized approach would arguably bring a win-win situation. For the affected persons it retains their dignity and reduces uncertainty whereas for states it minimizes intra-state and inter-state tension and blame-game. Although non-binding, a guideline on cross-border climate change displacement may gradually trigger national and even regional binding instruments on the issue, with the UN Guiding Principles on Internal Displacement serving as a successful precedent.

The sheer magnitude of this upcoming challenge warrants a complex solution. But thanks to the slow-onset nature of climate change impacts in PICs, time is on the side of the stakeholders. There is the rare opportunity to plan and negotiate, ahead of the impending disaster, towards a strategy which in the long-term may enhance options for dignified and diversified livelihood to the displaced as agreed in Dhaka Ministerial Declaration (2011, Preamble para. 12). Indeed, the international origin of climate change calls for an international solution too so that no single country—and its people—should have to bear the burden alone (Docherty and Gianini, 2009, p. 382). The people of PICs are now at risk of losing what they call home—so much more than a mere piece of land: community, identity and traditional way of life. The least the international community can do is to prevent them from getting out of the frying pan into the fire it lit from the first place.

BIBLIOGRAPHY

International Instruments

- African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa. 2009. (Kampala Convention)
- Alliance of Small Island States Leaders' Declaration. 2014. (AOSIS Declaration)
- Cancun Agreements. 2010.
- Charter of the United Nations. 1945. (UN Charter)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 1984. (CAT)
- Convention on the Reduction of Statelessness. 1961.
- Convention Relating to the Status of Refugees. 1951.
- Convention Relating to the Status of Stateless Persons. 1954.
- Declaration of Barbados. 1994.
- Declaration of the United Nations Conference on the Human Environment. 1972. (Stockholm Declaration)
- Dhaka Ministerial Declaration of the Climate Vulnerable Forum. 2011.
- European Convention on Human Rights. 1950. (ECHR)
- International Covenant on Civil and Political Rights. 1966. (ICCPR)
- International Covenant on Economic, Social and Cultural Rights. 1966. (ICESCR)
- Malé Declaration on Global Warming and Sea Level Rise. 1989.
- Malé Declaration on the Human Dimension of Global Climate Change. 2007.
- Montevideo Convention on the Rights and Duties of States. 1933.
- Niue Declaration on Climate Change. 2008.
- Paris Agreement. 2015.
- Protocol on the Protection and Assistance to Internally Displaced Persons. 2006. (Great Lakes Protocol)
- Suva Declaration on Climate Change. 2015.
- United Nations Framework Convention on Climate Change. 1992. (UNFCCC)
- Universal Declaration of Human Rights. 1948.
- Vienna Convention on the Law of Treaties. 1969. (VCLT)

Cases

International

- Al-Saadoon and Mufdhi v. UK*. 2010. Application No. 61498/08. European Court of Human Rights.
- Chahal v. UK*. 1996. Application No. 70/1995/576/662. European Court of Human Rights.
- Corfu Channel case (UK v. Albania)*. 1949. ICJ Rep 244 No. 1. International Court of Justice.
- D v. UK*. 1997. Application No. 146/1996/767/964. European Court of Human Rights.
- Factory at Chorzów case (Germany v. Poland)*. 1928. PCIJ Series A No. 17. Permanent Court of International Justice.
- Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*. 1997. ICJ Rep 7 No. 92. International Court of Justice.
- Henao v. the Netherlands*. 2003. Application No. 13669/03. European Court of Human Rights.
- Hirsi Jamaa and Others v. Italy*. 2012. Application No. 27765/09. European Court of Human Rights.
- N v. UK*. 2008. Application No. 26565/05. European Court of Human Rights.
- Ndangoya v. Sweden*. 2004. Application No. 17868/03. European Court of Human Rights.
- Nottebohm case (Liechtenstein v. Guatemala)*. 1955. ICJ Rep 4 No. 18. International Court of Justice.
- Trail Smelter case (United States v. Canada)*. 1941. 3 UNRIAA 1905. Trail Smelter Arbitral Tribunal.
- X, Y, Z v. Minister voor Immigratie en Asiel*. 2013. C-199/12-C-201/12. Court of Justice of the European Union.

National

- A and Another v. Minister for Immigration and Ethnic Affairs and Another*. 1997. HCA 4. High Court of Australia.
- AD (Tuvalu)*. 2014. NZIPT 501370-371. New Zealand Immigration and Protection Tribunal.
- AF (Kiribati)*. 2014. NZIPT 800413. New Zealand Immigration and Protection Tribunal.
- Association of Italian Knights of the Order of Malta v. Piccoli*. 1974. Case No. 1653. Italy Court of Cassation.
- Canada (Attorney General) v. Ward*. 1993. 2 SCR 689. Supreme Court of Canada.

- Chris Sale, Acting Commissioner, Immigration and Naturalization Service, et al v. Haitian Centers Council, Inc., et al.* 1993. 509 US 155. United States Supreme Court.
- Horvath v. Secretary of State for the Home Department.* 2000. UKHL 37. United Kingdom House of Lords.
- Indra Gurung v. Secretary of State for the Home Department.* 2002. UKIAT 04870. United Kingdom Immigration Appeal Tribunal.
- Ioane Teitiota v. the Chief Executive of the Ministry of Business, Innovation and Employment.* 2015. NZSC 107. New Zealand Supreme Court.
- Minister for Immigration and Multicultural Affairs v. Haji Ibrahim.* 2000. HCA 55. High Court of Australia.
- Refugee Review Tribunal Case No. 0907346.* 2009. RRTA 1168. Australia Refugee Review Tribunal.
- Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others.* 2004. UKHL 55. United Kingdom House of Lords.

Books

- Atapattu, S. (2016). *Human Rights Approaches to Climate Change: Challenges and Opportunities.* Abingdon, UK: Routledge.
- Barnett, J. and Campbell, J. (2010). *Climate Change and Small Island States: Power, Knowledge and the South Pacific.* London, UK: Earthscan.
- Breakey, H. et al (ed). (2015). *Ethical Values and the Integrity of the Climate Change Regime.* Surrey, UK: Ashgate Publishing Limited.
- Brophy, A. L. (2006). *Reparations: Pro & Con.* New York, US: Oxford University Press.
- Conisbee, M. and Simms, A. (2003). *Environmental Refugees: The Case for Recognition.* London, UK: New Economic Foundation.
- Crawford, J. (2006). *The Creation of States in International Law.* 2nd ed. Oxford, UK: Oxford University Press.
- Gerrard, M. B. and Wannier, G. E. (ed). (2013). *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate.* New York, US: Cambridge University Press.
- Goodwin-Gill, G. S. and McAdam, J. (2007). *The Refugee in International Law.* 3rd ed. Oxford, UK: Oxford University Press.

- Humphreys, S. (2010). *Human Rights and Climate Change*. Cambridge, UK: Cambridge University Press.
- Leckie, S. (2014). *Land Solutions for Climate Change*. Abingdon, UK: Routledge.
- Louka, E. (2006). *International Environmental Law: Fairness, Effectiveness, World Order*. New York, US: Cambridge University Press.
- McAdam, J. (2007). *Complementary Protection in International Refugee Law*. New York, US: Oxford University Press.
- McAdam, J. (2012). *Climate Change, Forced Migration and International Law*. Oxford, UK: Oxford University Press.
- McAdam, J. (ed). (2010). *Climate Change and Displacement: Multidisciplinary Perspectives*. Oxford, UK: Hart Publishing.
- Myers, N and Kent, J. (1995). *Environmental Exodus: An Emergence Crisis in the Global Arena*. Washington DC, US: Climate Institute.
- Piguet, E. and Laczko, F. (ed). (2014). *People on the Move in a Changing Climate*. Dordrecht, Netherlands: Springer.
- Piguet, E. et al (ed). (2011). *Migration and Climate Change*. New York, US: Cambridge University Press.
- Taylor, T. (1944). *Plato: The Timaeus and the Critias or Atlanticus*. Thomas Taylor translation ed. Washington DC, US: Pantheon Books.

Journals

- Biermann, F. and Boas, I. (2010). *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*. Global Environmental Politics Vol. 10(1):60-88.
- Breen, D. (2016). *Abuses at Europe's Borders*. 51 Forced Migration Review 21.
- Burkett, M. (2009). *Climate Reparations*. 10 Melb. J. Int'l L. 509.
- Castles, S. (2002). *Environmental Change and Forced Migration: Making Sense of the Debate*. UNHCR Working Paper No. 70.
- Cooper, J. B. (1998). *Environmental Refugees: Meeting the Requirements of the Refugee Definition*. 6 N.Y.U. Env'tl.L.J. 480
- Docherty, B. and Giannini, T. (2009). *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*. 33 Harv. Env'tl. L. Rev. 349.

- Griffin, J. (2001). *Discrepancies between the Best Philosophical Account of Human Rights and the International Law of Human Rights*. Proceedings of the Aristotelian Society Vol. 101(1):1-28.
- Kälin, W. and Schrepfer, N. (2012). *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches*. UNHCR Legal and Protection Policy Research Series No. PPLA/2012/01.
- Kolmannskog, V. and Trebbi, L. (2010). *Climate Change, Natural Disasters and Displacement: A Multi-track Approach to Filling the Protection Gaps*. International Review of the Red Cross Vol. 92 No. 879.
- Park, S. (2011). *Climate Change and the Risk of Statelessness: The Situation of Low-lying Island States*. UNHCR Legal and Protection Policy Research Series No. PPLA/2011/04.
- Williams, A. (2008). *Turning the Tide: Recognizing Climate Change Refugees in International Law*. Law & Policy Vol. 30 No. 4.

UN Documents

- Draft Paris Outcome. (2015). FCCC/ADP/2015/L.6/Rev.1.
- International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts. (2001). (DASR)
- Mauritius Strategy for the Further Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States. (2011). A/CONF.207/11 Annex II.
- Opening Statement by Mr. António Guterres, United Nations High Commissioner for Refugees, at the 58th Session of the Executive Committee of the High Commissioner's Programme (ExCom). (2007). Available at <http://www.unhcr.org/uk/admin/hcspeeches/4700eff54/opening-statement-mr-antonio-guterres-united-nations-high-commissioner.html>.
- Report of the Office of the UN High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights. (2009). A/HRC/10/61. (OHCHR Report)
- Report of the Secretary General on Climate Change and its Possible Security Implications. (2009). A/64/350.

UN Committee for Development Policy List of Least Developed Countries. (2016).
Available at

http://www.un.org/en/development/desa/policy/cdp/ldc/ldc_list.pdf.

UN General Assembly Resolution 50/151. (1996).

UN General Assembly Resolution 60/1. (2005).

UN Guiding Principles on Internal Displacement. (1998). E/CN.4.1998/53/Add.2 Annex.

UN Human Rights Council Resolution 10/4. (2009).

UN Human Rights Council Resolution 18/22. (2011).

UN Human Rights Council Resolution 7/23. (2008).

UN Security Council Official Records 383rd meeting No. 128. (1948). Available at

http://repository.un.org/bitstream/handle/11176/87970/S_PV.383-

[EN.pdf?sequence=2&isAllowed=y](http://repository.un.org/bitstream/handle/11176/87970/S_PV.383-EN.pdf?sequence=2&isAllowed=y).

UN Special Rapporteur Preliminary Report on the Protection of Persons in the Event of
Disasters. (2008). A/CN.4/598.

UNHCR Executive Committee Conclusion on the Provision on International Protection
Including through Complementary Forms of Protection No. 103 (LVI). (2005).
A/AC.96/1021.

UNHCR Submission on Climate Change and Statelessness: An Overview. (2009).
Available at

<http://www.unhcr.org/uk/protection/environment/4a1e50082/climate-change-statelessness-overview.html>.

UNHCR Summary of Deliberations on Climate Change and Displacement. (2011).
Available at <http://www.unhcr.org/4da2b5e19.pdf>.

Other International Reports

IPCC. (2007). *Climate Change 2007: The Physical Science Basis*. New York, US:
Cambridge University Press.

IPCC. (2007a). *Summary for Policymakers in Climate Change 2007: Synthesis Report*.
Geneva, Switzerland: IPCC.

IPCC. (2013). *Summary for Policymakers in Climate Change 2013: The Physical
Science Basis*. New York, US: Cambridge University Press.

IPCC. (2014). *Summary for Policymakers in Climate Change 2014: Impacts, Adaptation,
and Vulnerability*. New York, US: Cambridge University Press

IPCC. (2014a). *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects*. New York, US: Cambridge University Press.

Report of the Nansen Conference: Climate Change and Displacement in the 21st Century.

(2011). Available at

<http://pnc.iucnp.org/wp/wp-content/uploads/2011/06/Chairpersons-Summary-Nansen-Conference-on-Climate-Change-and-Displacement.pdf>.

Online News

Sydney Morning Herald. (2006). Ministers remain unmoved by the threat of rising sea levels. Available at <http://www.smh.com.au/news/national/ministersremain-unmoved-by-threat-of-rising-sea-levels/2006/01/05/1136387573236.html>.

The Guardian. (2011). South Pacific islands face water crisis after six months of low rainfall. Available at

<https://www.theguardian.com/environment/2011/oct/04/south-pacific-water-crisis-rainfall>.

The Guardian. (2015). Pacific nations beg for help for islanders when ‘calamity’ of climate change hits. Available at

<https://www.theguardian.com/environment/2015/oct/14/pacific-nations-beg-for-help-for-islanders-when-calamity-of-climate-change-hits>.

The Guardian. (2015a). UN drops plan to help move climate-change affected people.

Available at <https://www.theguardian.com/environment/2015/oct/07/un-drops-plan-to-create-group-to-relocate-climate-change-affected-people>.

The Guardian. (2016). Five Pacific islands lost to rising seas as climate change hits.

Available at <https://www.theguardian.com/environment/2016/may/10/five-pacific-islands-lost-rising-seas-climate-change>.

Miscellaneous

1048 to the Present Day. Official website of the Order of Malta. Available at

<https://www.orderofmalta.int/history/1048-to-the-present/>.

Kälin, W. (2001). *How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework*. Presentation at the

Roundtable Meeting, Ralph Bunche Institute for International Studies, CUNY

Graduate Center. Available at <https://www.brookings.edu/wp-content/uploads/2016/06/20011219.pdf>.

McAdam, J. and Loughry, M. (2009). *We aren't Refugees*. Inside Story. Available at <http://insidestory.org.au/we-arent-refugees>.

Ministry of Environment, Land, and Agricultural Development, Environment and Conservation Division. (2007). *Republic of Kiribati National Adaptation Program of Action (NAPA)*.

Ministry of Natural Resources, Environment, Agriculture and Lands, Department of Environment. (2007). *Tuvalu's National Adaptation Programme of Action (NAPA) under the Auspices of the United Framework Convention on Climate Change*.

Pacific Access Category Resident Visa. Official website of New Zealand Immigration. Available at <https://www.immigration.govt.nz/new-zealand-visas/apply-for-a-visa/about-visa/pacific-access-category-resident-visa>.

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. (2005). Available at <http://www.inuitcircumpolar.com/uploads/3/0/5/4/30542564/finalpetitionicc.pdf>

Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada. (2013). Available at http://earthjustice.org/sites/default/files/AAC_PETITION_13-04-23a.pdf.

Special Program Visa for the Seasonal Worker Programme. Official website of Australian Government Department of Immigration and Border Protection. Available at <http://www.border.gov.au/Trav/Visa-1/416-> .